STATE OF LOUISIANA	*	**NO. 2017-KA-0584**
VERSUS	*	
		COURT OF APPEAL
JERMENY MARSH	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 521-652, SECTION "L"
Honorable Franz Zibilich, Judge
* * * * * *
Judge Terrel J. Broussard, Pro Tempore
* * * * * *

(Court composed of Judge Daniel L. Dysart, Judge Regina Bartholomew Woods, Judge Terrel J. Broussard, Pro Tempore)

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CONVICTION AND SENTENCE VACATED; REMANDED

NOVEMBER 08, 2017

Defendant, Jermeny Marsh ("Defendant"), was charged by bill of information with battery of a correctional facility employee while under the jurisdiction and legal custody of the "Youth Study Center." On February 5, 2015, Defendant elected a bench trial. The district court rendered a verdict of guilty of attempted battery of a correctional facility employee and imposed a sentence of ninety days in the parish jail, with credit for time served, to run consecutively with any other sentences.

Defendant timely filed an out-of-time appeal which was granted.[1] On appeal, Defendant assigns two errors: (1) his conviction of attempted battery of a correctional facility employee is not a valid offense under Louisiana law; and (2) the State presented insufficient evidence to support the charged offense.

As set forth in the reasons below, we vacate Defendant's conviction and sentence and remand the matter to the district court for further proceedings.

[1]At the time Defendant filed his out-of-time appeal, based upon the record before this court, Defendant's sentence had been satisfied. In *State v. Morris,* 328 So.2d 65, 66 (La. 1976), the court held that satisfaction of a misdemeanor sentence renders subsequent appellate review of the conviction moot. *See also, State v. Malone*, 08-2253, p. 16 (La. 12/1/09), 25 So.3d 113, 125. However, in this case, Defendant was found guilty of a felony; thus, *Morris* and *Malone* are inapplicable.

FACTS AND PROCEDURAL HISTORY:

Defendant was charged with battery of a correctional facility employee, a violation of La.R.S. 14:34.5 which provides in pertinent part:

> A. (1) Battery of a correctional facility employee is a battery committed without the consent of the victim when the offender has reasonable grounds to believe the victim is a correctional facility employee acting in the performance of his duty.
>
> (2) For purposes of this Section, "correctional facility employee" means any employee of any jail, prison, correctional facility, juvenile institution, temporary holding center, halfway house, or detention facility.
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> * * *
>
> B. (1) Whoever commits the crime of battery of a correctional facility employee shall be fined not more than five hundred dollars and imprisoned not less than fifteen days nor more than six months without benefit of suspension of sentence.
>
> (2) If at the time of the commission of the offense the offender is under the jurisdiction and legal custody of the Department of Public Safety and Corrections, or is being detained in any jail, prison, correctional facility, juvenile institution, temporary holding center, halfway house, or detention facility, the offender shall be fined not more than one thousand dollars and imprisoned with or without hard labor without benefit of parole, probation, or suspension of sentence for not less than one year nor more than five years. Such sentence shall be consecutive to any other sentence imposed for violation of the provisions of any state criminal law. [2]

At the trial, only one witness testified. Officer Brittany Jackson ("Officer Jackson") of the New Orleans Police Department testified that Defendant was detained at the "Youth Study Center" ("the facility"). Officer Jackson recalled she was summoned to the facility on August 9, 2014, around 5:52 p.m. to investigate a

[2]In *State v. Francois*, 06-788, p. 14 (La.App. 3 Cir. 12/13/06), 945 So.2d 865, 874, the court noted one crime was contained in La.R.S. 14:34.5, but there are two possible penalties, depending on the custody of the offender.

complaint by Officer Robert Canon ("Officer Canon") who worked at the facility.[3] Officer Jackson explained that Officer Canon alleged he was investigating an altercation at the detention center when Defendant approached him. Officer Canon told Defendant to get back. Defendant belligerently retorted he ran the place and pushed Officer Canon. Defendant was arrested the same day by Officer Jackson for the charge of simple battery of a correctional facility employee.

