

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

NO. 01-KA-880

VERSUS

**COURT OF APPEALS
FIFTH CIRCUIT**

FIFTH CIRCUIT

MALCOLM SPRINKLE **FILED** JAN 29 2002

COURT OF APPEAL



Peter J. Mitzevich
CLERK

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 98-3445, DIVISION "J"
HONORABLE M. JOSEPH TIEMANN, JUDGE

JANUARY 29, 2002


**THOMAS F. DALEY
JUDGE**

Panel composed of Judges James L. Cannella,
Thomas F. Daley, and Walter E. Rothschild

PAUL D. CONNICK, JR.,
DISTRICT ATTORNEY
THOMAS J. BUTLER,
TERRY M. BOUDREAUX,
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**AFFIRMED;
MATTER REMANDED**



On June 4, 1998, the defendant, Malcolm Sprinkle, was charged by indictment with second degree murder of Ella Joyce Graham, in violation of LSA-R.S. 14:30.1. The defendant was arraigned on June 11, 1998, and he entered a plea of not guilty. On August 17, 1998, the court ordered a sanity hearing, which was held on January 7, 1999. The trial court found that the defendant was competent to stand trial. On May 27, 1999, the trial court held a second sanity hearing, and the court found the defendant competent to stand trial and also ordered the Indigent Defender Board to provide an "interpreter" if needed for trial. On December 9, 1999, a third sanity hearing was held, and the trial court again found the defendant competent to stand trial.

A three-day jury trial began on June 13, 2000, with the jury returning without being able to reach a verdict. The trial court declared a mistrial and discharged the jury. On July 13, 2000, the State filed a Prieur notice stating its intent to introduce

evidence of other acts. On July 20, 2000, the court held a Prieur hearing, and the trial court granted the State's request to introduce other acts. The second jury trial began on July 24, 2000, and the jury found the defendant guilty as charged on July 27, 2000 by a vote of twelve to zero. On September 21, 2000, the defendant filed a Motion for New trial, which was denied by the trial court. That same day, the defendant waived the sentencing delays, and the trial court sentenced the defendant to life imprisonment without benefit of parole, probation, or suspension of sentence. Also on September 21, 2000, the defendant filed a Motion for Appeal, which was granted by the trial court on September 22, 2000.

FACTS

On August 9, 1991, while jogging along the Mississippi River levee on the Westbank, Nolan Simoneaux saw a partially nude female lying face down. Simoneaux testified that he saw the body by the levee and near a pipe yard between 7:30 and 8:00 a.m. He went to the guard shack at the pipe yard to tell the guard on duty to call the police.

Detective Alwert of the Jefferson Parish Sheriff's Office Homicide Division arrived at the scene at the levee around 8:25 a.m. As a result of an investigation, Detective Alwert learned that the victim's name was Ella Joyce Graham and that she was a prostitute who had psychological problems and was a drug user.

Detective Alwert learned that the victim worked the area of 4th Street near the Royal Oaks Motel, a known area for drugs and prostitution. He also learned that the victim associated with Rhonda "Rusty" Weaver and Patty Comardelle. The victim was last seen between 4:00 and 6:00 a.m. near the Westbank Boat Supply on August 9, 1991 by a newspaper deliveryman and a milkman. On cross-examination,

Detective Alwert stated that he learned that Clarence Carpenter, a witness who testified for the defense in this case, claims to have seen the victim around 7:00 a.m. near the Happy Hour Bar in Westwego. Detective Alwert testified that hairs were found on the victim's chest; however, they did not match the defendant's hair.

Dr. Frazier McKenzie, an expert in the field of forensic pathology, performed the autopsy on the victim.¹ Dr. McKenzie testified that the victim was shot once in the neck at a downward angle and that the bullet exited through the back. The bullet went through the trachea, the right subclavian artery and the right lung. Dr. McKenzie explained that the severed artery caused the victim to bleed to death. He also testified that there was evidence of cocaine in the victim's urine.

Rhonda "Rusty" Weaver testified at trial. She testified that she lived at the Royal Oaks Hotel and that it was a known place for prostitution and drug use. Rhonda admitted that she had two convictions for prostitution, two for possession of cocaine, two for driving under the influence, and one for crime against nature. She stated that the victim was also a prostitute and drug user and lived at the Royal Oaks.

