STATE OF LOUISIANA	*	**NO. 2017-KA-0324**
VERSUS	*	
		COURT OF APPEAL
FRANK DIAZ	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 523-228, SECTION "E"
Honorable Keva M. Landrum-Johnson, Judge
* * * * * *
Judge Marion F. Edwards, Pro Tempore
* * * * * *
(Court composed of Judge Terri F. Love, Judge Marion F. Edwards, Pro Tempore, Judge Terrel J. Broussard, Pro Tempore)

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CONVICTIONS AFFIRMED; SENTENCES AFFIRMED, IN PART, AMENDED IN PART, WITH INSTRUCTIONS.

SEPTEMBER 6, 2017

The defendant, Frank Diaz ("Diaz"), appeals his convictions for second degree battery and attempted manslaughter. Finding sufficient evidence to support the convictions, and that the convictions and sentences do not violate double jeopardy, for the reasons that follow, we affirm the convictions and affirm the sentences, as amended.

PROCEDURAL HISTORY

On January 21, 2015, the State filed a bill of information charging Diaz with one count of second degree battery in violation of La. R.S. 14:34.1 ("Count I"), one count of attempted second degree murder in violation of La. R.S. 14:27(30.1) ("Count II"), and one count of extortion in violation of La. R.S. 14:66. Diaz pled not guilty to all counts at his January 26, 2015 arraignment.[1] Diaz was tried by a twelve-person jury on October 7-8, 2015, and found guilty as charged as to Count I and, as to Count II, guilty of the responsive verdict of attempted manslaughter in

[1] On April 7, 2015, the State filed a formal notice to introduce other crimes evidence at trial. On April 27, 2015, over the defendant's objection, the trial court granted the State's motion to introduce this evidence. The defendant sought supervisory review from this decision; in an unpublished *per curiam*, this Court denied the writ application on the basis that the defendant had an adequate remedy on appeal. *See State v. Diaz*, unpub., 15-0547 (La. App. 4 Cir. 4/22/15).

violation of La. R.S. 14:27(31).[2] The trial court denied Diaz's motions for new trial on February 29, 2016.[3] After waiving delays, the trial court sentenced Diaz to eight years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on Count I, and ten years imprisonment at hard labor on Count II, both to run concurrently and both counts designated as crimes of violence. Due to the State's having filed a multiple bill of information, which was ultimately withdrawn, the trial court deferred acting on Diaz's oral motion for an appeal. On November 4, 2016, Diaz filed a written motion for appeal, which the trial court granted. This appeal follows.

FACTUAL BACKGROUND

Kristen Blake, a 911 operator and a custodian of records of the 911 dispatch office, identified an incident recall printout containing information received during a 911 call from the victim, B.A., who reported that the subject, Frank Diaz, had a warrant out of Florida for domestic violence.[4] B.A. described a history of domestic abuse and reported that during the previous evening, Diaz had struck her in the face, head, and on her body, resulting in a bump on her forehead. B.A. advised that, when Diaz was asleep, she had packed up all of her belongings and fled the location and was on a RTA bus headed to the Greyhound Station. Based on the victim's report, the 911 operator dispatched an EMS unit and advised B.A. to exit the bus and wait for the ambulance to arrive. The 911 operator also dispatched the police under a signal of misdemeanor domestic abuse battery. The signal was later

[2] For reasons not clear on the record before us, Diaz was not tried on the extortion charge with the other two counts.
[3] Diaz, through counsel, filed a motion for new trial on December 10, 2015; he filed a supplemental motion pro se prior to the sentencing held on February 29, 2016.
[4] Ms. Blake testified that, for unknown reasons, the tape of the 911 call placed by the victim was unavailable. The incident recall, which is the printed version of the information taken down by

changed by the operator to attempted domestic homicide at the direction of the police officers responding to the call.

New Orleans EMS paramedic, Dona Reilly, testified that on January 10, 2015, in response to a 911 dispatch, she proceeded to the bus stop located at the intersection of North Broad and St. Bernard Avenues. Upon arrival, Ms. Reilly located the victim and observed her to have facial trauma, a hematoma on her left forehead, bruising on her right cheek, and bruising on her upper lip. B.A. advised Ms. Reilly that, on the previous evening, she had been punched and hit by her boyfriend, and that he had "attempted to put a plastic bag down her throat - - into her mouth and down her throat." It was unknown if B.A. "had lost consciousness at the time of the incident." She did not appear to be intoxicated. As a precautionary measure, the victim was placed in a C-collar and then transported by ambulance to the Emergency Room at University Hospital for treatment.

On cross examination, Ms. Reilly testified that she did not observe any handprints, scratches or marks on the victim's face or neck, nor did she observe any injury to the back of the victim's head. Additionally, B.A. reported that she did not have any pain to her head, neck or back. B.A. did not indicate to Ms. Reilly that she had experienced any difficulty swallowing.

NOPD Officer Michael Sartain testified that he and his partner, Terrence Hilliard, responded to the 911 dispatch of a signal 35-D, which related to a domestic abuse battery. He relocated to University Hospital and met with the victim in the Emergency Room. At that time, B.A. was wearing a neck brace. They observed her demeanor to be calm, but fearful. B.A. reported that her

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an operator during a 911 call, was duly introduced into evidence as State's exhibit one and published to the jury without objection.

boyfriend, Frank Diaz, had assaulted her the previous evening. Based on her account of the assault, the officers changed the original dispatch signal from domestic abuse battery to a signal 27/30-D, which related to an attempted murder, domestic. The officers also called out the crime lab to photograph the victim's injuries.

