NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 2237

STATE OF LOUISIANA

VERSUS

TROY BATISTE

Judgment rendered June 10, 2011.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 338584
Honorable Allison H. Penzato, Judge

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TROY BATISTE

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

PETTIGREW, J.

The defendant, Troy Batiste, was charged by bill of information with one count of second degree battery (count I), a violation of La. R.S. 14:34.1; and one count of aggravated criminal damage to property (count II), a violation of La. R.S. 14:55. He pled not guilty on both counts. Following a jury trial, the defendant was found guilty as charged on both counts. Thereafter, the State filed a habitual offender bill of information against the defendant alleging, in regard to count I, he was a fourth-felony habitual offender.[1] On the original bill of information, the defendant was sentenced, on each count, to five years at hard labor. Following a hearing on the habitual offender bill of information, he was adjudged a third-felony habitual offender. The trial court vacated the previously imposed sentence on count I, sentencing him on that count to imprisonment at hard labor for the remainder of his natural life without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, contending that he had ineffective assistance of counsel and that the State presented insufficient evidence on counts I and II. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence on count I, and we affirm the conviction and sentence on count II.

FACTS

The victim, Scott Roy Sewell, testified at trial. On July 6, 2001, at approximately 8:00 p.m. or 9:00 p.m., he was at the Chevron gas station on Highway 190 in Lacombe. According to the victim, he first noticed the defendant when the defendant almost sideswiped his vehicle while it was parked at the pump. The defendant said something about "cutting him off and stuff." When asked if he said anything to the defendant, the victim replied, "I guess I did. Probably, whatever." The victim claimed the defendant argued with him while the victim fueled his car and while the defendant's girlfriend told

[1] Predicate #1 was set forth as the defendant's September 23, 1982 conviction, under Twenty-second Judicial District Court Docket #102925, for illegal use of weapons. The State, however, abandoned proof of this predicate offense at the habitual offender hearing. Predicate #2 was set forth as the defendant's January 23, 1987 conviction, under Twenty-second Judicial District Court Docket #154069, for aggravated battery (on an original charge of attempted second degree murder). Predicate #3 was set forth as the defendant's August 1, 1991 conviction, under Twenty-second Judicial District Court Docket #198065, for second degree battery.

the defendant to get in the car and leave. Thereafter, the defendant got into his car and left.

When the victim exited the building after paying for the gas, however, the defendant was standing outside the building. According to the victim, the defendant continued to argue with him while the victim walked to his car. The victim got into his car, "revved it up a little," and "peal[ed] [sic] out a little." He denied striking, or trying to strike, the defendant with the car. According to the victim, the defendant ran up to the vehicle, smashed its side window with his fist, and tried to climb into the moving vehicle. The victim accidentally put the vehicle in reverse, then put it in park, and walked around to the back of the vehicle. He conceded his vehicle's tires might have run over the defendant's feet while he was trying to put the vehicle in park. The victim saw a hand coming at him, and saw that the defendant was "gushing out blood." The victim blocked some of the defendant's punches as he backed away from the defendant. The victim denied that he tried to hit the defendant. The victim then tripped and fell down, and the defendant jumped on him and punched him in the face until a clerk from the building jumped on the defendant. The defendant then left the gas station. The victim was unable to leave the gas station because he could "barely see."

The victim suffered a collapsed cheekbone, a gash on his face, which required five stitches, and a fractured jaw, which prevented him from chewing. At the time of trial, as a result of the injuries he received in the incident, he was suffering headaches, problems with the nerves in his face, and problems with his bite. He denied he did anything to provoke the defendant to attack him. He conceded that following the incident, in an unrelated incident involving his wife, he pled guilty to aggravated battery and simple battery.

On cross-examination, the defense asked the victim if, when the defendant was complaining about the victim's driving, the defendant had stated that the victim had "almost gotten him killed," and the victim had told the defendant not to worry about it because the victim had insurance. The victim answered "[p]robably." When asked if he "[shot] the bird" at the defendant, the victim answered, "[c]ould have. Don't really

remember anymore." The victim denied he was armed with a knife or a screwdriver during the incident, and denied calling the defendant a n____r.

