NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 2163

STATE OF LOUISIANA

VERSUS

KELTON B. TORREGANO

Judgment Rendered: May 6, 2011

* * * * * * * * * *

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 464575 "F"

Honorable Martin E. Coady, Judge Presiding

* * * * * * * * * *

Walter P. Reed
District Attorney
Covington, Louisiana

Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Mary E. Roper
Louisiana Appellate Project
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Kelton B. Torregano

* * * * * * * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Kelton B. Torregano, was charged by bill of information with forcible rape (count 1), a violation of LSA-R.S. 14:42.1, and second degree battery (count 2), a violation of LSA-R.S. 14:34.1. The defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. For the forcible rape conviction (count 1), the defendant was sentenced to twenty years at hard labor without benefit of parole, probation, or suspension of sentence. For the second degree battery conviction, the defendant was sentenced to five years at hard labor. The sentences were ordered to run concurrently. The State filed a multiple offender bill of information and, following a hearing on the matter, the defendant was adjudicated a second-felony habitual offender. His twenty-year sentence was vacated, and he was resentenced to twenty years at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the provisions of LSA-R.S. 15:529.1. The defendant now appeals, designating two assignments of error. We affirm the convictions, habitual offender adjudication, and sentences.

FACTS

D.L. had been in a three-month relationship with the defendant. They lived together in Slidell in D.L.'s house, still partially gutted from Hurricane Katrina and without electricity. On Thursday, January 8, 2009, D.L. and the defendant got into an argument. The defendant struck D.L. in the eye, face, and back, resulting in bruising and a black eye. The blow to D.L.'s back was to her ribs, which caused her a great deal of pain for several days.

Two days later on Saturday, January 10, the defendant raped D.L. in her house. The defendant straddled D.L., produced a pocket knife, and cut off the T-shirt D.L. was wearing. The defendant turned D.L. over on her stomach and,

despite her protestations, engaged in anal intercourse. Later that day, D.L. went to Northshore Hospital and was treated for her injuries.

The defendant testified at trial. He admitted to striking D.L. several times, including in her ribs. He denied that he raped her, testifying that he and D.L. had consensual "make up sex." The defendant had prior convictions for D.W.I., burglary, stalking, false imprisonment, and aggravated assault, in which he assaulted a police officer with a knife.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the evidence was insufficient to support the second degree battery conviction. Specifically, the defendant contends that D.L. did not suffer serious bodily injury.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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 LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (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, LSA-R.S. 15:438 provides that, in order to convict, the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

At the time of the offense, LSA-R.S. 14:34.1 provided, in pertinent part:

> Second degree battery is a battery committed without the

> consent of the victim when the offender intentionally inflicts serious bodily injury.
>
> For purposes of this article, serious bodily injury means 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.

In order to prove a second degree battery, the State had to prove that the defendant: (1) committed a battery upon another, (2) without his consent, and (3) intentionally inflicted serious bodily injury. **State v. Young**, 2000-1437 (La. 11/28/01), 800 So.2d 847, 852. The defendant disputes that he inflicted serious bodily injury.

Second degree battery is a crime requiring specific criminal intent. **State v. Fuller**, 414 So.2d 306, 310 (La. 1982). Specific 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 failure to act. LSA-R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1st Cir. 1986).

The defendant asserts in his brief that his attack on D.L. did not constitute a second degree battery, but was only a simple battery. The defendant's strikes caused soreness and bruising, but no fractures. She was not put in a cast, and her injuries did not require surgery. Thus, according to the defendant, his battery upon D.L. did not rise to the level of second degree battery.

Under LSA-R.S. 14:34.1, "serious bodily injury" means bodily injury which involves, among other things, "extreme physical pain." The testimony of witnesses

indicated that D.L. was in extreme physical pain after being struck in the ribs by the defendant. For example, during direct examination, the following exchange between the prosecutor and D.L. took place:

> Q. When you talked to the doctor, did they say the x-rays said they were broken or not broken?
>
> A. I don't know exactly how they explained it, the best I understood was they were fractured and some type bruising and other.[1]
>
> Q. That was your understanding?
>
> A. Right.
>
> Q. Now, did that hurt?
>
> A. Very much.
>
> Q. Did you -- what type [of] injuries did you receive during that physical violence at the hands of Mr. Torregano?
>
> A. I had a lot of bruising on my left eye, my cheek and foot was hurt. I was all most [sic] bald-headed on the back of my head. Then the back of my bottom ribs on the right-hand side was extremely painful.
>
> Q. Which was the worst of those things?
>
> A. The ribs.
>
> Q. How long did the ribs hurt?
>
> A. Total amount of time was couple of months. The worst part of it was a few days.
>
> Q. Now, when you describe them as hurting, could you run errands, could you do things?
>
> A. It hurt to breathe.
>
> Q. Describe your response to the injuries?
>
> A. At first I couldn't stand up by myself. It hurt to breathe. I am assuming during an injury like that you collect fluid in your lungs, it was very painful to try to cough and I just couldn't get up and walk by myself for the first day-and-a-half.

