

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0302

STATE OF LOUISIANA

VERSUS

BENJY NEWMAN WELCH

Judgment Rendered: September 10, 2010.

On Appeal from the
23rd Judicial District Court,
in and for the Parish of Ascension
State of Louisiana
District Court No. 19836

The Honorable Jane Trich-Milazzo, Judge Presiding

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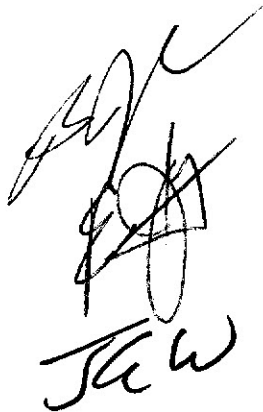
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Benjy Newman Welch

Benjy Newman Welch
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Appearing Pro Se

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.



CARTER, C.J.

The defendant, Benjy Newman Welch, was charged by bill of information with aggravated battery, a violation of La. R.S. 14:34 (count one).¹ The defendant also was charged with possession of a Schedule II controlled dangerous substance, cocaine, a violation of La. R.S. 40:967C (count two). See La. R.S. 40:964A(4). The defendant entered a plea of not guilty on both counts. After a trial by jury, the defendant was found guilty as charged on both counts. On count one, the defendant was sentenced to ten years imprisonment at hard labor. On count two, the defendant was sentenced to five years imprisonment at hard labor. The trial court ordered that the sentences be served concurrently.

The defendant appeals, assigning as error the sufficiency of the evidence as to count one. In a supplemental pro-se brief, the defendant challenges the legality of the amendment of the bill of information. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On or about February 15, 2006, Detectives Craig Beaman and Will Rheams of the Ascension Parish Sheriff's Office Narcotics Division, conducted surveillance on street-level dealers in Ascension Parish. The detectives travelled in an unmarked unit and were wearing street clothes. The detectives observed a white Chevrolet Blazer as it travelled through the intersection of La. Highway 73 and Stevenson Road and turned left onto La. Highway 73 without stopping at the stop sign. As the detectives summoned

¹ Initially, the defendant was charged with attempted first degree murder on count one. The bill of information was later amended.

a marked unit to the area to conduct a traffic stop, the vehicle turned into the parking lot of Geismar Grocery Store, located approximately 1,000 yards from Stevenson Road. The detectives followed the vehicle, and after it came to a stop, Detective Beaman exited his vehicle and approached the driver's side. The defendant was driving, and he had one passenger, Niles Wilson.

Detective Beaman showed the defendant the badge hanging around his neck, informed him that he was with the Sheriff's Office, and asked him to step out of his vehicle. Despite several requests to exit his vehicle, the defendant was noncompliant, and Detective Beaman opened the driver's door. The defendant accelerated the vehicle, and the vehicle's frame hit Detective Beaman's legs, knocking him back. As he was falling back, Detective Beaman held onto the driver's door and pulled himself onto the door frame. The vehicle was sliding around the gravel parking lot. As Detective Beaman reached into the vehicle and grabbed the steering wheel, the defendant began striking him with his hand and kicking him. The vehicle continued to slide back and forth. Detective Beaman grabbed the gearshift and threw the vehicle into park. The defendant hit and kicked Detective Beaman, placed the vehicle back in drive, and accelerated. Detective Beaman and the defendant continued to tussle over the gearshift until Detective Beaman regained control and held the vehicle in park.

Once the vehicle came to a complete stop, Detective Beaman pulled the defendant out of the vehicle and threw him on the ground. The defendant continued to resist and, ultimately, was handcuffed. During a search of the defendant, Detective Beaman recovered from the defendant's shirt pocket one piece of a rock-like substance, later determined to be

cocaine. Detective Beaman also recovered a crack pipe from the driver's seat of the vehicle.

COUNSELED ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that the testimony presented during the trial indicates that he did not use the automobile in a manner calculated to cause grave bodily harm to Detective Beaman. The defendant argues that the evidence alternatively shows that he was frightened when Detective Beaman approached his vehicle and was simply trying to escape. The defendant notes that he and Wilson were in an isolated part of a high-crime area and that Detective Beaman was dressed in plain clothes and using an unmarked vehicle. The defendant contends that Detective Beaman's attempt to identify himself as an officer was not convincing. The defendant argues that his own actions were reasonable under the circumstances. The defendant contends that Detective Beaman accidentally was hit by the frame of his vehicle, asserting that he did not know that Detective Beaman would hang onto the vehicle once he accelerated. The defendant argues that it is likely that the vehicle would not have gone into a dangerous spin if Detective Beaman had not grabbed the steering wheel. The defendant further argues that the State failed to prove that he adverted to the prescribed criminal consequences as reasonably certain to result from his actions. Finally, the defendant contends that he did not possess the general intent to use force or violence against Detective Beaman.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the

United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting La. Code Crim. P. art. 821B, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proven beyond a reasonable doubt. See State v. Brown, 03-0897 (La. 4/12/05), 907 So.2d 1, 18, cert. denied, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006). When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 02-1492 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

An appellate court is constitutionally precluded from acting as a “thirteenth juror” in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **State v. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **Azema**, 633 So.2d at 727. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v.**

Richardson, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **Richardson**, 459 So.2d at 38.

