NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1036

STATE OF LOUISIANA

VERSUS

WILLIE BRADLEY

Judgment Rendered: December 28, 2006.

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On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 08-05-0828

The Honorable Leon A. Cannizzaro, Jr., Judge Presiding

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* * * * *

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

CARTER, C.J.

The defendant, Willie Allen Bradley, was charged by bill of information with aggravated battery, a violation of LSA-R.S. 14:34. The defendant entered a plea of not guilty and waived his right to a jury trial. At the conclusion of the bench trial, the trial court found the defendant guilty of the responsive offense of simple battery, a violation of LSA-R.S. 14:35. See also LSA-C.Cr.P. art. 814A(14).

The defendant filed a motion for new trial, and following a hearing, the motion was denied. The defendant waived the sentencing delay and was sentenced to six (6) months in the parish prison. The defendant was given credit for time served, and the balance of his sentence was suspended. The defendant was placed on unsupervised probation for one year. The defendant was ordered to pay a $200.00 fine and $2,000.00 in restitution to the victim. The defendant made an oral motion to reconsider sentence, which was denied.

The defendant appeals, designating five assignments of error. We affirm the conviction and sentence.

FACTS

On the morning of April 16, 2005, the defendant and his cousin "Red" (Michael Roy Thomas, Jr.) were putting up fence posts in the defendant's yard. The victim, Pharoah Johnson, and Red began to argue. The defendant approached the two men with a metal fence post in his hands. Red also held a fence post; the victim's hands were empty. As the victim turned to walk away, the defendant hit him on the top of his head with the fence post, and Red hit the victim on the leg and shoulder with the fence post that he was

holding. The victim suffered a concussion and received approximately sixteen staples in his head. The victim's medical bills were $2,627.49.

There were three additional witnesses to the altercation: Yolanda Johnson, the victim's wife; Rebecca Williams, the defendant's live-in girlfriend; and Janae Larose, who resided with the victim and his wife.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred when it did not require the victim's wife to be sequestered as a witness. At the beginning of trial, the prosecutor informed the trial court that the victim and his wife were both witnesses and that the prosecution would object to their sequestration. The trial court found that, pursuant to the Louisiana Code of Evidence, it was not authorized to exclude the victim's wife from the courtroom. The trial court's ruling was correct, as indicated by the plain language of LSA-C.E. art. 615:

> A. **As a matter of right.** On its own motion the court may, and on request of a party the court shall, order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. In the interests of justice, the court may exempt any witness from its order of exclusion.
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> B. **Exceptions.** This Article does not authorize exclusion of any of the following:
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> ...
>
> (4) The victim of the offense or the family of the victim.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the evidence was insufficient to support the conviction of simple battery. A conviction based on insufficient evidence cannot stand, as it violates due process. See

U.S. Const. amend. XIV; LSA-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 LSA-C.Cr.P. art. 821B; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson v. Virginia** 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 the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 01-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Battery is the intentional use of force or violence upon the person of another. LSA-R.S. 14:33. Simple battery is a battery committed without the consent of the victim. LSA-R.S. 14:35. In the case at hand, three witnesses, including the victim, testified that while the defendant and Red were arguing with the victim, the defendant struck the victim in the head with a pipe (a metal fence post) and that the victim had nothing in his hands when the defendant struck him.

In contrast, the defendant and his girlfriend testified that the defendant did not strike the victim in the head or anywhere else with a fence post. According to the testimony of the defendant and his girlfriend, it was Red who struck the defendant in the head with a fence post. On cross-examination, the defendant's girlfriend testified that the victim and Red "got

to tussling." When asked what she meant by that, the defendant's girlfriend explained that the two men were fighting and wrestling. When asked if they actually had physical contact with each other, she responded, "Yes." This testimony, however, was not consistent with the defendant's testimony regarding any physical contact between the victim and Red. On cross-examination, the defendant testified:

> Q. You saw Pharoah [the victim] arguing with Red, didn't you?
> A. Yes, Ma'am, I did.
> Q. And you were a little concerned because you didn't like how Pharoah was talking to Red, did you? You didn't like it?
> A. They was (sic) arguing.
> Q. Right. And at the time you had a pipe in your hand, didn't you?
> A. A pipe and a maul.
> Q. Didn't you go up to break them up?
> A. They wasn't (sic) fighting. They were just arguing.
> Q. They weren't tussling as your wife said?
> A. No.
> Q. There was no physical contact?
> A. No. They didn't.