Rhonda knew the defendant, Malcolm Sprinkle, as "Bo." She stated that he was a regular prostitution customer. The defendant would give her money, drugs, and pay her rent sometimes.

On August 8, 1991, the night of the murder, the victim had a party at the Royal Oaks. The victim had a male friend over, and Rhonda and the defendant were all at the party. Rhonda stated that everyone was using crack cocaine that night. Rhonda saw the defendant several times that night coming and leaving the party to take

¹ Dr. McKenzie did not testify at trial because he was unavailable. His testimony from the first trial was read to the jury.

people to the "Shops" to buy drugs. According to Rhonda, the police broke the party up around midnight, and she left to solicit prostitution customers.

Rhonda testified that early that morning, she and the defendant left the Royal Oaks to go buy drugs at the "Shops." On the way, they saw the victim sitting on a rail in front of a boat business near the Happy Hour Bar. The defendant pulled over and invited the victim to come along to the "Shops" to purchase drugs. Rhonda testified that as the victim was getting in the truck, Rhonda told her that she was going to leave.

When they arrived at the "Shops," Rhonda got out of the defendant's truck and proceeded to knock on one of the doors. She explained that she acted like she was knocking on the door, and then walked around to the front of the nearby bar. According to Rhonda, the defendant asked her where she was going, and she told the defendant to just sit in his truck. She then stated that she went along the tracks and hurried back to the Royal Oaks. Rhonda testified that it was dark when they went to the "Shops," and that it started to get light as she was going back to the Royal Oaks. She went back to the hotel and purchased drugs there.

Ms. Weaver testified that later that morning, the defendant came to her room where he began yelling at her and throwing her around the room. Rhonda testified that the defendant told her that he killed the victim, and that it was Rhonda's fault because it should have been her instead. She spoke to the police that day and also gave a formal statement three days later on August 9, 1991. Rhonda admitted that she did not mention the ride to the "Shops," picking up the victim, or the defendant's admission in the room because she was afraid of him.

Two years later, after an incident that occurred in August of 1993, Rhonda gave another statement to the police concerning the murder. Rhonda stated that the

defendant picked her up to go smoke some crack cocaine. She testified that the defendant was unusually nice and in a good mood. She explained that she went with the defendant because of his good mood and that she was very dope sick. They went to the levee, and the defendant handed her a rock of crack cocaine. According to Rhonda, she began to smoke the cocaine, and the defendant "punched her lights out" in the truck for no reason. She testified that a friend woke her up, and that she was laying in the weeds near the levee. Rhonda later learned that the victim's body was found in the same spot where she was left by the defendant after this incident. She went to the hospital and claimed that she had a broken nose, black eyes, and cuts and bruises on her body. Rhonda admitted that she left the hospital before being treated.

After this incident, Rhonda told the police about what had happened the night of the murder. She also admitted to the police that she had lied in her first statement because she was afraid of the defendant. Rhonda stated that, after she gave the police her second statement, she testified before a grand jury and then left the State for fear of the defendant.

Connie Latham testified that the defendant was her uncle. She admitted that she had a conviction for forgery in 1992, and that she was a prior cocaine addict. She testified that she and the defendant got into an argument in December of 1995. She explained that the argument occurred after the defendant had been arrested and released for the murder of the victim. During the argument, Latham called the defendant a murderer, referring to the murder of Ella Joyce Graham. Latham testified that the defendant responded, "Yeah, I killed the bitch, and I will kill you, too."

Subsequent to the statement by the defendant, Latham discussed the statement with the police. The police wired Latham twice to see if the defendant would admit to the murder again. The first taped wire of the defendant occurred on June 3, 1997.

Latham testified that the defendant admitted that he killed the victim, and that he shot her in the head twice because the victim would not have sex with him. The other taped conversation occurred on June 6, 1997. Both audio tapes of the wire tapings were played for the jury. In both statements, the defendant also denied committing the murder.

Joey Sprinkle, the brother of the defendant, testified that on several occasions, the defendant bragged about getting away with murder. He testified that on one occasion, the defendant swung a shotgun at him.

Joey also testified concerning another incident. According to Joey, on another occasion he went to his mother's residence to stop an argument between the defendant and their mother. Joey testified that the defendant threatened to kill him and his mother and went to the back bedroom. He stated that the defendant came down the hallway with a shotgun and said he was going to kill him.

