NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0689

STATE OF LOUISIANA

VERSUS

TWDARRYL TONEY

Judgment Rendered: OCT 31 2016

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, State of Louisiana
Trial Court Number 15 CR6 127320

Honorable Rick Swartz, Judge Presiding

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BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.

WHIPPLE, C.J.

Defendant, Twdarryl Toney, was charged by bill of information with battery of a correctional facility employee, a violation of LSA-R.S. 14:34.5. He pled not guilty and, following a jury trial, was found guilty as charged. The trial court denied defendant's motions for new trial and postverdict judgment of acquittal. Thereafter, the state filed a habitual offender bill of information, alleging defendant to be a third-felony habitual offender.[1] Following a hearing, the trial court adjudicated defendant a third-felony habitual offender and sentenced him to five years at hard labor, without benefit of probation or suspension of sentence, to run consecutively to the sentence he is currently serving for his manslaughter conviction.[2] The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, alleging three assignments of error. For the following reasons, we affirm defendant's conviction and habitual offender adjudication but vacate the sentence and remand for resentencing.

FACTS

On December 10, 2014, defendant was housed as an inmate at the Rayburn Correctional Center in Washington Parish. Around 8:20 p.m., Corrections Sergeant Master Jordan Silva was working the "Sleet Four" cell block, where defendant was housed, escorting inmates to and from the shower.

Sergeant Silva approached defendant's cell (Cell 11) and, as per protocol, instructed him to turn around so that he could be handcuffed behind his back. After being handcuffed, defendant was allowed to retrieve a rag from his cell to take into

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[1]The alleged predicate offenses in the habitual offender bill were: (1) a March 8, 2002 conviction for illegal use of a weapon under case number 427-416 in Orleans Parish (Criminal District Court); and (2) a June 28, 2006 conviction for manslaughter under case number 448-917 in Orleans Parish (Criminal District Court).

[2]The minute entry and commitment order also indicate that the sentence restricted the benefit of parole, which conflicts with the transcript. This discrepancy will be discussed further below.

the shower. As defendant did so, Sergeant Silva looked away and signaled to the officer at the head of the tier to open defendant's cell door. When the door opened, defendant walked quickly ahead and to the left of Sergeant Silva, near the other inmates' cells. In response, Sergeant Silva attempted to catch up with defendant and yelled at him to walk near the wall. As Sergeant Silva reached defendant near Cell 8, defendant turned his back toward the cell and threw a cup of urine and feces from his own cell that he had concealed under the rag. The cup hit the bars of Cell 8, and its contents splashed onto Sergeant Silva's mouth, face, arm, chest, and hand.

Defendant testified at trial and admitted to throwing the cup, which he described as containing only feces that he had scooped out of his cell's toilet. Defendant explained that he never had any issue with Sergeant Silva and intended only to throw the cup of feces at the occupant of Cell 8, an inmate with whom he had had previous altercations. While defendant claimed that he later apologized to Sergeant Silva, Sergeant Silva testified on rebuttal that defendant had never apologized to him.

INSUFFICIENT EVIDENCE

In related assignments of error, defendant contends that the trial court erred in denying his motions for new trial and postverdict judgment of acquittal, because the evidence was insufficient to support his conviction for battery of a correctional facility employee. While defendant admits that the evidence was sufficient to support a finding of simple battery, he argues that he lacked the intent to commit a battery upon a correctional facility employee.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). The Jackson standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

"Battery of a correctional facility employee is a battery committed without the consent of the victim when the offender has reasonable grounds to believe the victim is a correctional facility employee acting in the performance of his duty." LSA-R.S. 14:34.5(A)(1). "'[B]attery of a correctional facility employee' includes the use of force or violence upon the person of the employee by throwing water or any other liquid, feces, urine, blood, saliva, or any form of human waste by an offender while the offender is incarcerated and is being detained in any jail, prison, correctional facility, juvenile institution, temporary holding center, halfway house, or detention facility." LSA-R.S. 14:34.5(A)(3).

Defendant's argument against the sufficiency of the evidence presented at trial is that he had no intent to commit a battery on Sergeant Silva, who is undoubtedly a correctional facility employee. See LSA-R.S. 14:34.5(A)(2). Rather, defendant contends that his actions only involved the intent to commit a simple battery, which he admits he intended to commit against another inmate. Although defendant does not articulate his argument using these specific words in his first two assignments of error, he appears to urge this court to consider battery of a correctional facility employee to be a "specific intent" crime.

Battery of a correctional facility employee is a general intent, rather than specific intent, crime. State v. Elliot, 2000-2637 (La. App. 1st Cir. 6/22/01), 809 So. 2d 203, 205. The offense requires neither the infliction of serious bodily harm nor the intent to inflict serious injury. Compare LSA-R.S. 14:34.1 (second degree battery); see State v. Howard, 94-0023 (La. 6/3/94), 638 So. 2d 216, 217 (per curiam) (determining LSA-R.S. 14:34, aggravated battery, to be a general intent crime). Criminal intent may be specific or general. Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Proof of specific intent is required where the statutory definition of a crime includes the intent to produce or accomplish some prescribed consequence. State v. Fuller, 414 So. 2d 306, 309-310 (La. 1982) (determining LSA-R.S. 14:34.1, second degree battery, to be a specific intent crime). The statutory definition of battery of a correctional facility employee does not include the intent to produce or accomplish some prescribed consequence. General intent requires a showing that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. LSA-R.S. 14:10(2); Howard, 638 So. 2d at 217. In general intent crimes, criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal. Id. The criminal intent necessary to sustain a conviction for battery of a correctional facility employee is shown by the very doing of the acts that have been declared criminal in the definition of the crime.

