NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2009-KA-0865**
VERSUS	*	**COURT OF APPEAL**
LARRY ROBAIR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 477-695, SECTION "C"
Honorable Benedict J. Willard, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Terri F. Love, Judge David S. Gorbaty)

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AFFIRMED

On April 21, 2008, the State charged Larry Robair by bill of information with the aggravated battery of Patrick Clark, in violation of La. R.S. 14:34. Robair was held competent for trial after a lunacy hearing held on November 6, 2008. Robair was tried before a jury on December 2, 2008. The jury returned with a responsive verdict of Second Degree Battery, a violation of La. R.S. 14:34.1. Robair appeared for sentencing on January 9, 2009. At this hearing, Robair filed and the trial court denied the following motions: Motion for New Trial, Motion for Post-Verdict Judgment of Acquittal, and a Motion to Reconsider Sentence. The trial court sentenced Robair to five years at hard labor, with credit for time served. The trial court also noted the conviction was for a crime of violence. On March 6, 2009, the State filed a multiple offender bill of information. As of June 17, 2009, multiple offender proceedings had not been completed.[1] This appeal followed.

FACTS

Patrick Clark, the victim, was homeless and living under the raised interstate on Claiborne Avenue on February 14, 2008. At that time, Clark knew who Robair was, but did not know him personally. The two men had been living under the

interstate for approximately seven months, and their tents were four or five tents apart.

Clark testified that on the morning of February 14, 2008, someone brought bags of clothes, which were received by three of the men living under the interstate. Robair and Clark were amongst this number. As Robair received a bag containing women's clothing, he asked Clark for some clothes from his bag. Clark refused to share. Robair got upset and left on his bicycle, exclaiming, "[i]t's not over with…". Robair returned about fifteen minutes later. Clark had the impression that Robair was upset, and the two men watched each other. However, Clark did not think the situation would escalate.

At approximately noon, some two hours later, someone brought food donations for lunch. Clark and another man got some food. When Clark returned to his tent, he saw Robair. Robair smiled, and Clark "thought nothing of it." However, as Clark walked away, he felt Robair grab his shirt, "real tight." He then felt himself being stabbed, but did not see it happening. Clark attempted to get away, but Robair continued stabbing. At one point, someone exclaimed, "what are you doing?" Realizing others were watching, Robair then let go and fled.

Clark had been stabbed ten or eleven times in his back and in the back of his arm. An ambulance arrived some three minutes later and took Mr. Clark to the University Hospital. He was there for three days. Treatment included surgery to drain blood from his lungs. Clark also had stitches.

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[1] Review of the docket master on the Orleans Parish Criminal Sherriff's webpage – opsco.org – shows that Relator was found to be a multiple offender on September 8, 2009, and was resentenced to serve twenty five years. No multiple offender issues are presented in this appeal, and may be part of another appeal.

While at the hospital, Clark was interviewed by Det. Lathouwers. She presented Clark with a picture of Robair and asked if he was the man who stabbed him. Clark said, "yeah." Clark identified Robair in court as his attacker.

ERRORS PATENT

The record on appeal reveals no errors patent.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

Robair argues that the trial court erred in denying his motion to reconsider his sentence. He claims that his sentence is excessive. He argues that the trial court did not provide reasons for issuing the maximum penalty for second degree battery, five years. He also notes that there was no presentence investigation. Robair points to no mitigating factors and cites no case-law to specifically address appropriate sentences for second degree battery convictions. Though the State has not responded, Robair's sentence is constitutional.

Absent presentence investigation report

Initially, the trial court did not err by not ordering a pre-sentence investigative report. Ordering a pre-sentence investigative report is discretionary; there is no mandate that such a report be ordered. State v. Hayden, 98-2768, p. 27 (La. App. 4 Cir. 5/17/00), 767 So.2d 732, 748, *citing* La. C.Cr.P. art. 875(A)(1).

Constitutionality of sentence

In State v. Smith, 2001-2574, pp. 6-7 (La.1/14/03), 839 So.2d 1, 4, the Louisiana Supreme Court set forth the standard for evaluating a claim of a constitutionally excessive sentence, evidencing the vast discretion of the sentencing court:

> Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o *law* shall subject any person to ••• *excessive* ••• *punishment.*" (Emphasis added .) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. State v. Sepulvado, 367 So.2d 762, 767 (La.1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. State v. Bonanno, 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. State v. Cann, 471 So.2d 701, 703 (La.1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. State v. Walker, 00-3200, p. 2 (La.10/12/01), 799 So.2d 461, 462; *cf.* State v. Phillips, 02-0737, p. 1 (La.11/15/02), 831 So.2d 905, 906.

