STATE OF LOUISIANA	*	**NO. 2002-KA-0771**
VERSUS	*	**COURT OF APPEAL**
ALFRED W. POUNDS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 419-070, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge David S. Gorbaty)

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AFFIRMED.

STATEMENT OF CASE

On January 27, 2001, the defendant, Alfred Pounds, was charged by bill of information with aggravated battery, a violation of La. R.S. 14:34. On March 6, 2001, the defendant was found guilty by a jury of second degree battery, a violation of La. R.S. 14:34.1. On September 4, 2001, the defendant was sentenced to eighteen months in the Department of Corrections, which was suspended, and to two years active probation, a thirty dollar per month probation fee, court costs, and $2,500 restitution to the victim. On appeal, the defendant raises two assignments of error.

STATEMENT OF FACT

At trial, Officer Laurence Celestine testified that when he responded to a 911 call at Francisco Verrett Drive in New Orleans, he found the victim, Earl Shine, lying on the floor, bleeding and complaining of pains in his side and back. The officer spoke briefly with the victim, who told him he had been cut by his neighbor, the defendant. As EMS workers lifted the victim to a stretcher, a knife was found under him. After interviewing witnesses,

the officer went to the defendant's residence where he interviewed the defendant and retrieved a knife from the coffee table and the shirt he was wearing. The officer transported the defendant to Charity Hospital for treatment of knife wounds on his arm.

Nicele Shine, the victim's older sister, testified that on August 27, 2000, she and two study partners were studying in the kitchen when the victim went outside to smoke. He returned a minute or two later, mumbling and walking fast through the kitchen. Ms. Shine noticed he was bleeding and followed him to his bedroom. The victim did not answer questions posed by his sister and mother, and he walked out of the bedroom after retrieving his work knife, which he kept in his dresser drawer. She blocked his exit from the house, and she and her study partner, both registered nurses working on their masters in nursing degrees, were making him lie down when he fell to the floor with the knife under his body. He was breathing heavily and incoherent. Ms. Shine called 911, and the police and an ambulance responded to the call. Ms. Shine identified an Entergy shirt as belonging to the victim. She testified that she may have been mistaken and perhaps the shirt belonged to the defendant, who works for Entergy. Ms. Shine stated that the victim did not have his knife when he initially left the house to smoke, although on cross-examination, she admitted that she did

not search his pockets when he first re-entered the house. Ms. Shine testified that she was positive the victim first took the knife from his dresser drawer only after re-entering the house.

Chandra Chapman testified that she was studying at the Shine residence on August 27, 2000 when the victim received a telephone call, and after the conversation, he was not upset. He then went outside, and when the victim returned five to ten minutes later, he was perspiring and upset. She saw Ms. Shine follow the victim and heard Ms. Shine and her mother saying that he was bleeding and should go to the hospital. When the victim returned to the kitchen, Ms. Chapman noticed either perspiration or blood and two puncture marks, but did not see anything in the victim's hands. She speculated that he was going into shock and described him as not knowing what was going on. The victim then collapsed as Ms. Shine prevented him from exiting, and Ms. Chapman examined the victim. Ms. Chapman told Ms. Shine that he might have a collapsed lung and applied pressure to the wounds in the victim's back. The only time she saw a knife was when emergency personnel picked up the victim to put him on the stretcher. Ms. Chapman denied that the Entergy shirt was the shirt the victim wore that evening.

