

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2011-KA-1222
VERSUS	*	COURT OF APPEAL
LARRY BROWN	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 497-740, SECTION "A"
Honorable Laurie A. White, Judge

* * * * *

Charles R. Jones
Chief Judge

* * * * *

(Court composed of Chief Judge Charles R. Jones, Judge Edwin A. Lombard, and Judge Paul A. Bonin)

BONIN, J., CONCURS WITH REASONS.

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**AFFIRMED; AMENDED
AND AFFIRMED AS
AMENDED**

MAY 30, 2012

The Appellant, Larry L. Brown, appeals his conviction of attempted manslaughter and his sentence of fifteen years at hard labor. Finding that the district court did not err in convicting Brown, but did err in sentencing him, we affirm his conviction, amend his sentence, and affirm his sentence as amended.

In June 2010, the State of Louisiana charged Larry L. Brown with attempted second degree murder. At his arraignment, Brown was appointed counsel, and entered a plea of not guilty to the charge. The district court later heard Brown's motions to suppress identification and to suppress statements given by Brown. The district court denied the motion to suppress identification, but granted the motion to suppress the statements.

Brown was later tried by a jury and was found guilty of attempted manslaughter in violation of La. R.S. 14:(27)31. He was sentenced to fifteen years at hard labor without benefit of probation, parole, or suspension of sentence. After the sentence was imposed, Brown made an oral request for the Court to reconsider the sentence and consider a lower sentence, which the district court denied. However, on this same day, the district court granted Brown's appeal, and this timely appeal followed.

At the motion hearing, Officer Nathan Gex testified that on March 12, 2010, he began investigating an attempted murder that occurred in the 1100 block of North Prieur St. in New Orleans. The victim was Kenneth Mouton. Officer Gex testified that on the night of the incident, he spoke to James Alexander, who is the roommate of Mr. Mouton, and was given the name “Larry”. When questioned by the Court, Officer Gex testified that Mr. Alexander told him that the individual (Larry) had applied for a job at a restaurant that began with a “B” on Bourbon Street. Officer Gex testified that it took him two weeks to conclude that he was looking for Larry Brown who was employed at Boudreaux’s Restaurant on Bourbon Street.

Officer Gex further testified that subsequently, in March 2010, he interviewed Brown at Boudreaux’s Restaurant. During the interview, Officer Gex asked Brown if he knew Mr. Mouton. Brown told Officer Gex that he had been drinking beers with Mr. Mouton on the night of the accident, and that he had attempted to see Mr. Mouton in the hospital. Although he questioned Brown, Officer Gex testified that he did not read Brown his Miranda rights because Brown was not “in custody” and was free to leave.

Officer Gex testified that he also interviewed Mr. Mouton. In fact, the officer testified that he was able to establish that Brown was a suspect and compiled a photographic lineup based on information provided by Mr. Mouton. The officer testified that Mr. Mouton knew the name “Larry Brown” and that he worked at a restaurant in the French Quarter that started with the letter “B”; however, he did not know any of Brown’s personal information. Because of this, the officer deemed it necessary to assemble a photographic lineup.

After compiling the lineup, Officer Gex testified that he gave Mr. Mouton the blank folder with the lineup enclosed and asked him to see if anyone in the pictures had stabbed him. The victim identified Brown, circled the picture, and signed his name across it. Officer Gex testified that subsequently, on March 25, 2010, he had an arrest warrant issued for Brown. At the conclusion of the motion hearing, the district court granted the motion to suppress Brown's statements, but denied the motion to suppress identification.

At the trial, Officer Paul Palmer testified that he is assigned to the crime lab. He testified that his duties include photographing, collecting evidence, drawing sketches, and fingerprinting crime scenes. Officer Palmer further testified that on March 12, 2010, a stabbing occurred in the 1100 block of North Prieur Street. The officer testified that he photographed the crime scene and was asked to identify several photos. Officer Palmer identified photos of blood in the street; blood and the t-shirt that was collected; and a cut on Mr. Mouton's arm. Officer Palmer testified that he did not have any medical training that would allow him to inform the jury if the photographed injuries were life threatening.

Officer Gex also testified at trial. He testified that he handles shootings, stabbings, and deaths. Officer Gex testified that Mr. Mouton had been taken to the hospital when he arrived at the crime scene. However, once he arrived, he processed the scene and conducted an interview of the initial suspect, Mr. Alexander. Officer Gex testified that Mr. Alexander was omitted as a suspect after he had been interviewed twice. Officer Gex further testified that Mr. Alexander provided him with a second name to develop a second suspect. Officer Gex testified that after processing the scene, he met with Mr. Mouton at the hospital and Mr. Mouton supplied him with the name of "Larry Brown".

