NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0505

STATE OF LOUISIANA

VERSUS

MICHAEL LEON SHOEMAKER

On Appeal from the 23rd Judicial District Court
Parish of Ascension, Louisiana
Docket No. 17,990, Division "D"
Honorable Pegram J. Mire, Jr., Judge Presiding

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Michael Leon Shoemaker

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered November 3, 2006

PARRO, J.

The defendant, Michael Leon Shoemaker, was charged by amended bill of information with one count of attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1, and he pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to fifty years at hard labor without benefit of probation, parole, or suspension of sentence. Thereafter, the state filed a habitual offender bill of information against the defendant, alleging he was a habitual offender.[1] Following a hearing, he was adjudged a third felony habitual offender, and was sentenced to an enhanced sentence of one hundred years without benefit of parole, probation, or suspension of sentence.[2] He now appeals, designating three assignments of error. We affirm the conviction, affirm the habitual offender adjudication, vacate the enhanced sentence, and remand for resentencing in accordance with law.

ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the victim to testify that her personal physician allegedly told her that she must have been strangled for a long time when the physician did not testify at trial and was not available for cross-examination.

2. The trial court erred in refusing to charge the jury that they must find that the defendant had specific intent to kill the victim to find him guilty of attempted second degree murder or attempted manslaughter and that it was not sufficient to find that the defendant had specific intent to inflict great bodily harm. The trial court incorrectly instructed the jury that it was sufficient to find specific intent to inflict great bodily harm. Then when the error of that instruction was brought to the court's attention by the prosecutor, the court did not adequately correct the mistake.

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[1] Predicate number 1 was set forth as the defendant's June 21, 1982 guilty pleas, under the Twenty-Fourth Judicial District Court docket number 82-960, to two counts of forcible rape, violations of LSA-R.S. 14:42.1. Predicate number 2 was set forth as the defendant's November 12, 1985 conviction, under the Twentieth Judicial District Court docket number W-84-7-1136, for simple escape, a violation of LSA-R.S. 14:110.

[2] The minutes of the habitual offender hearing indicate the defendant was sentenced to "an additional one hundred years with the Department of Corrections without benefit of probation or parole." The transcript of the habitual offender hearing, however, indicates the defendant was sentenced to an enhanced sentence of one hundred years without benefit of parole, probation, or suspension of sentence. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

3. The trial court erred in granting the state's motion in limine precluding the defense from asking the arresting officers about the circumstances of the offense and their impressions of the situation when they arrived on the scene.

FACTS

The victim, Mary Ellen Roper, testified at trial. On November 20, 2004, at approximately 8:17 p.m., she went to the Tanger shopping mall in Gonzales. She parked her van in front of the GAP store in the parking place next to a vacant handicapped parking place and went into the store. When she exited the store to return to her van, she noticed a company vehicle had backed into the handicapped parking place next to her van. As she was getting into her van, the defendant put his hands on her face. She screamed and began pressing her vehicle's horn. The defendant grabbed the victim's face and forced her into the back of the van. She asked the defendant what he was doing, and he replied, "I'm going to kill you, Bitch." The defendant strangled the victim with his hands and pulled some of her hair out, but she resisted by kicking him and fighting with him. She held onto her car keys and tried to automatically open the doors on her van by pressing the keyless entry control on her keys. The defendant stated, "Give me your fucking keys[,]" but the victim told him he would not get her keys. The victim told the defendant that her mother would be coming to the van soon. The defendant replied, "Don't lie to me, Bitch." Shortly before the police arrived, the defendant pulled out a bungee cord from somewhere on his person. When the police ordered the defendant to get out of the van with his hands up, he pushed the victim's head down on the ground and stated, "Son of a bitch[.]"

HEARSAY STATEMENTS OF PHYSICIAN

In assignment of error number one, the defendant argues where specific intent to kill was the sole issue and the other evidence indicated no intent to kill, the admission of the alleged statement of Dr. Poche that the victim must have been strangled for a long time and must have suffered a significant lack of oxygen was in clear contravention of the defendant's Sixth and Fourteenth Amendment rights to confront and cross-examine the witnesses against him and his right to a fair trial.