Officer Sartain testified that after having received a detailed description of Diaz from the victim, they relocated to Diaz's workplace, a tire store on Chef Menteur Highway, and were told by a supervisor that Diaz had come to work that morning, but had left.[5] The supervisor allowed the officers to view a security video, which showed the defendant arriving at work. Thereafter, the officers commenced searching the surrounding area for Diaz. Upon locating him, the officers elected to stop Diaz, at which time Diaz identified himself. After detaining and advising him of his Miranda rights, Diaz stated that he and B.A. had gotten into a "verbal altercation" the previous night at his home and that he had slapped her once. After he was questioned, the officers transported Diaz to jail for booking. Officer Sartain testified that at the time of his arrest, Diaz was in possession of a black plastic bag similar to the bag described by B.A. as being used by Diaz when he attempted to choke or suffocate her.

The officers' interactions with Diaz were recorded on their respective body cameras. Over defense objection, the video footage from Officer Sartain's camera was introduced into evidence by State and shown to the jury. The officers' body cameras recorded their interview with B.A. as well. After viewing a portion of the videotape, Officer Sartain confirmed that it accurately depicted B.A.'s physical

[5] Officer Sartain was the only NOPD officer involved in the investigation to testify at trial.

appearance at the hospital. He also identified the photographs of the victim taken at the hospital by crime lab personnel.

On cross-examination, Officer Sartain confirmed that Diaz did not attempt to flee when the officers approached him and that he was compliant with their directions. Finally, Officer Sartain testified that, aside from the initial interview of the victim at the hospital and their apprehension of Diaz, he and his partner had no further involvement in the case.

Dr. Heather Murphy-Lavoie, an expert in emergency medicine, testified that she was the supervising treating physician who treated B.A. when she arrived in the Emergency Room at University Hospital at 7:35 a.m. on January 19, 2015. B.A. presented with observable facial swelling, vomiting, bruising on the mouth, left wrist and right knee, and a decreased range of motion of her neck. B.A. reported nausea, muscle pain, neck stiffness and tenderness, and pain in her mouth, left wrist, and right flank, light headedness and headaches. B.A. provided a detailed history of being assaulted the previous night. As she did so, B.A. appeared nervous and anxious.

Dr. Murphy-Lavoie testified that B.A. had sustained a blunt force trauma to the head that was severe enough for her to have lost consciousness and, consequently, a CAT scan of her head was ordered. X-rays to B.A.'s elbow showed a small fracture, but the doctors could not rule out the possibility that this finding was consistent with arthritis or an old injury and not as a result of the assault. Due to B.A.'s reported history of being choked, coupled with neck tenderness upon palpation on exam, a vascular CAT scan of her neck area was ordered. Against medical advice, B.A. elected to leave the hospital prior to receiving the results of the scan; she got on a bus and left New Orleans. The result

of the vascular CAT scan was negative, indicating there was no observable internal damage.

Dr. Murphy-Lavoie testified that B.A. had reported to her that she had been drinking at the time of the assault. While the medical records reflected no clinical intoxication, the records did contain a notation that there was an odor of alcohol on B.A.'s breath. On cross examination, Dr. Murphy-Lavoie clarified that B.A. did not appear to be "clinically intoxicated" at the time of her physical exam, but conceded that no blood alcohol tests were ever conducted. On cross-examination, Dr. Murphy-Lavoie testified that there were no observable injuries to the victim's neck, nor did B.A. report any problems with her breathing or ability to swallow. Dr. Murphy-Lavoie explained, however, that external injuries are commonly not observed in cases of strangulation, which was the basis for ordering a vascular CAT scan for the victim.

B.A. was the last witness for the State. She testified that she was fifty-two years old and originally from New York. In 2008, she was living and working in Miami, Florida where she began a romantic relationship with Diaz, who was a neighbor. B.A. stated that while initially everything in the relationship was fine, things deteriorated when Diaz began drinking heavily and would become belligerent and berate her. B.A. described Diaz as a jealous man. If he saw her speaking with another man, Diaz would accuse her of sleeping with the man. According to B.A., the situation escalated over July 3 and 4, 2013, when Diaz got intoxicated, accused her of sexual infidelity, and then began hitting her. B.A. testified that she called 911, and when she did so, Diaz left the residence and did not return. In fear, B.A. went to a women's shelter and eventually obtained an

order of protection. In the process of doing so, she received a phone message from Diaz stating that if he were to catch her, he would kill her.

Following the incident in Florida, B.A. testified that she moved to Puerto Rico for eight months and then relocated to New York, where she lived on the streets. While in New York, B.A. reconnected with Diaz through his mother with whom she had kept in touch. B.A. relocated to Texas to be with Diaz, where he was then living. Diaz then moved to New Orleans to look for work and, in late December 2014, he asked B.A. to come to New Orleans and spend New Year's with him. B.A. stated that Diaz offered to pay for her bus ticket; she agreed and arrived in New Orleans on New Year's Eve.[6]

According to B.A., when she arrived in New Orleans, she stayed with Diaz in his rented trailer located on Chef Menteur Highway. At first Diaz was "nice," but that changed when he began drinking and possibly using drugs. B.A. testified that on January 8, 2015, it was her birthday and she was celebrating by drinking. She claimed that Diaz became angry and demanded anal sex; she refused. Later, B.A. spoke with her son and made the decision to leave New Orleans.

The following day, January 9, 2015, B.A. testified that she secretly packed up her belongings while Diaz was at work because she did not want Diaz to

[6] On cross-examination, B.A. recounted that, while she and Diaz were living in Miami, Diaz went to Las Vegas in search of employment, and that she later joined him there. They then went to San Diego, but split up for a time. She moved to New York and lived with her sister, who allowed B.A. to stay in her home as long as B.A. refrained from drinking. Diaz then came to New York, and he and B.A. began drinking together. Apparently, because B.A. had started drinking again, she was forced into homelessness. Diaz then moved alone to Texas, while B.A. remained homeless in New York until December 2014. At that time, B.A. relocated to Texas to live with Diaz. His boss helped her get a job. However, B.A. also testified that Diaz had moved to New Orleans to look for work a few months before the end of 2014. Thus, according to B.A.'s testimony, within the period from July 4, 2013 until December 2014, she lived in Puerto Rico for eight months, went to Las Vegas and San Diego with Diaz, moved to New York alone, and then in December 2014, reunited with Diaz in Texas, although Diaz had already been living in New Orleans for two to three months.

suspect that she was leaving for fear that he would get more angry. B.A. stated that Diaz arrived home that evening at approximately 8:00 p.m. and that "[h]e didn't look right. His eyes were weird." She claimed Diaz was angry and that he began to beat her up because she had consumed his beer. He demanded they have anal sex and when she refused, he continued to hit her with an open hand and pushed her to the floor where he positioned himself on top of her. Diaz began choking her causing her to lose consciousness.

