

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2000-KA-0273**  
**VERSUS** \* **COURT OF APPEAL**  
**WILLIAM ALLEN** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 389-272, SECTION "C"**  
**Honorable Sharon K. Hunter, Judge**  
\* \* \* \* \*  
**Judge Dennis R. Bagneris, Sr.**  
\* \* \* \* \*

(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr.,  
and Judge Michael E. Kirby)

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## **COUNSEL FOR DEFENDANT/APPELLANT**

### **CONVICTION AND SENTENCE AFFIRMED** **STATEMENT OF CASE**

On April 24, 1997, Defendant was charged by grand jury indictment with the first-degree murder of William Harrel. Defendant pled not guilty at arraignment. At defense request, a lunacy commission was appointed.

Following a hearing, defendant was found competent to stand trial.

Defendant filed a motion to suppress the identification, and following several hearings, the court denied the motion on September 11, 1997. On July 20, 1998, a trial was commenced. The jury was unable to reach a unanimous verdict and a mistrial was declared. On April 19, 1998, the second trial commenced with jury selection.

On April 21, 1998 the jury found Defendant guilty of second-degree murder. On May 21, 1998, the court sentenced Defendant to life in prison without benefit of parole. This appeal follows. The court granted his appeal on appeal on May 25, 1999.

### **STATEMENT OF FACT**

Bertha Rogers testified that in March of 1997 she and William Harrel, her common law husband of twenty-three years, lived at 232 North Robertson with Harrel's invalid mother, Annie Mae Harrel.

Rogers explained that William Harrel was confined to a wheelchair and that he was addicted to cocaine. She described William Allen as a friend of Harrel whom she had known for approximately one year before the murder.

On March 8, 1997, Harrel and Allen had been together for most of the day. That evening they were seated in the living room, drinking beer. Harrel got drunk; furthermore, Rogers believed Harrell had smoked some crack cocaine that day. Before going to bed, Rogers and Harrel argued over money. Harrel also requested that Rogers bring him his gun and she complied before retiring for the evening. Harrel refused to say why he wanted the gun. Rogers further explained that both she and Harrel's mother had recently received checks and that she had \$102 in a wallet under her mattress and that Harrel had a wallet with money as well.

Rogers slept in a room with Harrel's mother. When Rogers retired she turned off the lights and left the television on. Rogers testified that she was awoken to find Allen pointing a gun at her head. Allen told her to give him the money, but before she could answer, Allen shot her. Rogers testified that

she looked up, Allen had the gun to her temple and shot her again; the bullet struck her in the face. Allen then lifted up the mattress where Rogers kept her wallet and said, "I got it." Rogers moved again, and Allen shot her in the shoulder. Rogers decided to remain still so that Allen would not shoot her again. She observed Allen point the gun at her mother-in-law's head, but the dog jumped from underneath the bed and hit him on the arm causing him to drop the gun. The dog continued to pursue Allen, and he retrieved the gun and fled the apartment.

Rogers crawled to the floor and called 911. When Rogers entered the living room, she discovered Harrel dead on the floor. Paramedics transported Rogers to the hospital. Harrel's wallet was recovered after his body was removed by the coroner.

Det. Terrence Phillips of the New Orleans Police Department, was the lead homicide investigator in the case. Phillips testified that on the night following the murder he interviewed Rogers at the hospital. Rogers informed the detective that the person who shot her was named William, and that he lived with his aunt and uncle in the same courtyard of the Iberville housing project as herself. The detective was able to locate the Defendant's aunt, Gloria Poole, and learned the full name of the defendant. Phillips compiled a photographic lineup that included Allen and Rogers' positively

identified him.

Detective Kevin Anderson testified that he interviewed Bertha Rogers within an hour and a half of the incident and that she related that she was shot by a subject named William who lived in the Iberville project with his aunt and uncle. Anderson relayed that essentially Rogers reported being awakened by a gunshot, and immediately following, William appeared in her room asking where the money was before he shot her three times.

At trial, it was stipulated that Officer Byron Winbush, a firearms examiner with the New Orleans Police Department, was an expert in firearms identification and ballistics. Winbush testified that he examined three .9 millimeter casings recovered in the bedroom and one .9 millimeter casing recovered in the living room and determined that they were all fired by the same weapon.

