

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2012-KA-0710**
VERSUS *
ANTHONY BROWN * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 502-049, SECTION "C"
Honorable Benedict J. Willard, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome,
Judge Madeleine M. Landrieu)

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APRIL 24, 2013

CONVICTION AND SENTENCE AFFIRMED

Defendant, Anthony Brown, appeals his conviction of second degree cruelty to a juvenile, a violation of La. R.S. 14:93.2.3. Because we find that the evidence was sufficient to convict, we affirm.

STATEMENT OF CASE

On November 18, 2010, the State charged Anthony Brown with one count of second degree cruelty to a juvenile, M.R., (DOB: 8/15/1994), in violation of La. R.S. 14:93.2.3. Brown pled not guilty at his arraignment on November 29, 2010.

Brown waived his right to a jury trial. Trial was held on December 14, 2011, and the trial judge found Brown guilty of the charged offense. Brown was sentenced to seven years at hard labor with credit for time served on January 23, 2012. At that hearing, the trial court also denied Brown's motions for new trial, post verdict judgment of acquittal, and to reconsider sentence. This appeal followed.

STATEMENT OF FACT

M.R., the victim, was a seventeen year old student attending Walter L. Cohen High School at the time of trial. On September 10, 2010, the date of the charged offense, she was sixteen years old.

That day, she went to the park with several friends. After leaving the park, they bought a snack at a store and were on the way back to the park when Brown, M.R.'s maternal uncle, drove by and picked them up. They dropped two of the friends off at another park before Brown drove to M.R.'s grandmother's house on Napoleon Avenue, where M.R. lived.

M.R. testified that she argued with her uncle [Brown] from the time she got in the car with her friends. According to M.R., Brown accused her of "going through his stuff in his car." M.R. denied doing so. When they arrived at Napoleon Avenue, the argument continued. Brown exited the vehicle, went around to M.R., and "put his hand on [M.R.'s] face." M.R. said that she tried to calm her uncle, but he continued accusing her of "going through his stuff" and threatened to hit her. The argument turned to his actually hitting her when Brown began pulling M.R. and sticking his hand in her face. The situation progressed to Brown hitting M.R. with his belt. M.R. testified that he hit her "[e]verywhere. From [her] neck down." M.R. fought back. When Brown began using his belt, she hit him back with her own belt. This did not deter Brown. Instead, Brown discarded his belt and began punching M.R. in the face. M.R. fell to the ground and "blanked out" while Brown punched her. When she regained consciousness, her friends helped her up and told her that her uncle continued hitting her after she passed out.

One of M.R.'s friends, Dariana Burton, tried to stop the fight, but to no avail. After a while, "they got [Brown] off [M.R.]" and Brown got in his car and left. At that point, M.R. called 911. She then realized that she had lost two "left front" teeth and had scars all over her face. One of these teeth was recovered, and a dentist managed to place it back. She did not get a replacement tooth for the other one. The day of the attack, M.R. was treated at Children's Hospital. At the time of trial, M.R. was still being treated and had a retainer.

Yoshiandra Williams, one of M.R.'s friends who was with her that day, also said that Brown questioned M.R. about rooting through his stuff. He seemed mad. Brown exclaimed to M.R., "I'm your elder, respect me." Yoshiandra testified that M.R. really didn't disrespect him. Even so, Brown got madder and took his belt off and started whipping M.R. Yoshiandra saw Brown punch M.R., and two of her teeth fall out. Yoshiandra observed M.R. spitting blood. She said she made a phone call to the police after Brown left.

Aaron Thompson, M.D., was working in the emergency room of Children's Hospital when M.R. came in. He was qualified at trial as an expert in pediatric emergency care. Dr. Thompson examined M.R. within a few hours of the injury. He noted two of her teeth had been knocked out; there was a cut inside of her mouth, and a small cut on her ear. Dr. Thompson opined that these injuries could have several causes but were consistent with punching and the history provided to him. The doctors managed to re-implant one of the teeth. M.R. also received a tetanus shot and was prescribed antibiotics and pain medicine. M.R. was also scheduled for follow up dental care.

