

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2000-KA-0129**  
**VERSUS** \* **COURT OF APPEAL**  
**CHARLES LAMBERT** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 390-583, SECTION "H"  
Honorable Greg G. Hangartner, Judge Pro Tempore  
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**Judge Miriam G. Waltzer**  
\* \* \* \* \*

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and  
Judge Max N. Tobias Jr.)

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## **CONVICTION AND SENTENCE AFFIRMED**

Defendant, Charles Lambert, appeals his conviction and sentence for second degree murder. He argues that he was prohibited from presenting a reasonable defense to the crime.

### **STATEMENT OF CASE**

On 3 July 1997, the appellant was indicted for the second degree murder of Terrance Mason. At his arraignment on 9 July 1997, he pled not guilty. On 27 July 1998, a twelve-person jury found him guilty as charged. On 21 August 1998, the court sentenced him to life imprisonment without benefit of parole, probation, or suspension of sentence.

### **STATEMENT OF FACTS**

On the evening of 2 May 1997, Terrance Mason was shot to death in the 1300 block of Tupelo Street. Mason died of two gunshot wounds, one of which entered under his left arm and injured his lungs, aorta, stomach, and spleen. The other wound entered through his lower back. Two pellets were recovered from his body, and testing showed these pellets were fired from the same .38 caliber gun. An autopsy indicated Mason had ingested heroin sometime before his death.

Police officers responding to the scene discovered Mason lying face

down on the street. The officers noticed two bicycles lying near the victim. No witnesses were present. However, when the officers contacted Mason's mother, she identified Christopher Bush as the man who was with Mason prior to the shooting. Ms. Mason told the officers that Bush knew who shot her son. Three days later, officers were able to contact Bush, who they found sleeping at his mother's house. Bush accompanied the officers to the Fifth District, where he gave a statement implicating the defendant, Charles Lambert. The officers compiled a photographic lineup, from which Bush chose Lambert's picture as that of the shooter. The officers then obtained a warrant for Lambert's arrest. On 9 May 1997, other officers arrested Lambert at a friend's house, hiding under a bed.

At trial, Christopher Bush testified he had been Mason's close friend. He stated he went to Mason's house early on the evening of the shooting, and the two remained there for a few hours. They then borrowed two bicycles which belonged to Mason's brother and rode a few blocks to Bush's brother's residence in the 1200 block of Alabo Street. Bush testified that Lambert was in the area selling crack cocaine when they arrived. Bush stated he went inside his brother's residence, while Mason remained outside. Bush estimated he remained inside for approximately an hour, and when he left, he saw Lambert walking back and forth, talking and waving a Tech Nine

automatic. Bush testified he heard Mason tell Lambert to put the gun away to keep the police away. Bush stated he and Mason then rode away.

Bush testified they had only ridden a few blocks when Mason stated he wanted to visit a female friend who lived in the 1300 block of Tupelo. When they arrived at the friend's house, they got off the bicycles and began walking toward her front door. Bush testified that at that moment, Lambert came from around some bushes. Mason asked Lambert if he was running from the police. Lambert said he was and then pulled a .38 caliber gun, pointing it at Mason and Bush. Bush testified that Mason yelled "Run!", and he and Mason fled in opposite directions. Bush testified he heard two to three shots, but he kept running. He testified he ran home. He admitted he never called the police to report what he had witnessed, but he explained he was afraid to do so. He stated officers came to his home on 5 May 1997 and took him to the police station; there he gave a statement implicating Lambert in the murder and identified Lambert's photograph from a lineup. He denied he was handcuffed or under arrest when he was taken to the police station. He admitted having a prior conviction for possession of cocaine and also admitted having been charged a few months after the shooting with a gun violation and a theft violation. He also admitted asking the district attorney's office for help in getting a bond reduction on the newer charges to get out of

jail pending the trial in this case, and he stated that the prosecutor offered to have his pending charges reduced. He emphasized, however, that he gave the statement to the police prior to being arrested on the new charges. He also stated that at the time of trial, he was still incarcerated.

On cross-examination, Bush admitted he was arrested on 29 May 1997 for being a convicted felon in possession of a firearm and again on 28 January 1998 for automobile theft. He also admitted that on 28 April 1997 he pled guilty to possession of cocaine and received probation. He denied testing positive for opiates nine times while on probation for this offense, but he admitted his probation was terminated in that case three months before trial in this case. He stated he intended to testify in this case even if his probation had not been terminated in the earlier case. He also stated he would have eventually contacted the police if the officers had not contacted him.