Subsequently, Officer Gex testified that he re-interviewed Mr. Alexander, and at this point he was advised that Mr. Mouton had a friend named Larry, who was moving from Baton Rouge to the Westbank. Officer Gex testified that he was also informed that the friend had applied for a job at a restaurant on Bourbon Street that started with a “B”. A description of Brown was also provided. Officer Gex testified that he was told that Brown had gold teeth in his mouth. Officer Gex interviewed Brown, and the details of that interview were discussed above in the testimony in the motion hearing testimony of Officer Gex.

Upon completion of the interview with Brown, Officer Gex testified that he returned to the hospital to interview Mr. Mouton. Next, Officer Gex testified that he compiled a photo lineup, and as previously noted Mr. Mouton immediately identified Brown; an arrest warrant was issued. On cross examination, Officer Gex testified that the knife was never recovered. Officer Gex testified that Mr. Alexander’s demeanor on the night of the incident was mellow and worried. On redirect, Officer Gex testified that Mr. Mouton and Brown knew each other. Officer Gex testified that the incident occurred at 2:15 a.m.

Mr. Mouton also testified at trial. He testified that he was employed prior to the stabbing; however, he is no longer able to work. Mr. Mouton also testified that he exercised, ran, and played sports with his three children prior to the stabbing. He testified that on the day of the stabbing, he had gotten off from work, stopped home, saw Brown, and got some beer. The pair hung out on the front steps, talked, and drank for a few hours. Mr. Mouton testified that he had known Brown for a few years; they had gone out together, and Brown had stayed at his home in the past. Mr. Mouton knew that Brown carried a small three inch knife. Mr. Mouton testified that while he and Brown were drinking beer, the two had an argument,

wherein a few shoves and punches were thrown. Mr. Mouton testified that he tried to calm the argument down by getting more beers. However, Brown stabbed him in the back and pushed him on the ground. Mr. Mouton testified that he tried to protect himself the best way possible. Brown eventually stopped the stabbing after Mr. Mouton told him, “man you’re trying to take me away from my kids.” Brown stabbed Mr. Mouton fifty-seven times. Mr. Mouton testified that he is still being treated for the effects of the stabbing and has blood clots. Mr. Mouton identified Brown in the courtroom as the person who stabbed him.

On cross examination, Mr. Mouton testified that when he arrived home about 7:00 p.m., Brown was at his house watching television. He testified that he and Brown went to a store and purchased the beer. Three to four beers later the argument erupted.

Mr. Alexander also testified at trial. Mr. Alexander testified that he knows both Mr. Mouton and Brown and was friends with them. Mr. Alexander testified that he had been home for an hour to an hour and a half before the stabbing occurred. In fact, Mr. Alexander testified that he arrived home at approximately midnight. Mr. Alexander testified that Mr. Mouton was sitting in the front room listening to music when he arrived home. Mr. Alexander testified that he took off his shirt, fed his dogs, and took them out to walk after he arrived home. He testified that he took his dogs walking one at a time and walked them approximately thirty to forty minutes each. He testified that when he returned from walking his second dog, Mr. Mouton had been stabbed and was lying partially on the sidewalk and in the street. Mr. Alexander further testified that when he realized that it was Mr. Mouton who had been stabbed, he ran inside and dialed 911. Mr. Alexander testified that Mr. Mouton did not tell him what

happened on that night but a few months later told him that he did not know who stabbed him. Mr. Alexander testified that he told Officer Gex about Larry Brown, but he never told Officer Gex that Brown stabbed Mr. Mouton. Mr. Alexander also testified that he did not have any reason to believe that Brown stabbed Mr. Mouton.

Brown testified that he knew Mr. Mouton through Mr. Alexander. In fact, Brown testified to knowing Mr. Alexander for twelve years and Mr. Mouton for three years. Brown testified that he saw Mr. Mouton at the Prieur Street home at about 4:30 p.m. and stayed there for approximately an hour or two. He admitted drinking beer and watching television. Brown testified that he left the house at 6:30 p.m. and went to Baton Rouge. Brown testified that Mr. Mouton was well when he left and was in the living room. Brown further testified that he did not have any idea who stabbed Mr. Mouton. Brown testified that the police interviewed him several times at Boudreaux's, and approximately three weeks after speaking to the police officer he left the job at Boudreaux's.