Louisiana Code of Evidence article 803, in pertinent part, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . .
>
> (4) **Statements for purposes of medical treatment and medical diagnosis in connection with treatment.** Statements made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis in connection with treatment.

During direct examination of the victim by the state, the following colloquy occurred:

> [State]: And did you go to another physician later?
>
> [Victim]: I did. Tuesday I went to my local family physician.
>
> [State]: And did he give you any statement about the condition of your eyes and what the redness meant?
>
> [Victim]: Yeah. When – when I walked into the doctor's office, he said, "Damn, you must have been strangled –
>
> [Defense]: Your Honor, objection.
>
> [Victim]: -- for a long time because," he said, "this doesn't happen --
>
> [Defense]: Objection, hearsay.
>
> [State]: It's statements made in the history and the treatment and the diagnosis of a medical condition.
>
> [Court]: Overruled.
>
> [State]: Thank you.
>
> [Victim]: I'm sorry.
>
> [State]: Go ahead. You can tell them what he said.
>
> [Victim]: He said, "Damn, you must have really been strangled long." He said, "This – your eyes don't get this way just from a little strangulation." He said, "It had to be definitely a lot of lack of oxygen."

The physician's statements referenced by the victim in the above colloquy were outside the scope of LSA-C.E. art. 803(4). See George W. Pugh et al., Handbook on Louisiana Evidence Law, 570, n. 7 (2006) and **Landry v. Melancon**, 558 So.2d 1143, 1146-47 (La. App. 1st Cir. 1989), governed by prior law.

However, error in the admission of the physician's statements was harmless in this case. Confrontation errors are subject to a harmless error analysis. **Delaware v.**

Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The correct inquiry is whether the reviewing court, assuming that the damaging potential of the cross-examination were fully realized, is nonetheless convinced that the error was harmless beyond a reasonable doubt. **Van Arsdall**, 475 U.S. at 684. Factors to be considered by the reviewing court include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." **Van Arsdall**, 475 U.S. at 684; **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990), cert. denied, 506 U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992). The verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); **State v. Broadway**, 96-2659 (La. 10/19/99), 753 So.2d 801, 817, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000).

The key witness against the defendant at trial was the victim. The statements of the victim's physician were cumulative of other evidence at trial on the issue of specific intent to kill in the strong case against the defendant. The victim testified the defendant strangled her the entire time he attacked her in her van. Further, according to the victim, while attacking her, the defendant stated, "I'm going to kill you, Bitch[.]" Additionally, when the victim did not succumb to his attempt to manually strangle her, the defendant "pulled a bungee cord out[,]" but was interrupted by the arrival of the police before he could use the cord.

The victim's account of the incident was corroborated by testimony of numerous witnesses to the attack, as well as physical evidence. Officer Martin Mapp of the Gonzales Police Department testified that when the door to the victim's van opened, the defendant was on top of the screaming victim with his hands around her neck. Paulann McBride, the manager of the Naturalizer shoe store, testified she saw the victim being choked and "getting lifeless." Dr. William Soileau testified he saw the victim being attacked by a man in her van and, even after he (Dr. Soileau) shined the bright lights of his truck into the van, the attacker continued to make "aggressive

movements" against the victim with his hands. The state introduced photographs of the victim depicting red marks around her neck; injuries to her lips, tongue, eyes, arm, leg, and back; and a bald area of her scalp. The state also introduced into evidence the bungee cord the defendant pulled out to use on the victim.

The defense cross-examined the victim on the severity of the defendant's attack upon her and presented an expert in emergency medicine to attempt to establish that the victim did not suffer a life-threatening strangulation from the defendant.

After considering all relevant factors, we conclude the guilty verdict rendered in this particular trial was surely unattributable to the error in the admission of the statements of the victim's physician. This assignment of error is without merit.

