NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

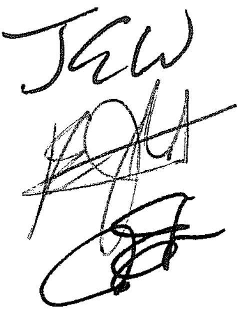
FIRST CIRCUIT

NUMBER 2006 KA 1358

STATE OF LOUISIANA

VERSUS

CARDELL BELL



Judgment Rendered: February 9, 2007

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 02-04-505

Honorable Anthony J. Marabella, Judge

* * * * * * *

Doug Moreau, District Attorney
Dylan C. Alge, Assistant District Attorney
Baton Rouge, LA

Attorneys for
State – Appellee

Benn Hamilton
Baton Rouge, LA

Attorney for
Defendant – Appellant
Cardell Bell

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant, Cardell Bell, was charged by bill of information with attempted second degree murder, a violation of La. R.S. 14:27 and 14:30.1. He pled not guilty. Following a jury trial, the defendant was found guilty of the responsive offense of aggravated battery, a violation of La. R.S. 14:34. He was sentenced to two years imprisonment at hard labor. The defendant filed a motion to reconsider sentence, but subsequently withdrew the motion. The defendant now appeals, designating four assignments of error. We affirm the conviction and sentence.

FACTS

On February 4, 2004, at about 8:30 a.m., the defendant was in his car, a Chevy Impala, in the parking lot of the inspection sticker station on North Foster in Baton Rouge, waiting for the station to open so that he could get an inspection sticker for his car. Moments later, Cedric Hall drove up in his car, a white Ford Taurus, to the inspection sticker station to also get an inspection sticker. Hall and the defendant, at some time in the past, worked together as barbers at Crazy Cuts Barbershop. At some point, both men got out of their cars. After an exchange of words, they engaged in a physical altercation that lasted several minutes. During the fight, they wound up next to the defendant's car. The defendant reached in his car and pulled out a .45 semi-automatic handgun. Hall turned to run. The defendant shot Hall six times. Hall was treated at Baton Rouge General Medical Center and survived his gunshot wounds.

Two eyewitnesses to the fight testified for the prosecution at the trial. Vincent Brassell testified that he was going to work on North Foster when he saw Hall and the defendant "pounding the heck out of each other going back and forth." Brassell testified the defendant was bent back over his car while Hall struck him in

the face. The defendant's jacket[1] was pulled down around his elbows. Obscenities were exchanged, the defendant said "I'm going to kill you," and Hall took off running across the street. According to Brassell, he saw the defendant shoot four times at Hall's back as the defendant chased Hall across the street. When Hall fell to the ground, the defendant stood directly above Hall and shot at him four more times in the back. Brassell indicated that the defendant's gun was hidden from view because the defendant's jacket was rolled up in a ball around his gun. Brassell testified that Hall did not show any weapon or make any gesture of going for a weapon when the defendant shot him in the back. Brassell called 911 and gave a taped statement to the police. Kevin Manns testified that he was going to work when he saw two men "tussling." Viewing the fight from the stoplight at North Foster and Fairfields, Manns testified as follows:

> They tussled for a few moments. The light changed, and as I eased into the intersection, one broke away from the other one and ran across the street. The other one took a few steps towards him, and his arms were up in this motion, but they were actually covered. I guess in the tussle a sweat shirt or a flannel jacket, or something, had gotten pulled over his arms so his arms were partially covered, and you could hear shots going off, and then the other gentleman fell.

When asked if he ever saw the person who broke away and ran produce a gun, Manns responded, "No."

Regarding Hall's position when the defendant first fired at Hall, the following colloquy on direct examination took place:

> Q. And did you see the person who got shot do anything after he started running? Did he do anything menacing or pull a weapon, or anything like that?
>
> A. Not that I recall.
>
> Q. Well, you saw him, correct?
>
> A. Yes.
> Q. Okay. Did you see him do anything like that?