A review of the record for errors patent reveals a sentencing error. In this case, Brown was sentenced without benefit of parole, probation, or suspension of sentence on the attempted manslaughter conviction. The sentencing provision for manslaughter is found at La. R.S. 14:31(B) and provides:

(B). Whoever commits manslaughter shall be imprisoned at hard labor for not more than forty years. However, if the victim killed was under the age of ten years, the offender shall be imprisoned at hard labor, without benefit of probation or suspension of sentence, for not less than ten years nor more than forty years.

The applicable sentencing provision for attempt is found at La. R.S. 14:27 (D)(3), which provides that:

(3) In all other cases he shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both.

Reading these provisions together, the sentence of Brown was to be served with benefit of parole, probation, and suspension of sentence. Thus, the sentence imposed is outside the statutory provision and illegal. An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. C.Cr.P. art. 882(A). Therefore, we strike the illegal portion of Brown's sentence, and amend his fifteen year sentence to be served with benefit of parole, probation, and suspension of sentence.

In his first assignment of error, Brown argues that the evidence is insufficient to support his conviction for attempted manslaughter because Mr. Alexander, a disinterested third party, testified that Brown was not present when Mr. Mouton was stabbed. The State, however, argues that sufficient evidence supports Brown's conviction.

Generally, when assessing the sufficiency of evidence to support a conviction, the reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, a rational fact finder could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). This review must include the whole record, as a rational fact finder does. State v. Mussall, 523 So. 2d 1305, 1310 (La. 1988). If rational finders of fact could disagree as to the interpretation of the evidence, the rational trier's view of all of the evidence most favorable to the prosecution must be adopted. Id. It is not the function of the appellate court to assess the credibility

of witnesses or reweigh the evidence. State v. Johnson, 619 So. 2d 1102, 1109 (La. App. 4 Cir. 1993), citing State v. Rosiere, 488 So. 2d 965, 968 (La. 1986). Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the fact finder. State v. Brumfield, 93-2404, pp. 5-6 (La. App. 4 Cir. 6/15/94), 639 So. 2d 312, 316.

Moreover, conflicting testimony as to factual matters is a question of weight of the evidence, not sufficiency. State v. Jones, 537 So. 2d 1244, 1249 (La. App. 4 Cir. 1989). Like all factual matters, credibility determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence. Id., citing State v. Vessell, 450 So. 2d 938 (La. 1984). Absent internal contradiction or irreconcilable conflict with the physical evidence, a single witness's testimony, if believed by the fact finder, is sufficient to support a factual conclusion. State v. Marshall, 04-3139, p. 9 (La. 11/29/06), 943 So. 2d 362, 369.

In this case, Brown was convicted of attempted manslaughter. La. R.S. 14:31 defines manslaughter in pertinent part as:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed . . .

Moreover, La. R.S. 14:27 defines an attempt in pertinent part as:

A. 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.

Contrary to Brown's argument, the testimony and evidence presented at trial, when viewed in the light most favorable to the prosecution, was sufficient to support the conviction of attempted manslaughter. At the trial, Mr. Mouton testified that Brown was at his house when he arrived home from work. Mr. Mouton testified that the pair purchased some beer and were drinking on the night of the incident. At one point, the two began arguing, and the argument escalated and got physical. In fact, Mr. Mouton testified that a few "baby punches" were thrown. Mr. Mouton tried to calm the argument down by getting more beers; however, Brown stabbed Mr. Mouton in the back when he started walking. Mr. Mouton testified that Brown also pushed him down and continued to stab him. Mr. Mouton testified that Brown did not stop stabbing him until he (Mr. Mouton) said, "man you're trying to take me away from my kids."

On the other hand, Mr. Alexander testified that Mr. Mouton was sitting in the front room listening to music when he arrived home from work. After getting home, Mr. Alexander walked his dogs one at a time. Mr. Alexander testified that he found Mr. Mouton lying partially on the sidewalk stabbed when he returned home after walking his second dog. Mr. Alexander testified that no one else was on the scene when he returned home. In this instance, the trier of fact considered the testimony of the victim and Mr. Alexander. After doing so, it obviously resolved the conflict in favor of the victim.

When testimony on factual matters is in conflict, and resolution of the conflict depends upon the credibility of witnesses, the credibility determination is a

question of fact within the sound discretion of the trier of fact. State v. Jones, 537 So. 2d 1244 (La. App. 4 Cir. 1989). The trier of fact's credibility determination will not be disturbed on appeal unless clearly contrary to the evidence. State v. Vessell, 450 So. 2d 938 (La. 1984). Thus, this assignment of error is without merit.