When Jordan Pietro, D.D.S., saw M.R., her upper lip was swollen and her lower lip was consistent with the trauma she had experienced. She had a laceration on the palatal side of her mouth. The emergency room had re-implanted one of her teeth, but Number ten was missing. The re-implanted tooth was only partially back in the socket. Dr. Pietro opined that it requires considerable force to avulse, or knock out, a tooth completely.

Dr. Pietro repositioned the re-implanted tooth and splinted it to another tooth for stability, as it was not stable in the socket. An x-ray of M.R.'s chest was also performed to rule out aspiration of the missing tooth. Subsequently, a root canal was performed on the re-implanted tooth. Dr. Pietro also opined that M.R. needed either an implant to replace the missing tooth or "some sort of bridge."

On cross examination, Dr. Pietro opined that, in addition to punching, the type of injury M.R. sustained could be caused by a motorcycle vehicle accident and hitting a dash. He explained that it requires "some sort of speed to knock a tooth completely out." He also opined that the injury could be sustained from a fall, "if you're running potentially or hit something at the right angle."

Detective Stephanie Horak of the N.O.P.D.'s Child Abuse Division investigated the September 10, 2010 incident. When she arrived at the scene on Napoleon Avenue, the scene was chaotic. M.R. was in pain and frightened. Det. Horak advised M.R. that they could go to Children's Hospital for treatment. Det. Horak met M.R. at the hospital, where pictures were taken of M.R.'s injuries.

At trial, Det. Horak identified several pictures. Among them, one depicted M.R. lying on the exam table at Children's Hospital. A close up picture of M.R.'s face and mouth showed blood. Another close up of M.R.'s mouth showed where the lost tooth was missing. By the time that photo was taken, the recovered tooth

had been re-implanted. Another mouth close-up depicted “blood coming over the tooth that had been pushed in and a better shot of the missing tooth.” One picture depicted bruises on M.R.’s arm. A close-up of M.R.’s left shoulder depicted a belt mark. There was also a close-up of another arm injury and an additional picture of M.R.’s arm. A close-up of M.R.’s ear showed a cut and blood.

Det. Horak interviewed both M.R. and Yoshiandra. M.R. was interviewed three days after the incident. Yoshiandra was interviewed a day later. The statements were consistent with each other. None of the other children present during the incident were interviewed. Det. Horak subsequently issued an arrest warrant for Brown.

ERRORS PATENT

The January 23, 2012 transcript shows that the trial court failed to abide by the requisite sentencing delay. The trial court sentenced defendant immediately after denying a motion for new trial.

La. C.Cr.P. art. 873 provides:

If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. *If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled.* If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

Emphasis added.

In State v. Augustine, 555 So.2d 1331, 1334 (La. 1990), the Louisiana Supreme Court held that the trial court's failure to observe the twenty-four hour delay did not constitute harmless error even where the defendant failed to raise that issue on appeal. However, in State v. Collins, 584 So.2d 356 (La. App. 4th Cir. 1991), this Court explained the Augustine case as follows:

In State v. Augustine, 555 So.2d 1331 (La. 1990), the Supreme Court held that the trial court's failure to observe the twenty-four hour delay did not constitute harmless error, even if the defendant did not raise that issue as error on appeal, where the defendant challenged his sentence on appeal. In the present case, defendant does not challenge his sentence and he does not raise as error the failure of the trial court to wait twenty-four hours before imposing sentence. Therefore, this error is harmless.

584 So.2d at 359.

Here, the trial court denied Brown's motion for a new trial immediately before sentencing him. Because there is no indication in the record that Brown waived the delay required under La. C.Cr.P. art. 873, the failure to comply with that article is an error patent. Brown, however, has not challenged his sentence, and he does not raise as error the failure of the trial court to wait twenty-four hours before imposing sentence. Therefore, this error is harmless under this Court's ruling in State v. Collins, 584 So.2d 356.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In his sole assignment of error, Brown asserts that the record is insufficient to support his conviction of second degree cruelty to a juvenile because it does not show the victim suffered serious bodily injury as defined by La. R.S. 14:93.2.3. In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Captville, 448 So.2d 676 (La. 1984); State v. Enis, 2011-976 (La. App. 4 Cir. 7/5/12), 97 So.3d 575. 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 but 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, 523 So.2d at 1309–1310; State v. Strother, 2009-2357, p. 10 (La. 10/22/10), 49 So.3d 372, 378. “[A] 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.” State v. Smith, 600 So.2d 1319, 1324 (La. 1992).