David Sprinkle testified that the defendant was his uncle. David stated that he would go to the defendant's residence with his aunt to bring him groceries and take care of his bills. David testified that on one occasion while riding in the car to buy groceries in 1994, after the defendant was released from jail for the murder of the victim, he asked the defendant why he was in jail. According to David, the defendant responded by saying that he shot and murdered the girl.

Judy Sprinkle Coghlan, the sister of the defendant and aunt of David Sprinkle, corroborated the testimony of David. She testified that on the way to buy groceries, David asked the defendant if he committed murder. According to Coghlan, the defendant responded that "he did it" and he "killed that woman."

Clarence Carpenter testified for the defense. He admitted that he was convicted for possession of PCP in 1976. Carpenter stated that he knew Ella Joyce

Graham, and that he dated her niece. Carpenter testified that he spoke to the police about the murder and told detectives that he saw the victim at 7:00 a.m. at the corner of Jung Boulevard on the day she was murdered. According to Carpenter, the victim was speaking to someone on the balcony of the Happy Hour Bar that morning.

Patty Comardelle also testified for the defense. She admitted that she was in jail at the time of trial for a parole violation of crime against nature and possession of cocaine. She also admitted that she was convicted of possession of cocaine in 1991 and had convictions for stolen property and theft. Comardelle stated that she lived at the Royal Oaks Hotel and was also a prostitute. She testified that the defendant told her that he killed Ella Joyce Graham and that he used a weapon he had found in his mother's house. She also testified that Rhonda Weaver accused her and her father of committing the murder of Ella Graham.

ASSIGNMENT OF ERROR NUMBER ONE

The defendant contends that there was insufficient evidence to sustain the conviction for second degree murder because there was only circumstantial evidence presented and that many reasonable hypotheses of innocence were not excluded. The defendant argues that the only evidence identifying the defendant as the murderer was the suspect testimony of Rhonda Weaver. The defendant points out that there was no gun found and that Clarence Carpenter saw the victim as late as 7:00 a.m. The defendant further claims that the statement he made to his niece when she wore a wire was only a tale and "trash talking."

The State responds that, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to convict the defendant with second degree murder. The State points out that Rhonda Weaver, Connie Latham, David

Sprinkle, Joey Sprinkle, and Judy Coghlan all testified that the defendant admitted to killing Ella Joyce Graham.

The standard for appellate review of the sufficiency of evidence 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 beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). Under Jackson, a review of a criminal conviction record for sufficiency of evidence does not require a court to ask whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. A reviewing court is required to consider the whole record and determine whether a rational trier of fact would have found guilt beyond a reasonable doubt. State v. Lapell, 00-1056 (La. App. 5 Cir. 12/13/00), 777 So.2d 541, 545.

Evidence may be either direct or circumstantial. Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372, 378 (La.1982). When circumstantial evidence is used to prove a case, the trial judge must instruct the jury that, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." LSA-R.S. 15:438.

A different standard is applied on appellate review. The Louisiana Supreme Court recently commented:

On appeal, the reviewing court "does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events." . . . Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt.

State v. Mitchell, 99-3342, p. 7 (La. 10/17/00), 772 So.2d 78, 83.

Ultimately, all evidence, both direct and circumstantial, must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt.

To prove second degree murder, LSA-R.S.14:30.1(A), the State must show (1) the killing of a human being and (2) that defendant had the specific intent to kill or inflict great bodily harm. Specific intent is "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LSA-R.S. 14:10(1). It may be inferred from the circumstances and actions of the accused. The intent to kill or inflict great bodily harm may be inferred from the extent and severity of the victim's injuries. State v. Keating, 00-51 (La. App. 5 Cir. 10/19/00), 772 So.2d 740. This Court has held that specific intent to commit second degree murder may be inferred from the pointing of a gun at close range and pulling the trigger. State v. Lewis, 00-80, p. 13 (La. App. 5 Cir. 5/30/00), 764 So.2d 164, 171.