See also State v. Johnson, 97-1906 (La.3/4/98), 709 So.2d 672; State v. Baxley, 94-2982 (La.5/22/95), 656 So.2d 973; State v. Batiste, 2006-0875 (La.App. 4 Cir. 12/20/06), 947 So.2d 810; State v. Landry, 2003-1671 (La.App. 4 Cir. 3/31/04), 871 So.2d 1235.

In Batiste, at p. 18, 947 So.2d at 820, this Court further explained the role of the La. C.Cr. P. art. 894.1 sentencing factors and noted that maximum sentences should be reserved for the most egregious offenders with the following:

> An appellate court reviewing a claim of excessive sentence must determine whether the trial court adequately complied with the statutory guidelines in La.C.Cr.P. art. 894.1, as well as whether the facts of the case warrant the sentence imposed. *State v. Landry, supra;* State v. Trepagnie, 97-2427 (La.App. 4 Cir. 9/15/99), 744 So.2d 181. However, as noted in State v. Major, 96-1214, p. 10 (La.App. 4 Cir. 3/4/98), 708 So.2d 813:
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> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for

> excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).
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> If the reviewing court finds adequate compliance with art. 894.1, it must then determine whether the sentence the trial court imposed is too severe in light of the particular defendant as well as the circumstances of the case, "keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged." State v. Landry, 2003-1671 at p. 8, 871 So.2d at 1239. See also State v. Bonicard, 98-0665 (La.App. 4 Cir. 8/4/99), 752 So.2d 184.

Robair received a five year sentence, the maximum pursuant to La. R.S. 14:34.1. Though the trial court was brief in issuing sentence, the record shows an adequate factual basis for the sentence imposed. *See* La. C.Cr.P. art. 881.4(D). The instant record reflects that the Robair admitted to Det. Lathouwers that he stabbed Clark because he was angry over an altercation involving a pair of pants. This attack resulted in injuries to Clark that required surgery to drain blood from his lungs and stitches. Clark was in the hospital for three days. Robair's attack was a knowing creation of a risk of death or great bodily harm and a use of actual violence, factors considered pursuant to paragraphs (B)(5) and (B)(6) of La. C.Cr.P. art. 894.1. Robair's admission that he stabbed Clark implicitly shows that he used a dangerous weapon, considered pursuant to paragraphs (B)(10) and (B)(19). That Robair turned himself into the police when he discovered that a warrant was issued for his arrest, and his expressed remorse may be considered other relevant mitigating factors pursuant to pargraph (B)(33). Accordingly, it is evident that the trial court complied with La. C.Cr.P. art. 894.1, and the sentence must be reviewed for constitutional excessiveness. A comparison of previous treatment of sentences for second degree battery will assist in this analysis.

The Second Circuit upheld a five year sentence for a second degree battery conviction in State v. Hamilton, 42,592 (La. App. 2 Cir. 10/24/07), 968 So.2d 328.

There, the victim was the mother of the defendant's child. Id., 42,592 at p. 1, 968 So.2d at p. 328. The defendant grew angry at the victim and started hitting her while on a trip from Shreveport to Desoto Parish. Id., 42,592 at p. 1, 968 So.2d at p. 329. At one point, the car engine died. Id. When the defendant exited the vehicle and restarted the vehicle by working under the good, the victim drove to the defendant's parents' home with him on the hood of the car. Id., 42,592 at p. 2, 968 So.2d at p. 329. While the victim knocked on the defendant's parents' front door, he threw a piece of firewood at her. Id. He then punched and kicked her until his father managed to restrain him. Id. The victim suffered a collapsed lung and was hospitalized for three days. Id. An investigating officer observed bruising on the victim's face, neck and arms, when he interviewed her. Id. In affirming the conviction, the Second Circuit noted that a PSI report revealed a criminal history and that the trial court considered a victim impact statement and the defendant's age, twenty-four. Id., 42,592 at p. 4, 968 So.2d at p. 330. The trial court stated that, based on the facts of the case, the defendant's criminal history, and the likelihood he would commit more crimes of violence, it would have imposed a greater sentence if it could. Id. The Second Circuit found the sentence, "neither shocking nor grossly disproportionate to the seriousness of the offense given the defendant's background." Id.

