

NOT DESIGNATED FOR PUBLICATION

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2017 KA 0044**

**STATE OF LOUISIANA**

**VERSUS**

**HARDY CORNWELL**

**Judgment Rendered: SEP 27 2017**

\* \* \* \* \*

On Appeal from the Twenty-Second Judicial District Court  
In and for the Parish of St. Tammany  
State of Louisiana  
No. 574176

Honorable Scott Gardner, Judge Presiding

\* \* \* \* \*

Warren L. Montgomery  
District Attorney  
Matthew Caplan  
Assistant District Attorney  
Covington, Louisiana

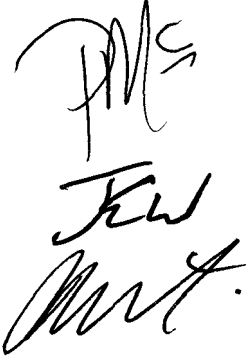
Counsel for Appellee  
State of Louisiana

Sherry Watters  
New Orleans, Louisiana

Counsel for Defendant/Appellant  
Hardy Cornwell

\* \* \* \* \*

**BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.**



**McCLENDON, J.**

Defendant, Hardy Cornwell, was charged by bill of information with false imprisonment (count one), a violation of LSA-R.S. 14:46.1, and aggravated second degree battery (count two), a violation of LSA-a. R.S. 14:34.7. He entered a plea of not guilty on both counts. After a trial by jury, defendant was found guilty on count one of attempted false imprisonment, in violation of LSA-R.S. 14:27 and LSA-R.S. 14:46.1, and guilty as charged on count two. The trial court denied defendant's motion for new trial and motion for postverdict judgment of acquittal. Defendant was sentenced on count one to ninety-days imprisonment in the parish jail, with full credit for time served, and on count two to ten-years imprisonment at hard labor, to be served concurrently. The State filed a habitual offender bill of information to enhance the sentence on count two.<sup>1</sup> After a hearing, the trial court adjudicated defendant a second-felony habitual offender, vacated the original sentence on count two, and resented defendant on count two to twenty-years imprisonment at hard labor, to be served concurrently with the sentence on count one. Defendant now appeals, assigning error to the sufficiency of the evidence on count two, and to the constitutionality of the sentence on count two. For the following reasons, we affirm the convictions and sentences.

**STATEMENT OF FACTS**

On March 8, 2016, Deputy Terry Bode and Deputy Tammy Philly of the St. Tammany Parish Sheriff's Office (STPSO) responded to a welfare check dispatch to a boat located at Slip 80 of Marina Beau Chene in Madisonville. After several announcements of the officer's presence, a male subject (later identified as defendant) came to the boat hatch and confirmed his identity. Based on information received during the dispatch, the officers questioned defendant as to the whereabouts of Allison McCartney (the victim), and he indicated that she was there previously, but had left.<sup>2</sup> Deputy Bode heard an apparent voice of a female individual coming from the inside of

---

<sup>1</sup> The habitual offender bill of information specifically alleges that defendant is a second-felony offender based on the predicate Oklahoma conviction of first degree manslaughter in 2001. Defendant denied the allegation.

<sup>2</sup> We note that the record is inconsistent as to the spelling of the victim's last name. The spelling used herein is consistent with the bill of information and the order of protection in the record.

the cabin stating, "help me, help me." The officers looked into the cabin and observed a white female later identified as the victim wrapped in a blanket. Deputy Philly entered the cabin to check on the victim while Deputy Bode remained with defendant.

The victim was unclothed, had trauma (bruises and swelling) to her face (including a head injury that was bleeding), both of her eyes were black, and her right eye was further swollen shut. She also had a puncture wound to her right hand that she indicated was the result of being stabbed, she was covered in blood, and she had duct tape in her hair and around her neck. Deputy Philly observed apparent blood on the floor near the kitchen and on the bedroom mattress, and a significant amount of hair on the mattress and the ledge above the bed. Deputy Philly summoned the paramedics, photographed the victim's injuries, helped her get dressed, and secured the scene. The victim, who appeared to be intoxicated and was at times uncooperative, was transported to Lakeview Hospital for treatment. Defendant was arrested and transported to the Covington law enforcement complex.