B.A. testified that when she regained consciousness, Diaz threw her on the bed and attempted to shove a plastic bag down her throat in an effort to cover her screams. He continued to hit her and tried to grab her by the neck, choking her, while she tried to kick him off of her. B.A. believes she momentarily lost consciousness a second time. She stated that Diaz kept threatening to kill her and told her that if she ever told anyone about what he had done, he would beat her up so badly that no one would be able to recognize her because "he wasn't going to go to jail for nobody," not even her.

B.A. explained that after assaulting her, Diaz told her to go to sleep. She claims she pretended to do so, and after Diaz had fallen asleep, she left the trailer. B.A. stated that she boarded a local bus with the intention of going to the Greyhound Station to leave the city. She testified that she called 911 from the bus because she wanted to report the assault and was told by the 911 operator to get off of the bus. B.A. claimed she initially advised the 911 operator that she did not need an ambulance because she did not realize she was hurt. She then exited the bus, met with the paramedics, and was transported to University Hospital where she spoke to the treating physician and met with the responding officers.

During cross-examination, B.A. admitted that on her birthday, January 8, 2015, she drank an entire bottle of vodka and the beer that was in Diaz's refrigerator. While B.A. conceded that she possibly had consumed a significant amount of alcohol that day, she did not believe that she was intoxicated because she had eaten. B.A. denied that she had an alcohol problem, although she conceded that she was an everyday drinker while going through menopause. She denied having ever blacked out from drinking, but admitted she had previously suffered from dehydration. B.A. further testified that sometime between her arrival in New Orleans on December 31, 2014 and January 9, 2015, she had been drinking and had fallen while at a bus stop and was treated by paramedics at the scene.

B.A. also testified on cross-examination that, contrary to the EMS report noting the victim to be accompanied by several suitcases, she only had a single bag of clothes and a Nutribullet blender with her when she left Diaz's trailer on the morning of January 9, 2015. She claimed that she left much of her clothing behind, as well as her medicines, a towel, and all the food at the trailer.

During further cross-examination, B.A. testified that the bump (hematoma) on the left side of her forehead that was noted in the medical records was not as a consequence of the assault by Diaz on January 9, 2015. According to B.A., the bump was the result of an accident that occurred when she was living in Florida where she had fallen onto a tile floor while getting out of the shower. She denied that she had been drinking when this fall occurred.

On redirect, B.A. viewed a police photograph of the black plastic grocery bag which Diaz had in his possession when he was arrested. B.A. testified that the bag looked like the one Diaz used during the assault. B.A. also described her

employment in Texas, stating that she was working at a Macy's and at a Taekwondo school. During their time together in Texas, B.A. claimed that she and Diaz lost an apartment because they could not afford to pay the rent, which resulted in her having to stay in a women's shelter while continuing to work. Despite stating that she was living in a shelter in Texas, B.A. testified that she had money in a bank account when she arrived in New Orleans. She claimed that Diaz forced her to close the account and that he spent her money.

The defense called Diaz's brother, Angel Diaz, as its sole witness. Counsel attempted to elicit testimony regarding B.A.'s drinking problems, including a history of black-outs and falls. The trial court, however, sustained the State's objection to this line of questioning and excused the witness; defense counsel proffered the testimony.

Diaz elected not to testify. The defendant affirmed this decision after the trial court specifically advised him of his right to do so.

DISCUSSION

ERRORS PATENT

In accordance with Article 920 of the Louisiana Code of Criminal Procedure, all appeals are reviewed for errors patent on the face of the record. After reviewing the record, we find one error patent; *i.e.*, the imposition of an illegally excessive sentence as to the second degree battery conviction.

La. R.S. 14:34.1(C) provides that whoever commits the crime of second degree battery shall be imprisoned, *inter alia*, for not more than eight years, with or without hard labor. At least eighteen months of the sentence imposed shall be served without benefit of probation, parole, or suspension of sentence if the offender knew or should have known that the victim is an active member of the

United States Armed Forces or is a disabled veteran, and the offender committed the second degree battery because of that status. The statute does not otherwise allow for denial of these benefits.

Here, absolutely no evidence was adduced that B.A. was a member of the United States Armed Forces or a disabled veteran. Nevertheless, when the trial court imposed the maximum eight-year sentence upon the defendant, it specified that the sentence should be served without the benefit of probation, parole, or suspension of sentence, rendering it illegally excessive. Accordingly, we amend the defendant's sentence for second decree battery to delete the provision denying eligibility for parole, probation, or suspension of sentence. The trial court is instructed to make an entry in the court minutes reflecting this change.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant-appellant asserts that the evidence was insufficient to convict him of violating either La. R.S. 14:34.1, second degree battery, or La. R.S. 14:27(31), attempted manslaughter. We disagree.

