NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 1590

STATE OF LOUISIANA

VERSUS

JOSE M. SANTOS

Judgment Rendered: March 27, 2009

Appealed from the
Twenty-second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 442114

Honorable Larry J. Green, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

The defendant, Jose M. Santos, was charged by bill of information with one count of public intimidation, a violation of LSA-R.S. 14:122. He pled not guilty. Following a jury trial, he was found guilty as charged. The trial court suspended the imposition of sentence and placed him on supervised probation for two years. See LSA-C.Cr.P. art. 893(A). The defendant now appeals, challenging the sufficiency of the evidence. We affirm the conviction and suspended sentence.

FACTS

Causeway Police Department Officer Shannon Guidry testified at trial that on December 25, 2007, while on routine patrol, she received complaints about the defendant's driving. When she initiated a traffic stop of the vehicle the defendant had been driving, the defendant was in the passenger seat.[1] Officer Guidry's vehicle was equipped with video and audio recording equipment. The recording of the events that transpired when Officer Guidry transported the defendant to another location to perform field sobriety tests was played for the jury. During the ten-minute drive, the defendant repeatedly cursed Officer Guidry and threatened to kill her. He told her he knew her and knew where she lived. He threatened, "Just wait." He laughed at her and asked "how long you gonna live?" He repeatedly kicked the division between the front and rear seats of the police car. He also told Officer Guidry he would never forget her face and would kill her when he got out of jail.

Officer Guidry testified the threats were the worst she had heard in her eleven years in law enforcement. She was concerned that the defendant would retaliate against her because he had stated he knew her face and knew where she lived. She

[1]The defendant does not challenge the sufficiency of the evidence that he was operating the vehicle while intoxicated.

indicated, however, that the threats did not prevent her from doing her job. She also indicated that the defendant never specifically asked to be released. She described the defendant's level of intoxication as "extremely intoxicated."

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues the State failed to carry its burden of proof to support the conviction for public intimidation because his threats against Officer Guidry were not made in an "or else" fashion. He also argues that his extremely intoxicated state at the time of the alleged offense precluded the formation of the specific intent required to commit the offense. The State argues that the jurisprudence requiring an "or else" threat is distinguishable, and the defendant should be precluded from raising an intoxication defense because he failed to comply with LSA-C.Cr.P. art. 726(A) and failed to raise the intoxication defense at trial.

The provisions of LSA-C.Cr.P. art. 726(A) require advance notice of intent to use the defense of voluntary intoxication. State v. Quinn, 479 So. 2d 592, 596-97 (La. App. 1st Cir. 1985). The purpose of article 726 and the other discovery rules in the Code of Criminal Procedure is to eliminate unwarranted prejudice which could arise from surprise testimony. State v. Toomer, 395 So. 2d 1320, 1329 (La. 1981). The record herein does not indicate that the defendant complied with LSA-C.Cr.P. art. 726(A). However, the record also indicates that the State failed to object to the following argument by the defense at trial:

> The critical determination here is whether the evidence both direct and circumstantial was sufficient for you to conclude that [the defendant's] threatening comments directed at Officer Guidry were made with the requisite specific intent to influence Officer Guidry's conduct in relation to her position, employment, or duty.
>
> I suggest to you, as I've stated all along today, he was extremely intoxicated according to Officer Guidry's own testimony. That was

> Officer Guidry's conclusion after her investigation which she was trained to conduct and do, she testifies in court. And her conclusion was that he was intoxicated.

Thereafter, the State responded to the defense closing, stating, "Was he angry, was he intoxicated? Yes. Was he so intoxicated he didn't know what he was doing? No." Accordingly, we will address the defendant's argument that intoxication precluded the formation of the specific intent required to commit the offense.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," in order to convict, every reasonable hypothesis of innocence is excluded. State v. Wright, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157 & 2000-0895 (La. 11/17/00), 773 So. 2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. Wright, 98-0601 at p. 3, 730 So. 2d at 487.

As pertinent here, public intimidation is the use of violence, force, or threats

upon any "[p]ublic officer or public employee" or upon a "[w]itness, or person about to be called as a witness upon a trial or other proceeding before any court, board or officer authorized to hear evidence or to take testimony[,]" with the intent to influence his conduct in relation to his position, employment, or duty. LSA-R.S. 14:122(A)(1) & (3). The offense requires specific criminal intent. State v. Mead, 36,131, p. 1 (La. App. 2nd Cir. 8/14/02), 823 So. 2d 1045, 1046, writ denied, 2002-2384 (La. 3/14/03), 839 So. 2d 34.

