STATE OF LOUISIANA	*	**NO. 2018-KA-0506**
VERSUS	*	
		COURT OF APPEAL
MICHAEL BAUGH	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 526-729, SECTION "1"
Honorable Camille Buras, Judge
* * * * * *
Judge Roland L. Belsome
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Regina Bartholomew-Woods)

LOBRANO, J., DISSENTS AND ASSIGNS REASONS

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AFFIRMED
DECEMBER 19, 2018

The defendant, Michael Baugh, was charged by bill of information with one count of battery of a police officer with injury that requires medical attention, in violation of La. R.S. 14:34.2(B)(3), and one count of first offense possession of marijuana, in violation of La. R.S. 40:966(E)(1). The matter proceeded to jury trial for the battery charge in July of 2017. The bench trial for Defendant's marijuana charge ran concurrently with the jury trial. On July 12, 2017, the jury returned with the responsive verdict of simple assault. [1]

Thereafter, the defendant filed a motion for post-verdict judgment of acquittal and motion for new trial. On December 1, 2017, the trial court granted the defendant's motion for post-verdict judgment of acquittal, finding that the evidence adduced at trial was not sufficient to support the verdict of simple assault and vacated the verdict.[2] The State appealed.

Discussion

In this case, the defendant was charged with battery of a police officer with injury that requires medical attention, and the jury returned a verdict of simple

[1] This appeal only pertains to the violation of La. R.S. 14:34.2(B)(3).
[2] Although not pertinent to the issue framed in this opinion, a full recitation of the facts of this case can be found at *State v. Baugh*, 2016-1201 (La. App. 4 Cir 1/18/17), 229 So.3d 520.

assault.[3] Returning a verdict of a lesser crime is well within the jury's authority if that lesser crime is deemed a responsive verdict. However, recent Supreme Court jurisprudence suggests that the jury's return of an unauthorized responsive verdict, even in the absence of an objection, constitutes an error patent, which is tantamount to an acquittal. *State v. Price*, 2017-0520 (La. 6/27/18), 250 So.3d 230 (finding that the verdicts of guilty of simple kidnapping, which were not responsive to charges of second-degree kidnapping, constituted implicit acquittal on charges for second-degree kidnapping, thus warranting reversal of convictions and post-verdict judgment of acquittal on charges)*; State v. Campbell,* 95-1409, p. 3 (La. 3/22/96), 670 So.2d 1212, 1213 ("Relators acquiesced in the list of responsive verdicts given jurors by the trial judge but the return of the unresponsive verdicts of attempted jury tampering constitutes an error patent on the face of the record and requires reversal of relators' convictions."); *State v. Mayeux,* 498 So.2d 701, 702 (La. 1986) ("non-responsive verdict [is] error patent on the face of the record and therefore reviewable on appeal despite the absence of an objection during trial."); *State v. Jones*, 2013-1118, p. 6 (La. App. 4 Cir. 1/30/14), 156 So. 3d 126, 129 ("a non-responsive verdict is a patent error which does not require a contemporaneous objection," citing La. C.Cr.P. art. 920(2)).

In accordance with the jurisprudence, this Court must determine if simple assault was a responsive verdict to battery of a police officer with injury that requires medical attention. La. C.Cr.P. art. 814 provides the particular responsive

[3] La. R.S. 14:38.

verdicts for charged offenses. The offense charged in this case does not appear in the statute.[4] Thus, this Court applies the precepts of La. C.Cr.P. art. 815.[5]

La. C.Cr.P. art. 815 requires that simple assault be a lesser and included offense of battery of a police officer with injury before a verdict of guilty of the former can be responsive to a charge of the latter. Lesser and included offenses are those in which all of the essential elements of the lesser offense are also essential elements of the greater offense charged.[6] Battery "is a crime of general intent, meaning that the State need only prove the offender must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act."[7] However, an attempted battery, one of the definitions of assault, requires specific intent.[8] That being the case, the lesser offense of assault possesses an element (specific intent) that the greater offense (battery of a police officer) does not. The other way to commit an assault also contains an element (the intentional placing of another in reasonable apprehension of receiving a battery) that the underlying crime of battery does not. Considering those factors, assault would not constitute a valid responsive verdict.

Further, in *State v. Johnson*, the Louisiana Supreme Court considered the possible responsive verdicts to a similar crime, battery of a police officer while the

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[4] Notably, all of the battery offenses that are listed in the article do not include assault as responsive. La. C.Cr.P. art. 814(A)(18), (20), (21), (24).

[5] La. C.Cr.P. art. 815 provides:

> In all cases not provided for in Article 814, the following verdicts are responsive:
> (1) Guilty;
>
> (2) Guilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense a misdemeanor; or
>
> (3) Not Guilty.

[6] *State v. Porter*, 93–1106, pp. 4–9 (La.7/5/94), 639 So.2d 1137, 1140–1142; *State v. Dufore*, 424 So.2d 256, 258 (La.1982); *State ex rel. Elaire v. Blackburn*, 424 So.2d 246, 248 (La.1982).

[7] *State v. Wix*, 2002-1493, p. 9 (La. App. 4 Cir. 1/15/03), 838 So. 2d 41, 47.

[8] *See* R.S. 14:27(A).

offender is the custody of a correctional facility[9], and found that valid verdicts in prosecution were:

> (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)
>
> (4) Not guilty.[10]

The *Johnson* Court did not include simple assault as a responsive verdict.

This Court finds that the verdict returned by the jury was nonresponsive to the charged offense. As such, the verdict amounted to an acquittal of the crime charged. Although this Court's reasons differ from that of the trial court, the trial court's post-verdict judgment of acquittal is affirmed.

AFFIRMED

[9] La. R.S. 14:34.2(B)(2).
[10] 2001-0006, p.5 (La. 5/31/02), 823 So. 2d 917, 921.