Dr. Michael Defattia, a forensic pathologist with the Orleans Parish Coroner's Office and an expert in the field of forensic pathology, testified that William Harrel was struck by a single gunshot which entered his skull on the right upper portion of his head and came to rest just above the left ear. The doctor described the wound as a distant gunshot wound, as there was no evidence of gunpowder residue or burning, a phenomena known as stippling, on the scalp. The doctor believed the gun was fired from no closer than

forty-two inches. The doctor further related that fluid samples removed from the body reflected that the victim had a .11 blood alcohol level and that he had ingested cocaine within one hour of the time of death.

The State introduced a number of medical records from Charity Hospital, one of which, Rogers' discharge summary, reflected the following notation: "The patient reports being at home with her boyfriend when four guys broke into her home to rob her and killed her boyfriend and also tried to kill her."

Further, the State introduced into evidence the 911 tape from Rogers' initial call for help which was played for the jury. The 911 operator asked Rogers if she knew who had shot her, she responded no. The EMS technician also testified that Rogers stated that a man shot her and that she did not identify him by name.

Gloria Poole testified that on the night of the murder she heard gunshots and that William Allen entered the apartment some twenty minutes afterwards. She stated he went to bed, where he stayed for approximately thirty minutes before leaving again.

### **ERRORS PATENT**

A review of the record reveals no errors patent.

### **ASSIGNMENT OF ERROR NUMBER 1**

The Defendant, through counsel and pro se, contends the evidence was insufficient to support the conviction. When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Cummings*, 95-1377 (La.2/28/96), 668 So.2d 1132, 1134. However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall*, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole because that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall supra*. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319, 1324 (La.1992). The state is

also required to negate any reasonable probability of misidentification in order to meet its burden of proof. *State v. Newman*, 99-841 (La. App. 5 Cir. 12/15/99), 750 So.2d 252, 258.

Additionally, when circumstantial evidence forms the basis of the conviction, that evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438; *State v. Captville*, 448 So.2d 676, 678 (La. 1984); *State v. Porter*, 98-2280 (La. App. 4 Cir. 5/12/99) 740 So.2d 160. This is not a separate test from *Jackson v. Virginia, supra*, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs*, 504 So.2d 817 (La.1987).

Specifically, the Defendant contends that the case was predicated on circumstantial evidence that failed to exclude every reasonable hypothesis of innocence. The Defendant contends essentially that Rogers' testimony was insufficient to establish that he murdered Harrel as Rogers did not witness the murder and could not establish when Harrel was shot. Indeed, there was some dispute as to when Harrel was shot in relation to Rogers being shot. Rogers testified that approximately five minutes before she felt the gun to



her head she heard what she believed was the sound of a gunshot coming from outside her apartment. Rogers had previously testified that she did not hear a shot prior to feeling the gun. Rogers explained that because she did not realize that the gunshot was coming from inside her apartment she neglected to mention the fact. The contention is that while the evidence may have established that Allen shot Rogers it did not necessarily establish that Allen shot Harrel.

The Defendant contends that *State v. Narcisse*, 420 So.2d 947 (La. 1982) is on point and requires reversal in this case. *Narcisse* involved a robbery of a grocery store by two men, one of whom was masked. The Defendant was observed in the company of the unmasked robber in the store shortly before the robbery occurred. Although the witness took no note of Narcisse's clothing, and therefore could not positively identify him as the masked robber, the jury found him guilty as charged. Our Supreme Court reversed because it was "not convinced that a rational trier of fact could have concluded beyond a reasonable doubt that Narcisse was the person wearing the ski mask at the time of the robbery." *Id.* at 949. *Narcisse* presents a clear case of guilt by association; the evidence here is far more direct and therefore compelling.

Unlike *Narcisse*, the Defendant was observed directly participating in

the crime. The Defendant's argument, in order to be successful, requires the assumption that the Rogers' shooting was unrelated to the Harrel murder. The fact that the same weapon was used to shoot both Rogers and Harrel demonstrates that the two crimes cannot be separated except by propounding the most far-reaching of possibilities. There was sufficient evidence, both direct and circumstantial, for a reasonable jury to conclude that the Defendant was also responsible for Harrel's death.