The defense called Michael Bollman, the chief of the trial division of the district attorney's office. Bollman testified he was the person who could approve any reduction or dismissal of charges. Defense counsel asked Bollman about Bush's prior cocaine conviction, the fact that he tested positive nine times during his probation, and the fact that when his probation was revoked, he was sentenced to credit for time served and released as to

that case. Bollman stated that it was not unusual for judges "in certain sections of court" to reduce a sentence when revoking probation, and he stated that he did not believe his office took any part in the judge's decision to revoke Bush's probation and sentence him to credit for time served.

Counsel then questioned Bollman about the reduction of the two charges against Bush that he obtained between the time of the murder and trial, those of being a convicted felon in possession of a firearm and auto theft. Bollman testified Bush eventually pled guilty to attempted possession of a firearm in one case and pled guilty as charged in the theft case.

Bollman stated evidentiary problems were present in both cases making the cases more difficult to prosecute, and he agreed to reduce the charge in the gun case to attempted possession of a gun and agreed not to multiple bill the theft charge. He testified Bush received six months in the gun case and probation in the theft case. Bollman insisted he told the other assistant district attorneys that if they decided to aid Bush with any deals, such deals must be completed before the murder trial, and information concerning the deals must be disclosed to Lambert's counsel.

Charles Lambert admitted he had two prior misdemeanor convictions, one for flight from an officer and one for aggravated assault. Lambert testified he only knew Mason by sight, but he was better acquainted with

Bush, to whom he had sold crack cocaine. Lambert testified that on the night of the shooting when he arrived on Alabo Street at approximately 8:30 p.m., Mason and Bush were already in the area. Lambert stated Bush approached him and asked if he had any "dope" on him. Lambert replied he had two "quarters" (of an ounce of cocaine). Lambert stated Bush asked how much each quarter cost, and Lambert replied each one cost \$225. Bush stated he wanted both of them, but he had only \$350. Lambert testified Bush told him he would "go around the corner" to get the remaining money. Bush and Mason then left. Lambert testified that while he was waiting for Bush to return, another man came up to him and purchased one of the two quarters. Lambert stated he then "went around the corner" and encountered Bush on Tupelo Street, where he informed Bush he had sold one of the quarters, but he would sell Bush the remaining quarter and then sell him another one when he replenished his stock. Lambert testified Bush offered to buy the remaining quarter for \$215. Lambert declined the offer, insisting the price was \$225. Bush then again offered \$215, and Lambert countered with \$225.

Lambert testified that at this point, Bush reached behind his back and retrieved a gun, which he pointed at Lambert. Mason was standing on Bush's right side. Lambert knocked Bush's hand with the gun to the side,

and the gun discharged. Lambert then grabbed the hand with the gun, and the gun discharged again, in the direction where Mason had been standing. Lambert charged Bush, and Bush fell to the ground, with Lambert following. Lambert testified that as Bush hit the ground, the gun fell from Bush's hand and discharged a third time. Lambert testified he hit Bush, got up, and ran away, with Bush firing a few times at him. Lambert admitted he did not call the police about the shooting. He insisted he did not see Mason getting shot and did not know he had been shot. He admitted he was arrested a week later while hiding at a friend's house, but he insisted he was hiding because he was carrying cocaine at the time he was arrested. Lambert denied the allegation that Mason had been selling drugs on Alabo Street earlier and that he had shot Mason as a result of Mason's violation of his turf.

## **DISCUSSION**

### **A. Errors Patent**

A review of the record reveals no errors patent.

### **B. Assignment of Error**

By his sole assignment of error, the appellant contends the trial court erred by refusing to allow him to present evidence to support his defense. Specifically, he argues the trial court erred by refusing to allow him to introduce nine test results from drug tests performed while Bush was on



probation to impeach Bush's denial that he violated his probation in that case and to show that Bush received a deal in that case in payment for his testimony in the appellant's case. He also argues the trial court erred by refusing to allow him to introduce a police report made in connection with Bush's firearm arrest a few weeks after the shooting to show that he had the same caliber gun used in the murder.