Amber Larkin Tabiner also testified at trial. On the evening of the incident, she was working as a gas station attendant for L & M Chevron in Lacombe. She remembered selling the victim some gasoline and indicated he was calm, not arrogant, and not angry. According to Tabiner, "somebody" punched in the window of the victim's car as he was driving out of the parking lot. When the victim exited his car, the attacker grabbed him by his ponytail and started beating him in the face. Tabiner indicated the defendant started the physical violence. She did not see the victim strike the defendant or try to hit him with the victim's vehicle. She also did not hear anyone squealing or spinning tires. She did, however, see the police taking measurements of skid marks after the incident.

Felicia Jarvis also testified at trial. The defendant was her estranged husband. She claimed, on the evening of the incident, she and the defendant were run off the road by the victim. She claimed the defendant pulled alongside the victim's car and complained, and the victim stated he had insurance and started digging in the glove box. She claimed the defendant pulled up to the building at the gas station to allow her to get some cigarettes. She claimed the victim exited the building, got into his car, and hit the defendant with the vehicle, but she did not know if he intentionally struck the defendant. She claimed the victim hit his brakes so hard, they squealed and his vehicle skidded. She claimed the defendant did not punch the victim's window, but the victim exited his car and rushed at the defendant with "something in his hands." She claimed the defendant did not try "to run from it," but left to get treatment from his brother, who was a nurse. She conceded her statement given to the police on the night of the incident did not allege that she and the defendant had been run off the road by the victim, or that the victim had anything in his hands.

The defendant also testified at trial. He stated that on the evening of the incident, he was driving his wife to the store to buy beer and rent movies, when he was forced off the road by a white Ford Mustang that crossed into his lane of travel. He claimed he was forced off the road, through some bushes, and into a roadside shrimp stand. The

Mustang pulled into a nearby Chevron gas station. The defendant indicated he pulled alongside the Mustang and told the driver, "Man, you almost killed me and my wife." According to the defendant, the victim replied, "Killed you and your wife? I got insurance, I got insurance. Did I hit you? Did I hit you? Did I hit you?" The defendant claimed he then returned to his vehicle and proceeded to the video store, but it was closed. As he was coming back, he passed in front of the Chevron. He claimed a friend of his, Reginald Dickson, pulled into the Chevron, so he pulled in behind him to talk to him. The defendant said the victim came out of the building at the Chevron station, walked by him without saying anything, and got into his car. He claimed the victim revved up his motor, began spinning his tires, and there was "nothing but smoke, smoke, burning tires, burning tires." The defendant indicated he tried to walk around the victim's vehicle, but the victim drove at him and struck him with the vehicle, injuring his feet and throwing him inside the vehicle through the passenger-side window. The defendant claimed he told the victim, "Boy, you in trouble," and the victim replied, "It's on, it's on, it's on." According to the defendant, the victim then jumped out of the car and attacked him with a screwdriver. He claimed he punched the victim because the victim was "sticking" him with the screwdriver.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 2, the defendant argues the evidence was insufficient to support the second degree battery conviction because the State failed to prove he did not act in self-defense. The defendant concedes that he used force upon the victim and that the victim suffered serious bodily injury. However, he disputes he had the specific intent to cause serious bodily injury, and claims he was only defending himself. He also claims the evidence was insufficient to support the aggravated criminal damage to property conviction, arguing, even if he intentionally broke the window of the car, it was not foreseeable that human life could be endangered from that act.

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. 1 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 La. 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 3, 730 So.2d at 487.

As is pertinent here, battery is the intentional use of force or violence upon the person of another. La. R.S. 14:33. Second degree battery is a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury. Serious bodily injury means bodily injury that 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. La. R.S. 14:34.1 (prior to amendment by 2009 La. Acts No. 264, § 1). Second degree battery is a specific-intent offense. Specific intent is that state of mind that exists when the circumstances indicate the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be proved 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. **State v. Druilhet**, 97-1717, p. 3 (La. App. 1 Cir. 6/29/98), 716 So.2d 422, 423.