The Defendant further contends in so many words that discrepancies in Rogers' account of Harrel's murder suggests reasonable doubt. The Defendant contends that there is a question as to the number of assailants because of the notation in the discharge summary that four men perpetrated the crime. Rogers denied ever making the statement. Other than the hearsay in the medical record, no one testified that Rogers ever stated that four men committed the crime. Rogers' initial statement to police was that there was one perpetrator, and Detective Philips testified that Rogers never waived from that assertion. Furthermore, the 911 tape did not reflect any mention by Rogers.

The Defendant further contends that the victim's failure to identify her assailant to the 911 operator is indicative of the fact that Rogers did not know who shot her. When questioned concerning why she did not identify

her assailant when asked who shot her, Rogers explained that her greatest concern was for her injuries, testifying, "I just wanted to get the bullets out of me." Rogers also explained that she did not know Allen's last name.

The Defendant also notes that no evidence of bite marks were located on his arm and that it would be reasonable to assume that the perpetrator would have sustained a bite wound when the dog caused him to drop the gun. The testimony of Rogers was that the dog knocked the gun from the defendant's hand; her testimony did not suggest that he was bitten.

The Defendant contends on the basis of these inconsistencies a reversal is warranted. In assessing the sufficiency of the evidence this court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Viewing the evidence in the light most favorable to the state, there was sufficient evidence for a reasonable jury to conclude that the defendant committed second-degree murder.

### **ASSIGNMENT OF ERRORS NUMBER TWO AND THREE**

The Defendant contends by assignment of error Number 3 that his

attorney rendered ineffective assistance of counsel by failing to file a motion to reconsider the sentence because the omission precludes appellate review of his sentence for anything other than excessiveness by virtue of La. C.Cr.P. art. 881.1. In assignment of error Number 2 defendant contends his sentence is excessive and that the trial court failed to comply with La. C.Cr.P. 894.1.

In order to determine whether counsel's performance was deficient and if defendant was prejudiced, this Court must determine whether defendant's sentence is excessive. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *State v. Crowell*, 99-2238 (La. App. 4 Cir. 11/21/00), 773 So.2d 871; *State v. Robinson*, 98-1606 (La. App. 4 Cir. 8/11/99), 744 So.2d 119.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. *State v. Sepulvado*, 367 So.2d 762 (La.1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the needless and purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. *State v. Lobato*, 603 So.2d 739 (La.1992); *State v. Telsee*, 425 So.2d 1251 (La.1983).

In *State v. Guy*, 95-0899 (La. App. 4 Cir. 1/31/96), 669 So.2d 517, the defendant argued that his mandatory life sentence for second-degree murder was excessive under *State v. Dorthey*, 623 So.2d 1276 (La.1993). This court rejected the defendant's argument, stating, "When a trial judge determines a sentence from a carefully tailored penalty statute, such as La. R.S. 14:30.1 (B), there is a strong presumption that the sentence is within constitutional parameters." *State v. Guy*, p. 14, 669 So.2d at 526.

Furthermore, "[i]n cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, *State v. Franks*, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when 'there appear[s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit.' *State v. Wimberly*, 414 So.2d 666, 672 (La.1982)." *State v. Soraparu*, 97-1027 (La.10/13/97), 703 So.2d 608.

In the instant case, the Defendant has failed to establish that the trial judge abused her discretion in imposing the mandatory life sentence. He also has not rebutted the presumption that the sentence is not unconstitutionally excessive under the facts of this case. Accordingly, both assignments of error are without merit.

## **PRO SE ASSIGNMENT OF ERROR NUMBER 1**

The Defendant contends that his attorney did not represent him fully after he declined to accept a plea bargain after the first trial. Allen fails to suggest how his attorney's performance was deficient. Moreover, after a careful review of the record we find vigorous and competent representation by his attorney. The Defendant has failed to articulate any basis from which this court could conclude that he received ineffective assistance of counsel; thus the assignment lacks merit.

## **CONCLUSION**

Accordingly, the Defendant's conviction and sentence are affirmed.

**CONVICTION AND SENTENCE AFFIRMED**