STPSO Detective Brian Williams, the lead detective, responded to the hospital after receiving a dispatch reporting a possible rape and badly beaten female. Detective Williams noted that the wound on the victim's head was still bleeding upon his arrival. At the hospital, the victim consented to photographs but refused a sex crime examination. She received staples to the injury on her head. Though she refused to provide a statement, she completed registration for victim notification (referred to as a LAVN form), which allowed her to be notified of any bond or release of defendant in the case of his arrest.<sup>3</sup> The victim also partially executed a judicial risk assessment form, and Detective Philly completed a domestic violence help form on the victim's behalf. The victim expressed her desire to not have any charges brought against defendant. Detective Philly was subsequently informed by the Mandeville Police Department that

---

<sup>3</sup> After her release, the victim met Detective Williams on March 22, 2016, and again refused to provide a formal statement. The victim did however indicate that she had been hit on the head with a large object. She never implicated anyone other than defendant as the source of her injuries.

the victim was involved in a separate incident with another male the day before, on March 7, 2016, which did not result in any arrest.<sup>4</sup>

Deputy Lauren Engle, the crime scene technician of the STPSO crime lab who processed the scene in this case, took photographs of the interior of the boat, collected items, and photographed defendant. The photographs in part depicted a substance suspected as blood, and among the evidence collected was a piece of duct tape with hair stuck to it, a clump of hair, a knife, a knife sheath, blankets and articles of clothing with suspected blood stains, and a pillow heavily soiled with suspected blood. Defendant had scratches on his face, including a one-inch linear scratch on his cheek, a mark under his right eyebrow, an injury on his nose, left-hand injuries on his knuckles and digits, and a toe injury on his left foot. Defendant was advised of his **Miranda**<sup>5</sup> rights and interviewed by Detective Williams.<sup>6</sup> The defendant indicated that he injured his hand while working. He further indicated that the victim had threatened to kill him two weeks before the instant offense, and threatened him with a knife on the night in question. He stated that he and the victim began arguing upon her arrival, were both consuming alcohol, and engaged in consensual sexual intercourse. Defendant contended that he tied up the victim at her request, though he admitted that he may have gone too far in using duct tape to do so. While he admitted to "perhaps" slapping the victim on the night in question, he repeatedly denied injuring the victim.<sup>7</sup> He further stated, "By the way, if you'd spent more than ten minutes with [the victim], you'd probably slap her."

---

<sup>4</sup> Sergeant David Sharp of the Mandeville Police Department responded to the prior incident. It involved a domestic dispute between the victim and Donald Brim with no indication of a physical altercation. The victim appeared to be intoxicated at the time.

<sup>5</sup> **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

<sup>6</sup> Detective Williams smelled alcohol on defendant's breath, but noted that he was responsive, seemed to understand his rights, and executed a waiver of rights form.

<sup>7</sup> Defendant stated that when the victim arrived, her face was puffy and her right eye was injured. Though he wrapped duct tape around her head and over her mouth, he did not notice her head injury until later that night. He claimed that the victim was holding the knife backwards while threatening to throw it at him, but never released it. The next morning her face was bruised and her left eye was also injured. Defendant claimed that he did not know how the victim received the injuries.

### **ASSIGNMENT OF ERROR NUMBER ONE**

In his first assignment of error, defendant argues that the State failed to prove count two beyond a reasonable doubt. Defendant argues that the State failed to show any nonconsensual battery or touching in this case, that defendant intended great body harm to the victim, or that he caused permanent disfigurement. Defendant contends that the victim could not explain if her injuries were sustained during falls or if she was injured as defendant was trying to disarm her after she pulled out a knife. Defendant notes that the victim admitted to pulling a machete on defendant in the past, and described herself as mean and vitriolic when she drinks. Defendant further contends that the victim had been arrested for past domestic violence incidents wherein she was the aggressor. He claims that the victim never stated that defendant did anything to intentionally injure her on the night in question. Defendant further notes that the victim stated that she wanted to be on the boat with defendant that night and admitted that she could have left at any time.

Citing such cases as **State v. Helou**, 02-2302 (La. 10/23/03), 857 So.2d 1024, **State v. Vidaurri**, 05-742 (La.App. 3 Cir. 12/30/05), 919 So.2d 803, writ denied, 06-0573 (La. 10/27/06), 939 So.2d 1270, and **State v. Touchet**, 04-1027 (La.App. 3 Cir. 3/9/05), 897 So.2d 900, defendant alternatively argues that the State failed to prove that he intentionally inflicted serious bodily injury upon the victim. On that basis, he contends that a lesser conviction of simple battery is required. Defendant argues that the evidence does not show that the victim suffered extreme physical pain, or a protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or that she was put at a substantial risk of death.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, 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. **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. 821B; **State v. Ordodi**, 06-0207 (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, 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, in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). The court does not determine whether another possible hypothesis has been suggested by the defendant, which could explain the events in an exculpatory fashion. Rather the reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not have found guilt beyond a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984).