When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged.[7] In doing so, the reviewing court must consider the record as a whole and not just the evidence most favorable to the prosecution; if rational triers of fact could not disagree as to the

[7] *State v. Landry*, 03-1671, p. 6 (La. App. 4 Cir. 3/31/04), 871 So.2d 1235, 1238, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

interpretation of the evidence, the rational decision to convict should be upheld.[8]

A. COUNT 1 – SECOND DEGREE BATTERY

In a second-degree battery conviction, the State must prove the offender committed a battery without the consent of the victim and that he intentionally inflicted serious bodily injury.[9] The offense requires proof of a specific intent to inflict "serious bodily harm."[10] "Serious bodily injury" is defined by La. R.S. 14:34.1(B)(3) as "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" as used in the statute refers to "a condition which most people of common intelligence can understand; it is considered subjective in nature and susceptible to interpretation."[11] Specific intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act."[12] In short, the elements of second-degree battery are: (1) the intentional use of force or violence upon the person of another, (2) without the consent of the victim, (3) when the offender has the specific intent to inflict serious bodily injury.[13]

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[8] *State v. Mussall*, 523 So.2d 1305, 1310-1311 (La.1988); *State v. Green*, 588 So.2d 757, 758 (La. App. 4 Cir.1991).
[9] La. R.S. 14:34.1; *State v. Landry*, 03-1671, p. 6, 871 So.2d at 1238.
[10] *Id*. at 1239; *State v. Welch*, 615 So.2d 300, 302 (La.1993), citing *State v. Fuller*, 414 So.2d 306 (La.1982).
[11] *State v. Legendre*, 522 So.2d 1249, 1251 (La. App. 4 Cir. 1988), quoting *State v. Thompson*, 399 So.2d 1161, 1168 (La.1981).
[12] La. R.S. 14:10(1).
[13] *Landry*, 03-1671, p. 7, 871 So.2d at 1239; *Legendre*, 522 So.2d at 1251.

The testimony of a single witness, if believed by the trier of fact, may be sufficient to support a conviction of second degree battery.[14] Moreover, a fact finder's decision regarding the credibility of a witness shall not be disturbed unless it is clearly contrary to the evidence.[15]

In *State v. Jones*,[16] the defendant was tried on charges of aggravated second degree battery and forcible rape. Despite the victim's testimony that the defendant was armed with a knife and sliced her fingers with it when she tried to grab it, the jury returned the responsive verdicts of guilty of second degree battery and simple rape. The victim testified that the defendant had beaten and choked her, and the evidence established that she had a black eye and considerable swelling on one side of her face following the assault. In considering whether the evidence presented was sufficient to establish that the defendant had committed a second degree battery, this Court extensively reviewed previous case law:

> In *State v. Stowe*, 93-2020 (La. 4/12/94), 635 So.2d 168, the defendant was convicted of the second degree battery of a police officer after the officer responded to a call of an injured person (the intoxicated defendant) walking along [La. Hwy. 125]. The officer learned that the defendant had earlier fought with his wife and punched through a window, resulting in a deep cut on his arm that was dripping blood. When the defendant became hostile and threatening, the officer advised him that he was under arrest for disturbing the peace. The defendant suddenly hit the officer in the head, knocking him backward into a ditch. The officer tried to remove his ASP expandable baton, but the defendant continued to hit the officer. The officer was finally able to handcuff the defendant with the assistance of two bystanders.
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> The report of the emergency room physician who treated the officer reflected that the officer had edema and a contusion under his right eye, abrasions on his forehead, lip, and under his right eye, as

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[14] *State v. Jones*, 15-0123, p. 36 (La. App. 4 Cir. 12/2/15), 182 So.3d 251, 275, *writ denied*, 16-0027 (La. 12/5/16), 210 So.3d 810, citing *State v. Wells*, 10-1338, p. 5 (La. App. 4 Cir. 3/30/11), 64 So.3d 303, 306.
[15] *Id.*
[16] *Id*.

well as contusions and some edema on his forehead. The physician testified at trial that the officer denied that he was in pain, but said he had treated patients who denied pain even though it was obvious they were in pain. The officer testified that when he got to the hospital one eye was nearly completely swollen shut and he had bruises and abrasions all over his face. He said he had knots on his head, a large one on his chin, and that he still had a small knot on his chin from the incident at the time of trial. Both of the officer's eyes were blackened, and he had a nose bleed and a cut lip. The officer also testified that a large "place" under his eye stayed there for about two weeks before it began going down. He had severe headaches day and night for approximately two weeks.

The Supreme Court found that, reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that the State proved the defendant had intentionally inflicted extreme physical pain on the officer without his consent.

In *State v. Helou*, 02-2302 (La. 10/23/03), 857 So.2d 1024, the defendant punched the victim in the nose with his fist causing him to bleed profusely, saturating his shoes, the front of his jeans and his shirt with blood, and leaving puddles of blood on the ground. [The defendant's friends jumped on the victim and beat him until they ran off when someone yelled that the police were on their way.] The defendant was tried and convicted of second degree battery. After the [Third Circuit] [C]ourt of [A]ppeal affirmed the defendant's conviction, the Supreme Court granted certiorari and reversed, with three justices dissenting, and the majority reasoning:

> The State submits that we must infer from the amount of bleeding that the victim suffered a "severe bodily injury." 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. 3d 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. 3d Cir.1989), where the defendant stabbed the victim twice with a large, folding knife.

There are other cases which 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, where the victim suffered a bloody nose, tenderness in hyoid area below the larynx, and complained of pain at incision in his lower abdominal area. The physician testified that the defendant's act of choking the victim could have resulted in substantial risk of death, and three months after the attack, the victim continued to have throat problems; *State v. Diaz*, 612 So.2d 1019, 1022–1023 (La. App. 2d Cir.1993), where the defendant broke the victim's jaw during a group fight; *State v. Mullins*, 537 So.2d 386, 391 (La. App. 4th Cir.1988), where a 6 foot tall defendant punched a 5′5″ girlfriend, breaking her nose; *State v. Legendre*, 522 So.2d 1249, 1251 (La. App. 4th Cir.1988), *writ denied*, 523 So.2d 1321 (La. 1988), where the defendant raised the victim over his head and smashed her to the floor, rendering her momentarily immobile and requiring a brief hospitalization followed by outpatient treatment leading to a loss of employment for several weeks; *State v. Accardo*, 466 So.2d 549, 552 (La. App. 5th 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.