On cross-examination, D.L. testified, "I was in so much pain when I got to my daughter's house, I told her I didn't know what to do." Detective James Davis, with the Slidell Police Department, testified at trial that he went to the hospital to speak to D.L. On direct examination, when asked about D.L.'s demeanor when speaking with her, Detective Davis responded, "She just appeared to be beaten down, just weak. She was what appeared to be in a lot of pain. She had trouble

[1] The parties stipulated at trial that, according to D.L.'s medical records, the x-rays of D.L.'s ribs did not show any fractures.

moving in the hospital bed at all. When I went back to take pictures, she had a lot of trouble moving."

The defendant testified at trial that he struck and injured D.L. When asked on direct examination if D.L. could go to the bathroom by herself, the defendant responded, "Not without a lot of pain." On the cross-examination of the defendant, the following exchange took place:

> Q. And how long -- when is the last time you saw [D.L.] before today?
>
> A. Saturday morning before I went to sleep.
>
> Q. At that point in time, was she still in pain from her ribs?
>
> A. Not as much as she was Thursday.
>
> Q. But bad enough you had to carry her to the bathroom after y'all had sex so she could clean up?
>
> A. I walked with her. I had to carry [her] Thursday but I walked with her Saturday morning.
>
> Q. Bad enough that in your statement to the police officers you explained that she had to lay down in the tub and pee because she couldn't sit on the toilet?
>
> A. That was Thursday.
>
> * * * *
>
> Q. You ever hit her that bad before?
>
> A. No, sir.
>
> Q. You don't think you crossed the line when you hit her so bad she thought her ribs were broken?
>
> A. Yes, sir.
>
> Q. And did she express to you she thought her ribs were broken?
>
> A. Yes, sir.
>
> Q. What did you think had happened?
>
> A. I didn't think I broke her rib, but I realize I hit her pretty hard.
>
> * * * *
>
> Q. Was she in a lot of pain?
>
> A. Yes, sir.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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.

The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 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 (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).

The jury's verdict of second degree battery indicates that, after considering the credibility of the witnesses and weighing the evidence, it accepted the testimony of D.L., Detective Davis, and even the defendant, regarding the extent of D.L.'s injuries and the pain she suffered. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Further, the testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). A rational interpretation of the evidence adduced is that the defendant, in striking D.L. in the face and in the ribs, intended to cause her extreme physical pain and that D.L., in fact, suffered extreme physical pain mainly due to the injury to her ribs. See **State v. Odom**, 2003-1772 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 587-88, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026; **State v. Accardo**, 466 So.2d 549, 551-53 (La. App. 5th Cir.), writ denied, 468 So.2d 1204 (La. 1985).

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 the defendant was guilty of second degree battery. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues he was convicted of forcible rape by a ten to two non-unanimous verdict in violation of the United States and Louisiana Constitutions. Specifically, the defendant contends that LSA-C.Cr.P. art. 782(A) violates the Sixth Amendment right to a jury trial since it must be considered in light of the Fourteenth Amendment right to due process of law.

Whoever commits the crime of forcible rape shall be imprisoned at hard labor. See LSA-R.S. 14:42.1(B). Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

The defendant suggests that **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and **Jones v. United States**, 526 U.S. 227, 119 S.Ct.

1215, 143 L.Ed.2d 311 (1999), which emphasize the necessity of a unanimous verdict, "implicitly overrule the prior anomalous holding in **Apodaca**, and must be taken account of by this Court." This argument has been repeatedly rejected by this court. See **State v. Smith**, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 15-16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352; **State v. Caples**, 2005-2517 (La. App. 1st Cir. 6/9/06), 938 So.2d 147, 156-57, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684. Moreover, our supreme court has affirmed the constitutionality of Article 782. See **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738. The **Bertrand** court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. **Bertrand**, 6 So.3d at 743.

Accordingly, this assignment of error is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.