At the conclusion of the bench trial, Defendant's attorney requested the district court find Defendant guilty of the lesser included offense, the misdemeanor. The district court questioned whether the attorney was referring to an attempt charge. Defendant's attorney responded, "Just like an attempt. [sic] Or [sic] the evidence can be legally sufficient to submit to the jury the charge of second-degree murder, and the jury could come back with manslaughter, even though the evidence is legally sufficient." The State reurged the charge was battery of a correction officer in a facility (La.R.S. 14:34.5). The district court found Defendant guilty "as charged." Defendant waived sentencing delays. The district court noted, on the record, that Defendant had been in jail since August 9, and sentenced Defendant to ninety days, credit for time served. The State, citing section (B)(2) of La.R.S. 14:34.5, argued that the sentence was illegally lenient, and Defendant's attorney urged the lesser included offense made more sense. The district court stated, "[D]ue to the additional deliberations, [it] finds the defendant guilty of attempt [14:]34.5," and it imposed a sentence of ninety days in the parish prison, consecutive with any other sentence Defendant was serving with credit for time served. The district court concluded the proceeding by stating, "Both sides

[3]The bill of information spells the victim's name "Cannon," but the transcript of trial spells it "Canon."

won. The State got a felony, and you got no extra time. Another Solomon decision."

ERRORS PATENT/ASSIGNED ERROR NO. 1:

This Court routinely reviews the record on appeal for errors patent. *State v. Lewis*, 15-0773, p. 9 (La.App. 4 Cir. 2/3/16), 187 So.3d 24, 29. A review of the record reveals there is an error patent regarding the verdict, which is assignment of error number one.[4]

Attempted Battery Of A Correctional Facility Employee Is Not Designated As A Crime In Louisiana.

Attempted battery of a correctional facility officer is a non-crime under Louisiana Law.[5] In *State v. Lambert*, 14-1138, p. 6 (La.App. 4 Cir. 2/25/15), 160 So.3d 1097, 1101, this court held convictions rendered for *attempts* to commit various degrees of battery are "non-crimes" in Louisiana whether the defendant pled guilty or was convicted. Although the State argues this particular crime, attempted battery of a correctional facility employee, is distinguishable from the other attempted battery crimes, the jurisprudence supports otherwise.

In *State v. Mayeux*, 498 So.2d 701, 702–04 (La. 1986) (hereinafter referred to as "*Mayeux I"*), the court recognized, as an error patent, the conviction of attempted aggravated battery was an unresponsive verdict and not specifically

[4]There is an error patent regarding the legality of the sentence imposed. *See* La.R.S. 14:34.5; La.Code Crim.P. art. 882(A); *State v. Gibson*, 16-0132, pp. 8-9 (La.App. 4 Cir. 3/16/16), 192 So.3d 132, 137-38. However, because the error concerning the verdict requires the conviction and sentence to be vacated, the error patent regarding the sentence is rendered moot and the discussion is pretermitted.

[5]The State alleges Defendant waived this issue when it requested, during closing arguments, the district court to impose a lesser included offense, specifically, attempt, which Defendant received. However, the conviction of a non-crime is an error patent which can be recognized by the appellate court on its own.

designated as a crime in Louisiana. Since *Mayeux I*, this Court has held, an attempted battery is not specifically designated as a crime in Louisiana. In *State v. Nazar*, 96-0175, p. 2 (La.App. 4 Cir. 5/22/96), 675 So.2d 780, 781, this court found the conviction of attempted simple battery was a non-crime. In *State v. Lewis*, 15-0773, p. 19 (La.App. 4 Cir. 2/3/16), 187 So.3d 24, 34-35, this court held the conviction of attempted misdemeanor battery of a police officer was a non-crime.[6] In *State v. Arita*, 01-1512, p. 4 (La.App. 4 Cir. 2/27/02), 811 So.2d 1146, 1149, this court found that attempted second degree battery is not a recognized crime in Louisiana.

In *State v. Johnson,* 01-0006, p. 5 (La. 5/31/02), 823 So.2d 917, 921, the Supreme Court, considered the possible responsive verdicts for a charge of battery on a police officer including while the offender was in the custody of a correctional facility, a violation of La.R.S. 14:34.2.[7] The crime at issue, La.R.S. 14:34.5, is very

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[6]In *Lewis*, 187 So.3d 24, this court converted the defendant's appeal for the conviction for attempted battery to an application for supervisory writ since it was a misdemeanor.

[7]Louisiana Revised Statute 14:34.2 provides in part:

A. (1) Battery of a police officer is a battery committed without the consent of the victim when the offender has reasonable grounds to believe the victim is a police officer acting in the performance of his duty.

(2) For purposes of this Section, "police officer" shall include commissioned police officers, sheriffs, deputy sheriffs, marshals, deputy marshals, correctional officers, federal law enforcement officers, constables, wildlife enforcement agents, state park wardens, and probation and parole officers.