The victim testified that he resided on Francisco Verritt Drive in New

Orleans East with his mother and that he was a warehouse worker who typically wore combat boots, jeans and t-shirt to work, along with his knife on his belt in a sheath. He kept his knife in his top dresser drawer at home so his nephew could not reach it. He testified that after work on the evening of August 27, 2000, he disposed of the family dog that had died earlier that day before changing into jeans and a t-shirt. He saw the defendant three times that evening, twice in passing with a "hello" and "good evening" as he disposed of the dog. At about 9:45 or 10:00 p.m., the victim had spoken with his ex-wife and son and went outside to smoke. Pounds yelled something from across the street, the victim went to his truck for a cigarette, and went across the street. He spoke with "Anthony" and another man sitting with the defendant on his truck tailgate drinking beer. The victim did not address the defendant, except to state that he did not feel he had to speak to him every time he walked out his front door. The defendant then pushed the victim in the back, then on his sternum, threw a beer at him, and then pulled a knife on him. The two men then tussled. The victim denied cutting the defendant but admitted he struck him in the face, probably drawing blood, and identified the Entergy shirt as the shirt the defendant wore that night. The victim denied intent to get his knife immediately after the confrontation, but only decided to get the knife after his sister told him he

was stabbed. His intent at that time was to show the defendant how to use a knife. The victim did not walk away because he did not want to lose face.

Mr. Anthony Caples testified that on August 27, 2000 he was visiting the defendant, sitting on the back of his truck with another neighbor, "Ronald." The victim came outside to smoke, and the defendant and the victim engaged in a brief questions and answers about the dog and about payment for the defendant cutting the grass for the victim's mother. The victim went over to the tailgate and greeted Mr. Caples and Ronald with a handshake. Mr. Caples testified that the defendant asked in a friendly manner why the victim did not greet him with a handshake and the two proceeded to exchange angry words. Ronald left and the defendant got off the tailgate and walked up his driveway. Mr. Caples testified that he did not recall seeing the defendant throw a beer at the victim but said the victim advanced up the driveway with clenched fists and the two bumped chests. The defendant pushed the victim off and told him he needed to leave. When the victim came back at him, the defendant pulled a knife. The victim grabbed the hand holding the knife, the two tussled, and the victim came up with a raised knife. More angry words were exchanged, and the two walked away. Mr. Caples identified the Entergy shirt as the shirt worn by the defendant that evening, and recalled seeing blood on the defendant back

upper arm and hearing defendant say his hands were bleeding.

The defendant testified that he was employed by Entergy and had worked for that company for twenty eight years. He also cuts grass on a regular basis, including the victim's mother's grass. On the evening of August 27, 2000, he and "Ronald" cut the grass for the victim's mother, found the family dog dead, informed the victim's mother, and then sat on his truck's tailgate talking and drinking a beer. He recalled asking the victim for the money owed from cutting the grass, victim coming over, shaking the hands of Mr. Caples and Ronald, and ignoring him. He described victim as angry, and he testified that he got up off the tailgate and walked up his driveway, telling victim he should leave. The victim balled up his fists and ran up against him, saying the defendant did not own the street. As the victim approached him again, the defendant showed him his knife, and the two tussled. As they tussled, the victim produced a knife, and after the victim left, the defendant realized he was cut on his hand and shoulder. He denied throwing a beer at the victim. The defendant acknowledged he did not tell the officers about the knife he had pulled in his defense, but he stated he did not know the victim had been cut. He said he told the officers that the victim had tried to take his knife from him, but he was told to shut up. He gave the knife to the officers.

The victim was called as a rebuttal witness by the State and testified that he returned home from work on August 27, 2000 at approximately 3:30 or 4:00 p.m. and found out that the family dog had been killed. He called his sister, the owner of the dog, and asked her when she would be home from work with her truck so he could dispose of the dog. The victim confirmed that the grass had already been cut that day.

Also called again as a rebuttal witness, Officer Celestine testified that when he relocated to the defendant's house, he informed the defendant that he was under investigation for aggravated battery by cutting. Shown his police report, the officer stated that the report reflected the defendant's statement that the victim pulled a knife first, with the defendant pulling his knife after that and cutting the victim. He recalled Mr. Caples telling him that he broke up the fight and saw the defendant with the only knife he saw that evening.

ERRORS PATENT

A review of the record for errors patent reveals none.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant argues that the evidence was constitutionally insufficient to support his conviction for a second-

degree battery upon the victim, and that the evidence showed that he acted in self-defense. The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So. 2d 1305, 1310 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed absent an abuse of discretion. State v. Cashen, 544 So 2d 1268, 1275 (La. 4 Cir. 1989), citing State v. Vessell, 450 So.2d 938 (La.1984).