The Second Circuit also upheld a five year sentence for second degree battery in State v. Winnon, 28,654 (La. App. 2 Cir. 9/25/96), 681 So.2d 463. There, the victim was a sixty-three year old lady who had told her son to tell the defendant to leave the house in which her son lived and she owned. Id., 28,654 at p. 1, 681 So.2d at 465. Later, the defendant cut the victim off as she was driving home. Id. The defendant then pulled the victim onto the roadway, a country road,

and hit the victim numerous times in the head and face. Id., 28,654 at p. 2, 681 So.2d at 465. The victim's doctor testified that she suffered swelling in the left eye and nose, a fractured tooth, and a fracture of the orbit of the right eye. Id. The doctor also testified that the blows the victim suffered were sufficient to render a person unconscious, and that the victim's description of losing track of what was happening was consistent with being unconscious or disoriented. Id. The victim continued to suffer swelling, pain, and numbness for six weeks to two months after the incident. Id. At the time of trial, ten months after the incident, the victim continued to suffer occasional stinging sensations in her face. Id. In affirming the sentence, the Second Circuit noted the defendant's prior criminal history, including violence, his disregard for the law, and that "[h]e created a great risk of injury by repeatedly battering this elderly victim's face and head." Id., 28,654 at p. 8, 681 So.2d at 468.

In State v. Fletcher, 03-60 (La. App. 5 Cir. 4/29/03), 845 So.2d 1213, the Fifth Circuit upheld a ten year sentence for convictions of second degree battery and being a two time multiple offender. The Fifth Circuit noted, "the defendant beat the victim, a complete stranger, without provocation" and "inflicted such severe injuries that the victim's jaw was wired shut, and she could only sip liquids through a tube for two months thereafter." Id., 03-60 at p. 8, 854 So.2d at 1219.

The instant record contains two mitigating circumstances: Robair turned himself in to authorities when he discovered that a warrant had been issued for his arrest, and he expressed remorse for his actions. However, given the extensive injury Robair caused to Clark over a pair of pants in an act of revenge that took place several hours after the initial altercation, it cannot be said that the sentencing

court abused its discretion. Accordingly, we conclude that this assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 2

Robair argues that the record contains insufficient evidence to sustain his conviction of Second Degree Battery. Specifically, he argues that the State did not prove that the victim suffered serious bodily injury.

This Court has stated the following law in analyzing sufficiency of the evidence arguments:

> In assessing the sufficiency of evidence to support a conviction, the reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 309, 99 S.Ct. 2781, 2784, 61 L.Ed.2d 560 (1979); State v. Rose, 607 So.2d 974, 978-979 (La.App. 4th Cir.1992), *writ denied,* 612 So.2d 97 (La.1993). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court is not permitted to consider just the evidence most favorable to the prosecution; it must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall, *id.*

State v. Everett, 99-1963, pp. 5-6 (La. 4 Cir. 9/27/00), 770 So.2d 466, 470.

In Everett, this Court also stated the following regarding the jury's purview in making credibility determinations:

> It is not the function of the appellate court to reassess the credibility of witnesses or to reweigh the evidence; the reviewing court's function is to determine the constitutional sufficiency of the evidence presented. State v. Johnson, 619 So.2d 1102, 1109 (La.App. 4 Cir. 5/13/93), *writ denied,* 625 So.2d 173 (La.10/1/93). Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the fact finder. State v. Brumfield, 93-2404 (La.App.

> 4th Cir.1994), 639 So.2d 312; State v. Garner, 621 So.2d 1203 (La.App. 4th Cir.1993), *writ denied* 627 So.2d 661 (La.1993). Moreover, conflicting testimony as to factual matters is a question of weight of the evidence, not sufficiency. State v. Jones, 537 So.2d 1244, 1249 (La.App. 4 Cir.1989); Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Such a determination rests solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witness. Id. A trier of fact's determination as to the credibility of a witness is a question of fact entitled to great weight, and its determination will not be disturbed unless it is clearly contrary to the evidence. State v. Vessell, 450 So.2d 938, 943 (La.1984).

Id., 99-1963, pp. 8-9, 770 So.2d at 471.