* * *

B. (1) Whoever commits the crime of battery of a police officer shall be fined not more than five hundred dollars and imprisoned not less than fifteen days nor more than six months without benefit of suspension of sentence.

(2) If at the time of the commission of the offense the offender is under the jurisdiction and legal custody of the Department of Public Safety and Corrections, or is being detained in any jail, prison, correctional facility, juvenile institution, temporary holding center, halfway house, or detention facility, the offender shall be fined not more than one thousand dollars and imprisoned with or without hard labor without benefit of parole, probation, or suspension of sentence for not less than one year nor more than five years. Such sentence shall be consecutive to any other sentence imposed for violation of the provisions of any state criminal law. . . .

similar to La.R.S. 14:34.2, except La.R.S. 14:34.5 encompasses any employee in a correctional facility. The *Johnson* court set forth the valid responsive verdicts for battery of a police officer (La.R.S. 14:34.2), which are instructional in reviewing this error: 1) Guilty as charged (battery on a police officer when the offender is in the custody of a correctional facility) (felony grade); (2) Guilty of battery on a police officer (misdemeanor grade); (3) Guilty of simple battery (misdemeanor) and (4) Not guilty. *Johnson*, 823 So.2d at 920. The court explained, "[D]espite the broad language of La.R.S. 14:27(C), that attempt 'is a separate but lesser grade of the intended crime,' attempted battery is not a proper responsive verdict to a charged offense of battery because it is not a separate offense in Louisiana." *Johnson,* 823 So.2d at 921 (*quoting Mayeux I*, 498 So.2d at 703).

Based upon Louisiana's jurisprudence, we find attempted battery of a correctional facility employee is a non-crime, and the trial court erred in imposing a sentence on a non-existent crime.

In its brief to this court, the State questions the authority of the district court to enter a verdict to a non-existent crime after finding Defendant guilty as charged. It urges the original verdict should stand.[8] As noted above, the trial court, after further deliberations, entered a conviction of attempted battery of a correctional facility employee. The State failed to object and did not raise this issue in the district court. Failure to timely object at the district court level is fatal to the State's assertions, and we will not consider the State's argument. La.Code Crim.P.

[8]The State also asserts the matter should be remanded to the trial court for clarification of the verdict. However, the record before this court indicates there was no ambiguity in the verdict.

art. 841; *State v. Vernon*, 16-0692, p. 8 (La.App. 4 Cir. 12/21/16), 207 So.3d 525, 529, *writ denied*, 17-0137 (La. 9/22/17) ___So.3d___. [9]

The Conviction Of Attempted Battery Of A Correctional Facility Employee Is A Nullity.

In *Mayeux I,* the court held, "[W]e find the verdict [guilty of attempted aggravated battery] to be wholly invalid and without legal effect to convict or acquit the defendant of aggravated battery or of lesser included responsive offense." *Mayeux I,* 498 So.2d at 704; *See also*, *Arita*, 811 So.2d at 1150, and *Nazar*, 675 So.2d at 783. Following *Mayeux I*, the remedy imposed by this Court, when the trier of fact imposes a non-existent crime, is to find the conviction a nullity, to find that double jeopardy does not attach, to vacate the sentence, and to remand the matter to the trial court for a retrial.

Defendant concedes the *Mayeux I* court held that when a trier of fact renders a verdict which is a non-crime under Louisiana law, the verdict does not operate as a conviction or acquittal. Nevertheless, Defendant erroneously maintains this Court should exercise its discretion and enter an acquittal citing *Mayeux v. Belt*, 737 F.Supp. 957 (W.D. La. 1990) (hereinafter referred to as "*Mayeux II*"), and *State v. Hurst*, 10-1204 (La.App. 3 Cir. 4/13/11), 62 So.3d 327.

In *Mayeux II,* defendant sought habeas corpus relief after the Louisiana Supreme Court held defendant was convicted of a non-crime, attempted aggravated battery, and the conviction was a nullity and remanded the matter for retrial.

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[9] In *State v. Carter*, 13-0074 (La.App. 4 Cir. 12/11/13), 131 So.3d 153, this Court noted, on error patent review, it was reviewing an assigned error which challenged the trial court's authority to direct the jury to clarify the verdict which is distinguishable from the present case. Additionally, in other reported cases, an error challenging the trial court's authority to change, modify, or clarify the verdict was raised in the trial court and reviewed on appeal as an assigned error. *See Nazar*, 675 So.2d 780 and *State v. Reed*, 315 So.2d 703 (La. 1975).