It is obvious from the finding of guilt that the trial court concluded that the testimony of the victim, his wife, and Janae Larose was credible and reliable enough to establish that the defendant had committed a battery upon the victim. It also is clear that the trial court rejected that part of the testimony of the defendant and his girlfriend wherein they claimed that it was Red, and not the defendant, who struck the victim in the head.

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. 1 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. **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that 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. 1 Cir. 1985).

After a thorough review of the record, we find that the evidence supports the trial court'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 simple battery.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court erred when it denied his motion for new trial. Specifically, the defendant contends that, pursuant to LSA-C.Cr.P. art. 851(3), there was new and material evidence that, if introduced at trial, probably would have changed the guilty verdict.

In a motion for new trial based upon the discovery of new and material evidence, the burden is on the defendant to show that the new evidence was not discoverable prior to or during trial and that, if the

evidence had been introduced at trial, the new evidence probably would have caused the trier of fact to reach a different verdict. In evaluating whether the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that it ought to produce a verdict different from that rendered at trial. Furthermore, the trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Spears**, 504 So.2d 974, 979 (La. App. 1 Cir.), writ denied, 507 So.2d 225 (La. 1987).

The defendant contends that the newly discovered evidence would have been the testimony of Red, who was in jail at the time of the trial and unavailable to testify. According to the defendant, Red would testify that it was he (Red) who hit the victim on the back of the head with the pipe.

The defendant's assertion is baseless. Red's testimony does not constitute newly discovered evidence. As the testimony of all of the witnesses at trial clearly indicates, Red participated in the attack on the victim. Thus, Red was known by the parties and witnesses prior to trial, and his testimony concerning the events on April 16, 2005, could have been obtained prior to trial. The defendant also could have called Red to testify at trial, despite the fact that he was in jail at the time.

Moreover, the trial court conducted a hearing on the defendant's motion for new trial. The defendant called Red to testify. Nothing in Red's testimony constituted newly discovered evidence. Red's testimony simply corroborated the defendant's testimony at trial. Furthermore, contrary to the defendant's assertion in his brief, Red did not testify that that it was he, not

the defendant, who hit the victim in the head. The only testimony at the hearing regarding Red striking the victim is the following:

> Q. Did you in fact hit Pharoah Johnson with one of the pipes?
> A. I hit him on his shoulder, tried to get him up off my cousin.
> Q. Did he start bleeding after you hit him?
> A. No.
> Q. Did you at any time see Mr. Willie Bradley strike Mr. Pharoah Johnson?
> A. No, sir.

We find there is nothing in Red's testimony that would have produced a verdict different from that rendered at trial. The trial court did not abuse its discretion in denying the motion for new trial.

This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 4 & 5

In these assignments of error, the defendant avers that the trial court erred in imposing an excessive sentence and in denying his motion to reconsider sentence.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment, and although a sentence falls within the statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, the sentence imposed shocks one's sense of justice. **State v. Andrews**, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a

sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. **Andrews**, 655 So.2d at 454.

Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. The articulation of the factual basis for a sentence is the goal of Article 894.1, not the rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with LSA-C.Cr.P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial court should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981).

A conviction for simple battery carries a fine of up to $500.00, or imprisonment for not more than six months, or both. LSA-R.S. 14:35. The trial court fined the defendant $200.00, sentenced him to six months in the parish jail, suspended the balance of the sentence, and placed the defendant on unsupervised probation for one year. The trial court noted that the defendant had a good record and that he worked hard his whole life. However, the court observed, the defendant had made a "mistake," and the court did not want a similar event to happen again or for the defendant to ever return to court. In view of its consideration of the particular circumstances of this case, we find no manifest abuse of discretion by the

trial court in the sentence imposed. The record adequately supports the sentence given, and the sentence is not grossly disproportionate to the severity of the offense. The sentence imposed is not unconstitutionally excessive.

These assignments of error are without merit.

CONVICTION AND SENTENCE AFFIRMED.