The fact of an intoxicated or drugged condition of the offender at the time of the commission of the offense is immaterial, except where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or special knowledge required for a particular offense. Then the condition constitutes a defense to prosecution for the offense. See LSA-R.S. 14:15(2); State v. Myles, 439 So. 2d 650, 651-52 (La. App. 1st Cir. 1983).

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended, and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. LSA-R.S. 14:27(A). Specific criminal 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); State v. Henderson, 99-1945, p. 3 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So. 2d 1235. Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence,

such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. Henderson, 99-1945 at p. 3, 762 So. 2d at 751.

The defendant relies upon State v. Love, 602 So. 2d 1014, 1019 (La. App. 3rd Cir. 1992), wherein the court reversed a conviction for public intimidation. In Love, police officers had responded to a disturbance call at the residence of the defendant's mother. They learned that the defendant had run from the home with a butcher knife, threatening to kill everybody. Officer White subsequently apprehended the defendant on a trail. The defendant began fighting with Officer White, but with the assistance of several officers, was handcuffed and taken to a police car. Officer White was injured after the defendant kicked him in the groin and he fell to the ground, and after another police officer fell onto Officer White's knee when Officer White pulled him and the defendant down while falling. Love, 602 So. 2d at 1016. On the trail, the defendant repeatedly threatened to kill Officer White. While being transported to the police station, the defendant threatened to burn down Officer White's house with his family inside the house. Love, 602 So. 2d at 1019.

The court in Love found that viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could not have concluded beyond a reasonable doubt that the specific intent element of the crime of public intimidation was proven. The court found that the threats made by the defendant against White were, in and of themselves, insufficient to prove specific intent to influence Officer White's conduct in relation to his position, employment, or duty. The court noted: (1) there was no evidence in the record to indicate that Officer White was in a position to grant the defendant lenient treatment or release from

confinement; (2) at the time of the threats, the defendant was already handcuffed and under arrest (for two counts of battery of a police officer, violations of LSA-R.S. 14:34.2; disturbing the peace, a violation of LSA-R.S. 14:103; and resisting an officer, a violation of LSA-R.S. 14:108); (3) the defendant did not indicate in any way that the threats were intended to influence Officer White's behavior; and (4) the threats were not made in an "or else" fashion. Love, 602 So. 2d at 1019.

Love is distinguishable from the instant case. The defendant herein repeatedly threatened Officer Guidry while she was in a position to grant him lenient treatment or release from confinement. At the time of the threats, the defendant was being investigated for driving while intoxicated, but had not been arrested on that charge. Officer Guidry testified she had discretion concerning which, if any, field sobriety tests to administer to the defendant. She also had discretion to decide whether or not the defendant passed or failed the field sobriety tests. See State v. Jones, 2000-0980, p. 8 (La. App. 5th Cir. 10/18/00), 772 So. 2d 788, 792 (limiting application of Love to circumstances where the defendant is already under arrest); see also State v. Stamps, 2006-0971, p. 9 (La. App. 5th Cir. 5/15/07), 960 So. 2d 237, 241 (noting that LSA-R.S. 14:122 does not have an arrest element, but more broadly includes "conduct in relation to his position, employment, or duty").

The verdict rendered against the defendant indicates the jury accepted the testimony of Officer Guidry and the State's interpretation of the recording of the defendant's threats against Officer Guidry. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. State v. Johnson, 99-0385, p. 9 (La. App. 1st Cir. 11/5/99), 745 So. 2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So. 2d 971. On appeal, this court will not assess the

credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. State v. Glynn, 94-0332, p. 32 (La. App. 1st Cir. 4/7/95), 653 So. 2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So. 2d 464. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See State v. Ordodi, 2006-0207, p. 14 (La. 11/29/06), 946 So. 2d 654, 662.

Additionally, the verdict rendered against the defendant indicates that the jury rejected the defense theory that the threats made by defendant against Officer Guidry were expressions of anger because he did not understand why he was handcuffed or because he may have been claustrophobic or because he was not getting Officer Guidry's attention, rather than threats made with the intent to influence Officer Guidry's conduct in relation to her position, employment, or duty. The verdict also indicates that the jury rejected the defense claim that the intoxicated or drugged condition of the defendant precluded the presence of a specific criminal intent. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987). No such hypothesis exists in the instant case.

After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of public intimidation and the defendant's identity as the perpetrator of that offense

against Officer Guidry. Further, a rational trier of fact could have inferred beyond a reasonable doubt that the defendant was not so intoxicated as to preclude the presence of specific criminal intent.

This assignment of error is without merit.

CONVICTION AND SUSPENDED SENTENCE AFFIRMED.