

STATE OF LOUISIANA

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NO. 2000-KA-0212

VERSUS

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COURT OF APPEAL

FREDERICK D. STOKES

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 407-743, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE

* * * * *

JUDGE JOAN BERNARD ARMSTRONG

* * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones
and Judge James F. McKay, III)

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CONVICTION REVERSED
SENTENCE VACATED

CASE REMANDED.

STATEMENT OF THE CASE

On June 25, 1999, the defendant, Frederick Stokes, was charged by bill of information with attempted second-degree murder of Jenora Webb. On July 29, 1999, a jury found him guilty of the lesser included offense of aggravated burglary. On October 28, 1999, the trial court denied defense motions for post verdict judgment of acquittal and for new trial and sentenced the defendant to nine years at hard labor. The defendant now appeals, raising three assignments of error. We find merit in the first and second assignments of error. Therefore, for the reasons that follow, we reverse the defendant's conviction, vacate the sentence, and remand for further proceedings.

STATEMENT OF THE FACTS

On April 19, 1999, at about 2:30 a.m., Officer Terry Thomas and his

partner, Officer Deborah Morris, responded to a report of a gunshot wound. They found the victim, Jenora Webb, had been shot in the stomach. Ms. Webb was transported to the hospital where she underwent surgery; however, the bullet remains lodged inside her.

Ms. Webb testified that, on the night of the shooting, she had been out with a male friend. She further testified that she got out of her friend's car at the intersection of Melpomene and Constance Streets. When she met up with her boyfriend, the defendant, he took a gun out of his pocket and put it on the roof of his car. Ms. Webb testified that she and the defendant both reached for the gun; they struggled for control of it; and it accidentally went off. She further testified that she did not know whose hand was on the gun when it went off.

It is not clear from Ms. Webb's testimony whether the defendant arrived in another car, or whether the car on which the defendant placed the gun was her male friend's car. It is also not clear how Ms. Webb got from the intersection of the shooting to the apartment. She testified that the defendant picked her up from by the car, but that she walked inside.

Ms. Webb testified that the defendant is the father of her youngest child, and that she still loved him. She denied telling the responding police officers that the defendant shot her. She further testified that she pleaded

with the district attorney to withdraw the charges because she and the defendant share children.

Officer Stephen Jefferson produced the 911 tape which alerted the police department to the incident. Over defense objection, the tape was played for the jury.

Criminalist Joe Tafaro testified that he examined the clothing worn by the victim when she was shot. He found no evidence of gunpowder residue or stippling, which indicated that the gun had to have been at least two to three feet from the victim when it was fired.

ERRORS PATENT

The district attorney did not sign the bill of information, as required by La. C.Cr.P. art. 834. The defendant waived his right to quash the information by his failure to file a motion to quash prior to trial. La. C.C.r.P. arts. 534, 535. Moreover, the fact that the prosecutor's signature is omitted from an otherwise sufficient bill of information that fairly apprises a defendant of the nature and cause of the accusation against him does not warrant reversal. By presenting the case at trial, the prosecution fully ratifies the filing of formal charges, and any protection that is afforded to the accused and to society by the requirement that the district attorney's signature appear on the bill of information is fully accorded. State v. White,

404 So. 2d 1202 (La. 1981).

ASSIGNMENT THREE – SUFFICIENCY OF THE EVIDENCE

In this assignment of error, the defendant argues that the evidence was insufficient to sustain the verdict of guilty of aggravated battery. He maintains that there was no admissible evidence which tended to prove that he intentionally shot the victim.

When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. When the entirety of the evidence both admissible and inadmissible is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must review the assignments of error to determine whether the accused is entitled to a new trial. State v. Hearold, 603 So. 2d 731 (La. 1992).

The standard of appellate review for sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). Either direct or circumstantial evidence may prove the essential elements of the crime. With circumstantial evidence the rule is: "assuming every fact to be proved that the evidence tends to

prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438. This rule is not a separate test from the review standard established by Jackson v. Virginia, but rather it is an evidentiary guideline which facilitates appellate review of the sufficiency of the evidence. State v. Jacobs, 504 So. 2d 817, 820 (La. 1987). Ultimately, to support a conviction, the evidence, whether direct or circumstantial or both, must be sufficient under Jackson to satisfy any rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Sutton, 436 So. 2d 471 (La. 1983). Specific intent may be inferred from circumstances and the defendant's actions. State v. Smith, 94-2588 (La. App. 4 Cir. 3/27/96), 672 So. 2d 1034.