[1] The "jacket" referred to was the defendant's black and orange Orioles jersey.

A. No, ma’am.

Q. Okay. What is the only thing you saw him do after he [broke] away from the shooter?

A. He turned once. Some shots were fired at him. He made some moving motions like he was trying to avoid being shot, and then he fell.

Q. And was he running away when the shots first were being fired at him?

A. Yes, ma'am.

Q. So the shooter was shooting at his back; is that correct?

A. Yes, ma'am. The other subject was actually running away from him.

Q. So the shooter was shooting at the victim's back as he ran away, correct, in the direction of his back?

A. I would say in the direction.

Q. That's what I mean, he's not -- the victim is not facing the shooter as he gets shot, is he?

A. No, ma'am.

Q. He's running away --

A. Yes, ma'am.

Q. From the direction of --

A. Yes, ma'am.

Q. The bullets --

A. Yes.

Regarding Hall being shot after he was on the ground, the following colloquy on direct examination took place:

Q. Okay. Did you see him fire any shots at the victim after the victim had fallen?

A. Yes.

Q. You did?

A. Yes.

> Q. Tell us how close he was to the victim as he fired at the victim after the victim had fallen to the ground?
>
> A. Maybe five or six feet. He took a couple of steps toward him. The guy who was shot was laying down. He just took a couple of steps, fired a couple of shots, and then he actually turned and ran back towards his car.

On cross-examination, Manns testified that he did not see the start of the fight. He also stated that he did not hear anything being said.

Wroten Brumfield, a Baton Rouge City police officer, was the first officer on the scene. Officer Brumfield testified that Hall's car door was open when he got there.

Dr. James Crowell, III, an expert in the field of emergency medicine, testified that he saw the victim, Hall, in the emergency room at Baton Rouge General Medical Center following the shooting. He testified that Hall was shot twice in the right lower abdomen, once in the left lower abdomen, twice in his left thigh, twice in his right forearm, and once in his right flank above his buttocks. Dr. Crowell stated that all of the wounds, except for the forearm wound, could have been life-threatening. When asked on direct examination what his opinion was as to whether or not the person inflicting these gunshot wounds had the intent to kill Hall, Dr. Crowell responded, "Absolutely my opinion would be that they were trying to kill him."

On direct examination, Dr. Crowell stated that Hall's wounds were consistent with the scenario described by the prosecutor, wherein Hall was shot while running away from the defendant, fell to the ground, and then shielded himself with his right arm while the defendant shot him while he was on the ground. On cross-examination, Dr. Crowell agreed that the scenario described by the prosecutor of how Hall was shot was just one of dozens of possible scenarios. Dr. Crowell further stated that he had no way of knowing from Hall's wounds what

actually happened at the scene.

Charles O'Malley was another Baton Rouge City police officer who responded to the shooting. Officer O'Malley spotted the defendant in his vehicle and pulled the defendant over. The defendant exited his vehicle and stated that he shot Hall and that he was driving to the police station.[2] At that point, the defendant was **Mirandized**. The defendant then stated that he had shot Hall two or three times. He further stated that he shot Hall because Hall was beating him.[3] When asked where his gun was, the defendant stated that it was in his car. The defendant's injuries consisted of a minor cut above his right eye, and some blood below his nose and on his lips. Ambulance personnel checked out the defendant and then left him in police custody.

Detective George Caldwell of the Baton Rouge City Police Department was the lead investigator of the case. He testified that the defendant was seen by a doctor at Earl K. Long Hospital and released the same day to finish the booking process because he did not have any injuries that necessitated him to stay.