In his second assignment of error, Brown argues that his sentence is unconstitutionally excessive. He points out that the Court imposed a fifteen year sentence, although the evidence did not prove that he committed the crime.

In State v. Smith, 01-2574, pp. 6-7 (La. 1/14/03), 839 So. 2d 1, 4, the Court set forth the standard for evaluating a claim of excessive sentence:

Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that “[n]o law shall subject any person to ...*excessive...punishment*.” (Emphasis added.) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. State v. Bonanno, 384 So. 2d 355, 357 (La. 1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. State v. Cann, 471 So. 2d 701, 703 (La. 1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. State v. Walker, 00-3200, p. 2 (La. 10/12/01), 799 So. 2d 461, 462; *cf.* State v. Phillips, 02-0737, p. 1 (La. 11/15/02), 831 So. 2d 905, 906.

In State v. Batiste, 06-0875, p. 18 (La. App. 4 Cir 12/20/06), 947 So. 2d 810, 820, we further explained:

An appellate court reviewing a claim of excessive sentence must determine whether the trial court adequately complied with the statutory guidelines in La.

C.Cr.P. art. 894.1, as well as whether the facts of the case warrant the sentence imposed. State v. Landry, *supra*; State v. Trepagnier, 97-2427 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181. However, as noted in State v. Major, 96-1214, p. 10 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813:

The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. *State v. Lanclos*, 419 So. 2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D).

If the reviewing court finds adequate compliance with art. 894.1, it must then determine whether the sentence the district court imposed is too severe in light of the particular defendant as well as the circumstances of the case, “keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged.” State v. Landry, 2003-1671 at p. 8, 871 So. 2d at 1239. See also State v. Bonicard, 98-0665 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184.

In this case, Brown received a sentence of fifteen years at hard labor. This sentence was less than twenty years, which is the maximum sentence that could have been imposed. At sentencing, the State noted that it would be filing a multiple bill against Brown. However, per the docket master, Brown did not appear, and his multiple bill hearing was continued without date.

At the sentencing hearing, the district court noted that this was a crime of violence and pointed out the aggravating circumstances surrounding this crime. The Court pointed out that Brown “manifested deliberate cruelty” to Mr. Mouton and noted that the “actual violence” which caused “significant and permanent

injury or significant economic loss to the victim”. Lastly, the Court pointed out that Brown used physical force and a dangerous weapon in the commission of the offense.

It is important to note that in State v. Boyd, 95-1248 (La. App. 4 Cir. 8/28/96), 681 So. 2d 396, this Court upheld the imposition of a twenty year sentence on a defendant who shot the victim in the head and was convicted of attempted manslaughter. In fact, the defendant did not have any prior convictions but had three prior arrests. When this Court affirmed the district court’s sentence, we noted:

Maximum or near maximum sentences for attempted manslaughter have been affirmed in many cases, including: State v. Alexander, 550 So. 2d 207 (La. App. 4th Cir.1989), writ denied, 556 So. 2d 55 (La.1990) (ten years); State v. Solomon, 461 So. 2d 548 (La. App. 3d Cir.1984) (ten years); State v. Palmer, 447 So. 2d 1159 (La. App. 3d Cir.1984) (maximum, ten and one-half years); State v. Guidry, 428 So. 2d 1292 (La. App. 3rd Cir.1983) (maximum, ten and one-half years). In 1992, La. R.S. 14:31 was amended to increase the maximum penalty for manslaughter from twenty-one to forty years, almost doubling it. Thus, the defendant in the instant case was sentenced to serve twenty years at hard labor for attempted manslaughter, one-half the maximum for manslaughter. In the instant case the trial court found that the facts supported a conviction for attempted murder, and the court supported the imposition of the maximum sentence with reasons from the sentencing guidelines. We cannot say the sentence was constitutionally excessive and find no merit to the defendant's arguments otherwise.

Boyd, 95-1248, p. 8, 681 So. 2d at 401.

After considering the above, we do not find that Brown has shown that the district court abused its discretion by imposing an unconstitutionally excessive sentence. Accordingly, this argument is without merit.

DECREE

For the foregoing reasons, we affirm the conviction of Larry L. Brown. Furthermore, we amend his fifteen year sentence to reflect that it is to be served with benefit of parole, probation, and suspension of sentence, and the sentence is affirmed as amended.

**AFFIRMED; AMENDED
AND AFFIRMED AS
AMENDED**