NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 1346

STATE OF LOUISIANA

VERSUS

SERON MARQUEL GRAYER

Judgment Rendered: JUN 03 2019

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APPEALED FROM THE 21st JUDICIAL DISTRICT COURT
LIVINGSTON PARISH, LOUISIANA
DOCKET NUMBER 36,288

HONORABLE CHARLOTTE H. FOSTER, JUDGE

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Seron Marquel Grayer	Pro Se

BEFORE: McDONALD, CRAIN, and HOLDRIDGE, JJ.

McDONALD, J.

The State filed a bill of information charging defendant, Seron Marquel Grayer, with second degree battery, a violation of LSA-R.S. 14:34.1. He pled not guilty. After a trial, a six-member jury found defendant guilty as charged. The trial court initially imposed a term of eight years imprisonment at hard labor, but later vacated the sentence, adjudicated defendant a third-felony habitual offender, and re-sentenced him to twelve years imprisonment at hard labor.[1] Defendant now appeals. For the following reasons, we affirm his conviction and habitual offender adjudication, amend his sentence to remove the prohibition on parole eligibility, and affirm his sentence as amended.

STATEMENT OF FACTS

On August 5, 2017, a "Mr. Barry" hired Nicholas Michel, the victim, to supervise a work crew remodeling a daiquiri shop in Denham Springs, Louisiana. Mr. Michel did not know the members of the crew he was hired to supervise, one of which was defendant, nor was he responsible for paying them. Mr. Barry had previously hired the crew and told Mr. Michel that he would pay them.

On August 10, 2017, Mr. Michel, his wife, Stacie Van Meter, and certain members of the four-man crew, including defendant, had a heated discussion about when and by whom the crew would be paid for work they had already completed. One unidentified crew member was irate that he was not getting paid that day. Mr. Michel explained to him that he was not responsible for paying the crew and that Mr. Barry was going to pay them. After additional heated words between defendant and Mr. Michel, as Mr. Michel turned to light a cigarette, defendant punched him in the side of the head, knocking Mr. Michel to the ground. Ms. Van Meter, who had stepped outside to text Mr. Barry to come to the site, heard something fall in the building. She went inside, saw Mr. Michel on the ground, and saw defendant walking away from him saying, "I can't stand that [motherf*****'s] mouth no more." She told the crew to get out of the building. Mr. Michel sought medical treatment that day and ultimately underwent surgery. His jaw was wired shut for several weeks. Over a month after the incident, a

[1] *See* LSA-R.S. 15:529.1A(3)(a).

Livingston Parish sheriff's deputy arrested defendant. Both Mr. Michel and Ms. Van Meter testified at trial that they did not know defendant before the daiquiri shop job.

PRO SE ASSIGNMENTS OF ERROR NUMBERS THREE, FOUR, AND FIVE: INSUFFICIENT EVIDENCE

In cases where a defendant has raised issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should preliminarily determine the sufficiency of the evidence before discussing the other issues raised on appeal. When the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must review the assignments of error to determine whether the accused is entitled to a new trial. *State v. Hearold*, 603 So.2d 731, 734 (La. 1992); *State v. Smith*, 03-0917 (La. App. 1 Cir. 12/31/03), 868 So.2d 794, 798. Accordingly, we will first address defendant's pro se assignments of error three, four, and five, which challenge the sufficiency of the State's evidence.

A conviction based on insufficient evidence cannot stand, as it violates Due Process. *See* U.S. Const. amend. XIV; La. 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); *State v. Ordodi*, 06-0207 (La. 11/29/06), 946 So.2d 654, 660. The *Jackson* standard of review, incorporated in LSA-C.Cr.P. art. 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt.

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; the trier of fact has the sole discretion to make that determination. *State v. Moultrie*, 14-1535 (La. App. 1 Cir. 12/14/17), 234 So.3d 142, 146, *writ denied*, 18-0134 (La. 12/3/18), 257 So.3d 1252. When weighing the evidence, the trier of fact is free to accept or reject, in whole or in part, any witness's testimony. *State v. Leger*, 17-0461 (La. App. 1 Cir. 11/15/17), 236 So.3d 577, 585. The fact that the record contains evidence that conflicts with the

testimony accepted by the trier of fact does not render the evidence accepted by the trier of fact insufficient. *State v. Morgan*, 12-2060 (La. App. 1 Cir. 6/7/13), 119 So.3d 817, 826. A single witness's testimony, if believed by the factfinder, is sufficient to support a factual conclusion, unless there is internal contradiction or irreconcilable conflict with the physical evidence. *State v. Malarcher*, 17-1497 (La. App. 1 Cir. 4/13/18), 249 So.3d 837, 844. Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of witness credibility, the matter is one of the weight of the evidence, not its sufficiency. *State v. Grandison*, 18-0046 (La. App. 1 Cir. 11/5/18), 2018 WL 5785333 *6 (unpublished).