Both Hall’s car and the defendant's car were impounded. Lieutenant Richard Cochran and Detective John Colter, both with the Baton Rouge City Police Department, searched the vehicles. They found the defendant's gun, a .45 Taurus semi-automatic, between the seat and the center console of his Impala. The .45, with a maximum capacity of nine bullets (which would include a bullet in the chamber) had a magazine in it with one live bullet. Another live bullet was in the chamber. It was determined by the State Police Crime Lab that the seven shell

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[2] After the incident with Hall, the defendant placed a 911 call that was received by Dennis Kimball of the Baker City Police. The contents of the recording were not transcribed. Kimball testified at the trial that the first thing the defendant said was, “I got beat up, the boy went to get his gun, but I got mine first.”

[3] Stephen Ashford, who was a homicide detective with the Baton Rouge City Police Department at the time of the shooting, testified that when he arrived at the location where the defendant was pulled over, the defendant was already in the back of a police unit. Officer Ashford, who **Mirandized** the defendant, stated that the defendant told him that “he shot the dude in self-defense because he was kicking his butt.”

casings found at the crime scene came from the defendant's gun. Lieutenant Cochran also seized a gun holster that he found in the street at the crime scene. The officers found Hall's gun, a 9mm Taurus semi-automatic, under the passenger seat in his Taurus. The 9mm had a magazine in it with thirteen live rounds. The chamber was empty. Also found in Hall's car in the driver's side door was a large capacity magazine (which fit Hall's 9mm) containing twenty-five bullets. A cell phone was also found on the front seat of Hall's car.

Patrick Lane, a firearms identification expert with the State Police Crime Lab, was asked on cross-examination, "So in other words, if [the defendant's gun is] wrapped up in a jacket, it's in all likelihood not going to fire?" Lane responded, "I would be surprised that you would get seven rounds off without a jam, yes."

Keith McMorris testified that he worked with Hall at Crazy Cuts Barbershop. On the morning of the shooting, McMorris was on the phone with Hall when he heard arguing and then heard the phone drop. About two minutes later, he heard several gunshots.

Cedric Hall testified that when he arrived at the inspection sticker station, he exited his car. The defendant also exited his car and approached Hall. The defendant said "some words" and, when he made an "attempt like he was going to swing" at Hall, the two men began to fight. Many blows were exchanged. Hall stated that he was "fending for [his] life." Hall "got the best of" the defendant during the fight. At the beginning of the fight, Hall hit the defendant with his cell phone before the phone fell on the ground. The fight ended up by the front of the defendant's car. The defendant said, "all right, all right." Hall let the defendant go, but held on to the defendant's throat with one hand. The defendant opened his car door, stuck his hand under the seat, and grabbed a gun with the holster still on it. Hall turned and ran. At one point while Hall was running, Hall turned and looked back and saw the defendant chasing him with his gun. Hall heard several

gunshots while he was running across the street. Hall then fell because he could not use his leg anymore due to a gunshot wound. While Hall was on the ground, he put his hand up and got shot twice in his arm and twice in his side. Moments later, Hall heard the defendant starting his car.

Hall stated that he had his gun in his car, but he never took it out. He stated that he never had his gun in his hand at any time, and he never threatened to use the gun on the defendant. Hall stated that the passenger door to his (Hall's) car was not open when he got out of his car and that he did not know how it had gotten opened.

Helena Morrison, another eyewitness to the fight, testified for the defense. She did not see the beginning of the fight. She saw a man standing at the back of Hall's car. The defendant was "[g]etting whipped pretty bad." During the fight, it appeared that Hall was beating the defendant with an object in his hand. At some point during the fight, Hall handed the man standing by Hall's car an object, and the man put the object in Hall's vehicle on the passenger side. Following this, the defendant, who was still getting beat by Hall, "just decked" Hall. Hall told the man by his car to get him his "m----- f------" gun. The man by Hall's car did not move or give Hall anything. At this point, the defendant began "getting the best" of Hall. Hall then ran around the back of his vehicle to the driver's side. The defendant went to his vehicle. Frightened, Morrison got in her car and left. She did not witness the shooting. On cross-examination, Morrison stated that she never gave a statement to the police. She also stated she did not recall seeing a jacket pulled down over the defendant's arms.