ERRONEOUS JURY INSTRUCTION

In assignment of error number two, the defendant argues the charge ultimately given to the jury was incorrect and may well have misled the jurors regarding the sole element of the offense at issue, i.e., the level of intent required to find the defendant guilty of attempted second degree murder.

The crime of second degree murder, in pertinent part, is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. LSA-R.S. 14:30.1(A)(1). However, a specific intent to kill is an essential element of the crime of attempted murder. **State v. Butler**, 322 So.2d 189, 192 (La. 1975). 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).

The court shall charge the jury as to the law applicable to the case. LSA-C.Cr.P. art. 802(1). It is well-settled that the ruling of a trial court on an objection to a portion of its charge to the jury will not be disturbed unless the disputed portion, when considered in connection with the remainder of the charge, is shown to be both erroneous and prejudicial. **State v. Owens**, 03-2838 (La. App. 1st Cir. 9/17/04), 888 So.2d 239, 241, writ denied, 04-2807 (La. 3/11/05), 896 So.2d 64.

Prior to closing argument, the defense made a request to the court for a special written jury charge. The requested charge stated:

> To find Mr. Shoemaker guilty of either Attempted Second Degree Murder or Attempted Manslaughter, you must be convinced beyond a reasonable doubt that he had specific intent to kill Mary Ellen Roper. It is not sufficient for you to find that he attempted to inflict great bodily harm upon Mary Ellen Roper.

The state objected to the proposed special jury charge, arguing the jury instructions were clear as written. The trial court refused to give the special jury charge, and the defense objected to the court's ruling.

In charging the jury, the trial court initially defined attempted second degree murder as "the attempted killing of a human being when the offender has specific intent to kill or to inflict great bodily harm." Almost immediately thereafter, following a sidebar conference between the state, the defense, and the court, the court instructed the jury that attempted second degree murder was "the attempted killing of a human being when the offender has specific intent to kill."

When viewed in its entirety, the jury charge was neither erroneous nor prejudicial. Although the court initially incorrectly defined the offense of attempted second degree murder, the court quickly corrected the error and correctly defined the offense for the jury.

Moreover, an erroneous jury instruction which includes intent to inflict great bodily harm as an element of attempted second degree murder is a trial error subject to harmless error analysis. **State v. Hongo**, 96-2060 (La. 12/2/97), 706 So.2d 419, 420-22. Given the evidence at trial on the issue of specific intent to kill,[3] error, if any, in the jury instruction in this case was harmless.

This assignment of error is without merit.

MOTION TO PRECLUDE TESTIMONY CONCERNING EVIDENCE OF CONSUMPTION OF ALCOHOL BY THE DEFENDANT

In assignment of error number three, the defendant argues, in violation of his constitutional rights to due process and to present a defense, the defense was prohibited from eliciting from the officers their impression at the time of the incident that the offense was a simple battery committed by a drunk man.

Louisiana Code of Criminal Procedure article 726 provides:

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[3] See the discussion of the evidence concerning the defendant's specific intent to kill under assignment of error number one, supra.

> A. If a defendant intends to introduce testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall not later than ten days prior to trial or such reasonable time as the court may permit, notify the district attorney in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other orders as may be appropriate.
>
> B. If there is a failure to give notice as required by Subsection A of this Article, the court may exclude the testimony of any witness offered by the defendant on the issue of mental condition.

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. Intoxication is an "other condition" bearing on the issue of whether the defendant had the mental state for the offense charged. **State v. Trahan**, 576 So.2d 1, 6 (La. 1990).

Prior to the selection of the jury, the state filed a motion in limine to enjoin and prohibit the defendant from introducing evidence or testimony relating to mental disease, defect, or other condition, including but not limited to intoxication by alcohol or drugs, bearing upon the issue of whether the defendant had the requisite mental state for the offense charged. The motion in limine set forth that the state had requested notice of whether the defendant intended to introduce such evidence or testimony, and the defense had failed to notify the state or indicate in any way an intention to do so. Following a hearing, the trial court granted the motion in limine, and the defense objected to the ruling of the court.