Encompassed in proving the elements of an offense is the necessity of proving the identity of the defendant as the perpetrator. The State presented both direct and circumstantial evidence that the defendant committed the murder of Ella Joyce Graham. First, the testimony of Rhonda Weaver placed the defendant with the victim around the time of the murder. Weaver testified that she left the defendant and the victim together that morning while at the "Shops" shortly before the murder. Second, Weaver testified that later that morning, the defendant admitted to her that he killed the victim and that it should have been her instead. Third, David Sprinkle, Joey Sprinkle, Judy Coghlan, and Patty Comardelle all testified that the defendant admitted killing the victim to each of them.

The defendant contends that the testimony of Carpenter placing the victim at the Happy Hour Bar around 7:00 a.m. created a reasonable hypothesis of innocence because anyone, including a new customer or one of the men on the lounge balcony, could have killed the victim. A determination of the weight of evidence is a question of fact, resting solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witnesses. A reviewing court may impinge on the fact finding function of the jury only to the extent necessary to assure the Jackson standard of review. State v. Lovick, 00-1833 (La. App. 5 Cir. 5/16/01), 788 So.2d 565, 572. It is not the function of this Court to assess credibility or to re-weigh evidence. State v. Hotoph, 99-243 (La. App. 5 Cir. 11/10/99), 750 So.2d 1036. The jury obviously believed the testimony of the State's witnesses and the inculpatory admissions of the defendant to others. Based on the evidence presented at trial, a rational trier of fact could have found that the State proved, beyond reasonable doubt, that defendant committed the murder of Ella Joyce Graham.

ASSIGNMENT OF ERROR NUMBER TWO

The defendant contends that the trial court erred in admitting into evidence of other crimes and bad acts because the evidence served no purpose other than to depict the defendant as a bad person. The defendant specifically argues that the battery on Weaver, the two assaults on Joey Sprinkle, and the following of Weaver and a customer did not show knowledge, motive, intent, or system as to this defendant and the victim.

The State responds that the trial court did not err in admitting the evidence of other crimes and bad acts because the evidence introduced at trial showed the

defendant's violent reaction to little or no provocation and showed the defendant's system in committing this murder.

Evidence of other crimes, wrongs, or acts committed by the accused generally is inadmissible to prove the character of the person in order to show that he or she acted in conformity therewith. LSA-C.E. art. 404B. However, such evidence may be admitted to prove identity under certain circumstances, as when the other crimes exhibit an almost identical modus operandi and were committed in close proximity and place. State v. Ballard, 351 So.2d 484 (La.1977). Nevertheless, the evidence must tend to prove a material fact genuinely at issue, and the probative value of the evidence must outweigh its prejudicial effect. LSA-C.E. art. 403; State v. Bell, 99-3278 (La. 12/8/00), 776 So.2d 418.

In State v. Miller, 98-0301 (La. 9/9/98), 718 So.2d 960, the Louisiana Supreme Court set out the factors in determining the admissibility of other acts evidence as follows:

Several other statutory and jurisprudential rules also play a role in determining the admissibility of such evidence. First, one of the factors listed in Article 404(B) "must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible." State v. Jackson, 625 So.2d 146, 149 (La. 1993). Second, the state is required to prove the defendant committed these other acts by clear and convincing evidence. Id.; State v. Davis, 449 So.2d 466 (La. 1984). Third, even if independently relevant, the evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403. Finally, the requirements set forth in State v. Prieur, 277 So.2d 126 (La. 1973) must be met. Thereunder, the state must, within a reasonable time before trial, provide written notice of its intent to use other acts or crimes evidence and describe these acts in sufficient detail. The state must show the evidence is neither repetitive nor cumulative, and is not being introduced to show the

defendant is of bad character. Further, the court must, at the request of the defendant, offer a limiting instruction to the jury at the time the evidence is introduced. The court must also charge the jury at the close of the trial that the other crimes evidence serves a limited purpose and that the defendant cannot be convicted for any crime other than the one charged or any offense responsive to it.

Id. at 962.

A trial court's ruling on the admissibility of evidence pursuant to LSA-C.E. art. 404B(1) will not be disturbed absent an abuse of discretion. State v. Stepp, 28,868 (La. App. 2 Cir. 12/11/96), 686 So.2d 76, 79, writ denied, 97-0410 (La. 6/30/97), 696 So.2d 1006.