Battery is defined as "the intentional use of force or violence upon the person of another" La. R.S. 14:33. Aggravated battery is "a battery committed with a dangerous weapon." La. R.S. 14:34.

The available evidence in this case consists of the victim's testimony that the defendant met her in the early morning hours after she got out of the car of a male friend. The victim further testified that the defendant placed a gun on the roof of the car, and that she and the defendant struggled over control of the gun, which then went off accidentally. The victim suffered a gunshot wound to her stomach. The bullet remains lodged there despite

surgery.

The victim testified that she tried to withdraw the complaint, but was not allowed to do so. She further testified that the defendant is the father of her youngest child, and that she still loves him. She disputed the prosecutor's suggestion that she told the responding officers that the defendant shot her. A criminalist testified that he examined the victim's clothing and determined from the lack of gunshot residue that the weapon was at least two or three feet away from the victim when it was fired. The criminalist's testimony thus diminishes the credibility of the victim's testimony as to how the gun fired.

Although there is no available direct evidence which links the defendant as the shooter, the jury could accept the victim's testimony that the defendant appeared on the scene with a gun, but consider the testimony of the criminalist and reject her contention that the gun accidentally fired during a struggle. Assuming the jury accepted the testimony of the criminalist and disbelieved the victim's version of the firing, the jury could find, beyond a reasonable doubt, that the only reasonable hypothesis was that the defendant intentionally shot the victim. Accordingly, the evidence is sufficient to sustain the conviction.

ASSIGNMENT ONE – ADMISSIBILITY OF HEARSAY

STATEMENT

In his first assignment of error, the defendant argues that the trial court erroneously admitted the prior statement which the victim allegedly made to the responding officers naming him as the shooter. A statement, “other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted,” is hearsay. La. C.E. art. 801C. Generally, such out-of-court statements are inadmissible. La. C.E. art. 802. An exception is the prior testimony of a witness made under oath at a prior trial or preliminary hearing of the accused, which testimony is classified as non-hearsay and is admissible. La. C.E. art. 801D(1)(a).

Nevertheless, as noted in State v. Cousin, 96-2973, (La. 4/14/98), 710 So. 2d 1065, La. C.E. art. 607D(2) permits the introduction of a prior inconsistent statement, even though it is hearsay, for the limited purpose of attacking the credibility of a witness. Although such evidence is admissible for impeachment, the Louisiana Supreme Court has steadfastly recognized that “when a witness other than the defendant is impeached by the admission of a prior inconsistent statement incriminating the defendant, the statement is admissible only on the issue of credibility and not as substantive evidence of the defendant's guilt.” State v. Ray, 259 La. 105, 249 So. 2d 540, 542

(1971).

La. C.E. art. 105 provides, in pertinent part:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

When the defendant requests a contemporaneous jury instruction, the trial court must caution the jury, at the time the impeaching evidence is introduced, that the prior inconsistent statement is not substantive proof of guilt. State v. Kaufman, 304 So. 2d 300 (La.1974); State v. Willis, 241 La. 796, 131 So. 2d 792 (1961). However, in State v. Jones, 94-0926 (La. App. 4 Cir. 12/28/94), 648 So. 2d 472, this court found that giving the limiting instruction at the end of trial rather than at the time the evidence was admitted was not erroneous where the evidence was elicited just before the end of the trial.

La. C.E. art. 613 requires that a distinct foundation be laid before evidence of a prior inconsistent statement is admissible to impeach a witness. The witness's attention must be fairly directed to the particular statement and he must be given the opportunity to admit the fact of his prior inconsistent statement. If the witness fails to distinctly admit the particular statement, the extrinsic evidence of the prior inconsistent statement is

admissible, unless “the interests of justice otherwise require.”

Finally, La. C.E. art. 403 provides that relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.” A statement otherwise admissible as impeachment evidence may be excluded by the Article 403 balancing test. State v. Laymon, 97-1520 (La. App. 4 Cir. 3/15/00), 756 So. 2d 1160, rehearing denied, (La. App. 4 Cir. 3/31/00).