Aggravated criminal damage to property is "the intentional damaging of any ... movable, wherein it is foreseeable that human life might be endangered, by any means other than fire or explosion." La. R.S. 14:55.

Prior to amendment by 2006 La. Acts No. 141, § 1, La. R.S. 14:19, in pertinent part, 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 ... 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.

However, La. R.S. 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.

In a 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. In a homicide case, the State must prove, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. However, Louisiana law is unclear as to who has the burden of proving self-defense in a non-homicide case. 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. Similarly, we need not decide in this case who has the burden of proving (or disproving) self-defense, because under either standard the evidence sufficiently established that defendant did not act in self-defense. **State v. Taylor**, 97-2261, p. 4 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 931.

Any 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 second degree battery and aggravated criminal damage to property, the

defendant's identity as the perpetrator of those offenses, and that the defendant's attack on the victim was not justified. The verdict rendered against the defendant indicates the jury rejected the defense theory that the victim was the aggressor in this case. When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). No such hypothesis exists in the instant case. Additionally, the verdict rendered against the defendant indicates the jury accepted the testimony offered against him and rejected the testimony offered in his favor. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may 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. **State v. Lofton**, 96-1429, p. 5 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. 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. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Additionally, any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find that the evidence presented by the State established that the defendant was the aggressor in the conflict, and thus, was not entitled to claim self-defense. Moreover, even if it could be found that the defendant was not the aggressor, any rational trier of fact could find, beyond a reasonable doubt, and to

the exclusion of every reasonable hypothesis of innocence, that the defendant did not act in self-defense. Testimony at trial indicated the defendant ran up to the victim's vehicle as he was trying to leave the gas station, smashed one of its windows with his fist, tried to climb into the moving vehicle, attacked the victim after he exited the vehicle, and repeatedly punched him in the face after he fell down.

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In assignment of error number 1, the defendant argues "trial counsel" rendered ineffective assistance by "requesting a multitude of unnecessary continuances," which resulted in the unavailability of two witnesses who could have testified for the defense.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components.

State v. Serigny, 610 So.2d 857, 859-860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

The record indicates the defendant was represented by Kevin D. Linder at arraignment (October 3, 2001), and John J. McGuckin, Jr., thereafter. Following continuances on motion of the court (November 12, 2001) and the State (February 6, 2002), between February 19, 2002 and the commencement of trial on July 30, 2008, the matter was continued over forty times on motion of the defense. A defense motion to suppress and a State motion for discovery were pending before the court during that time.

At the beginning of the third day of trial, the defendant argued he was being denied the opportunity to question the arresting officer – Deputy O'Neal. The State indicated Deputy O'Neal was unavailable because he was now a member of the Federal Border Patrol in Arizona. The court indicated Deputy O'Neal was not subject to subpoena. The defendant claimed Deputy O'Neal had come to his house after the incident and told the defendant's sisters and wife that he had made a big mistake and was "going to straighten this up." The defendant's estranged wife, Felicia Jarvis, testified at trial that the day following the incident, "the cop" came back and indicated he had gone back to the Chevron and seen skid marks.

Additionally, defense counsel stated the defendant was unable to call Reginald Dickson because he was incarcerated in the federal penitentiary.[2] The court indicated it had no subpoena power over someone in the federal penitentiary. Thereafter, the defendant testified at trial that Reginald Dickson and "Lester" were at the gas station at the time of the incident. He indicated "Lester" was in court, but did not call him to the stand.

This assignment of error is not subject to appellate review. The record does not indicate defense counsel's reasons for requesting that the matter be continued, and thus, we are unable to definitively conclude the requests for continuance were "unnecessary."

[2] Defense counsel did not set forth the substance of Reginald Dickson's anticipated testimony.

Defense counsel may have had strategic reasons for his requests. The investigation of strategy decisions requires an evidentiary hearing[3] and, therefore, cannot possibly be reviewed on appeal. **State v. Allen**, 94-1941, p. 8 (La. App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1 Cir. 1993).

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT I AFFIRMED; CONVICTION AND SENTENCE ON COUNT II AFFIRMED.

[3] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.