In support, he cites State v. Van Winkle, 94-0947 (La. 6/30/95), 658 So.2d 198, where the Court found that the trial court erred by refusing on evidentiary grounds to allow the defendant to introduce evidence which would have cast suspicion for the defendant's son's murder on another person who shared their home. The defendant's son was found suffocated in his bedroom. The defendant was arrested for his murder. The defense theory was that another man who lived in the apartment was a homosexual hustler who brought home another man, and these two men accidentally killed the boy during forced attempted homosexual activity. In furtherance of this theory, the defendant sought to question: (1) the roommate about his sexual activities and source of income; (2) the coroner about the condition of the victim's anal orifice; (3) the State's chemist as to why the absence of sperm in the anal swabs containing seminal fluid did not necessarily disprove sexual activity; (4) the bartender of the bar where the roommate

hung out as to what he meant by the bar being a "hustler" bar; and (5) another bartender of the bar as to whether the bar was a gay bar. The district court refused to allow counsel to question the witnesses as to these areas, and the defendant was convicted of her son's murder. The court of appeal affirmed her conviction. On review, the Louisiana Supreme Court reversed, finding the trial court's ruling prevented the defendant from presenting a defense. The Court stated:

A criminal defendant has the constitutional right to present a defense. U.S. Const. amend. 6; La. Const. Art. 1 § 16; *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Gremillion*, 542 So.2d 1074 (La. 1989); *State v. Vige*, 518 So.2d 501 (La. 1988). Due process affords the defendant the right of full confrontation and cross examination of the State's witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Mosby*, 595 So.2d 1135 (La. 1992). It is difficult to imagine rights more inextricably linked to our concept of a fair trial.

Evidentiary rules may not supersede the fundamental right to present a defense. In *State v. Gremillion*, supra, the defendant attempted to introduce evidence that third parties, rather than the defendant, had killed the victim. The evidence consisted of a statement that the victim had made to a sheriff's deputy who investigated the crime. The statement was that he had been attacked and beaten by three white males. The trial court and the Court of Appeal both held the statement was inadmissible hearsay. We agreed that the statement was hearsay and that it did not meet any applicable exception (res gestae, dying declaration,

business records). However, we concluded that normally inadmissible hearsay may be admitted if it is reliable, trustworthy and relevant, and if to exclude it would compromise the defendant's right to present a defense. *See Chambers v. Mississippi*, 410 U.S. at 302, 93 S.Ct. at 1049. Exclusion of the statement in *Gremillion* impermissibly impaired the defendant's fundamental right. 542 So.2d at 1079, citing *State v. Washington*, 386 So.2d 1368 (La. 1980).

Similarly, in *State v. Vigee, supra*, we held that hearsay evidence supporting the defendant's theory of the case and undermining the State's lead witnesses was relevant; excluding it mandated reversal. The defendant may *always* assert that someone else committed the crime. *Chambers v. Mississippi, supra; State v. Ludwig*, 423 So.2d 1073 (La.1982). [Emphasis applied.]

State v. Van Winkle, 94-0947 at pp. 5-6, 658 So.2d at 201-202. The Court found that the evidence that the trial court refused to allow the defense to present was relevant to the issue of whether someone else may have committed the murder, and it stated: "By abridging the cross examination of these witnesses, the trial court impaired [the defendant's] constitutional right to present a defense." *Id.* at 7; 658 So.2d at 202. The Court further held this error was not harmless because it found a reasonable possibility that the excluded evidence might have contributed to the verdict. The case against the defendant was based upon circumstantial evidence, and the defense theory (that the roommate and another man who was seen leaving the

apartment early on the morning of the murder committed the murder) may well have given the jurors reasonable doubt of the defendant's guilt. The Court reversed the conviction and remanded for a new trial.

This court addressed a similar claim in State v. Short, 94-0233 (La.App. 4 Cir. 5/16/95), 655 So.2d 790, writ denied, 95-1520 (La. 11/17/95), 663 So.2d 719. The defendant was charged with the aggravated rape of his stepdaughter. The defendant wanted to present evidence to show: (1) that his wife was having an affair and was spending his paychecks while he was offshore; (2) that the victim liked the new boyfriend better than she liked him; and (3) that several other men, including the new boyfriend, had access to the victim. The defense was not allowed to delve into these matters, and the defendant was convicted. On appeal, this court rejected his claim that he was denied the right to present a defense. The court noted the defendant was allowed to question the victim concerning her bias against the defendant, including his ability to show her wish that the defendant and her mother were not married and her wish to live elsewhere. In addition, the defendant was allowed to testify that the victim had made a similar accusation against her mother's former husband, and he was allowed to establish the existence of her mother's boyfriend at the time of the alleged rape.