In this case, Robair was convicted of second degree battery, a responsive verdict to the original charge of aggravated battery. *See* La. C.Cr.P. art. 814(14). In State Ex. Rel. Elaire v. Blackburn, 424 So.2d 246, (La. 1981), the Louisiana Supreme Court held that a defendant must "make a contemporaneous objection to the instruction on responsive verdicts in order to complain on appeal of the insufficiency of evidence supporting the responsive verdict." At 251, *citing* La. C.Cr.P. art. 814. *See also* State v. Williams, 1999-1581, p. 10 (La. App. 4 Cir. 6/14/00), 766 So.2d 579, 684. It is sufficient that this objection be made after the jury is charged, but before the jury begins to deliberate. State v. Rideau, 2005-0462, p. 18 (La. App. 4 Cir. 12/6/06), 947 So.2d 127, 138. In adopting this rule, the Court reasoned:

> "[i]t would be unfair to permit the defendant to have the advantage of the possibility that a lesser "compromise" verdict will be returned (as opposed to being convicted of the offense charged) and then to raise the complaint for the first time on appeal, that the evidence did not support the responsive verdict to which he failed to object.

State Ex. Rel. Elair v. Blackburn, 424 So.2d at 251-252. The record on appeal shows no objection to any of the potential responsive verdicts for aggravated battery, as listed in La. C.Cr.P. art. 814(14). Accordingly, this

Court may affirm if the evidence supports a conviction of the greater offense, aggravated battery. *See* State Ex Rel. Elaire, 424 So.2d at 251.

La. R.S. 14:34 defines aggravated battery as "battery committed with a dangerous weapon." "Battery" includes "the intentional use of force or violence upon the person of another." *See* La. R.S. 14:33.

Here. Det. Lathouwers testified that Robair admitted to her that he had been angry at Clark, produced a knife, and stabbed Clark with the knife. Viewing this evidence in a light most favorable to the State, this admission alone is sufficient to support a conviction for aggravated battery. Accordingly, Robair's conviction for second degree battery must stand.

However, even had Robair objected to the responsive verdict of second degree battery, the record contains sufficient evident to sustain the conviction.

La. R.S. 34.1 defines second degree battery as:

> battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury.
> For purposes of this article, serious bodily injury means 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.

The term "extreme physical pain" is "a condition that most people of common intelligence can understand; it is considered subjective in nature and susceptible to interpretation." *Quoting* State v. Thompson, 399 So.2d 1161, 1169 (La. 1981).

In State v. Clay, 2005-1467, pp. 3-7 (La. App. 4 Cir. 10/4/06), 942 So.2d 563, 565-667, this Court provided the following comparison of the case law addressing serious bodily injury in second degree battery cases:

In [State v. Landry], the defendant and the victim were at a bar where the victim and his family were having a birthday party. 03-1671, p. 2, [(La. App. 4 Cir. 3/31/04),] 871 So.2d [1235,] 1236. At some point, the victim and the defendant exchanged words. When the victim later walked outside, the defendant followed him and punched him in the face. The blow caused the victim to fall on the concrete, rendering him unconscious; the victim also sustained a fractured jaw, scrapes, and bruises. The facial injury required that his teeth be removed and his jaw wired shut; he had to maintain a liquid diet for eight weeks. On appeal, this Court held that these injuries constituted "serious bodily injury" as defined in La. R.S. 14:34.1.

In State v. Odom, the defendant was originally charged with aggravated battery, and the jury returned a responsive verdict of guilty of second degree battery, as occurred in the instant case. 03-1772 (La.App. 1 Cir. 4/2/04), 878 So.2d 582, *writ denied* 04-1105 (La.10/8/04), 883 So.2d 1026. The offense began as a domestic disturbance and continued over several hours. The defendant struck the victim repeatedly with his fists and went on a destructive spree in their home, destroying furnishings. At some point, he armed himself with a pistol and struck the victim with the butt of the weapon several times. At trial, the victim and a co-employee testified that the victim had bruises, a black eye and a gash on her head, all of which were still visible a week after the incident. The victim also testified that her whole body hurt for days after the incident. No expert testimony was presented, and the victim testified that she did not seek medical treatment out of embarrassment. However, she did spend the night of the incident with her brother who had some first aid training, and he monitored her for a possible concussion. Based on the record, the appellate court found that the evidence supported the conviction for second degree battery, noting that the victim's testimony may be sufficient to prove that she sustained serious bodily injury. Odom, 03-1772, p. 6, 878 So.2d at 588.