Aggravated battery is defined by La. R.S. 14:34 as “a battery committed with a dangerous weapon.” Pursuant to La. R.S. 14:2(3), a dangerous weapon “includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm.” The dangerousness of an instrumentality because of its use is a factual question for the jury to decide for purposes of a conviction of aggravated battery. **State v. Odom**, 03-1772 (La. App. 1 Cir. 4/2/04), 878 So.2d 582, 589, writ denied, 04-1105 (La. 10/8/04), 883 So.2d 1026. An automobile can constitute a dangerous weapon if used in a manner likely to cause death or great bodily harm. **State v. Trahan**, 416 So.2d 65, 68 (La. 1982). Aggravated battery requires neither the infliction of serious bodily harm nor the intent to inflict serious injury. **State v. Brown**, 00-1951 (La. App. 1 Cir. 5/11/01), 808 So.2d 622, 623-624. Instead, the requisite intent element is general criminal intent. **Brown**, 808 So.2d at 624. In accordance with La. R.S. 14:10(2), general criminal intent exists “whenever there is specific intent, and also when the circumstances indicate that the offender, 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.”

Herein, the encounter between the defendant and the detectives took place during nighttime hours in an area described as a high drug-crime area, and the detectives were investigating complaints of drug activity. The unmarked unit driven by the detectives was a gray Ford F-150 pickup truck. According to Detective Beaman's testimony, the detectives were following police policy in summoning a marked unit to conduct a traffic stop. However, the defendant stopped the vehicle on his own accord after the traffic violation and parked in a well-lit nearby parking lot of a closed store. Detective Beaman was wearing blue jeans and a T-shirt when he approached the defendant's vehicle and immediately identified himself as being with the sheriff's office, brandishing his badge. At the time, the driver's door was closed, and the window was up. While Detective Beaman did not draw his weapon, it was visibly located in a holster on his hip. Detective Beaman testified that after the incident his legs were sore and hurting but he did not require hospitalization or medical treatment, adding that he was "just shook up from being drug through the parking lot."

Niles, the passenger in defendant's vehicle, testified that he stated, "It's a police officer," after Detective Beaman approached the vehicle showing his badge. Niles further testified that he tried to convince the defendant to follow the officer's requests and stop the vehicle. The defendant did not testify or present any witnesses.

When the defendant continuously accelerated the vehicle as Detective Beaman held onto the opened driver's door, he must have realized that serious consequences were reasonably certain. Thus, general criminal intent, the intent required for aggravated battery, was present. The evidence

establishes physical contact between the detective and the Blazer. The automobile was used in a manner likely to cause death or great bodily harm. A rational juror could have concluded that all of this evidence together, viewed most favorably to the State, proved beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence that the essential elements of an aggravated battery were proven. We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660. This counseled assignment of error lacks merit.

PRO-SE ASSIGNMENTS OF ERROR

In pro-se assignment of error number one, the defendant argues that a literal or constructive amendment substantively altered the charging terms of the "bill of indictment" after it was returned a true bill by a grand jury, contrary to the law. In the second pro-se assignment of error, the defendant similarly argues that the "bill of indictment or bill of information" was substantively amended after the commencement of trial, contrary to the law. In a combined argument in support of the assignments of error, the defendant notes that aggravated battery has its own set of responsive verdicts, separate from the responsive verdicts for attempted first degree murder. The defendant argues the amendment of the charge from attempted first degree murder to aggravated battery violated his right to be tried only for the offense presented in an indictment returned by a grand jury. Citing Federal Rules of Criminal Procedure articles 7(a) and 7(b), the defendant contends that the instant case may be instituted only by grand jury indictment. The defendant further contends that the State was required to

give the defense adequate and timely notice of the intent to amend or file a bill of information, at least seven to ten days prior to the date of trial. The defendant asserts that he did not waive the indictment or consent to the amendment of the indictment or the bill of information.

At the outset, we note that prosecution herein was instituted by bill of information. A grand jury indictment was not required. In his appeal brief, the defendant cites a federal rule that is applicable to criminal procedure in the federal courts. Article 1, § 15 of the Louisiana Constitution, entitled "Initiation of Prosecution," provides in pertinent part as follows: "Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury." Similarly, La. Code Crim. P. art. 382A provides: "A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. Other criminal prosecutions in a district court shall be instituted by indictment or by information." The defendant was not charged with an offense punishable by death or life imprisonment either as originally charged or as provided in the amended bill of information. See La. R.S. 14:34; La. R.S. 40:967C; La. R.S. 14:27D(1); La. R.S. 14:30C. Thus, prosecution was properly instituted by bill of information.

The record reflects that on the day of the trial, after the jury was selected and sworn in, the State requested permission to amend the bill of information on count one from attempted first degree murder to aggravated battery. The trial court granted the request. Once a trial begins, the court

should not allow amendment of an indictment or information with respect to a defect of substance. See La. Code Crim. P. art. 487A. Nevertheless, the defendant did not object to the amendment of the bill of information, nor did he request a continuance to prepare a defense to the amended charge or move for a mistrial. Louisiana Code of Criminal Procedure article 841A provides in pertinent part that “[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.” The defendant’s failure to object to the amendment of the bill of information, or to request a continuance, or to move for a mistrial, precludes relief on this claim. See State v. Johnson, 08-1156 (La. App. 5 Cir. 4/28/09), 9 So.3d 1084, 1092, writ denied, 09-1394 (La. 2/26/10), 28 So.3d 268.

Moreover, the defendant fails to show how the amendment of the charge on count one from attempted first degree murder to aggravated battery, significantly lowering his sentencing exposure, based on the same set of facts and evidence, was prejudicial to his substantial rights. Thus, we find no reversible error in this regard. See La. Code Crim. P. art. 921. The pro se assignments of error lack merit.

CONVICTIONS AND SENTENCES AFFIRMED.