Louisiana Revised Statutes 14:34.7A defines aggravated second degree battery as "a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury." A battery is defined in pertinent part by LSA-R.S. 14:33 as "the intentional use of force or violence upon the person of another." Pursuant to LSA-R.S. 14:2A(3), a "[d]angerous weapon" includes "any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm." Pursuant to LSA-R.S. 14:34.7B(3), "[s]erious bodily injury" is defined as "bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death." Aggravated second degree battery is a crime requiring specific criminal intent. See **State v. Fuller**, 414 So.2d 306, 310 (La. 1982). 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). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of a defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The intent to inflict serious bodily injury may be inferred from the extent and severity of the victim's injuries. **State v. Strickland**, 11-715 (La.App. 5 Cir. 3/27/12), 91 So.3d 411, 416. See also Fuller, 414 So.2d at 309-10. The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La.App. 1 Cir. 1986).

The victim testified that she had known defendant for over thirty years and that they had been dating for the past nine or ten years. She had been living in the New Orleans area for three to four years, at times with defendant on a boat. She characterized her relationship with defendant as tumultuous. The victim stated that she had been diagnosed with bipolar disorder, depression, and anxiety and that she believed she had mild ADHD, although it had not been diagnosed. She confirmed a history of alcohol abuse and previous misdemeanor convictions for DWI, domestic violence, misuse of 911, and public intoxication. The instant offense occurred when she went to see defendant after an altercation with Donald Bim, her live-in boyfriend at the time.<sup>8</sup> The victim confirmed that she did not have any injuries before arriving at defendant's boat on the night in question.

Initially, she and defendant were consuming alcohol and socializing with one another before an argument ensued. The victim further stated, "Oh, once our arguments start, I'm very vitriolic. There's a lot of vitriolic, acidic language." She did not recall defendant becoming enraged, noting that she "kind of blacked out" during the altercation, though she did recall the argument being in part over Bim. She further

---

<sup>8</sup> During the prior altercation the victim threatened Bim with a knife, and he slammed her head against the wall, called the police, and told her to leave his residence. The victim indicated that she did not receive the injuries noted in this case during the altercation with Bim, confirming that her eyes were not swollen, and nor was she bleeding when she left Bim's residence. She recalled taking a taxicab to a gas station to buy alcohol before arriving at defendant's boat. Detective Williams located the cab driver who picked up the victim that night. While the cab driver did not transport the victim to defendant's boat, he stated that the victim did not have visible injuries while in his presence. The victim testified that the cab driver was the only person who she encountered before arriving at defendant's boat.

recalled the incident becoming physical, noting that she hit defendant first (in the chest), and defendant punctured her hand with the butt of a knife. When asked what other injuries she sustained as a result of the altercation, the victim stated that she had to get eight staples in her head, due to another puncture wound from the same knife. The victim added, "I never even had to take any pain killers for it or anything. I mean, it was superficial. I think they over stapled, to tell you the truth. But that's just me." She stated that she was prescribed pain medication, but did not take any of it due to her status as an addict.

The victim confirmed past consensual sexual encounters with defendant wherein he would restrain her, indicating that she preferred him to use silk scarves, which was not an option that night because her scarves had been stolen. She noted that defendant had previously taught her how to remove duct tape restraints by repositioning her elbows and ripping the tape apart. She further stated that although she did not recall asking defendant to bind her on the night in question, it would not have been out of her character to make such a request. She did not, however, believe that she would have consented to having duct tape in her hair.

The victim recalled asking for help when the police arrived, but did not remember stating that she had been raped. The victim further confirmed that she had forgiven and still loved defendant. She added, "And I think he just snapped. This is so out of his character." She described defendant as her best friend while admitting that they had a toxic relationship that needed to be discontinued. The victim further testified that she would have preferred the charges against defendant be dropped, stating that while she knew what happened was wrong, a lengthy prison sentence for defendant would also be wrong. She further indicated that she wanted defendant to be released because she needed help taking care of the boat and the equipment therein. The victim readily admitted that her recollection of what occurred on the boat was not completely clear. When asked if defendant held her there against her will, she stated, "I believe I could have left." She further admitted to pulling a machete on defendant on multiple occasions, stating that it was her weapon of choice. When asked if she



pulled a machete at the time of the instant offenses, she stated that she did not recall doing so, adding, "But I did it earlier in the night. So, I wouldn't put it past me."