The defendant testified that while he was parked at the inspection sticker station waiting for it to open, Hall pulled up in his car. Hall parked at an angle on the side of the main street. Hall jumped out, closed the door, and came around to the defendant's driver's door. The defendant got out of his car and asked Hall how

he was doing. Hall began cursing at the defendant. Hall then rushed at the defendant, and the two men began fighting. The defendant ended up on the ground. Hall was choking and "constantly beating" him. The defendant felt something hard hitting him across his eye and forehead. A "guy" approached them and told Hall, "Give me your gun before the police come." Hall handed him the gun and told him to put the gun in the car. The defendant could not see the guy because the defendant had blood in his eye. As the fight continued, the defendant "got the best" of Hall and threw Hall on the front of his (the defendant's) car. Hall told the guy, "Bring me my m----- f------ gun." Hall broke to his car and the defendant broke to his car and grabbed his holstered gun from underneath the driver's seat. The defendant testified at trial, "I feared my life was in danger, and I feared that Cedric was going to kill me that day."

When the defendant grabbed his gun, he "ran on an angle" shooting at Hall. When the defendant was asked on direct examination if he actually saw Hall with a gun in his hand, the defendant responded, "Well, I knowed [*sic*] he had something. I couldn't really see because my face was so beat up. I couldn't really see him." Shortly thereafter on direct examination, the following exchange took place:

> Q. When you ran on that angle, [were] you then at a point where you could see where Cedric was?
>
> A. Well, I seen [*sic*] him at the door of the driver's side.
>
> Q. Do you know if he had been in that car door at that point?
>
> A. I just knew he had his gun.
>
> Q. Did you ever see a gun?
>
> A. Well, at that time I just knew he had it.
>
> Q. Did you see a gun?
>
> A. He had a -- I couldn't see, I couldn't see. My eyes [*sic*] was --
>
> Q. You thought he may have had a gun; is that correct?

A. Yeah, yeah. My eyes, I couldn't see.

On cross-examination, the following exchange took place regarding whether or not the defendant saw a gun in Hall's hand:

Q. Okay.

A. And I ran out. I shot a few times. He broke and ran. When he turned around as in shooting position, I shot several more times, and he was about right along in here, and he fell over.

Q. You said he turned around in a shooting position?

A. Yes, ma'am, as in turned around.

Q. He did?

A. Yes, ma'am.

Q. What did he have in his hand?

A. Well, at that time I could not see. I was shooting. I could not see from my face being, you know, blood, and I couldn't hardly see, ma'am.

The defendant stated he fired a few shots when Hall was at his (Hall's) door. When Hall broke and turned around, the defendant fired a few more shots, and Hall fell. The defendant ran back to his car, called 911, and headed to the police station. The defendant stated that he did not follow Hall across the street while shooting him. He stated that he did not shoot Hall while Hall was down, or stand over Hall when he was down and shoot him. The defendant denied wrapping his gun in his jersey before firing it. On cross-examination, the defendant stated that he did not see the hard object that Hall was hitting him in the head with, but he thought it was a gun.

Hall's gun was swabbed and the swabs were analyzed for DNA at the State Police Crime Lab.[4] The DNA results were inconclusive. It could not be determined whether or not the defendant's skin ever came into contact with Hall's gun.

4 A visual examination of Hall's gun did not indicate the presence of blood.

ASSIGNMENTS OF ERROR NUMBERS 1 AND 2

In his first two assignments of error, the defendant argues the evidence was insufficient to support the conviction of aggravated battery. Specifically, the defendant contends that he shot Hall in self-defense.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this Court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

While the defendant was charged with attempted second degree murder, he was found guilty of aggravated battery. Guilty of aggravated battery is a proper responsive verdict for a charge of attempted second degree murder. La. C.Cr.P. art. 814(A)(4).

Prior to the 2006 amendment, La. R.S. 14:19 provided:

> The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession; provided that the force or violence used must be reasonable and apparently necessary to prevent such offense, and that this article shall not apply where the force or violence results in a homicide.