After a thorough review of the record, we are convinced that viewing the evidence in the light most favorable to the state, and to the exclusion of every reasonable hypothesis of innocence, that defendant was guilty of battery of a correctional facility employee. By throwing a concealed cup of urine and feces as he was being escorted down the cell block, defendant knew or should have known

of the likelihood that the contents of this cup would contact Sergeant Silva in addition to, or instead of, his intended target. At the time of the offense, defendant was handcuffed behind his back and, thus, lacked the full dexterity to aim the cup at the other inmate. Further, the photographic evidence indicates that the bars' openings appear to be barely wider than the cup, increasing the chance of the cup failing to make it into the cell and splashing any bystanders. Finally, by walking quickly ahead and to the left of Sergeant Silva in violation of protocol, defendant's actions invited a physical reaction from Sergeant Silva that placed him more in the line of defendant's cup than he otherwise might have been. While defendant's testimony might ultimately have been truthful that he did not intend to hit Sergeant Silva, battery of a correctional facility employee is a general intent crime. Based on the above factors, the battery of Sergeant Silva was "reasonably certain" to result from defendant's actions in throwing the cup of urine and feces. See LSA-R.S. 14:10(2). We cannot say that the jury's determination was irrational under the facts and circumstances presented to it. Ordodi, 946 So. 2d at 662.

These assignments of error are without merit.

SPECIAL JURY INSTRUCTION

In his final assignment of error, defendant argues that the trial court erred in refusing to give a particular special jury instruction relative to the intent required to commit battery on a correctional officer.

Defense counsel submitted to the trial court the following proposed jury instruction:

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> When a person attempts to commit a battery upon another, and accidently commits a battery on a third person, if the battery would have been unlawful against the first person, then it would have been unlawful against the third person, even though it would have been accidental. In other words, if the State has proven beyond a reasonable doubt, that defendant had the intent to commit simple battery upon the first person, but accidentally committed a simple battery upon a third person, you

must find the defendant had the necessary intent to commit a simple battery upon the third person.

II

In order to convict defendant as charged you must find that the state proved beyond a reasonable doubt that defendant had the specific intent to commit battery on a correctional officer. If you find the State proved defendant had the intent to commit simple battery on another, who was not a correctional officer and defendant accidentally and unintentionally committed a simple battery on a third person, a correctional officer, then you must find the defendant guilty of the responsive verdict of simple battery.

The trial court denied this requested jury instruction on the reasoning that the charged offense was a general intent crime.[3]

The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. 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. See LSA-C.Cr.P. art. 807.

In the instant case, the trial court did not err or abuse its discretion in rejecting defendant's proposed jury charge. The charge was not wholly correct, because it attempted to impose a specific intent requirement on the charged offense. As discussed above, battery of a correctional facility employee is a general intent crime.

This assignment of error is without merit.

PATENT ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." Having reviewed the record, we note an error in defendant's habitual offender sentence.

[3]Defense counsel submitted a second proposed jury instruction that omitted "specific" from the first sentence of the second paragraph. The trial court also denied this second proposed instruction, but defendant does not challenge this ruling on appeal.

The sentencing range for defendant's underlying felony conviction of battery of a correctional facility employee is imprisonment with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not less than one year nor more than five years. See LSA-R.S. 14:34.5(B)(2).[4] As a third-felony habitual offender, defendant was to be sentenced to imprisonment at hard labor for not less than two-thirds of the longest possible sentence for the underlying conviction (40 months) and not more than twice the longest possible sentence (10 years). See LSA-R.S. 15:529.1(A)(3)(a).[5] The conditions imposed on a habitual offender sentence are the same as those called for in the reference statute. See State v. Bruins, 407 So. 2d 685, 687 (La. 1981). Therefore, defendant's sentencing range as a third-felony habitual offender was 40 months to 10 years, all without benefit of parole, probation, or suspension of sentence.

After adjudicating defendant a third-felony habitual offender, the trial court sentenced him to "five years with the Department of Corrections at hard labor." The court added, "That sentence must be served without benefit of probation or suspension of sentence." However, the court did not restrict the benefit of parole. Although the minute entry and commitment order both reflect such a restriction, the transcript does not. Since there is a discrepancy between the minutes and the transcript, the transcript must prevail. State v. Lynch, 441 So. 2d 732, 734 (La. 1983). As a result, defendant's habitual offender sentence is illegally lenient.

An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. LSA-C.Cr.P. art. 882(A). In the instant case, however, correction of the illegal sentence requires the exercise of discretion. Had the trial court realized that a parole restriction was required on

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[4]The statute also authorizes, but does not mandate, a fine.

[5]The habitual offender statute does not authorize the assessment of a fine from an underlying criminal statute. See State v. Dickerson, 584 So. 2d 1140 (La. 1991) (per curiam); State v. Thomas, 2012-0177 (La. App. 1st Cir. 12/28/12), 112 So. 3d 875, 880.

defendant's instant sentence, it might have sentenced defendant to a shorter overall term of imprisonment. Accordingly, under State v. Haynes, 2004-1893 (La. 12/10/04), 889 So. 2d 224 (per curiam), we vacate defendant's habitual offender sentence and remand the matter to the trial court for resentencing on defendant's habitual offender adjudication.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.