When circumstantial evidence forms the basis of the conviction, such evidence must consist 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. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La. 1987); State v. Williams, 2007-0700, p. 5 (La. App. 4 Cir. 2/13/08), 977 So.2d 1101, 1108. If a rational trier of fact reasonably rejects the defendant's hypothesis of innocence, that hypothesis falls; and, unless another one creates reasonable doubt,

the defendant is guilty. State v. Captville, *supra*. On review, this Court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of the events. State v. Smith, 2006-313, p. 5 (La. App. 4 Cir. 11/21/06), 946 So.2d 218, 221. Rather, this Court, when evaluating the evidence in the light most favorable to the prosecution, must determine whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found guilt beyond a reasonable doubt under Jackson. *Id.*

A factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence. State v. Huckabay, 2000-1082 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093; State v. Harris, 99-3147 (La. App. 4 Cir. 5/31/00), 765 So.2d 432.

The determination of whether the requisite intent is present in a criminal case is for the trier of fact. State v. Huizar, 414 So.2d 741 (La. 1982); State v. Butler, 322 So.2d 189 (La. 1975). In reviewing the correctness of such a determination, the court should review the evidence in a light most favorable to the prosecution and must determine if the evidence is sufficient to convince a reasonable trier of fact of the guilt of the defendant beyond a reasonable doubt as to every element of the offense. Jackson v. Virginia, *supra*; State v. Huizar, *supra*.

La. R.S. 14:93.2.3 (A)(1) defines second degree cruelty to a juvenile as:

the intentional or criminally negligent mistreatment or neglect by anyone over the age of seventeen to any child under the age of seventeen *which causes serious bodily injury or neurological impairment* to that child.

Emphasis added.

The only element Brown argues the evidence does not support is serious bodily injury¹. La. R.S. 14:93.2.3 (A)(2) defines “serious bodily injury” as:

bodily injury involving protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or substantial risk of death.

As the case law addressing “serious bodily injury” under La. R.S. 14:93.2 is relatively scarce, the State points this Court’s attention to case law addressing “serious bodily injury” under La. R.S. 14:34.1 (second degree battery). However, as the State admits, the definition of serious bodily injury for second degree battery is broader than the definition for purposes of second degree cruelty to a juvenile. The definition of “serious bodily injury” for purposes of second degree battery is:

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.

La. R.S. 14:34.1(B)(3). *Emphasis added.*

A comparison of La. R.S. 14:93.2.3 (A)(2) and La. R.S. 14:34.1(B)(3) shows that the definition of “serious bodily injury” for second degree battery is broader – it includes unconsciousness and extreme physical pain. These elements are not part of the second degree cruelty to a juvenile statute.

The Third Circuit addressed La. R.S. 14:93.2.3 (A)(2) directly in State v. Dixon, 2003-160 (La. App. 3 Cir. 6/4/03), 852 So.2d 471. Therein, the Third Circuit stated:

Neither second degree battery nor second degree cruelty to a juvenile defines protracted as a permanent or lifetime condition as proposed by the Defendant. Webster's Ninth New Collegiate Dictionary defines protract as “to draw forward,” “to delay, defer,” “to prolong in time or space: continue.” Thus, there is no requirement that the injuries

¹ There is no evidence in the record that M.R. suffered neurological injury.

inflicted upon the victim must be permanent, lifelong, or chronic as suggested by the Defendant.

2003-0160, p. 9, 852 So.2d at 477.

There, the Third Circuit noted the following in concluding the record supported a finding that the victim suffered serious bodily injury under La. R.S.