In State v. Hall, the victim testified that she was sprayed with mace and beaten and kicked by the defendants. 03-1384, p. 1 (La.App. 5 Cir. 3/30/04), 871 So.2d 558, 559. She recounted that the mace caused her eyes to burn, made breathing difficult, and made it feel like her esophagus was swollen. She required fifteen stitches to close the various lacerations on her nose; the bottle striking her face apparently caused the lacerations. On appeal, the court held that the victim's testimony describing these injuries was sufficient to sustain the convictions for second degree battery.

In contrast to these cases, in State v. Helou, the Supreme Court reversed the decision of the appellate court, which held that the evidence was sufficient to prove the element of serious bodily injury. 02-2302 (La.10/23/03), 857 So.2d 1024. The court noted that the defendant and two other men repeatedly struck the victim, but no

weapons were involved. Helou, 02-2302, p. 6, 857 So.2d at 1028. The victim's wife testified that her husband's nose was bleeding profusely; the victim testified he had never seen so much blood in his life and that his clothes were saturated. A bystander, who was a former army medic, testified that there was so much blood on the ground that it was hard to tell where it came from. The State later argued that the sheer quantity of blood led to an inference that the victim suffered a serious bodily injury. The Supreme Court disagreed:

> This Court finds that the presence of blood alone does not satisfy the "serious bodily injury" element of second degree battery. Our jurisprudence demonstrates many cases where the State proved the "serious bodily injury" element of second degree battery. Some examples are: 1) State v. Abercrumbia, 412 So.2d 1027 (La.1982), where the defendant hit the victim with boards across his head, neck, and arm, causing a "deep cut over his right eye;" 2) State v. Robertson, 98-0883 (La.App. 3 Cir. 12/9/98), 723 So.2d 500, *writ denied,* 99-0658 (La.6/25/99), 745 So.2d 1187, where the defendant knocked the victim to the ground and repeatedly kicked and hit her until she "kind of lost her senses for a minute;" the victim had bruises and contusions over the entire extent of her body, which left significant scars and lacerations on her nose; and 3) State v. Robinson, 549 So.2d 1282, 1285 (La.App. 3 Cir.1989), where the defendant stabbed the victim twice with a large, folding knife.
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> There are other cases that indicate that less substantial injuries may also constitute "serious bodily injury." *See* State v. Young, 00-1437, pp. 9-10 (La.11/28/01), 800 So.2d 847, 852-853, ...; State v. Diaz, 612 So.2d 1019, 1022-1023 (La.App. 2 Cir.1993), where the defendant broke the victim's jaw during a group fight; State v. Mullins, 537 So.2d 386, 391 (La.App. 4 Cir.1988), where a 6 foot tall defendant punched a 5′5″ girlfriend, breaking her nose; ... State v. Accardo, 466 So.2d 549, 552 (La.App. 5 Cir.1985), writ denied, 468 So.2d 1204 (La.1985), where a 17-year-old female victim was struck on the head by the defendant with either his fist or a blackjack, causing the side of her face to swell.
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> After a careful review of LSA-R.S. 14:34.1 and the related jurisprudence, we find that in the case *sub judice,* the State failed to offer any evidence of "extreme physical pain" by way of testimony from the fact witnesses. Nor do we have testimony from medical witnesses or medical records, which would prove this factor. Rather, the evidence presented, [sic] dealt solely

> with the amount of blood the victim lost.... We cannot infer that the loss of blood is tantamount to "extreme physical pain." We also cannot infer that a punch in the nose, without more evidence, is sufficient to support a conviction of second degree battery.

Helou, 02-2302, pp. 6-8, 857 So.2d at 1028-29.

The record in this case reflects that the victim was stabbed ten or eleven times, including in his back. Clark also testified that part of his treatment included sutures and "mak[ing] an incision around my heart to drain the blood off my lungs." Clark was in the hospital for three days to treat his injuries. Clark's testimony clearly shows that he sustained serious bodily injures that required extensive medical attention. Accordingly, even had Robair objected to allowing the jury to be instructed that second degree battery was a responsive verdict, the evidence in the record, when viewed in a light most favorable to the state, clearly supports the conviction. This assignment of error has no merit.

CONCLUSION

Accordingly, for the foregoing reasons, the conviction and sentence are affirmed.

AFFIRMED