There were four other acts that the State introduced to show system. The first other act was the disturbing the peace that resulted when the defendant followed Weaver and a customer. Weaver testified that shortly before the murder, the defendant followed her and became angry when she left the hotel with a potential customer. The State argued that this event showed system and that the defendant continually harassed Weaver. However, we find that the evidence of following Weaver had no probative value as to this crime. There was no evidence presented that the defendant followed the victim or that he became angry at the victim for leaving with customers.

There were two other acts introduced by the State that involved instances with a shotgun and Joey Sprinkle. One was the assault by the defendant on Joey Sprinkle where the defendant was swinging a shotgun like a baseball bat at him. The State argued that this evidence showed system because, with little or no provocation, the defendant threatened to kill Joey Sprinkle. The second instance introduced was the other assault by the defendant on Joey and their mother involving a shotgun and the defendant's threats that he was going to kill Joey. The State also argued that the

evidence of this other act showed system for the same reason. Although these two other acts indicated the defendant's inclination to act ragefully with little provocation, even against family members, it appears that there is little probative value of these other acts as to any issue involving this particular crime. There was no evidence presented that the victim was killed by a shotgun, hit in the head with a shotgun or other blunt object, or that the defendant ever was provoked by the victim or that he threatened to kill the victim. Also, the defendant did not in either instance fire the shotgun at Joey Sprinkle or his mother.

The fourth other act evidence introduced by the State involved the battery on Rhonda Weaver by the defendant when the defendant punched her while at the levee in August of 1993. The State argued that this evidence showed system because Weaver was beaten at the levee and left at the same spot where the victim was murdered. Weaver testified that, in August of 1993, the defendant took her to the levee to smoke some crack cocaine. She alleged that the defendant hit her and left her there. The victim was found in the same location. Further, Dr. McKenzie testified that the victim had evidence of cocaine in her urine.

In this case, even though the battery incident involving Rhonda Weaver was two years after the murder, time is only one of the factors in determining admissibility. We conclude as did the trial judge that there is enough similarity between taking Rhonda Weaver behind the levee to smoke cocaine injuring her and leaving her unconscious in the same spot as the homicide victim, Ella Joyce Graham, to show system. The trial court did not abuse its discretion in determining that the probative value of this other act outweighed any prejudicial effect.

We find, however, that the evidence regarding other bad acts, i.e. following Weaver and threatening Joey, was wrongfully admitted, we must now determine if

this evidence was harmless.² The test for determining harmless error is whether the verdict actually rendered in the case was surely unattributable to the error.

We find that the admission of evidence of other bad acts was harmless error. The evidence that defendant followed Weaver and threatened family members with a shotgun, in our view, did not create an inference that the defendant committed the murder for which he is charged. Other evidence presented at trial showed that the defendant was last seen with the victim prior to the time of her murder. Ms. Weaver testified that shortly after the time of the victim's death, the defendant came to her room and admitted to killing the victim. Several family members testified that the defendant admitted and even bragged about killing Ella Joyce Graham. Further, the defendant's own statement, that was recorded on a wire device worn by Latham and played to the jury, indicated that he admittedly shot the victim. Based on this other evidence, we find the verdict rendered by the jury was unattributable to the error of admitting evidence of other bad acts.

The record was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). The review reveals one error patent in this case.

The court failed to properly advise defendant of the time within which to file for post-conviction relief, as required by LSA-C.Cr.P. art. 930.8. The judge orally advised the defendant that he had two years to file for post-conviction relief. The notification was incomplete, because LSA-C.Cr.P. art. 930.8 requires the Application for Post-Conviction Relief to be filed no more than two years "after the judgment of conviction and sentence has become final." Therefore, the matter is remanded to the

²State v. Battie, 98-1296 (La. App. 5 Cir. 5/19/99), 735 So.2d 844, 852, writ denied, 99-1785 (La. 11/24/99), 750 So.2d 980 (citing State v. Johnson, 94-1379 (La. 11/27/95), 664 So.2d 94, 101-102).

district court for the limited purpose of informing the defendant of the full provisions of article 930.8 by sending written notice to the defendant within ten days of the rendition of this Court's opinion and to file written proof that the defendant received notice in the record. See State v. Gibson, 97-1203 (La. App. 3/25/98), 708 So.2d 1276.

For the foregoing reasons, the defendant's conviction is affirmed. This matter is remanded for the limited purpose of correctly informing the defendant of the time frame for seeking post conviction relief.

AFFIRMED; MATTER REMANDED