The trier of fact is free to accept, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385 (La.App. 1 Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 00-0829 (La. 11/13/00), 774 So.2d 971. The testimony of a victim may present sufficient evidence to establish that the victim sustained serious bodily injury, without the testimony of any expert. **State v. Gunnells**, 619 So.2d 192, 201 (La.App. 3 Cir.), writ denied, 625 So.2d 1061 (La. 1993). In this case, the jury was charged with the law regarding simple battery, which does not require serious bodily injury. LSA-R.S. 14:35. The jury was advised that it could return that verdict if the evidence did not support conviction for a more serious grade of the offense. The jury declined to find defendant guilty of the lesser offense of simple battery.

As noted, defendant argues that the present case is comparable to **Helou**, **Vidaurri**, and **Touchet**. We find those cases distinguishable from the present case. In **Helou**, the victim sustained a bloody nose; in **Vidaurri**, the victim similarly sustained minor injuries including scratches, a cut lip, and a black eye; and in **Touchet**, the injuries at issue consisted of bruises. **Helou**, 857 So.2d at 1029; **Vidaurri**, 919 So.2d at 806; **Touchet**, 897 So.2d at 907-08. In this case, defendant used a knife to inflict a stabbing or puncture wound to the victim's head, requiring staples. Thus, the victim's head required medical intervention to avoid permanent damage. In addition to the head injury, the victim sustained another puncture wound to her hand, two black eyes, one being swollen shut, and other facial injuries. Though the victim conceded that she may have agreed to being tied up or restrained, there was no testimony to indicate that she consented to the injuries that she sustained.

While the victim was intoxicated, may have blacked out during the incident, and was sympathetic to defendant during the trial, her testimony indicated that defendant inflicted her injuries. The officers photographed and collected evidence indicating that the victim's injuries were sustained on defendant's boat. Further, the victim confirmed that she did not have the injuries in question before boarding defendant's boat, and that she and defendant were the only two people on the boat. She recalled the

culmination of the verbal argument that became physical, and she specifically recalled defendant hitting her in the head and puncturing her hand with the knife.

From the evidence presented at the trial, the jury reasonably could have inferred that defendant had specific intent to cause serious bodily injury through the use of force or violence with the use of a dangerous weapon. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). A court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law in accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder. See **State v. Mire**, 14-2295 (La. 1/27/16), \_\_\_ So.3d \_\_\_, \_\_\_, (per curiam). After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of aggravated second degree battery and defendant's identity as the perpetrator. Accordingly, assignment of error number one lacks merit.

#### **ASSIGNMENT OF ERROR NUMBER TWO**

In his second assignment of error, defendant challenges the constitutionality of the enhanced sentence imposed on count two. Defendant contends that under the circumstances, the sentence is excessive, cruel, and unusual punishment. Defendant argues that the sentence does not take into account as mitigating circumstances, the victim's role in provoking the situation, or defendant's education, depression, PTSD, and substance abuse. He further notes that he was a forty-eight year old with a fifteen-year-old prior conviction for which he had completed serving the sentence.

The record before this court does not contain a copy of a motion to reconsider sentence or evidence that defendant objected to or moved for reconsideration of the

sentence. Louisiana Code of Criminal Procedure article 881.1A(1) requires a defendant or the State to make or file a motion to reconsider sentence within thirty days of sentencing unless the trial court sets a longer period of time at the time of sentencing. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the State or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review. LSA-C.Cr.P. art. 881.1E. As stated, the record before us does not include a motion to reconsider sentence, nor did defendant enter an objection after the sentence was imposed. As defendant failed to comply with LSA-C.Cr.P. art. 881.1, he is barred procedurally from having assignment of error number two reviewed. See LSA-C.Cr.P. art. 881.1E. See also **State v. Duncan**, 94-1563 (La.App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

#### **CONCLUSION**

For the foregoing reasons, defendant's convictions, habitual offender adjudication, and sentences are affirmed.

**CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.**