Here, Lambert argues that the trial court erred by refusing to allow him to introduce the report of Bush's nine positive drug tests during his probationary period for the cocaine conviction. He asserts that the court refused to allow him to introduce this exhibit because it was hearsay, and he argues that under LSA-C.E. art. 803(8)(a)(i) the record would have been an exception to the hearsay rule. LSA-C.E. art. 803(8)(a)(i) exempts from the hearsay rule: "Records, reports, statements, or data compilations, in any form, of a public office or agency setting forth: (i) Its regularly conducted and regularly recorded activities." However, a reading of the trial transcript shows that the court refused to allow the defendant to introduce this evidence on the basis of its relevancy, not because it contained possible hearsay. During the cross-examination of Bush, defense counsel asked him if he had tested positive during his probation, and Bush replied he did not remember doing so. Defense counsel then asked if he wanted to see his drug tests, and the defendant replied it did not matter. The prosecutor objected to the relevance of these questions, and the court noted that impeachment was proper for convictions only. Defense counsel then continued questioning Bush about his probation in the cocaine case and any possible deal he could have received and then moved on to questions concerning the shooting. Defense counsel then returned to Bush's failure to contact the police, his

attempts to get out of jail, and any deals he may have made. Defense counsel marked exhibit D-1, which he described as "case number 388-821". The prosecutor requested a bench conference, at the conclusion of which defense counsel again asked Bush if he tested positive for opiates while on probation. The prosecutor objected, and defense counsel noted that Bush had already answered the question and he was giving him an opportunity to clarify his answer. The court asked him why he was asking the question again if Bush had already answered it, and the following occurred:

BY MR. GREEN [defense counsel]:

Because I'm going to remind him what perjury is about and ask him if he wants to –

BY MR. HOTH [prosecutor]:

Judge, but it's my position the first time he asked this question that it was irrelevant. And I still think it's irrelevant.

BY THE COURT:

I must sustain the objection. If you want to ask him if he uses drugs – I don't even know if that's proper. That's irrelevant. But if you want to ask that, go ahead and ask it.

BY MR. GREEN:

Do you use heroin?

BY MR. HOTH:

Objection.

BY THE COURT:

Overruled.

EXAMINATION RESUMED BY MR. GREEN:

Q. Were you using heroin while you were on the street?

A. No.

Q. So you never tested positive while you were on the street?

A. Okay.

BY MR. GREEN:

That's all the questions I have, your honor.

A reading of this passage shows defense counsel attempted to introduce evidence of the positive drug tests as impeachment of Bush's credibility (hence, the reference to perjury). As per LSA-C.E. art. 608(B), "Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required." Here, because defense counsel sought to introduce the drug tests (if, indeed that was all he intended to introduce from the record) to impeach Bush's credibility with respect to his assertion that he did not test positive during his probation, the

trial court correctly refused to allow him to do so.

When defense counsel questioned Bollman of the district attorney's office concerning the disposition of the cocaine case, counsel questioned him about Bush's positive drug tests and the likelihood that someone would have obtained credit for time served if revoked. Counsel did not seek to introduce the exhibit at that time, and no ruling was made as to any hearsay aspect of it. This claim has no merit with respect to the records of the positive drug tests.

The other evidence the defense sought to introduce was the caliber of gun Bush possessed when he was arrested a few weeks after the shooting. Counsel did not ask Bush any questions on this topic. Instead, during the direct examination of Mr. Bollman, counsel first questioned him concerning the original LSA-R.S. 14:95.1 charge in case #390-138 and the possible sentence Bush could have received if he had been found guilty as charged. The following then occurred:

BY MR. GREEN:

And what kind of gun did Mr. Bush have?

BY MR. HOTH:

Objection.

[BY MR. BOLLMAN]:

I don't know. I know it was found in a back



yard. I remember that. I do not know what kind of gun he had.

BY MR. GREEN:

A .38 revolver? Does it show it on the first page there?

BY MR. HOTH:

Judge, if he wants to testify –

BY MR. GREEN:

He said he doesn't know. I'm asking him.

[BY MR. BOLLMAN]:

It wasn't relevant to my decision what kind of gun he had.

BY THE COURT:

If it's relevant, he just said it's not relevant.

BY MR. GREEN:

Well –

BY MR. HOTH:

Judge, we need to approach the bench. Mr. Green, I think, is proceeding to testify here.

