STATE OF LOUISIANA	*	**NO. 2017-KA-0124**
VERSUS	*	**COURT OF APPEAL**
WILLIAM J. BROWN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 526-770, SECTION "A"
Honorable Laurie A. White, Judge

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JUDGE SANDRA CABRINA JENKINS

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(Court composed of Judge Joy Cossich Lobrano,
Judge Sandra Cabrina Jenkins, and Judge Paula A. Brown)

LOBRANO, J., CONCURS AND ASSIGNS REASONS.

Leon A. Cannizzaro, Jr., District Attorney
Scott G. Vincent, Assistant District Attorney
ORLEANS PARISH
619 South White Street
New Orleans, LA 70119

COUNSEL FOR STATE OF LOUISIANA/APPELLEE

Paul J. Barker
Martin Edward Regan, Jr.
Graham daPonte
REGAN LAW, PLC
2125 St. Charles Avenue
New Orleans, LA 70130

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

DECEMBER 12, 2017

The defendant appeals his conviction and sentence for aggravated assault with a firearm. Defendant's conviction and sentence are affirmed.

Statement of Case and Facts

After a jury trial, the defendant was found guilty as charged of aggravated assault with a firearm, La. R.S. 14: 37.4. He was sentenced on May 3, 2016, to five years at hard labor and fined $10,000.00.[1]

Dale Collie, the victim in this case, was hired by the defendant as a subcontractor to clear, clean and haul away debris. Mr. Collie has been the owner of a construction and demolition company since 1995. It was his practice to subcontract with other companies to perform various jobs. Mr. Collie began working with the defendant after Hurricane Katrina. In August 2015, the defendant obtained a contract with Covenant House to clear and haul away debris in the Ninth Ward. The defendant subcontracted some of the work to Mr. Collie.

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[1] The minute entry for May 3, 2016, indicates the defendant was sentenced to five years and a "$1,000.00 fine/criminal court fund (CCF)[La. C.Cr.P. art 895.1(B)(2)]." However, the sentencing transcript reflects that the judge imposed a five-year sentence and a $10,000.00 fine. When there is a discrepancy between the minute entry and the transcript, the transcript prevails. *State v. Bridges*, 11-1666 (La. App. 4 Cir. 11/28/12), 104 So.3d 657, 659, *citing State v. Lynch,* 441 So.2d 732, 734 (La.1983).

The agreement was to haul the debris for $10,000.00 which equated to approximately seven days worth of work.

Approximately one week after completion of the work, the defendant tendered a $2,500.00 check to Mr. Collie which, when he attempted to cash, was declined for non-sufficient funds. The very next day, Mr. Collie saw the defendant driving on Gentilly Boulevard and followed him to obtain an explanation for the bad check. The defendant turned onto a side street and stopped. Mr. Collie pulled up behind the defendant's vehicle. The defendant exited his truck and approached Mr. Collie's vehicle. As the defendant approached, Mr. Collie activated the record function on his cell phone. The defendant opened Mr. Collie's door and placed a gun in his side. An argument ensued and the defendant cocked his weapon twice during the verbal exchange.

Later, Mr. Collie went to the police station to file a report of the incident. While Mr. Collie was at the police station, he learned that the defendant had called 911 earlier and reported him as the armed assailant. Mr. Collie and the defendant were actually at the police station at the same time filing complaints against one another. The police officers placed Mr. Collie and defendant in separate rooms. After listening to the cellphone recording made by Mr. Collie, the officers arrested the defendant.

The defendant testified at trial. He explained that he was a contractor and had done work for Covenant House in August/September 2015, primarily clearing and removing debris from blighted property in the Ninth Ward. The defendant acknowledged subcontracting some of the work to Mr. Collie for $10,000.00. The defendant billed Covenant House approximately $17,000.00 for the work to be performed. The defendant acknowledged that Mr. Collie performed the work he

had been subcontracted to do, and the defendant gave him a $2,500.00 check on September 11, 2015, with the express instruction that the victim was not to negotiate the check until the defendant notified him there were sufficient funds in his account to cover the check. He explained that Mr. Collie attempted to cash the check the following morning, despite instructions not to do so. The bank refused the check due to non-sufficient funds.

