

STATE OF LOUISIANA

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NO. 2000-KA-1231

VERSUS

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COURT OF APPEAL

KINTAD PHILLIPS

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 378-343, SECTION "D"
Honorable Frank A. Marullo, Judge

Judge Patricia Rivet Murray

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer,
Judge Patricia Rivet Murray)

Honorable Harry F. Connick
District Attorney of Orleans Parish
Nicole Barron
Assistant District Attorney of Orleans Parish
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Brian P. Brancato
LOUISIANA APPELLATE PROJECT
407 South Broad Street
New Orleans, LA 70119

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

In August 1995, Kintad Phillips and three co-defendants were indicted by a grand jury with three counts of first degree murder for the February 4, 1995 killings of Tangie Thompson, her three-year-old son Devyn Thompson, and her boyfriend, Andre White. After a twelve-person jury found Mr. Phillips guilty as charged, he was sentenced on August 8, 1998 to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. Mr. Phillips now appeals his conviction, asserting two assignments of error. We affirm for the reasons that follow.

FACTS

On the late afternoon of February 5, 1995, New Orleans Police officers found the bodies of Tangie Thompson, Devyn Thompson and Andre White in their residence on Morrison Road. Each of the victims had multiple gunshot wounds from a 9-mm weapon, and most of the rooms of the house as well as the attic had been ransacked. While one of the victims'

vehicles, a white Lexus, was in the garage, their black Four Runner was found a few blocks away, abandoned with the keys in the ignition. Despite an intensive, week-long analysis of the home and the vehicles, nothing was found that provided any clue to the identity of the killers.

In early March 1995, another multiple shooting occurred in another area of New Orleans. In connection with that investigation, a search warrant was executed at the residence where the defendant, Kintad Phillips, was said to live. One AK-47 assault rifle bullet and a 9-mm magazine clip were seized by the police.

On May 6, 1995, a thirteen-year-old girl was wounded by gunshots during an armed robbery in Uptown New Orleans. The perpetrators fled in a maroon Grand Am that was soon located and chased by the police. Prior to the capture of the suspects, Robert Trackling, Donielle Bannister, and Romalice McGhee, two handguns were thrown from the Grand Am and recovered by the police. One of these, a 9-mm Ruger, was found to be the weapon that had killed the three people at the Morrison Road residence earlier in the year.

After this incident, the police were informed by an Orleans Parish Prison inmate that Robert Trackling had confessed to participating in the Morrison Road murders. When questioned by the police on June 1, 1995,

Mr. Trackling admitted that he had driven Kintad Phillips, Donielle Bannister and Juan Smith to the home on Morrison Road on the evening of February 4, 1995, but stated that he waited in his car while the other three went inside. After being questioned for an hour or so, an audiotaped statement was taken and arrest warrants were issued for those named as the perpetrators. Mr. Phillips turned himself in to Florida authorities in July 1995 and waived extradition.

In addition to other testimony and evidence presented at Mr. Phillips' August 1998 trial, Mr. Trackling's audiotaped statement was played, with transcripts provided for the jurors to follow. Later, Mr. Trackling was called to testify pursuant to his plea agreement with the State.

Robert Trackling testified that he was at home on February 4, 1995 when Mr. Phillips beeped him "in the evening sometime." He was asked to drive Mr. Phillips and Mr. Bannister to rob someone, and was told that he did not have to do anything but just drive. If he would take them, they would compensate him. Upon arrival at Mr. Phillips' house, Mr. Trackling saw two assault rifles and a handgun on the table. After waiting ten or fifteen minutes, they received the phone call for which they had been waiting, then drove to St. Roch Avenue, bringing the weapons with them. Another man joined them there, introduced to Mr. Trackling as Juan Smith.

Mr. Smith stated they were going to New Orleans East to rob someone who had at least twenty thousand dollars on him, plus "a lot of dope."

After Mr. Smith located the house he was seeking on Morrison Road, Mr. Trackling stopped on a side street. He noticed as they all got out of his car that Mr. Phillips and Mr. Smith put some masks and gloves into their pockets. Those two walked to the house carrying their weapons, apparently planning to wait for someone to get home. Rather than hanging around at the car, Mr. Trackling and Mr. Bannister walked about half-a-block to a bus stop to wait for the other two. After about fifteen or twenty minutes, the four got back into the car because no one was home. Mr. Smith directed Mr. Trackling to the intended victim's place of business, but neither the victim nor his white Lexus was spotted, so they went back to New Orleans East.

Mr. Phillips and Mr. Smith again got out of the car and approached the home on Morrison Road. They returned after five minutes or so and the group was preparing to leave when they noticed a light go on by the house. Mr. Trackling backed up his car to the driveway and they saw a man and a little boy standing near one of the cars in the garage. The three passengers jumped out of the car and ran toward their victims; Mr. Phillips and Mr. Bannister carried the assault rifles while Mr. Smith had the handgun. After Mr. Bannister grabbed the man and Mr. Phillips picked up the child, Mr.

Smith closed the garage door. Mr. Trackling pulled his car into the driveway, turned off the engine and lights, then waited.