At the hearing on the motion, the defense stated it wanted to be "very clear" that it was not arguing that the defendant was intoxicated to the point where he was not criminally culpable. Rather, the defense argued the only facts it wished to elicit were that the defendant was arrested for disturbing the peace by intoxication,[4] that Officer Mapp smelled alcohol on the defendant's breath, and that Officer Billiot found beer cans in the defendant's truck.

There was no error in the granting of the motion in limine. Under the facts of the case, evidence of alcohol consumption by the defendant at the time of the

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[4] The Gonzales Police Department's arrest report regarding the defendant indicated the defendant was arrested for attempted second degree murder, simple battery, disturbing the peace by intoxication, and parking in a handicap zone.

offense was immaterial unless the circumstances indicated that the intoxicated condition had precluded the presence of specific criminal intent required to commit the offense. See LSA-R.S. 14:15; **Trahan,** 576 So.2d at 6 n.2. The defense, however, specifically set forth it was not arguing that the defendant was intoxicated to the point where he was not criminally culpable.

In his brief to this court, the defendant attempts to distinguish **Trahan** on the basis that the decision recognized the right to present relevant evidence as an important component of the defendant's constitutional right to present a defense and noted there was ample evidence supporting Trahan's claim that he had been drinking. **Trahan,** 576 So.2d at 6.

Formal rules of evidence must yield to a defendant's constitutional right to confront and cross-examine witnesses and to present a defense. See U.S. Const. amend. VI; LSA-Const. art. I, §16; **Chambers v. Mississippi**, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); **Washington v. Texas**, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); **State v. Van Winkle**, 94-0947 (La. 6/30/95), 658 So.2d 198; **State v. Gremillion**, 542 So.2d 1074 (La. 1989).

In **Trahan**, however, the state did not move to exclude all evidence supporting the defendant's claim that he had been drinking, but rather only the evidence of the blood-alcohol level of the defendant (.26 ethyl-alcohol level). **Trahan,** 576 So.2d at 5 and at 5 n.1. In the instant case, the state did not limit its motion in limine to a specific item of evidence.

Moreover, the defendant's constitutional right to present a defense was not violated in this case. The exclusion of the evidence at issue did not prevent the defense from presenting its theory that the defendant did not intend to kill the victim.

This assignment of error is without merit.

PATENT SENTENCING ERROR

Following the defendant's conviction for attempted second degree murder and original sentence of fifty years at hard labor without benefit of probation, parole, or suspension of sentence, he was adjudged a third felony habitual offender. The habitual offender sentence should have been imposed at hard labor without benefit

of parole, probation, or suspension of sentence. LSA-R.S. 14:27(D)(1)(a); LSA-R.S. 14:30.1(B); LSA-R.S. 15:529.1(A)(1)(b)(i); **State v. Bruins**, 407 So.2d 685, 687 (La. 1981). According to the transcript of the habitual offender hearing, however, the trial court failed to impose the habitual offender sentence at hard labor.[5]

In **State v. Gordon**, 01-0236 (La. App. 1st Cir. 2/15/02), 809 So.2d 549, 551, writ denied, 04-2438 (La. 6/24/05), 904 So.2d 733, the trial court imposed a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence for second degree murder. On appeal, this court vacated the sentence and remanded for sentencing in accordance with law, because the trial court had failed to state that the sentence was to be served at hard labor and/or in the custody of the Department of Public Safety and Corrections. **Gordon**, 809 So.2d at 555-56.

Accordingly, in the instant case, we vacate the habitual offender sentence and remand for resentencing in accordance with law.

We further note that the trial court did not vacate the original fifty-year sentence after sentencing the defendant as a habitual offender. See LSA-R.S. 15:529.1(D)(3). Upon remand, the trial court is instructed to comply with LSA-R.S. 15:529.1(D)(3).

CONVICTION AFFIRMED; HABITUAL OFFENDER ADJUDICATION AFFIRMED; ENHANCED SENTENCE VACATED AND REMANDED FOR RESENTENCING.

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[5] When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **Lynch**, 441 So.2d at 734.