Louisiana Revised Statute 14:34.1A pertinently provides that "[s]econd degree battery is a battery when the offender intentionally inflicts serious bodily injury[.]"

Defendant argues here that Mr. Michel and Ms. Van Meter lied during their testimonies. Specifically, defendant argues that the Michels' testimonies were inconsistent as to when Mr. Michel first met defendant, implying that Rebecca Michel's prior association with defendant also meant that Mr. Michel, her brother, knew him before the incident. Further, defendant contends there is a discrepancy in the Michels' testimonies as to whether Ms. Van Meter pushed him out of the door after he struck Mr. Michel or whether defendant walked away.

After reviewing the record, we conclude that nothing in the Michels' trial testimony presented an internal contradiction or irreconcilable conflict of such a degree as to undermine the jury's considerable discretion. Mr. Michel and Ms. Van Meter both testified consistently they did not know defendant prior to the daiquiri shop job. Both also testified that they found out later that Rebecca Michel, Mr. Michel's sister, knew defendant.[2] Ms. Van Meter's testimony also clearly shows that she told the crew members to leave the building after defendant struck Mr. Michel. Moreover, whether Ms. Van Meter pushed defendant out of the door or he walked away is not relevant to proving the underlying offense of second degree battery. These assignments of error are without merit.

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[2] Defendant was arrested while with Ms. Michel.

COUNSELED ASSIGNMENT OF ERROR:
SENTENCING ERROR

In his sole counseled assignment of error, defendant contends there is a discrepancy between the sentencing transcript and the minute entry and commitment order regarding the terms of his sentence. Specifically, he points out that the trial court properly sentenced him on the record to 12 years imprisonment at hard labor without benefit of probation or suspension of sentence but that the sentencing minutes and commitment order indicate a prohibition on parole as well.[3]

Where there is a discrepancy between a minute entry and the transcript, the transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983); *State v. Howard*, 18-0317 (La. App. 1 Cir. 9/21/18), 258 So.3d 66, 72 n.1. The sentencing transcript reflects the trial court's pronouncement that defendant only be denied the benefit of probation or suspension of sentence. The sentencing minutes and habitual offender commitment order, however, indicate defendant's sentence is to be served without the benefit of parole, probation, or suspension of sentence, although neither the penalty provision of the second degree battery statute nor the habitual offender law authorized such a restriction on defendant's parole eligibility. LSA-R.S. 14:34.1C; LSA-R.S. 15:529.1A(3)(a).[4] Moreover, while LSA-R.S. 15:529.1G prohibits probation or suspension of sentence, it does not prohibit parole eligibility. Thus, the inclusion of the parole restriction in the commitment order renders this sentence illegal.

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. 882A. Accordingly, we amend defendant's sentence by deleting the parole restriction and affirm the sentence as amended. *See State v. Campbell*, 10-0693 (La. App. 1 Cir. 10/29/10), 2010 WL 4273273 *1 (unpublished). Defendant's entire sentence is still to be served without benefit of probation or suspension of sentence. *See* LSA-R.S. 15:529.1G. We remand for correction of the minutes and the commitment order and for transmission of a

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[3] The commitment order indicates the sentence is to be served "without benefits." This is a common trial court short-hand for "without benefit of parole, probation, or suspension of sentence."

[4] The version of the habitual offender statute in effect at the time of the offense.

corrected commitment order to the Department of Corrections. *State v. Bethley*, 17-1127 (La. App. 1 Cir. 4/9/18), 2018 WL 1704096 *2 (unpublished).

PRO SE ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO: INEFFECTIVE ASSISTANCE OF COUNSEL

In his pro se assignments of error numbers one and two, defendant argues he received ineffective assistance of counsel when counsel: 1) failed to challenge for cause a venire member who defendant alleges concealed the fact she worked for State government; 2) did not secure witnesses in his favor; and 3) "alter[ed]" the bill of information to reflect the date the State was alleging the incident occurred.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court rather than by appeal. This is because post-conviction relief creates the opportunity for a full evidentiary hearing under LSA-C.Cr.P. art. 930. *State v. Jackson*, 09-1930 (La. App. 1 Cir. 5/7/10), 2010 WL 1838312 *5 (unpublished). Since the appeal record is insufficient to address the merits of defendant's ineffective assistance claims, defendant should raise those claims in an application for post-conviction relief in the trial court.

CONCLUSION

For the above reasons, we affirm defendant's conviction and habitual offender adjudication. We amend his sentence to delete the parole restriction, and we affirm the sentence as amended. We remand this matter to the trial court for correction of the minutes and the commitment order and for transmission of the amended commitment order to the Louisiana Department of Corrections.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED AND AFFIRMED AS AMENDED; REMANDED FOR CORRECTION OF MINUTES AND COMMITMENT ORDER.