

Judgment rendered December 20, 2006  
Application for rehearing may be filed  
within the delay allowed by Art. 922,  
La. C.Cr.P.

No. 41,650-KA

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

\* \* \* \* \*

STATE OF LOUISIANA

Appellee

versus

RAYMOND JOHNSON

Appellant

\* \* \* \* \*

Appealed from the  
First Judicial District Court for the  
Parish of Caddo, Louisiana  
Trial Court No. 246,658

Honorable John D. Mosely, Jr., Judge

\* \* \* \* \*

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\* \* \* \* \*

Before BROWN, GASKINS and CARAWAY, JJ.

NOT DESIGNATED FOR PUBLICATION.  
Rule 2-16.3, Uniform Rules, Courts of Appeal.

CARAWAY, J.

A jury convicted Raymond Johnson of aggravated battery and he was sentenced to seven years at hard labor. Johnson now appeals his conviction and sentence. We affirm.

*Facts*

On October 5, 2005, Milford Jones and a female companion were riding bicycles around his neighborhood when they stopped to talk to Raymond Johnson, an acquaintance of Jones. Jones was en route to Roy Lee Butler's house to "get high" on crack cocaine. Johnson followed Jones and the woman to Butler's house. Johnson later claimed Jones insinuated he could "get with" his female friend. Butler let Johnson in the house right after the bicyclists entered.

Shortly thereafter, Butler tried to move a hatchet located next to the front door when Johnson brandished a black .45mm automatic pistol striking Jones in the face. Jones claimed that Johnson continued pointing the weapon at him and Butler. He and Johnson struggled and the gun discharged. A bullet hit a television table and a can of paint. After the gun discharged, Johnson hit Jones again with the weapon on the top of his head. As Jones lay on the floor, Johnson kicked him, picked up a lamp and swung it at him. Jones protected himself using his arm and his hand. Jones eventually scrambled to another room, and a short time later, Johnson left.

Saul Battle lived next door and testified as a witness. Battle reported hearing the argument next door from his house and then a gun discharging. Battle went to his front porch and heard the defendant tell Jones, "you must

think I'm a punk or something.” Soon after, Battle saw the defendant leave carrying a pistol in his right hand. Battle said Johnson got into a parked white car and drove away. Battle explained that he knew Johnson and could identify him in a photographic line-up as the same man who left Butler's house. After Johnson left, Battle went to check on the situation where he saw Jones's head and hand bleeding.

Shreveport Police Department Corporal W.W. Lindsey, Jr., testified that when he arrived, EMS was on the scene treating Jones. He photographed the crime scene and recovered a bloody gun magazine from the front yard. He identified a photograph of a magazine from a .45mm pistol and others depicting the crime scene. Corporal Lindsey also went to the hospital to see Jones. He obtained statements from Butler and Battle on the night of the crime, but testified that Battle did not describe seeing Johnson leave with a handgun.

Jones required approximately 45 stitches for his head and hand injuries. Jones retrieved the bullet fired from Johnson's gun found in the house and gave it to the police. Jones was able to identify his assailant as Raymond and eventually identified Johnson as the perpetrator from a photographic line-up. Police arrested the defendant nineteen days later.

#### *Discussion*

On appeal, Johnson argues that the state failed to prove by a preponderance of the evidence that he did not act in self-defense and thus the conviction should be reversed.

The standard of appellate review for a sufficiency of the evidence claim is 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 proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *State v. Cummings*, 95-1377 (La. 2/28/96), 668 So. 2d 1132; *State v. Murray*, 36,137 (La. App. 2d Cir. 8/29/02), 827 So. 2d 488, *writ denied*, 02-2634 (La. 9/05/03), 852 So. 2d 1020. This standard, now legislatively embodied in La. C. Cr. P. art. 821, does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the fact finder. *State v. Robertson*, 96-1048 (La. 10/4/96), 680 So. 2d 1165. The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So. 2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Gilliam*, 36,118 (La. App. 2d Cir. 8/30/02), 827 So. 2d 508, *writ denied*, 02-3090 (La. 11/14/03), 858 So. 2d 422.

In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. *State v. White*, 28,095 (La. App. 2d Cir. 5/8/96), 674 So. 2d 1018, *writ denied*, 96-1459 (La. 11/15/96), 682 So. 2d 760, *writ denied*, 98-0282 (La. 6/26/98), 719 So. 2d 1048.

La. R.S. 14:33 provides in part, a battery is the intentional use of force or violence upon the person of another. Aggravated battery is a battery committed with a dangerous weapon. La. R.S. 14:34. “Dangerous weapon” includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm. La. R.S. 14:2(3); *State v. Sanders*, 39,645 (La. App. 2d Cir. 4/6/05), 900 So. 2d 221, *writ denied*, 05-1634 (La. 2/3/06), 922 So. 2d 1173. Pistol whipping is an aggravated battery. *State v. Etienne*, 94-910 (La. App. 3d Cir. 2/1/95), 649 So. 2d 1230, *writ denied*, 95-0544 (La. 6/23/95), 656 So. 2d 1012.

The provisions of La. R.S. 14:19 govern a claim of self-defense in a non-homicide case as follows:

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 or a forcible offense or trespass against property in a person’s lawful possession; 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.

The issue of self-defense requires a dual inquiry: (1) an objective inquiry into whether the force used was reasonable under the circumstances, and (2) a subjective inquiry into whether the force was apparently necessary. *State v. Robinson*, 37,043 (La. App. 2d Cir. 5/14/03), 848 So. 2d 642.