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, dealt solely with the amount of blood the victim lost. The record demonstrates that at trial the State's direct examination of its witnesses completely avoided the subject of pain. 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.

In summary, there is no testimony that the victim lost consciousness at any time despite the victim's "confusion" as to whether his wife rode with him in the ambulance to the hospital. There is no evidence of

> severe injury. In fact, the victim initially declined medical help; he required only a brief visit to the emergency room; thereafter, he sought no further medical attention, and there is no evidence of disfigurement or permanent disability. No medical personnel appeared at trial to provide jurors with a diagnosis or a summary of the victim's treatment. The only evidence in the record is the medical bill for $983.90. There was no explanation of what medical services were provided to the victim. Because the State failed in its burden of proof, any conclusion by the jury as to pain suffered by the victim was simply a guess on the jury's part, since the State failed to offer any evidence on the issue. Simply put, because the jury had to infer the victim's pain, the State failed to prove beyond a reasonable doubt that the victim, in fact, suffered "extreme physical pain" as required by the statute. Accordingly, we conclude that the evidence is insufficient to sustain the defendant's conviction for second degree battery.
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> *Id.* at pp. 6-9, 857 So.2d at 1028-1029.[17]

In *Jones*, this Court concluded that the evidence, when viewed in the light most favorable to the State, was sufficient to establish that the defendant had committed a second degree battery on the victim when he sliced her fingers with the knife with which he was armed. The Court noted that the victim had "sustained 'obvious disfigurement' of her fingers and lost consciousness, however momentary that might have been."[18]

In *State v. Odom,*[19] the defendant was originally charged with aggravated battery, and the jury returned a responsive verdict of guilty of second degree battery. As in the instant case, the offense began as a domestic disturbance and continued over several hours. In contrast to this matter, at some point, Odom armed himself with a pistol and struck the victim with the butt of the weapon

[17] *Jones*, 15-0123, pp. 39-42, 182 So.3d at 277-79.
[18] *Id.*, 15-0123, p. 43, 182 So.3d at 279.
[19] 03-1772 (La. App. 1 Cir. 4/2/04), 878 So.2d 582.

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 assault. No expert testimony was presented, and the victim testified that she was too embarrassed to seek medical treatment. On the night the incident occurred, however, she did spend the night with her brother, who had some first aid training, and he monitored her for a possible concussion. Based on its review of the entire record, the appellate court found that the evidence supported the conviction for second degree battery, noting that "a victim may present sufficient evidence to establish that the victim sustained serious bodily injury, without the testimony of any expert."[20]

Similarly, in *State v. Hall*,[21] the court found the evidence sufficient to support a second-degree battery conviction where the victim testified that she was sprayed with mace and beaten and kicked by the defendants, that the mace caused her eyes to burn, made breathing difficult, and made it feel like her esophagus was swollen. The victim also required fifteen stitches to close the various lacerations on her nose; a bottle striking her face apparently caused the lacerations.

In contrast, in *State v. Clay*,[22] this Court found the evidence insufficient to sustain convictions for second degree battery where the two victims stated the defendant scratched them. The victims, who were medical personnel at the jail infirmary, treated the scratches themselves; one put antibiotic cream and a Band-Aid on her scratch, while the other merely cleaned his with soap and water.

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[20] *Odom*, 03-1772, p. 6, 878 So.2d at 588.
[21] 03-1384 (La. App. 5 Cir. 3/30/04), 871 So.2d 558.
[22] 05-0467 (La. App. 4 Cir. 10/4/06), 942 So.2d 563.

In the instant case, the evidence is not as compelling as in *Jones* or *Hall* as there is nothing in the B.A.'s testimony or the medical evidence to indicate that she suffered any protracted and obvious disfigurement or required stitches. However, B.A. testified that the defendant choked her twice, causing her to lose consciousness. While the defense attempted to convince the jury that B.A. may have passed out due to her alcohol consumption on the day of the incident, Dr. Murphy-Lavoie testified unequivocally that the victim's reported symptoms and her observable injuries were consistent with B.A.'s account of the assault. B.A.'s treating physician was sufficiently persuaded by her symptoms that a variety of x-rays and CAT scans were ordered, including the vascular CAT scan to look for damage from having been choked. Additionally, there was objective evidence that B.A. had suffered a fracture to the tip of her elbow bone, although it was medically underdetermined as to whether she had suffered this fracture before the defendant assaulted her, perhaps when she fell at the bus stop sometime in the preceding ten days. Thus, the jury's decision to find the victim's testimony credible should not be disturbed by this Court. This assignment of error as to count one, second degree battery, has no merit.

B. COUNT 2 – ATTEMPTED MANSLAUGHTER

To prove attempted manslaughter, the State must establish beyond a reasonable doubt that the defendant specifically intended to kill another human being and committed an overt act in furtherance of that goal.[23] "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or

[23] La. R.S. 14:27(31); *State v. Collins*, 01-1459, p. 17 (La. App. 4 Cir. 8/21/02), 826 So.2d 598, 610.

failure to act."[24] Specific intent need not be proven as fact, but may be inferred from the circumstances and the actions of the accused.[25]

In *State v. Tyler*,[26] the Third Circuit found sufficient evidence to prove a specific intent to kill where the defendant verbalized an intent to kill the victim and placed a hand over her mouth and a shirt over her face to suffocate her. The court relied upon its earlier decision in *State v. Wommack*,[27] in which the defendant had placed a large cloth over the victim's mouth with one hand, while grabbing her throat and squeezing it with his other hand. He also told the victim that he was going to kill her.