Louisiana Revised Statutes 14:21 provides:

> A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

Louisiana Revised Statutes 14:33 defines battery to include the intentional use of force or violence upon the person of another. Louisiana Revised Statutes 14:34 defines aggravated battery as a battery committed with a dangerous weapon.

The fact that the defendant shot Hall six times at or near point blank range is not in doubt. The only remaining issue is whether or not the defendant acted in self-defense. In the non-homicide situation, a claim of self-defense requires a dual inquiry: first, an objective inquiry into whether the force used was reasonable under the circumstances, and, second, a subjective inquiry into whether the force used was apparently necessary. **State v. Pizzalato**, 93-1415, p. 3 (La. App. 1st Cir. 10/7/94), 644 So.2d 712, 714, writ denied, 94-2755 (La. 3/10/95), 650 So.2d 1174.

In a homicide case, the State must prove, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. **State v. Spears**, 504 So.2d 974, 978 (La. App. 1st Cir.), writ denied, 507 So.2d 225 (La. 1987). However, Louisiana law is unclear as to who has the burden of proving self-defense in a non-homicide case, and what the burden is.[5] **State v. Barnes**, 590 So.2d 1298, 1300 (La. App. 1st Cir. 1991). In previous cases dealing with this issue, this court has analyzed the evidence under both standards of review, that is whether the defendant proved self-defense by a preponderance of the evidence or whether the state proved beyond a reasonable doubt that the defendant did not act in self-defense. In this case, we need not and do not decide the issue of who has the burden of proving (or disproving) self-defense because under either standard the evidence sufficiently

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[5] In **State v. Freeman**, 427 So.2d 1161, 1162-1163 (La. 1983), the Louisiana Supreme Court, without resolving the issue, suggested that the defendant in a non-homicide case may have the burden of proving self-defense by a preponderance of the evidence. See **Barnes**, 590 So.2d at 1300-1301.

established that the defendant did not act in self-defense. See **Pizzalato**, 93-1415 at p. 4, 644 So.2d at 714.

The evidence reflects two conflicting versions of the incident, which occurred between Hall and the defendant. Hall claimed that when he saw the defendant grab a gun, Hall turned and ran. Hall claimed that he, at no time, had a gun in his hand when he was fighting with the defendant, and Hall did not threaten to use his gun that he had in his car on the defendant. The defendant, on the other hand, claimed that he shot Hall in self-defense because Hall had gone back to his car to retrieve his gun to shoot the defendant.

In finding the defendant guilty of aggravated battery, it is clear the jury accepted the State's witnesses' version of the events and rejected the claim of self-defense, concluding that the scenario of self-defense, as suggested by the defendant, was not reasonable. Given the number of gunshot wounds and the manner in which the defendant shot Hall -- while he was running away and, moments later, while he was laying on the ground already wounded -- the jury could have concluded that the force used by the defendant against Hall was neither reasonable nor necessary to prevent further attack, particularly since Hall was unarmed. See **State v. Wilson**, 613 So.2d 234, 238-239 (La. App. 1st Cir. 1992), writ denied, 93-0533 (La. 3/25/94), 635 So.2d 238.

Even assuming that Hall was initially the aggressor, it was unreasonable for the defendant to respond with deadly force. See **State v. Taylor**, 97-2261, p. 6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. Once the defendant grabbed his gun, Hall attempted to withdraw from the conflict. When the defendant chased down Hall and shot him six times, the defendant abandoned the role of defender, and took on the role of aggressor and, as such, was not entitled to claim self-defense. See La. R.S. 14:21; **State v. Tran**, 98-2812, p. 21 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1291, writ denied, 99-3380 (La. 5/26/00), 762 So.2d