The evidence included Jones’s testimony and Johnson’s statement given to police on October 24, 2005. Both individuals conceded that an altercation took place between them, but Jones claimed that the pistol

whipping and beating he received at the hands of Johnson was not provoked. Jones added that as the two wrestled, the gun discharged. When asked if the defendant spoke during the attack, the victim testified that, "he said something like I was trying to punk him or something like that."

An audio tape of Johnson's statement was played for the jury during the trial. Johnson's statement to Detective James Cromer, Jr., consistently represented that an altercation took place after Johnson's arrival at Butler's house with Jones and an unidentified female. Johnson claimed that as he attempted to approach the female, someone hit him from behind and he got into a scuffle with the individual. Johnson denied having a gun or hearing a gunshot and recalled no incident involving a lamp. During the interview, Johnson showed the detective several scratches on his back and nicks on his hands which were substantially healed. Johnson claimed that he received the injuries in his attempt to defend himself during the incident.

When viewed in the light most favorable to the state, we find the evidence presented by the state sufficient to support Johnson's aggravated battery conviction. The jury heard Johnson's claim that he got into the altercation with the victim to defend himself and that he did not hear a gunshot or possess a gun. Nevertheless, the jury apparently chose to believe the contrary testimony of the victim that Johnson inexplicably pulled a gun and battered him. Although the victim surmised that Johnson acted anxiously and pulled the gun, possibly due to Butler's actions with the hatchet, he insisted that he did not provoke the defendant's attack in any manner. Battle's account corroborated the victim's testimony that a gunshot

was fired inside the house and further identified Johnson leaving while carrying a gun. Likewise, the physical evidence corroborated the fact that a gun was fired at the crime scene. The victim's injuries were also consistent with his claim to have been injured from blows to the head and attempts to defend himself from Johnson's efforts to hit him with a lamp. It is apparent that the jury did not believe Johnson's claim that his actions were taken in self defense or that the level of force he used was reasonable or justified under the circumstances, even considering the fresh scars on the defendant's hands and back. The remaining evidence is adequate to support Johnson's conviction for the aggravated battery of Jones. It shows that a struggle took place, but it was the unarmed victim who was defending himself against the defendant's unprovoked attack with a dangerous weapon. This assignment of error lacks merit.

In his next argument, Johnson claims that the trial court erred in failing to adequately consider that a lesser sentence would not deprecate the seriousness of the offense, or requesting a pre-sentence investigation. Johnson also contends that imposition of the upper range sentence is constitutionally excessive.

Because Johnson failed to file a motion to reconsider sentence, however, this court's review is limited to the bare claim that the sentence is constitutionally excessive. *State v. Mims*, 619 So. 2d 1059 (La. 1993); *State v. Duncan*, 30,453 (La. App. 2d Cir. 2/25/98), 707 So. 2d 164.

Constitutional review turns upon whether the sentence is illegal, grossly disproportionate to the severity of the offense or shocking to the

sense of justice. *State v. Lobato*, 603 So. 2d 739 (La. 1992); *State v. White*, 37,815 (La. App. 2d Cir. 12/17/03), 862 So. 2d 1123.

A sentence violates La. Const. art. 1, §20 if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. *State v. Smith*, 01-2574 (La. 1/14/03), 839 So. 2d 1; *State v. Dorthey*, 623 So. 2d 1276 (La. 1993); *State v. Bonanno*, 384 So. 2d 355 (La. 1980). A sentence is considered grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks one's sense of justice. *State v. Weaver*, 01-0467 (La. 1/15/02), 805 So. 2d 166; *State v. Lobato*, *supra*; *State v. Hogan*, 480 So. 2d 288 (La. 1985).

In sentencing the defendant, the trial court noted that it had taken into consideration Johnson's extensive criminal record which involved felony convictions.<sup>1</sup> Thus, the record reflects that Johnson is a multiple offender for whom several periods of incarceration have apparently failed to have rehabilitative effect. Although the sentencing record is scant regarding the defendant's background, we cannot find the imposed sentence to be grossly disproportionate to the severity of the crime. For the conviction, Johnson faced a maximum ten-year sentence. La. R.S. 14:34. On its face, we find

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<sup>1</sup>The trial court imposed the sentence immediately after the denial of the defendant's motions for new trial and post-verdict judgment of acquittal and there is no showing on the record that defendant waived the delay required by La. C. Cr. P. art. 873. Because no actual prejudice has been shown on the record before us as the result of the mistake, however, the error patent is harmless. See *State v. Roberson*, 40,809 (La. App. 2d Cir. 4/19/06), 929 So. 2d 789; *State v. Wilson*, 469 So. 2d 1087 (La. App. 2d Cir. 1985), *writ denied*, 475 So. 2d 778 (La. 1985).

this sentence appropriate for this defendant who pistol whipped an unarmed individual.<sup>2</sup> Thus, we reject Johnson's excessive sentence claim.

*Conclusion*

For the reason stated above, Johnson's conviction and sentence are affirmed.

**CONVICTION AND SENTENCE AFFIRMED.**

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<sup>2</sup>This court has upheld the maximum sentence of ten years for aggravated battery for an individual with an extensive criminal history in *State v. Williams*, 33,581 (La. App. 2d Cir. 6/21/00), 764 So. 2d 1164.