In *Wommack* and *Tyler*, the defendants' actions produced observable bruising on the victims' necks. No such bruising was observable on B.A.'s neck in this case, but the uncontroverted expert medical testimony elicited from Dr. Murphy-Lavoie was clear that a lack of such observable injuries was the norm in strangulation or suffocation cases. Considering that B.A. testified that the defendant twice choked her, attempted to place a plastic bag in her mouth, and threatened to kill her, we find the jury could reasonably determine that Diaz had the specific intent to kill. Consequently, we find the evidence was sufficient to support a conviction for attempted manslaughter.

The first assignment of error lacks merit as to both counts.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, Diaz argues that the convictions and sentences for both second degree battery and attempted manslaughter violate the

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[24] La. R.S. 14:10(1).
[25] *State v. Everrett*, 11-0714, p. 14 (La. App. 4 Cir. 6/13/12), 96 So. 3d 605, 619.
[26] 11-1256 (La. App. 3 Cir. 5/2/12), 93 So. 3d 670.
[27] 00-137 (La. App. 3 Cir. 6/7/00), 770 So. 2d 365.

principles of double jeopardy as the same evidence was used to prove both offenses. We disagree and find no double jeopardy violation.[28]

As stated in *State v. Parker*,[29]

> Both the Fifth Amendment to the United States Constitution and Article I, § 15 of the Louisiana Constitution guarantee that no person shall be twice placed in jeopardy for the same offense. *State v. Butler*, 14-1016, p. 4 (La. App. 4 Cir. 2/11/15), 162 So.3d 455, 459; *see also* La.C.Cr.P. art. 591 (providing that "[n]o person shall be twice put in jeopardy of life or liberty for the same offense"). La. C.Cr.P. art. 596 establishes the requirements for double jeopardy as follows:
>
> > Double jeopardy exists in a second trial only when the charge in that trial is:
> >
> > (1) Identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial; or
> >
> > (2) Based on a part of a continuous offense for which offense the defendant was in jeopardy in the first trial.

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[28] We note that the defendant neither filed a motion to quash based on the allegation that both counts rested on the same facts, see La. C.Cr.P. art. 532(6), nor did he raise the issue in the trial court post-verdict. *Cf.*, La. C.Cr.P. art. 594 ("Double jeopardy may be raised at any time, but only once, and shall be tried by the court alone. If raised during trial, a hearing thereon may be deferred until the end of trial."). This Court has previously addressed a claim for double jeopardy raised for the first time on appeal. *See State v. Roe*, 13-1434, p. 40 (La. App. 4 Cir. 10/8/14), 151 So.2d 838, 862, *writ denied sub. nom. State v. Watson*, 14-2355 (La. 8/28/15), 175 So.3d 966, *writ granted in part, denied in part*, 14-2322 (La. 8/28/15), 177 So.3d 125 ("defendant's double jeopardy claim will be addressed as an assignment of error raised for the first time on appeal"); *State v. Gibson*, 03-0647, p. 7 (La. App. 4 Cir. 2/4/04), 867 So.2d 793, 798 (noting that double jeopardy has been recognized as a patent error, but addressing it as an assignment of error because the defendant raised it as such, apparently for the first time on appeal). Accordingly, Diaz's double jeopardy argument is properly before us for appellate review.

[29] 15-1013, p. 4 (La. App. 4 Cir. 6/22/16), 195 So.3d 1243, 1245.

Although La. C.Cr.P. art. 596 speaks of double jeopardy relative to a second prosecution, the prohibition against double jeopardy also protects an accused from multiple punishments for the same criminal conduct.[30]

When evaluating double jeopardy claims, Louisiana courts have recognized both the *Blockburger* test[31] and the "same evidence" test;[32] however, courts have mainly relied upon the "same evidence" test.[33] Nonetheless, the Louisiana Supreme Court has not adopted a "same transaction" test, which would prohibit, on double jeopardy grounds, prosecution for different crimes committed during one sequential and continuing course of conduct.[34] Consequently, an accused who commits separate and distinct offenses during the same criminal episode or transaction may be prosecuted and convicted for each offense without violating the prohibition against double jeopardy.[35]

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[30] *Roe*, 13-1434, p. 40, 151 So. 3d at 862, citing *State v. Gibson*, 03-0647, p. 8 (La. App. 4 Cir. 2/4/04), 867 So. 2d 793, 798-799.

[31] Under the *Blockburger* test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two different offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Gibson,* 03–0647, p. 9, 867 So.2d at 799; *State v. Smith,* 95–0061, p. 4 (La.7/2/96), 676 So.2d 1068, 1069.

[32] Under the "same evidence" test, if the evidence required to support a finding of guilt of one offense would also have supported conviction of the other, the two offenses are the same under a plea of double jeopardy, and a defendant can be placed in jeopardy for only one. *Smith,* 95–0061, p. 4, 676 So.2d at 1069–1070; *State v. Steele,* 387 So.2d 1175, 1177 (La.1980). The same evidence test depends on the evidence necessary for a conviction, not all of the evidence introduced at trial. *Id.* See also *Parker*, 15-1013, p. 5, 195 So.3d at 1245.

[33] *State v. German*, 12-1293, p. 28 (La. App. 4 Cir. 1/22/14), 133 So.3d 179, 198-99; *Gibson,* 03–0647, p. 8, 867 So.2d at 799; *State v. Jones*, 97-2217, p. 6 (La. App. 4 Cir. 2/24/99), 731 So.2d 389, 393; *see Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[34] *Jones*, 97-2217, p. 6, 731 So.2d at 393-94.

[35] *Id*.

Here, the defendant argues that his convictions for second degree battery and attempted manslaughter violate the "same evidence" test. In essence, Diaz contends that the evidence used to prove the element in La. R.S. 14:34.1 (*i.e.*, that the offender inflicted serious bodily injury on the victim), is the same evidence which proves a violation of La. R.S. 14:27(31) (*i.e.*, that the defendant specifically intended to kill the victim and committed an act in furtherance of that intent).