BY THE COURT:

The type of gun is not relevant. All right. It alleges a firearm. If you want to ask him about what was relevant to his decision, then ask him that.

BY MR. GREEN:

Your honor, you are failing to realize that he can be called as a witness for more than one purpose here.

BY MR. HOTH:

Can I also say something, Judge? The police report is hearsay. Mr. Bollman is testifying to hearsay if he reads what's on the police report.

BY MR. GREEN:

It's his file.

BY MR. HOTH:

It's hearsay.

[BY MR. BOLLMAN]:

Well, this is a Court file.

BY MR. GREEN:

Well, I know. But we can get your file if that would make you feel better.

BY MR. HOTH:

That's hearsay.

BY THE COURT:

Mr. Green, my understanding is that the relevant reason why Mr. Bollman is called is why they reduced the charge for Mr. Bush. Why don't you ask him questions about that?

BY MR. GREEN:

I have a lot of reasons why I called Mr. Bollman, your honor.

BY THE COURT:

Okay. Well, let's start with Mr. Bush and then we'll get to the other stuff later. All right?

Counsel then continued by asking Bollman about Bush's theft charge. He did not return to the issue of the caliber of gun Bush possessed at his arrest.

The appellant now argues that the trial court erred by refusing to allow him to introduce evidence of the caliber of gun based upon its finding that the report which contained this information was inadmissible hearsay.

However, the above-quoted passage shows defense counsel did not attempt to introduce the report; rather, the State's objections to his questions concerning what was contained in the report were sustained by the court. In addition, although the prosecutor argued the information was hearsay, the court sustained the objection because it found the caliber of the gun was not relevant to Bollman's decision to authorize Bush to plead guilty to the lesser included offense of attempted possession of a firearm. This ruling was not error, especially given Bollman's testimony that the caliber of gun did not enter into his decision. As per LSA-C.E. art. 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." Art. 402 provides:

"Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In State v. Badon, 95-0452, pp. 7-8 (La.App. 4 Cir. 11/16/95), 664 So.2d 1291, 1295-1296, this court stated:

The standard of relevancy is based upon logic and experience. So long as the proffered evidence has a tendency to make a consequential fact more or less probable, the logical relevancy test is satisfied. Logically relevant circumstantial evidence should be excluded only if its probative value is outweighed by the risk that its admission will consume too much time, unnecessarily confuse the jury concerning the issues to be determined, tend to excite emotions of the jury to the undue prejudice of the opponent, or unfairly surprise the opponent. State v. Davenport, 445 So.2d 1190, 1195 (La. 1984). . . . Absent a clear abuse of discretion, the trial court's ruling as to relevancy should not be disturbed on appeal. State v. Whittaker, 463 So.2d 1270, 1272 (La. 1985).

See also State v. Harper, 98-1020 (La.App. 4 Cir. 12/22/99), 754 So.2d 286.

Although defense counsel alluded to another purpose for asking this question, ostensibly to try to connect the gun to the shooting to bolster the defense theory that the victim was shot by Bush's gun during a struggle between Bush and the appellant, counsel did not try to show the relevancy of

the question at the time the objection was raised. In addition, the relevancy of this information is speculative at best because the defense attempted to present no evidence to show that gun was the one used in the shooting. Thus, the trial court did not err by sustaining on the basis of relevancy the State's objections to the questions concerning the caliber of gun. This claim has no merit.

The thrust of the appellant's claim is that he was not allowed to present his defense that Bush received great deals in his three other cases in exchange for his testimony against the appellant. Despite the trial court's rulings, the defense was able to present this evidence. Mr. Bollman testified that with respect to the cocaine case, Bush's probation was revoked, and the court imposed a sentence of credit for time served, thus exposing him to no more jail time. With respect to the firearms charge, Bollman testified that Bush was allowed to plead guilty to the lesser charge of attempted possession of a firearm and was sentenced to serve six months in jail. With respect to the theft charge, Bollman testified Bush pled guilty as charged, with the State's agreement not to multiple bill him, and he was placed on probation. Thus, the full extent of each of the deals was presented to the jury. Therefore, even if the trial court had erred in its rulings on these two points, such error was harmless because the jury was aware of the deals

Bush received, even if he would admit to only asking for the opportunity to post bond during the pendency of the trial in this case. This assignment has no merit.

## **CONCLUSION**

Accordingly, Lambert's conviction and sentence are affirmed.

**CONVICTION AND SENTENCE AFFIRMED**