1101. Instead of chasing and shooting Hall while he was running away, and again shooting Hall while he was on the ground, the defendant simply could have withdrawn from the confrontation and left. Although there is no unqualified duty to retreat, the possibility of escape is a recognized factor in determining whether or not the defendant had a reasonable belief that deadly force was necessary to avoid danger. **State v. Loston**, 2003-0977, p. 10 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 204, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167. See **State v. Henderson**, 99-1945, p. 8 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 754, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **Taylor**, 97-2261 at p. 5, 721 So.2d at 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **Taylor**, 97-2261 at p. 6, 721 So.2d at 932. A determination of the weight of the evidence is a question of fact. This court has no appellate jurisdiction to review questions of fact in criminal cases. La. Const. art. V, § 10(B). See **Spears**, 504 So.2d at 978.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that, in shooting Hall multiple times when Hall was retreating and then

laying wounded on the ground, the defendant did not shoot Hall in self-defense and, as such, was guilty of aggravated battery.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In his third assignment of error, the defendant argues that under La. C.Cr.P. art. 814, the jury's verdict is "contradictory and confusing." Specifically, the defendant contends that aggravated battery should not have simply been inserted as a responsive verdict where none of the elements of the charged offense had been proven. The defendant then asserts that the force or violence used against Hall was permissible.

That the force used by the defendant against Hall did not constitute self-defense has already been addressed in the first two assignments of error. As to the remaining portion of the defendant's argument, the assertion is baseless.[6] The evidence herein clearly supports the conviction of the responsive verdict of aggravated battery. To reach this verdict, the jury had to find that the defendant intentionally used force or violence upon Hall and used a dangerous weapon, the defendant's gun.[7] General criminal intent, the intent required for aggravated battery, was also present. La. R.S. 14:10(2). Given the fact that the defendant shot Hall six times at or near point blank range, a reasonable trier of fact could have concluded beyond a reasonable doubt that the essential elements of an aggravated battery were proven. See **State v. Clark**, 589 So.2d 549, 552 (La. App. 1st Cir.

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6 Upon motion of the State or the defense, the trial court, in its discretion, may exclude a listed responsive verdict, if, after all the evidence has been submitted, there is no evidence to establish that responsive verdict. La. C.Cr.P. art. 814(C). See **State v. Clark**, 589 So.2d 549, 552 (La. App. 1st Cir. 1991), writ denied, 592 So.2d 1333 (La. 1992). Thus, the defendant's assertion that aggravated battery should have been excluded as a responsive verdict because there was no evidence to establish the *charged offense* of attempted second degree murder is a misstatement or misunderstanding of the applicable law. We also note that the record is devoid of any motion filed or objection made by the defendant regarding the issue of the responsive verdict list.

7 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. La. R.S. 14:2(3).

1991), writ denied, 592 So.2d 1333 (La. 1992).

Moreover, a rational trier of fact, viewing all of the evidence as favorable to the prosecution as any rational factfinder can, could have concluded that the State proved beyond a reasonable doubt that the charged offense of attempted second degree murder was proved and that the defendant did not shoot Hall in self-defense. Therefore, the responsive verdict of aggravated battery was proper. See **State v. Jones**, 598 So.2d 511, 514-515 (La. App. 1st Cir. 1992). See also **State ex rel. Elaire v. Blackburn**, 424 So.2d 246 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983).

ASSIGNMENT OF ERROR NUMBER 4

In his fourth assignment of error, the defendant argues that his sentence was excessive.

The defendant timely filed a motion to reconsider sentence. In response, the State filed an answer to the defendant's motion, arguing that the two-year sentence was "grossly lenient" and that the court should impose a sentence of ten years. A hearing was scheduled for argument on the motions. However, at that hearing, the defendant withdrew his motion to reconsider sentence. Thus, the defendant is precluded from contesting his sentence on appeal. There is nothing before us to review.

This assignment of error is without merit.

CONCLUSION

For the above and foregoing reasons, the defendant's conviction and sentence are hereby affirmed.

CONVICTION AND SENTENCE AFFIRMED.