In *Parker*, *supra*,[36] this Court found that the Double Jeopardy Clause was violated when the defendant was convicted of committing simple criminal damage to property, a violation of La. R.S. 14:56(A)(1), and tampering with a monitoring device, a violation of La. R.S. 14:110.3. The defendant's conduct consisted of a single act: he cut the strap of the EMP monitor (electronic monitoring device) which had been placed on his ankle by an employee of the Orleans Parish Sheriff's Office as a condition of his release from jail. Because this single act established both the tampering and criminal damage charges, they arose from the same conduct and double jeopardy prevented the defendant from being punished for both offenses.

Conversely, in *State v. German*,[37] this Court found no double jeopardy for convictions for aggravated burglary and aggravated battery despite the crimes having been committed during one continuous course of conduct. The evidence established that the defendant broke into the victim's apartment while armed with a gun, threw her down, and threatened to kill her. The defendant then dragged the

[36] *See* Footnote 29.
[37] 12-1293 (La. App. 4 Cir. 1/22/14), 133 So.3d 179.

victim to a nearby unoccupied apartment where he struck her with the gun.[38] In discussing the issue of double jeopardy, we stated:

> An aggravated burglary requires—in addition to proof of an unauthorized entry with the specific intent to commit a felony or theft therein—proof that the offender was (1) armed with a dangerous weapon; (2) armed himself with a dangerous weapon after entering or leaving such place; or (3) committed a battery upon any person while in such place, or in entering or leaving such place.
> An offender could commit an aggravated battery while in the act of committing an aggravated burglary, and such aggravated battery could constitute proof of a necessary element of the offense of aggravated burglary—the committing of a battery upon any person while in the place. Under such scenario, where both a battery and burglary occurred during the same act or transaction, a plea of double jeopardy would bar the offender's prosecution for both the aggravated burglary and the aggravated battery under both the *Blockburger* and same evidence tests.
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> In the instant case, the victim, S.R., testified that defendant committed multiple acts upon her that took place in three separate locations. The bill of indictment charging defendant did not specify a location of the aggravated battery upon the victim but it did specify that defendant committed aggravated burglary of the dwelling "belonging to. . .while armed with a dangerous weapon." . . . The victim testified that defendant first kidnapped her from her apartment, then took her to the unoccupied apartment, and then took her to his apartment. . . .
>
> Based on her testimony . . ., there was sufficient evidence to prove beyond a reasonable doubt that defendant committed an aggravated battery upon the victim during the commission of the aggravated burglary of her apartment. Thus, in a single act or transaction at that location defendant perpetrated both an aggravated burglary and aggravated battery and he cannot be subject to indictment and conviction for both. . . .

[38] The Court also rejected the defendant's contention that his conviction for attempted aggravated rape of the same victim at a third apartment during the same course of conduct violated double jeopardy.

> The victim also testified, however, that defendant took her from . . . [to] his apartment . . . [and hit her with the gun.]
>
> * * *
>
> Based on the testimony and evidence presented, jurors could have found beyond a reasonable doubt that defendant committed separate offenses at different times and in different locations: an aggravated burglary at . . . ; and, in a separate act, defendant committed an aggravated battery upon the victim while at his apartment . . . The same evidence is not necessary to prove the elements of these two separate offenses. Thus, defendant's convictions for these two offenses do not violate the constitutional prohibition against double jeopardy.[39]

Our result in *German* relied, at least in part, on the offenses having occurred in separate physical locations. However, in *State v. Fairman*,[40] the court found no double jeopardy where the defendant was convicted, *inter alia*, for battery of a police officer producing an injury requiring medical attention, a violation of La. R.S. 14:34.2(B)(3), and simple battery of a police officer, a violation of La. R.S. 14:34.2. The victim was Deputy Lowe. The offenses occurred in a barroom after Deputies Lowe and Smith approached the defendant to interview him in response to a report of a man threatening people with a gun. The defendant pushed Deputy Lowe away and slapped Deputy Smith's hand. The defendant became more aggressive, and while attempting to obtain control over him, the deputies and the defendant fell to the ground. The defendant continued to punch and kick the deputies. At some point, the defendant was placed in a carotid artery restraint and lost consciousness. The deputies then tried to place handcuffs on the defendant; he became combative again and punched Deputy Lowe in the face. This punch

[39] *German*, 12-1293, pp. 30-33, 133 So.3d at 200-201.
[40] 15-67 (La. App. 5 Cir. 9/23/15), 173 So.3d 1279.

lacerated the deputy's lip. The deputies then used a Taser on the defendant, putting an end to his struggles. Deputy Lowe received medical attention for the injury to his lip.

The defendant asserted that the two convictions for battery of Deputy Lowe violated the prohibition against double jeopardy as the evidence supporting the conviction for violating La. R.S. 14:34.2(B)(3) also supported the conviction for violating La. R.S. 14:34.2. In response, the State argued that there "were separate and distinct physical events that were proven independently of each other," and, therefore, double jeopardy did not attach.[41] In considering the issue, the court conceded that, "[a] strict reading of these statutes does appear to create the presumption of a double jeopardy violation" because, once the State succeeded in proving the offense of battery of a police officer producing an injury requiring medical attention, all the elements of simple battery of a police officer were proven.[42] The court opined, however, that "based on the facts adduced at trial, the evidence which supported defendant's La. R.S. 14:34.2 conviction were [sic] different from the evidence used to support his La. R.S. 14:34.2(B)(3) conviction."[43] Specifically, the court focused on testimony establishing that the defendant had battered Deputy Lowe twice: (1) after they fell to the ground; and (2) after Deputy Lowe had successfully briefly incapacitated the defendant using a form of a chokehold. The court concluded that the batteries were "separate and distinct offenses committed during the same criminal episode, and supported by corresponding separate and distinct facts."[44]

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[41] *Fairman*, 15-67, p. 14, 173 So.3d at 1288.
[42] *Id.* at 16, 173 So.3d at 1290.
[43] *Id.*
[44] *Id.*, p. 17, 173 So.3d at 1290.