Battery is the intentional use of force or violence upon the person of another. La. R.S. 14:33. Aggravated battery is a battery committed with a dangerous weapon. La. R.S. 14:34. Second degree battery is a battery committed without the consent of the victim when the offender intentionally

inflicts serious bodily injury. La. R.S. 14:34.1. The Supreme Court has recognized that in aggravated battery cases, the charged offense requires proof of general intent, whereas in second degree battery cases the offense requires proof of a specific intent to inflict serious bodily injury. State v. Welch, 615 So.2d 300, 302 (La. 1993). Serious bodily injury is defined as injury that 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. La. R.S. 14:34.1. Specific criminal intent is defined as that state of mind existing when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Thus, the elements of second degree battery are as follows: (1) the intentional use of force or violence upon the person of another, (2) without the consent of the victim, and (3) when the offender has the specific intent to inflict serious bodily injury. State v. Hernandez, 96-115, p. 4-5 (La. App. 4 Cir. 12/18/96), 686 So.2d 92, 95.

Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Lilly, 468 So.2d 1154 (La.1985). When circumstantial evidence forms the basis for the conviction,

such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of events; rather, when evaluating the evidence in the light most favorable to the prosecution, the court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilty beyond a reasonable doubt under Jackson. State v. Davis, 92-1623, p. 11 (La. 5/23/94), 637 So. 2d 1012, 1020. This test is not separate from the Jackson test; rather, it is an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found the defendant guilty beyond a reasonable doubt. State v. Wright, 445 So. 2d 1198, 1201 (La. 1984); State v. Addison, 94-2431, p. 5-6 (La. App. 4 Cir. 11/30/95), 665 So. 2d 1224, 1228.

In this case, the jury heard several slightly different versions of the events that transpired the evening of August 27, 2000. The testimony was sufficient circumstantial evidence to factually support the defendant's conviction: when the victim went outside for a cigarette, he did not have a knife on him, and the defendant admitted to pulling his knife on the victim. The victim was seriously injured in the altercation. The jury could have

reasonably concluded that the defendant's testimony offering an alternative explanation regarding how this crime occurred, that the victim pulled the knife and the defendant pulled and used his in self defense, lacked credibility. The facts are sufficient to convict the defendant of the lesser included crime of second degree battery. La. C.C.P. art. 814. The jury chose to believe the version of facts supporting a finding of second degree battery by the defendant, and any issues of credibility are for the trier of fact.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second and final assignment of error, the defendant asserts that his trial counsel was ineffective for failing to impeach Officer Celestine's statement on rebuttal that witness Caples told him he did not see any knife other than the defendant's knife. Defense counsel did not object and did not impeach Officer Celestine with the officer's incident report, which reads: "Mr. Caples stated he saw the defendant pull a knife first and continue to fight with the victim." The defendant alleges that a reasonable inference from Mr. Caples' statement as recorded in the incident report is that the victim also pulled a knife and that the defendant acted in self defense.

As the Supreme Court recently reiterated, "[g]enerally, the preference

for addressing claims of ineffective assistance of counsel is a postconviction proceeding in the trial court, not on appeal. The rationale behind such procedure is that a full evidentiary hearing may be conducted to explore the issue." State v. Watson, 00-1580, p. 4 (La. 5/14/02), 817 So. 2d 81, 84. Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the issues on appeal. State v. Seiss, 428 So.2d 444, 448-449 (La. 1983); State v. Holmes, 2000-1816, p. 6 (La. App. 4 Cir. 4/25/01), 787 So.2d 440, 444. The incident report, however, was not made part of the record on appeal. The report was attached as an exhibit to the defendant's brief, but an exhibit attached to a brief is not part of the record. State in Interest of Solomon, 95-0638, p. 6 (La. 4 Cir. 1996), 672 So.2d 1039, 1042. Therefore, this Court cannot review the claim of ineffective assistance of counsel, even if the record were sufficient otherwise for review of this issue.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.

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