The defendant admitted that he had a verbal confrontation on Sunday, September 13, 2015, over non-payment. He admitted "going off" on Mr. Collie and getting into his face, telling him, "I done killed two or three people" but characterized that as "just talk sh*t."

The defendant denied brandishing a gun during the confrontation. He verified that he filed a complaint against Mr. Collie, but said the police arrested him.

SUFFICIENCY OF EVIDENCE

The defendant assigns as error the sufficiency of the evidence as well as other instances of alleged trial error.

When reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts apply the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). Under that standard, the appellate court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that all of the elements of the offense had been proven beyond a reasonable doubt. *Id.*; *State v. Tate*, 01-1658, p. 4 (La. 5/20/03), 851 So.2d 921, 928. The reviewing court must consider the whole record, just as the rational trier of fact considers all of the evidence, and the actual trier of fact is presumed to have acted rationally. *State v. Mussall*, 523

So.2d 1305, 1310 (La. 1988). "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." *State v. Egana*, 97-0318, p. 6 (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 228; *State v. Green*, 588 So. 2d 757, 758 (La. App. 4th Cir. 1991); *Mussall*, *supra*. It is not the function of the appellate court to assess the credibility of witnesses or reweigh the evidence. *State v. Scott*, 12-1603, p. 11 (La. App. 4 Cir. 12/23/13), 131 So.3d 501, 508, *citing State v. Johnson*, 619 So.2d 1102, 1109 (La. App. 4th Cir. 1993). Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the trier of fact. *Id*., *citing State v. Brumfield*, 93-2404 (La. App. 4 Cir. 6/15/94), 639 So.2d 312, 316. "Moreover, conflicting testimony as to factual matters is a question of weight of the evidence, not sufficiency. 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*., *citing State v. Jones*, 537 So.2d 1244, 1249 (La. App. 4th Cir. 1989). "Absent internal contradiction or irreconcilable conflict with the physical evidence, a single witness's testimony, if believed by the fact finder, is sufficient to support a factual conclusion." *State v. Marshall*, 04-3139, p. 9 (La. 11/29/06), 943 So.2d 362, 369, *citing State v. Legrand*, 02-1462, p. 5 (La. 12/3/03), 864 So.2d 89, 94.

The defendant in this case was convicted of aggravated assault with a firearm. La. R.S. 14:37.4. The defendant cites internal contradictions in the victim's testimony and the absence of physical evidence in support of his claim that the State presented insufficient evidence to sustain the conviction.

An assault is defined "as an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." La. R.S.

14:36.[2] One of the prerequisites for proving an assault, as it relates to the second aspect of the definition of "assault," with respect to the victim is proving the victim's reasonable apprehension of receiving a battery. *See State v. Rideau*, 05-0462 (La. App. 4 Cir. 12/6/06), 947 So. 2d 127, 140–141. Aggravated assault is defined as "an assault committed with a dangerous weapon." La. R.S. 14:37(A).

In order to support a conviction for assault, the State must prove beyond a reasonable doubt: (1) the intent-to-scare mental element (general intent); (2) conduct by defendant of the sort to arouse a reasonable apprehension of bodily harm; and (3) the resulting apprehension on the part of the victim. *State v. De Gruy*, 16-0891, p. 12 (La. App. 4 Cir. 4/5/17), 215 So.3d 723, 730, *citing State in the Interest of K.M.*, 14-0306, p. 9 (La. App. 4 Cir. 7/23/14), 146 So.3d 865, 872.

Assault requires proof of only general criminal intent or a showing that the defendant, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2); *State v. Hill*, 35,013, pp. 5-6 (La. App. 2 Cir. 9/26/01), 796 So.2d 127, 131–32; *State v. Johnston*, 207 La. 161, 20 So.2d 741, 744–45 (1944). "An offender has the requisite intent when the prohibited result may have reasonably been expected to follow from the offender's voluntary act, regardless of any subjective desire on his part to have accomplished the result." *De Gruy*, 16-0891, p. 13, 215 So. 3d at 730, *quoting State v. Amos*, 15-0954, p. 11 (La. App. 4 Cir. 4/6/16), 192 So.3d 822, 829. To establish the general criminal intent for an aggravated assault, jurisprudence holds that the act of

[2] A battery is defined, in pertinent part, as "the intentional use of force or violence upon the person of another." La. R.S. 14:33.

pointing a weapon at another person and threatening bodily harm is sufficient to establish the element of intent. *See State v. Hill*, 47,568, p. 11 (La. App. 2 Cir. 9/26/12), 106 So.3d 617, 624 (finding that aiming a pistol at a victim from point blank range and verbal threatening harm satisfies the level of proof required to sustain a conviction for aggravated assault); *State v. Connors*, 432 So.2d 308 (La. App. 5th Cir. 1983) (finding that an aggravated assault occurred when defendant intentionally raised the gun as if to aim at victim and thereby placed the victim in reasonable apprehension of receiving a battery).

The record in this case establishes that the charge against the defendant was based on the allegation he placed a gun in Mr. Collie's side and told him, "I done killed two or three people!" During trial, Mr. Collie gave direct testimony to that effect and indicated to the court the manner in which defendant was pointing the gun. Mr. Collie's testimony also established that defendant's actions were intended and, in fact, did place him in reasonable apprehension of receiving a battery. Moreover, Mr. Collie's testimony was buttressed by the recording he made of his encounter with the defendant.

Although the defendant herein denied pointing a gun at the victim, the jury chose to credit the testimony of the State's witnesses, which, when viewed in the light most favorable to the prosecution, established the defendant's guilt of aggravated assault with a firearm. Defendant's assignment is without merit.

CONSTITUTIONALLY EXCESSIVE SENTENCE

The defendant complains his sentence is constitutionally excessive. Specifically, the defendant argues that the imposition of the sentence is an abuse of judicial discretion considering there were no injuries, no discharge of a weapon

and the fact that the defendant is a first offender with young children and significant ties to the community.

The defendant did not file a motion to reconsider following the trial court's imposition of sentence. La. C.Cr.P. art. 881.1(E) (providing that the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal or review). However, the defendant did object to the sentence at the sentencing hearing, and this Court has found that a simple objection lodged after sentencing is sufficient to preserve the claim of constitutional excessiveness. *See State v. Amos*, 15-0954, p. 14 (La. App. 4 Cir. 4/6/16), 192 So.3d 822, 831.

On appeal, a claim of excessive sentencing is held to a high standard of review:

> Excessive sentences are prohibited under the Eighth Amendment of the Unites States Constitution and La. Const. art. I, § 20. A sentence may be constitutionally excessive even when the sentence falls within the range permitted by statute. *See State v. Sepulvado,* 367 So.2d 762, 769 (La.1979). For a sentence to be found excessive, it must be "so grossly disproportionate to the crime committed, in light of the harm caused to society, as to shock our sense of justice." *State v. Cann,* 471 So.2d 701, 703 (La.1985). The district court is granted broad sentencing discretion, and we will not overturn the district court's judgment absent an abuse of that discretion. *See State v. Walker,* [20]00–3200, p. 2 (La.10/12/01), 799 So.2d 461, 462.
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> To determine whether the district court has abused its broad sentencing discretion, we first discern whether the court took into account the sentencing criteria listed in La. C.Cr.P. art. 894.1. *See Sepulvado,* 367 So.2d at 767–768. The district court, while not required to expound on all factors listed in Article 894.1, is required to take into account both aggravating and mitigating factors. *See State v. Square,* 433 So.2d 104, 110 (La.1983). Our purpose is not to enforce mechanical compliance by a sentencing judge, but to ensure that there is a factual basis for the sentence imposed. *See State v. Batiste,* [20]06–0875, p. 18 (La. App. 4 Cir. 12/20/06), 947 So.2d 810, 820. If

> we find that the district court properly articulated its reasons for the defendant's sentence, we then determine whether the defendant's sentence was tailored to both the severity of his crime and his personal situation.

State v. Smith, 11-0664, p. 23-24 (La. App. 4 Cir. 1/30/13), 108 So.3d 390; *see State v. Spencer*, 14-0003, p. 16 (La. App. 4 Cir. 10/8/14), 151 So. 3d 816, 826.

A conviction for aggravated assault with a firearm carries a fine of not more than ten thousand dollars or imprisonment for not more than ten years, with or without hard labor, or both. La. R.S. 14:37.4(C). In this case, the defendant was sentenced to five years and a $10,000.00 fine was imposed.

At the sentencing hearing in this case, Mr. Collie gave a victim-impact statement setting forth his disappointment in the defendant as someone he had considered a friend.

The defendant also addressed the court, apologizing to Mr. Collie and citing his (the defendant's) close ties with the city and his efforts mentoring "at-risk" youth. He detailed a proposed blueprint for an amusement park he hoped to construct, and he requested that the court take into account that he was a family man and had no previous criminal history.

In sentencing the defendant, the trial judge cited the defendant's failure to accept responsibility for his actions, the violent and senseless nature of the crime and the use of a dangerous weapon in the commission of the crime. Further, the judge expressed her belief that if the sentence was suspended or probated, there was an undue risk that during the period of suspended sentence or probation the defendant would re-offend. The judge opined the defendant would not likely respond affirmatively to probation, that he was in need of correctional treatment in a custodial environment, which would best be provided by commitment to an

institution, and that a lesser sentence would deprecate the seriousness of the offense. Finally, although the defendant received the maximum statutory fine permissible for the conviction, the judge sentenced him to five years, only one-half of the prison term he might have received.

Contrary to the defendant's assertion as to mitigating factors, the sentencing transcript indicates the judge did consider the defendant's assertion of familial/community ties, volunteer work and personal attributes. However, she described the defendant's testimony as an amazing performance, one not worthy of belief.

The defendant's sentence is supported by the facts of the case; the defendant placed a gun in the victim's side and threatened to shoot him. Other circuits have held similar sentences for aggravated assault with a weapon not excessive. *See State v. Nailor,* 10-1062 (La. App. 5 Cir. 11/15/11), 78 So.3d 816 (five years for aggravated assault with a weapon not excessive); *State v. Jackson*, 43,818 (La. App. 2 Cir. 1/14/09), 1 So.3d 841 (sentence of four years and three months at hard labor after guilty plea to aggravated assault with a firearm was not excessive). Defendant's assignment is without merit.

TRIAL COURT'S FAILURE TO RECUSE

The defendant contends the trial judge erred by failing to recuse herself at the sentencing hearing. The defendant argues the trial judge was biased against him at the sentencing hearing because shortly before imposing sentence, the judge revealed she was aware the defendant had been recorded on a jail call attempting to learn from his family member the name of the judge's husband.

The State contends the issue of judicial bias has not been preserved for appellate review and is raised for the first time on appeal. We agree. *See* La.

C.Cr.P. art. 674;[3] *State v. Mercadel*, 12-0685, p. 14 (La. App. 4 Cir. 7/24/13), 120 So. 3d 872, 881–882 ("No such motion was brought in this case and the issue was not raised in the trial court. As the issue is being raised for the first time here, it is untimely and can be dismissed as such."). This assignment of error will not be considered.

CONCLUSION

Defendant's conviction and sentence are affirmed.

AFFIRMED

[3] La C.Cr.P. art. 674 provides in pertinent part as follows:

> A party desiring to recuse a trial judge shall file a written motion therefor assigning the ground for recusation. The motion shall be filed prior to commencement of the trial unless the party discovers the facts constituting the ground for recusation thereafter, in which event it shall be filed immediately after the facts are discovered, but prior to verdict or judgment.