The Second Circuit reached a similar conclusion in *State v. Clark*,[45] where, when the elderly victim opened her door, the defendant struck her in the head with a concrete rock. He demanded money and threatened to kill her if she did not comply. She denied having any money. He then forced her into a bathroom, while continuing to threaten her. The defendnat then pretended to speak to someone outside the bathroom, telling the unseen (and nonexistent) person to give him a pistol, at which point the victim told the defendant where he could find her money. The defendant was subsequently apprehended and convicted of violating La. R.S. 14:34.7, aggravated second degree battery, and La. R.S.14:64, armed robbery. The defendant asserted that the two convictions violated double jeopardy on the grounds that the State relied on the same evidence and "use of force" element found in both statutes to prove the charges.[46] While the court did not dispute that both offenses contained the element of "use of force," it found no double jeopardy violation because the facts of the case showed that the defendant "exhibited two different instances of the `use of force' that created two separate and distinct acts stemming from the series of events."[47] First, the defendant hit the victim in the head with the piece of concrete rock; this act caused the victim extreme pain and injury, a necessary element of La. R.S. 14:34.7. As to the second instance of "use of force," the court stated that this element was proven because the defendant threatened the victim while he was armed with the concrete rock, pretended he was

[45] 44,594 (La. App. 2 Cir. 8/19/09), 16 So.3d 1256.
[46] *Clark*, 44,594, p. 9, 16 So.3d at 1262.
[47] *Id.* at 11, 16 So.3d at 1262.

going to obtain a pistol, and took her money. The threat to kill her also established intimidation.[48]

In another Second Circuit case, *State v. White*,[49] the trial court denied the defendant's motion to quash an indictment charging simple robbery, a violation of La. R.S. 14:65, and second degree battery. After his motion was denied, the defendant pled guilty and sought appellate review of the adverse ruling. The court affirmed, noting that the two crimes do not contain the same elements, and thus the critical issue was "whether the evidence necessary for a conviction of simple robbery was the same evidence necessary for a conviction of second degree battery, or vice versa."[50] The stipulated facts established that the defendant and an accomplice rushed into an office while wearing masks and ripped out the telephone, causing the victim to scream. The court found that this sufficed to prove intimidation, an element of simple robbery. The defendant began beating the victim and continued to do so even after his accomplice had snatched a briefcase and began to flee. The court held that the same evidence was not necessary "because the crime of simple robbery was completed prior to the second degree battery."[51] The court stated further that the beating of the victim, i.e. the

[48] La. R.S. 14:64 provides that armed robbery is the taking of anything of value by use of force **or** intimidation while armed with a dangerous weapon. The court's opinion implies that both "use of force" and "intimidation" was required to prove an armed robbery, but only one was necessary. Aggravated second degree battery, La. R.S. 14:34.7, requires the use of a dangerous weapon to commit a battery when the offender intentionally inflicts serious bodily harm. Thus, proof of the dangerous weapon is an essential element of both offenses. Battery is defined in La. R.S. 14:33, in pertinent part, as "the intentional use of force or violence upon the person of another."

[49] 35,235 (La. App. 2 Cir. 10/31/01), 799 So.2d 1165.

[50] *Id.*, 35,235, p. 5, 799 So.2d at 1169.

[51] *Id.*, 35,235, p. 6, 799 So.2d at 1169.

offense of second degree battery, "was a consequence of the victim's screams of fright, not as a result of or as a part of the robbery itself."[52]

In *State v. Shupp*,[53] the Third Circuit held that no double jeopardy violation occurred when the defendant was convicted of both armed robbery and false imprisonment with a dangerous weapon. The evidence established that, after the defendant robbed the female victim at gunpoint of all the money in a register and a petty cash box, he forced her into a bathroom where he tied her hands and left her on the floor while he made his escape. The court found that the two offenses "can be temporally separated," because the defendant restrained the victim "*after* the taking," and she remained restrained until after the defendant left the scene.[54]

Based upon our review of the above jurisprudence, we conclude that there was no double jeopardy violation in this case. B.A. testified that when Diaz returned from work and she refused his demand to engage in anal sex, he struck her causing her to fall on the floor. Diaz then choked her to the point that she lost consciousness. At that point, based on the evidence when viewed in the light most favorable to the prosecution, the jury could have found beyond a reasonable doubt that Diaz had completed the offense of second degree battery.

After B.A regained consciousness, Diaz resumed the assault by attempting to shove a plastic bag down her throat and choking her, causing B.A. to lose consciousness a second time. Throughout the assault, Diaz made continuous threats to kill B.A.[55] In viewing the evidence in the light most favorable to the

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[52] *Id.*
[53] 15-695 (La. App. 3 Cir. 2/13/16), 185 So.3d 900.
[54] *Id.*, 15-695, pp. 30-31, 185 So.3d at 920. [Emphasis in original.]
[55] The defendant's acts which demonstrate his specific intent to kill the victim were choking the victim, making threats to kill her, and trying to place the bag in her throat.

prosecution, based on either of those second actions by Diaz, each accompanied by his threat to kill B.A., we conclude the jury could have found Diaz guilty of attempted manslaughter. Thus, we determine that this assignment of error lacks merit and that the prohibition against double jeopardy was not violated.

CONCLUSION

For the foregoing reasons, the convictions of Frank Diaz of second degree battery and of attempted manslaughter are affirmed. The sentence imposed for the offense of attempted manslaughter is affirmed. The sentence imposed for the offense of second degree battery is amended to delete the provision denying eligibility for parole, probation, or suspension of sentence. The trial court is hereby ordered to note the amendment in the court minutes.

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED, IN PART, AMENDED IN PART, WITH INSTRUCTIONS.