14:93.2.3 (A)(2):

Dr. Mayeux testified that when he saw the victim, the victim was completely bruised from the waist down, on his inner and outer thighs, buttocks, and legs. Several of the wounds were large and opened, with literally no skin left. The victim could barely walk because of the pain from the opened wounds. Both knees were swollen, with the right knee being approximately fifty percent enlarged. The victim's ability to bend his knees was "grossly diminished," and he could hardly walk. Dr. Mayeux saw fresh wounds as well as old wounds on the victim. Some of the wounds were infected, and, if secondary infection had set in, the wounds could have been life-threatening. Additionally, the record reflects that at trial, seven months after the victim's initial visit with Dr. Mayeux, the victim showed the jury scars that were still present on his body. Finally, Dr. Mayeux described the victim's physical condition as one of the worst cases of abuse he had seen. Dr. Mayeux stated that it was horrifying to see the victim in person and, after seeing the victim, he was unable to do much the rest of the day. Considering Dr. Mayeux's testimony, we find that the jury did not err in finding the Defendant inflicted serious bodily injury upon the victim.

Dixon, 2003-0160, p. 10, 852 So.2d at 477.

In State v. Helou, 2002-2302 (La. 10/23/03), 857 So.2d 1024, Justice Weimer explicated La. R.S. 14:34.1(B)(3) in his dissent by stating the following:

To establish "serious bodily injury," the State must prove any one of the injuries or conditions listed in the statute. The first condition listed is "unconsciousness." Review of the record reveals that Mr. Richard's [(the victim)] injuries did not include unconsciousness, although the record indicates some confusion on his part in that he believed, until the day of the trial, that his wife had accompanied him to the hospital in the ambulance. However, such evidence is not sufficient to establish unconsciousness; rather, such evidence is as likely to indicate a faulty memory. The second condition included in the definition of serious bodily injury is "extreme physical pain," a condition addressed *infra*. *The next condition constituting serious bodily injury is "protracted and obvious disfigurement."*

Disfigurement under this example must be both obvious and protracted. Thus, there must be proof of an obvious disfigurement lasting for a protracted period of time. While bloodshed could be considered as obvious, the record does not support a finding that it was protracted.

State v. Helou, 2002-2302 at pp. 2-3, 857 So.2d at 1031, Weimer, J., *dissenting*.

Emphasis added. In a footnote, Justice Weimer noted:

The term “protracted” is not listed in Black's Law Dictionary (7th ed.1999), but is defined by The New Oxford American Dictionary 1371 (2001) as: “lasting for a long time or longer than expected or usual.”

Id., n. 3.

In Dixon, the injuries were more severe than in the instant case. However, the record supports a finding that M.R.'s injuries were protracted and obvious. The record shows that Brown progressed from “sticking his hand [in M.R.'s] face,” to hitting her with a belt, and then to punching her with his hands. The record further reflects that M.R. suffered a swollen lip, a laceration on the palatal side of her mouth, a belt mark on her left shoulder, a cut on her ear that bled, an arm injury, and the loss of two teeth. Pictures of M.R. after the beating also showed blood.

M.R.'s treating emergency room doctor, Dr. Thompson, testified that one of M.R.'s teeth was re-implanted when he saw her, and that M.R. received not only a tetanus shot, but was prescribed antibiotics and pain medicine when she was discharged from the hospital. The fact that M.R. was discharged with instructions to use antibiotics and pain medicine indicates the prolonged or protracted nature of her injuries. The pictures which depict blood, missing teeth, a lacerated mouth, a swollen lip, and the belt mark all show that M.R.'s injuries were obvious.

Stronger support for the trial court's holding is found in the evidence concerning M.R.'s lost teeth. Though the emergency room was able to re-implant the recovered tooth, Dr. Pietro testified that it was only partially in the socket, and he splinted it for stability. Moreover, Dr. Pietro testified that a subsequent root canal was performed on the re-implanted tooth. The other tooth was not recovered, and at the time of trial, some fifteen months after the incident, Dr. Pietro testified that M.R. continued to need an implant to replace the missing tooth or a bridge. In considering this evidence in a light most favorable to the state, the record supports the trial court's finding that M.R. was seriously injured. Accordingly, this assignment of error is without merit.

CONCLUSION

Based on the foregoing reasons, we affirm Brown's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED