**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1471

STATE OF LOUISIANA

VERSUS

JOSEPH ANDREA MICKEY

Judgment Rendered: APR 29 2015

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On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, State of Louisiana
Docket No. 624125
Honorable Randall L. Bethancourt, Judge Presiding

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**BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.**

**HOLDRIDGE, J.**

The defendant, Joseph Andrea Mickey, was charged by bill of information with aggravated second degree battery, a violation of Louisiana Revised Statutes 14:34.7. He entered a plea of not guilty and, following a jury trial, was found guilty of the responsive offense of aggravated battery, a violation of Louisiana Revised Statutes 14:34. He filed motions for new trial and post verdict judgment of acquittal, both of which were denied. The State subsequently filed a habitual offender bill of information, and the defendant pled not guilty to the allegations of the bill.[1] After a hearing, he was adjudicated a second-felony habitual offender. He was then sentenced to fifteen years imprisonment at hard labor without the benefit of probation or suspension of sentence. He now appeals, alleging one assignment of error. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

## FACTS

On February 25, 2011, the defendant and his girlfriend of four-and-one-half years, Danielle Davis, went to the Archway Lounge in Houma, Louisiana, to watch a Mardi Gras parade passing in front of the lounge. The victim, Danielle's ex-boyfriend of five years, Derrick Pharr, was also watching the parade at the lounge. Toward the end of the parade, the defendant and a few other men approached the victim. Words were exchanged, and the men began fighting.[2] During the course

[1] The defendant's predicate offense was listed as his July 19, 1992, guilty plea to manslaughter under Thirty-Second Judicial District Court, Parish of Terrebonne, docket number 215,215. He was sentenced to fifteen years at hard labor and released on parole on November 10, 1998. His parole was revoked in 2000, and he was released on parole again on November 26, 2003.

[2] The victim and Danielle had a son together, and the victim admitted contacting Danielle after their relationship ended in an attempt to reconcile, even after he knew she was in a relationship with the defendant. He also admitted that he informed Danielle that the defendant was cheating on her. A few months prior to their fight at the parade, the defendant and the victim engaged in a fight in front of Danielle's house wherein the victim ultimately drove off, and the defendant met him down the street and said, "I got something for you the next time, I got something for you."

of the fight, the victim was stabbed by the defendant with a screwdriver. Soon after, a law enforcement officer broke up the fight. The officer put his hand on the victim's chest and said "Look, get in your car and leave." The victim did not tell the officer that he had been stabbed. As a result of the stabbing, the victim suffered a skull fracture with multiple fragments extending into his brain, and was forced to undergo emergency surgery. Despite efforts by law enforcement, including making repeated visits to Danielle's home where the defendant had been living since 2009, the defendant was not located and arrested until October 2011.

## JURY INSTRUCTION

In his sole assignment of error, the defendant contends that the special jury charge on flight given by the district court was not supported by the evidence presented. He argues that the instruction was not pertinent and misled the jury into believing that he fled. In contending that the error was not harmless, the defendant argues that the evidence "shrouded" him with "an aura of guilt[.]"

Pursuant to Louisiana Code of Criminal Procedure article 802(1), the court shall charge the jury as to the law applicable to the case. Louisiana Code of Criminal Procedure article 807 provides, in pertinent part, "The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun." It further provides, "A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given."

At the jury charge conference held during the trial, defense counsel objected to the inclusion of an instruction on flight and argued that the facts did not establish flight. The State responded that even an adverse witness, Danielle,

established that the defendant did not return home on the night of the fight or for the two following weeks. The district court noted the defendant's objection, but allowed the charge. The jury instructions included the following:

> If you find that the defendant fled immediately after a crime was committed or after he was accused of a crime, his flight alone is not sufficient to prove that he is guilty. However, flight may be considered along with all of the other evidence. You must decide whether his flight was due to consciousness of guilt or to other reasons unrelated to guilt.

The ruling of the district court on an objection to a portion of its charge to the jury will not be disturbed unless the disputed portion, when considered in connection with the remainder of the charge, is shown to be both erroneous and prejudicial. **State v. Butler**, 563 So.2d 976, 988 (La. App. 1st Cir.), writ denied, 567 So.2d 609 (La. 1990). If there is testimony of flight after the crime was committed and the jury charge regarding flight is brief when considered in connection with the remainder of the charge, the instruction is neither erroneous nor prejudicial. **State v. Bell**, 97-896 (La. App. 5th Cir. 10/14/98), 721 So.2d 38, 41, writs denied, 98-2875 & 98-2890 (La. 3/12/99), 738 So.2d 1085.[3]

Some erroneous jury instructions are subject to harmless error review. **State v. Frank**, 2009-2275 (La. App. 1st Cir. 9/10/10), 2010 WL 3518055, 3 (unpublished); see also **State v. Jynes**, 94-745 (La. App. 5th Cir. 3/1/95), 652 So.2d 91, 98. The question becomes whether it appears beyond a reasonable doubt that the erroneous instruction did not contribute to the jury's finding of guilt or whether the error is unimportant in relation to everything else the jury considered, as revealed in the record. See **State v. Cooper**, 2005-2070 (La. App. 1st Cir. 5/5/06), 935 So.2d 194, 200, writ denied, 2006-1314 (La. 11/22/06), 942 So.2d

[3] The jury may consider evidence of flight from the scene of a crime whether or not law enforcement personnel are involved. See **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 459, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603; see also **State v. Davies**, 350 So.2d 586, 588-89 (La. 1977).

554. Stated another way, the appropriate standard for determining harmless error is whether the guilty verdict was surely unattributable to the jury charge error. See **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

Danielle testified that the defendant left after the fight and that she did not see him for the following two weeks. Although the defendant had been living in Danielle's home since 2009, he did not return to the home during that period of time. According to Danielle, the defendant did call her in the weeks following the fight, but never disclosed his whereabouts. The defendant did return to Danielle's home for a brief amount of time in March, but he left by the end of that month. He returned a second time in April when Danielle found out that she was pregnant. Danielle had an interview with a detective on April 25 regarding the fight, and she informed the defendant that detectives were looking for him when he returned to her home later that month. The defendant told Danielle he would "get around to it." The defendant left Danielle's home again in July and did not return until October. He lived there for two weeks before he was arrested.

The victim testified that the defendant left when law enforcement arrived. The manager of the lounge testified that after the fight, the defendant did not "stay around." Kenard McKever, the defendant's step-brother, was also involved in the fight and testified that he and the defendant left after an officer broke up the fight. He claimed that they went farther down the street and watched the remainder of the parade after the defendant cleaned himself. According to Kenard's testimony, he drove the defendant to the defendant's father's house after they watched the remainder of the parade. However, in Kenard's statement taken in October 2011, he claimed that he and the defendant left the parade in separate vehicles.

"Flight" comprehends continued concealment to avoid arrest and prosecution as well as the act of leaving the jurisdiction. The term is defined, in criminal law, as "the evading of the course of justice by voluntarily withdrawing oneself in order to avoid arrest or detention, or the institution or continuance of criminal proceedings." Thus, in criminal law, "flight" is "not merely a leaving, but a leaving or concealment under a consciousness of guilt and for the purpose of evading arrest." **State v. Davies**, 350 So.2d 586, 588-89 (La. 1977) (quoting 22A CJS, Criminal Law, § 625A, pp. 460 et. seq.).

As there was testimony that the defendant left the scene after the fight and avoided contact with law enforcement at Danielle's home, where he had been residing, the instruction on flight was not erroneous. Based on the record before us, we find that the guilty verdict was amply supported by the testimony and surely unattributable to the disputed portion of the jury charge. Accordingly, this assignment of error is without merit.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED**