STATE OF LOUISIANA	*	**NO. 2000-KA-0616**
VERSUS	*	**COURT OF APPEAL**
KENTRELL PARKER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 406-941, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE
* * * * * *
JAMES F. MC KAY, III
JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge James F. McKay,III)

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AFFIRMED

STATEMENT OF CASE

Kentrell Parker was indicted on May 13, 1999, for the second-degree murder of Kawana Bernard, a violation of La. R.S. 14:30.1. He was arraigned on May 19, 1999, and pled not guilty. On November 18, 1999, a twelve-member jury found Parker guilty as charged. He was sentenced on December 2, 1999, to life imprisonment without benefit of parole, probation or suspension of sentence.

STATEMENT OF FACTS

Ms. Adrienne Bernard, the victim's mother, testified that her daughter had four children, ranging in age from two to ten years old. Ms. Bernard denied that her daughter kept guns in her house and that she used or sold drugs. Ms. Bernard further stated that her daughter supported her children through various jobs.

Officer Bruce Cranstoun testified that on March 15, 1999, at approximately 3:30 p.m., a woman flagged him down as he drove on Martin Luther King Blvd., and told him there had been a shooting in apartment 4-C of the Melpomene Housing Development. As he approached the apartment building, he saw several people and three children standing outside the

entrance. He entered the apartment, and found a woman's body on the floor. He checked for vital signs, notified the police dispatcher of the homicide, and then checked to be sure that no one else was in the apartment. Thereafter, he secured the scene, and awaited the arrival of the coroner and homicide detectives.

Dr. James Traylor, who testified as an expert in forensic pathology, performed the autopsy on the victim's body on March 16, 1999. He opined that a "single perforating tight contact gunshot wound to the left neck" killed the victim. He explained that because the victim suffered a "perforating", or through and through wound, no bullet was recovered from the victim's body. Dr. Traylor classified the wound as "tight contact" because he detected a gun muzzle imprint on the victim's neck.

Officer Terrie Clark, an NOPD 911 operator, testified that all 911 calls are recorded and that she received the defendant's call reporting the shooting at 9:09 a.m. on March 15, 1999. The defendant identified himself by name, and told her that his girlfriend had been shot by two men he saw running from the apartment. The defendant gave her an incorrect address as the scene of the shooting.

The tape recording of the 911 call was played for the jury. In the call the defendant identified himself, and told the operator that he found his

girlfriend, shot in the neck, at her apartment. He further stated that he saw two men running from the apartment through the project.

NOPD homicide detective John Deshotel investigated the murder of Kawana Bernard at 2339 Martin Luther King Blvd., apartment 4C. The apartment door was partially open and the victim's body was on the floor near the front door. The body displayed a left head wound with an exit wound at the back of the head. He canvassed the area, and found a spent 9mm-bullet casing on the floor, which had entered and exited the VCR unit, across the room from where the body lay. Detective Deshotel noticed that the phone was unplugged, and found fifteen small bags of marijuana in the bedroom. Derielle and Kevielle Bernard, two of the victim's children, told him "Trell" lived with them and their mother. The children identified the defendant as Trell from a police photograph, and told Detective Deshotel that their mother, Trell, and Trell's friend Frederick Jones were alone in the apartment that morning when the children left for school. The day after the shooting, the defendant turned himself in at central lock up. Detective Deshotel arrested him, and advised him he need not make any statement. Subsequently, Detective Deshotel executed a search warrant at the defendant's mother's residence and confiscated a black and gray FUBU jacket containing blood smears on the right sleeve. Further investigation

revealed that .25 caliber automatic and 9-mm semi-automatic weapons were fired from the apartment balcony during the argument between the victim and the defendant; however, neither of these weapons was ever found.

Officer Kenneth Leary, Jr., expert firearms examiner, testified that he inspected a 9-mm bullet and casing retrieved from the crime scene and concluded that both pieces were components of 9-mm ammunition.

Kevielle Bernard, the victim's seven-year-old daughter, identified the defendant in court as Trell, and said that he lived with them in the Melpomene Housing complex. She testified that her mother did not like guns, and did not own any. However, Trell kept two guns in the house – one on the shelf in the living room and the other in her mother's bedroom drawer. Her mother argued with Trell, and wanted him to get the guns out of the house.

Frederick Jones testified that he had been staying with the victim and defendant at the victim's apartment for a few nights prior to the shooting. On the morning of the shooting, he was asleep on the sofa in the living room and awoke to the sound of the defendant packing his belongings. The three were alone in the apartment because the victim's children had gone to school. The defendant and the victim began to argue, then began pushing and shoving each other. The victim attempted to leave the apartment but the

defendant brought her back. When the pair was outside the apartment, Jones heard the victim tell the defendant: "That boy see you with the gun at my head." When the pair came back into the apartment, Jones noticed that the defendant was holding a gun. Jones tried to calm the situation, telling the defendant to put the gun away. The defendant put the gun in his jacket. The victim and defendant were arguing in the living room about the defendant's moving out of the apartment, and taking his clothes with him. The victim refused to allow the defendant to leave with any clothes she had bought for him, so as he packed his possessions, she began removing items she said she had purchased. Shortly thereafter, Jones heard a gunshot and looked up to see Trell on the floor saying he was sorry, and the victim falling to the floor. Jones saw blood, grabbed his jacket and ran out of the apartment. The defendant left right after Jones, and caught up with him. The defendant asked Jones to accompany him to his mother's house. Jones complied because he feared the defendant would shoot him if he refused. When the defendant came out of his mother's house, his aunt came with him. The trio went back to the project and the defendant alone went back and forth to the victim's apartment three or four times. After his first trip back into the apartment, which was about ten or fifteen minutes after the shooting, the defendant told Jones that the victim was still breathing. The defendant used

a pay phone across from the project to make the 911 call. Jones stated that prior to the shooting the phone in the apartment worked because he made a call from that phone prior to the shooting.

After making the 911 call, the defendant headed back to the project but upon seeing the police arrive, he and his aunt left in his aunt's car. Jones called his mother and reported what he had seen, and asked her to call the police. Jones denied ever buying drugs from the victim or seeing the victim use or sell drugs. He knew Trell kept two guns in the apartment. Prior to shooting the victim, Jones heard Trell fire one of the guns on the front porch.

Jones admitted that he had two prior narcotics convictions.

Derielle Bernard, the victim's nine-year-old daughter, testified that she, her sister, Kevielle, her mother and Trell lived at 2339 Martin Luther King Blvd., apartment 4C on March 15, 1999. She and her little sister found their mother's body that afternoon when they returned from school. Derielle knocked on the door and when she did not hear her mother coming to open the door, she tried to open it. The door opened only slightly because her mother's feet were blocking the opening. She squeezed through the doorway, and got on the floor to check her mother's heart. She ran to the phone, but someone had unplugged it, and removed the connecting wire. She then ran to a neighboring apartment to ask for help to call the police.

Derielle said that her mother did not own or keep a gun in the apartment but that the defendant had two guns at their apartment. Whenever he left the apartment, he took the guns with him.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends the evidence is insufficient to support his conviction for second-degree murder. He argues that "the jury's guilty verdict was irrational when considered in light of conflicting testimony of the State witnesses, the lack of physical evidence, and the circumstances under which the shooting occurred." He concludes that at best, "the evidence supports a lesser responsive verdict of manslaughter."

There is sufficient evidence to support a conviction if, after viewing the record as a whole in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jacobs*, 504 So.2d 817, 820 (La.1987); see also *State v. Mussall*, 523 So.2d 1305, 1311 (La.1988).

The defendant was convicted of second-degree murder, which is

defined as the killing of a human being with specific intent to kill or to inflict great bodily harm. La.R.S. 14:30.1. Specific intent is defined as: "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." La.R.S. 14:10; see also *State v. Lindsey*, 543 So.2d 886, 902-03 (La.1989), *cert. denied*, 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 798 (1990). Specific intent is an ultimate legal conclusion that can be inferred by the fact finder from the pointing of a gun at close range and pulling of the trigger. *State v. Williams*, 383 So.2d 369, 373 (La.1980), *cert. denied*, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981); *State v. Procell*, 365 So.2d 484, 492 (La.1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2164, 60 L.Ed.2d 1046 (1979); *State v. Guy*, 95-0899 (La.App. 4 Cir. 1/31/96), 669 So.2d 517, *writ denied* 96-0388 (La.9/13/96), 679 So.2d 102.

Manslaughter is a homicide that would be either first or second-degree murder, but the killing 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." La. R.S. 14:31(A)(1). "Sudden passion" and "heat of blood" are not separate elements of the offense but are mitigating factors that exhibit a degree of culpability less than that present when the homicide is committed without them. *State v. Lombard*, 486 So.2d

106 (La.1986). Because they are mitigating factors, the defendant must establish them by a preponderance of the evidence. *State v. Heck*, 560 So.2d 611 (La.App. 4 Cir.1990), *writ denied* 566 So.2d 395 (La.1990).

In this case, all of the inconsistencies in the testimony of the prosecution witnesses were brought to the attention of the jury, and the jury apparently found the testimony sufficiently consistent and credible in finding the defendant guilty as charged. The defendant has not shown that the jurors abused their discretion in their credibility finding. Moreover, the defendant has not established by a preponderance of the evidence that the killing was committed in "sudden passion" or "heat of blood." The only evidence of provocation came from Frederick Jones, the witness present at the time of the shooting, and he testified that he did not believe the bickering attendant to the defendant's departure from the victim's residence was anything "major." He testified he heard only one shot, nothing more, no protest from the victim nor any utterance from the defendant.

On the other hand, the coroner testified that the victim suffered a "single perforating tight contact gunshot wound to the left neck." Contact was so close, in fact, that the victim's neck bore the gun muzzle imprint imparted by gunpowder burns. This court has held that the discharge of a firearm at close range and aimed at a person is indicative of a specific intent

to kill or inflict great bodily harm upon that person. *State v. Guy*, 95-0899 (La.App. 4 Cir. 1/31/96), 669 So.2d 517, *writ denied* 96-0388 (La.9/13/96), 679 So.2d 102.

The jury heard clear evidence of the defendant's specific intent to kill or inflict severe bodily harm based on the coroner's testimony of the "close contact" wound but it did not hear any evidence of the mitigating factors of "sudden passion" or "heat of blood". This assignment has no merit.

ASSIGNMENT OF ERROR NUMBER 2

By this assignment of error, the defendant complains the State impermissibly introduced "other crimes" evidence by reference to the defendant's "mug shot." The reference was elicited during Detective Deshotel's testimony:

> PROSECUTOR:
>
> Q. You got a photograph because you heard the 911 tape?
> A. Correct.
>
> Q. And did you have a chance to show that to the two young ladies?
> A. Certainly did.
>
> Q. Let me show you what's marked as State's 12 and 13. Tell me what this one is?
> A. It's what we call a SID photograph that was obtained from the NOPD mug shot database. It's a photograph of Kentrell Parker.

Defense counsel objected to the reference "mug shot" but the court

overruled his objection and refused to grant a mistrial, even though the defense had not made the request. Later in the proceedings, during the cataloging of exhibits, the defense revisited its objection to the "mug shot." As a result, the trial judge stated:

> I admonish the jury, the fact that the police may have shown a photograph, and I'm not saying they did, but shown a photograph that was in their possession that was of the defendant, that is in no way evidence that this man has committed any crime, nor that he has indeed committed this crime for which he is on trial. . .

La. C.E. article 404 provides that evidence of other crimes, acts or wrongs is generally not admissible. When a witness refers directly or indirectly to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible, upon request of the defendant, the defendant's remedy is a request for an admonition or a mistrial pursuant to La.C.Cr.P. arts. 770 and 771. The remark or comment must constitute an unambiguous reference to other crimes. *State v. Lewis*, 95-0769, p. 7 (La.App. 4 Cir. 1/10/97), 687 So.2d 1056, 1060, *writ denied*, 97-0328 (La.6/30/97), 696 So.2d 1004. On request, the trial court shall admonish the jury to disregard such remark or comment. La.C.Cr.P. art. 771. Upon motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant of a fair trial. *Id.* The granting of a mistrial under La.C.Cr.P. art. 771 is at the

discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. *State v. Smith*, 418 So.2d 515, 522 (La.1982); *State v. Allen*, 94-1895, p. 9 (La.App. 4 Cir. 9/15/95), 661 So.2d 1078, 1085, *writs denied*, 95-2557, 95-2475, (La.2/2/96), 666 So.2d 1087. Mistrial is a drastic remedy which is only authorized where substantial prejudice will otherwise result to the defendant. The determination of whether prejudice has resulted lies within the sound discretion of the trial court. *Id.* A trial court's ruling on whether or not to grant a mistrial for a comment by a police officer referring to other crimes evidence should not be disturbed absent a clear abuse of discretion. *State v. Manuel*, 94-0087, 94-0088, p. 4 (La.App. 4 Cir. 11/30/94), 646 So.2d 489, 491.

In the present case, the detective's answer was not directly related to a particular offense. The statement at best could be the basis of an inference of another crime but it did not directly refer to another crime. Further, the Louisiana Supreme Court and this court have held that reference to "mug shots," "booking photos" or Bureau of Identification ("B of I") photographs would not require the granting of a mistrial under Article 770. See *State v. Curry*, 390 So.2d 506 (La.1980); *State v. Harris*, 258 La. 720, 247 So.2d 847 (1971); *State v. Harris*, 97-2903 (La. App. 4 Cir. 9/1/99), 742 So.2d 997

writ denied 1999-2835 (La. 3/24/00), 758 So.2d 146. Additionally, "(n)o inference that an accused is a bad person can be drawn simply from the fact that the police had, or were able to procure, his photograph," *State v. Youngblood*, 325 So.2d 250, 251 (La.1975). Since admission of the photographs was not prejudicial, the judge did not abuse his discretion in refusing to grant a mistrial under C.Cr.P. art. 770 because of the reference to the source of the photos.

Even if the admission of the reference was error, it was harmless. Under La.C.Cr.P. art. 921, an appellate court shall not reverse a judgment because of any error "which does not affect substantial rights of the accused." Whether substantial rights of the accused were violated is determined under federal harmless error standards, i.e., whether the guilty verdict in this trial was surely unattributable to the error. *State v. [Silas] Johnson*, 94-1379, p. 14 (La.11/27/95), 664 So.2d 94, 100, citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In this case, the jury heard one witness testify that the defendant threatened the victim by holding a gun to her head. That same witness heard the fatal bullet fired, and heard the defendant tell the victim he was sorry. In the face of this evidence it is unlikely the guilty verdict was attributable to the “mug shot” reference. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d

182 (1993).

ASSIGNMENT OF ERROR NUMBER 3

In another assignment of error the defendant argues that the trial court allowed certain photographs into evidence for which a proper foundation or identification had not been made. Specifically, he objects to State's exhibits 3 and 4, which were photographs of the victim's wounds and State's exhibit 7, a picture depicting the living room in the victim's apartment where her body was found.

In the cataloguing of evidence, the defense objected to the introduction of State's exhibits 3, 4 and 7 on the basis that no one identified the photographs. The judge sustained the defense objection and the photographs were not admitted into evidence. The judge removed the photographs from the collection of admissible evidence, which the jury ultimately viewed, and returned them to the prosecutor. However, unnoticed by defense counsel and the judge, during the State's final closing argument, the prosecutor remarked and seemingly demonstrated:

> . . .These are not the prettiest photos and I'm not going to flash this up to y'all. But if you didn't see it, I want you to look back at this. The one on the back that says **State's 3**. Look at this if you need to. I don't want to show y'all this. I know this is disturbing to a lot of you. You can see the muzzle mark on her neck. You can see the close tight contact perforated wound that [the coroner] told you about. . . Those of you who checked it, do you see any bruising on her? . . . (emphasis supplied)

Nevertheless, defense counsel's objection that State's exhibits 3 and 4, the photographs of the victim's wounds, were not identified has no basis in fact. The coroner testified, explaining the mechanism of the victim's death, and the prosecutor displayed State's exhibits 3 and 4 to the doctor:

PROSECUTOR:

Q. I'm going to show you what we're going to mark as State's exhibit three. Can you describe what's pictured, which wound is that?

A. This is actually the –

DEFENSE COUNSEL:

Objection, Your Honor. He's showing it to the Jury and I object to that.

BY THE COURT:

I'll sustain that. If the gentleman wants to just view it himself.

A. This is the entry gunshot wound which shows some dried blood about the wound, as well as the muscle [muzzle] imprint of the weapon.

Q. I'm going to show you what's marked as State's Four. Can you tell us what wound this is that you see there?

A. This is a view of the exit wound with some blood surrounding it.

Q. And do both of these photos actually depict the wounds that you just described to the jury?

A. Yes, they do.

Although the photographs were ruled inadmissible and the prosecutor

improperly published them to the jury during closing arguments, the foregoing excerpt of trial testimony belies the defendant's assertion that the photographs were not identified. Nevertheless, because the State apparently did publish at least one of photographs to the jury, despite the court's having sustained defense counsel's objection as to its admissibility, the focus shifts to whether the error impacted the jury's verdict.

An error is harmless if it does not affect substantial rights of the defendant, La.C.Cr.P. art. 921, i.e., whether the guilty verdict in this trial was surely unattributable to the error. *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In this case, the coroner testified extensively as to the victim's wounds, explaining the bullet trajectory and the devastating injuries it inflicted. It is difficult to imagine that the jury's viewing the photographs, after having been supplied such a graphic mental picture of the wounds, contributed to the guilty verdict.

ASSIGNMENT OF ERROR NUMBER 4

In his final assignment, the defendant charges error in the court's allowing the State to introduce exhibits 18 and 19, the bullet and bullet casing, in spite of its failure to show the chain of custody.

Defense counsel objected to Officer Kenneth Leary's testifying that the bullet and bullet casings were retrieved from the scene of the shooting

when in fact he did not retrieve the evidence. A crime technician confiscated that evidence. The court sustained the objection and addressed the jury:

> I would sustain that and admonish the Jury to disregard that. He does not know, the gentleman, who may have collected them unless he was there. . . I so admonish the Jury to disregard the comment.

Hence, the court did not allow Officer Leary to testify that the bullet and bullet casing were found at the murder scene, only that they were components of 9-mm ammunition. Nevertheless, the defendant complains that the State was allowed to introduce inadmissible evidence from which the jury could have inferred that a 9-mm gun was employed to shoot the decedent.

Even if the admission of the bullet and bullet casing was error, the defendant is unable to demonstrate any prejudice. In his opening statement defense counsel advised the jury there were guns in the apartment, the victim's daughter testified that her mother had no guns but that the defendant kept two in the apartment. Frederick Jones testified that he saw a gun in the defendant's hand just prior to the shooting and also that the defendant held the gun to the victim's head when they first began to argue. Whether a 9-mm handgun killed the victim or a weapon of another caliber is of little note in light of the overwhelming evidence that the defendant shot

the victim.

CONCLUSION

Accordingly, the defendant's conviction and sentence is affirmed.

AFFIRMED