Mayeux II, 737 F.Supp at 961. The *Mayeux II* court held the retrial of the charge of aggravated battery was prohibited under the Double Jeopardy Clause. *Id*. at 960-61.

In *Hurst*, 62 So.3d 327, following a bench trial on one of the charges, the defendant was found guilty of attempted aggravated battery. On appeal, the third circuit, on error patent review, recognized that attempted aggravated battery was a non-crime. *Hurst,* 62 So.3d at 332. However, rather than following the Supreme Court's ruling in *Mayeux I*, the court entered an acquittal on the charge of aggravated battery. The court explained this was consistent with the federal district court's holding in *Mayeux II.* The third circuit noted it would prefer to follow the ruling in *Mayeux I,* but "refuse[d] to waste the limited judicial resources of this state in vain and futile acts." *Hurst*, 62 So.3d at 332 (*quoting State v. Campbell*, 94-1268 (La.App. 3 Cir. 5/3/95), 657 So.2d 152, 156, *aff'd in part, vacated in part*, 95-1409 (La. 3/22/96), 670 So.2d 1212.)

In *State v. Norman*, 03-248 (La.App. 5 Cir. 5/28/03), 848 So.2d 91, the court discussed *Mayeux I*, and whether a retrial should be permitted. In its discussion, the *Norman* court also cited to jurisprudence from this Court allowing retrials:

> Despite the federal court's ruling in *Mayeux v. Belt,* the appellate courts of this state have continued to follow the ruling of the Louisiana Supreme Court in *State v. Mayeux.* As noted by the Fourth Circuit in *State v. Nazar,* 96–0175 (La.App. 4 Cir. 5/22/96), 675 So.2d 780, 783:
>
> > [A]lthough this Court finds the reasoning of the federal district court in *Mayeux v. Belt,* 737 F.Supp. at 957, persuasive, we follow *State v. Mayeux,* 498 So.2d at 701, which holds that the verdict of guilty of a non-crime cannot serve as an acquittal or a conviction for double jeopardy purposes.
>
> *See also State v. Arita,* 01–1512 (La.App. 4 Cir. 2/27/02), 811 So.2d 1146; *State v. Norman,* 34,868 (La.App. 2 Cir. 10/31/01), 799 So.2d

619; and *State v. Walker,* 00–1028 (La.App. 3 Cir. 1/1/01), 778 So.2d 1192, *writ denied,* 01–0546 (La.2/1/02), 808 So.2d 336.

Norman, 848 So.2d at 94 (footnote omitted).

Although *Mayeux II* is persuasive, as we expressed in *Nazar*, we are constrained by the ruling in *Mayeux I*.[10] Therefore, in light of this Court's jurisprudence and *Mayeux I*, we find the conviction and sentence are invalid; thus, Defendant's conviction and sentence are vacated.

ASSIGNMENT OF ERROR NO. 3:

Defendant asserts the State presented insufficient evidence to support his conviction. In *State v. Serigne,* 14-0379, pp. 17-18 (La.App. 4 Cir. 5/2/16), 193 So.3d 297, 311, *writ granted,* 16-1034 (La. 5/26/17), 221 So.3d 78, this court held "[A] review for the sufficiency of the evidence cannot be undertaken in a case where no valid verdict has been rendered. . . ."[11] Since Defendant's conviction is invalid, Defendant's challenge to the sufficiency of the evidence is rendered moot and any discussion pretermitted.

DECREE

Defendant's conviction and sentence for attempted battery of a correctional facility employee are vacated, and the matter is remanded for further proceedings.

CONVICTION AND SENTENCE VACATED; REMANDED

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[10]In *State v. Graham*, 14-1801, p. 10 (La. 10/14/15), 180 So.3d 271, 278, the court, in *dicta*, mentioned whether *Mayeux I* was still viable in light of *Mayeux II*, and noted *Mayeux I* was distinguishable in that the conviction involved a non-crime. *See also, State v. Campbell,* 95-1409, p. 4 (La. 3/22/96), 670 So.2d 1212,1213-14. However, *Mayeux I* is still the controlling law in Louisiana.

[11]This case is still pending in the Supreme Court. However, the principle of law which is cited is based generally on *State v. Hearold,* 603 So.2d 731, 734 (La. 1992) and should not be affected by the outcome. *Serigne*, 193 So.3d at 311.