In the instant case, the prosecutor advised the jury in opening argument that the victim had changed her story. The prosecutor then called Officer Thomas, who testified that the victim told him that the defendant shot her in connection with a verbal altercation. Defense counsel objected to the hearsay and particularly noted that the State had not laid a foundation to use the statement as impeachment, as the victim had not yet testified. The victim subsequently testified and denied having ever told police officers that the defendant shot her. Rather, she claimed that the gun went off accidentally as they struggled for control of it. Defense counsel again objected and requested a limiting instruction. Despite the contemporaneous objections, the trial court refused to give the limiting instruction until the end of the trial.

In Cousin, the court fully discussed the considerations required in the balancing test in a similar issue, as follows:

The purpose of impeachment is to diminish the credibility of a witness. When the testimony of a witness in court is inconsistent with a prior statement by the witness, the party calling the witness may be able to use the prior statement to impeach the witness--that is, to diminish his or her credibility. The right to use the prior statement depends upon the probative value of the statement as to the credibility of the witness' in-court testimony, as measured against the prejudicial impact that potentially may result from the jury's improper use of the evidence. Weissenberger, supra, at § 607.3. In performing the weighing process, the court should consider the relevancy of the prior statement to the credibility of the in-court testimony and the motivation for the impeachment. The court should further consider the prejudicial effect of the statement if used improperly as substantive evidence, and the effectiveness of a limiting instruction in avoiding improper use of the statement. Id.

One purpose of allowing impeachment by a prior inconsistent statement is to prevent a party from being damaged by the party's own witness. Thus if a witness testifies at trial that he or she saw the accused in another state at the time of the crime, the prosecutor can offset the damage of that testimony by impeaching the witness with a prior statement by the witness of his or her presence in the vicinity of the crime at the time of the crime. This is appropriate use of a prior inconsistent statement to impeach a witness regarding the substance of the witness' * 12 in-court testimony that damaged the prosecutor's case. However, a statement by a witness that merely denies making a prior statement which incriminated the accused does not, by the substance of the in-court testimony, damage the prosecutor's case (although "damage," of course, is suffered by the loss of favorable evidence). Indeed, there is nothing of substance in such a denial for the prosecutor to impeach. The denial itself is non-evidence, and it is unnecessary to attack the credibility of non-evidence. The only purpose in using a prior inconsistent statement to attack such a denial is to expose to the jury

inculpatory evidence that is substantively inadmissible.

Cousin, 96-2973, pp. 11-12, 710 So. 2d at 1071.

As in Cousin, the witness's denial of the statement was non-evidence; and the prosecutor's only purpose in introducing it was to expose the jury to inculpatory evidence that was substantively inadmissible. The statement should thus have been excluded. Moreover, considering the lack of other evidence, the hearsay statement was extremely prejudicial in persuading the jury to find that the defendant was guilty of aggravated battery.

Accordingly, the admission of the statement was reversible error.

ASSIGNMENT TWO – RIGHT TO APPELLATE REVIEW

In his second assignment of error, the defendant argues that he is being denied his right to appellate review due to the unavailability of the 911 tape played for the jury. The tape of the 911 call for assistance was played over the objection of the defense. The trial court noted that counsel timely moved for a mistrial, which was denied. Defense counsel objected that the tape was inadmissible hearsay, irrelevant and prejudicial. The tape was authenticated only as to the date it was made. No questions were asked of any witness relative to the time of the call or identification of the voices other than the 911 operators. The prosecutor estimated that the playing time

of the tape was about ten minutes.

The defendant requested that the record be supplemented with the 911 tape for review relative to the objections urged at trial. In response to a request by this court, the clerk of the district court certified that the tape admitted into evidence in the instant case could not be located.

La. Const. art. I, §19 (1974), in pertinent part, provides: "No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based."

In the instant case, the defendant timely objected to the introduction of the evidence as irrelevant and prejudicial hearsay. This court cannot review the ruling on these objections without the tape or a verified transcript. The appeal was timely made, thus the defendant cannot be faulted for the disappearance of the evidence. Accordingly, this assignment has merit and requires reversal.

For the foregoing reasons, the defendant's conviction is reversed, the sentence vacated, and the case remanded to the trial court for further proceedings.

CONVICTION REVERSED
SENTENCE VACATED
CASE REMANDED.