After about twenty or thirty minutes, Mr. Trackling saw a light come on, so he started his engine and began to back up. The garage door opened, and he saw the black Four Runner coming out, driven by Mr. Phillips. At that point, Mr. Trackling heard "a whole bunch" of gunshots, but it sounded like someone emptying the clip of a handgun rather than the firing of an assault rifle. Mr. Bannister and Mr. Smith ran out of the house and jumped in the Four Runner, stopping just long enough to hit the garage door button. Mr. Trackling took off, alone in his car, with the Four Runner following. He saw the others signalling with the lights for him to pull over, but he waited until he was on Crowder Boulevard, some distance from the house, to stop. The Four Runner was left on Crowder Boulevard with the doors unlocked and the keys in the ignition. When the three got back into Mr. Trackling's vehicle they were still carrying their guns, and Mr. Phillips and Mr. Smith were wearing gloves.

Mr. Trackling testified that during the ride back into the center of town, Mr. Phillips stated that he hoped someone would steal the Four Runner. The three men discussed the force Mr. Smith had used in hitting each of the victims, then told Mr. Trackling that there was nothing in the

house, so everyone would just go home. Before being dropped off at his girlfriend's, Mr. Smith gave the 9-mm handgun back to Mr. Bannister. Mr. Trackling took the other two back to Mr. Phillips' residence, then went home. Two or three days later, the four got together again in St. Roch Park and laughed about the fact that the police were investigating Benny Thompson, Tangie's ex-husband, in connection with the murders.

Mr. Trackling described the police chase that led to his arrest on May 6, 1995, acknowledging that the 9-mm gun thrown from the car was the same one Mr. Smith had used on February 4th. He also testified regarding his questioning on June 1, 1995 and the circumstances surrounding the subsequent taped statement. Mr. Trackling acknowledged prior convictions for attempted murder and attempted armed robbery, and admitted that he had pled guilty to three counts of manslaughter in connection with these killings. He further explained that under his plea agreement with the State, he had received a ten-year sentence in exchange for his promise to testify truthfully concerning the Morrison Road murders, and that if he did not so testify he could be tried for three counts of first degree murder. He identified the plea agreement to that effect, signed on July 2, 1996.

On cross-examination, Mr. Trackling admitted that nothing specific was said about shooting anyone before the men went into the house, so it

was possible that, like himself, Mr. Phillips was unaware that anyone would be shot. He further testified that he had never been arrested until May 6, 1995, and that that arrest had resulted in the jury verdicts of guilty to the charges of attempted murder and attempted armed robbery of a thirteen-year-old girl. Mr. Trackling insisted that he was not guilty of that crime, but was convicted only because Mr. Bannister, who was identified as the shooter by the victim, had been caught in his car. Mr. Trackling could not explain why he readily agreed to drive his friends to Morrison Road to commit a robbery, or why his conscience did not prod him to tell the police about his involvement in this triple murder before June 1, 1995.

Defense counsel then went through the many discrepancies between Mr. Trackling's audiotaped statement and his trial testimony. While Mr. Trackling conceded that he had testified to a great many details that were not mentioned in his statement, he explained that this was because the police had not asked the right questions. He acknowledged that he did not make a deal with the State until after his conviction for the May 1995 shooting, for which he was facing a possible fifty years for attempted murder and more than forty-nine years for attempted armed robbery. In addition, despite his knowledge that he could be sentenced to life imprisonment for his participation in this crime, he had rejected the State's first offer of twenty-

five years for his testimony against the other three. It was not until a year later, after his attorney had learned about the lack of physical evidence, that Mr. Trackling had accepted the State's offer of a ten-year sentence. Mr. Trackling stated that in exchange for his testimony, he expects to be released after serving only five years for both the Morrison Road murders and the May 1995 shooting. He admitted that, under his deal with the State, he would be facing the death penalty himself if he now said Mr. Phillips had nothing to do with this crime.

At the conclusion of the two-day guilt phase of the trial, the jury unanimously agreed that Mr. Phillips was guilty of three counts of first degree murder. After the penalty phase, all twelve jurors recommended life imprisonment for the killings of Tangie Thompson and Andre White, but they could not agree on a sentence recommendation for the death of three-year-old Devyn. Consequently, after waiving delays, Mr. Phillips was sentenced to three consecutive terms of life imprisonment.

DISCUSSION

In his first assignment of error, Mr. Phillips contends that the evidence was insufficient to support the convictions for first degree murder because there was nothing to indicate that he had specific intent to kill or to harm anyone.

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Jacobs*, 504 So.2d 817 (La. 1987). The elements of the crime must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This statute does not provide a separate test from *Jackson v. Virginia, supra*, but rather is 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). When circumstantial evidence forms the basis of the conviction, such evidence must consist 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 (La. 1982). All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs, supra*.

A 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). In

addition, the appellate court is not permitted to consider just the evidence most favorable to the prosecution but must consider the record as a whole since that is what a rational trier of fact would do. *Id.* at 1310. If rational triers of fact could disagree as to the interpretation of the evidence, the rational factfinder's view of all the evidence most favorable to the prosecution must be adopted. *Id.* Moreover, "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). Instead, the credibility of witnesses is for the trier of fact to determine. *State v. Green*, 613 So.2d 263 (La. App. 4th Cir. 1992). Thus, the discretion of the trier of fact will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall*, 523 So.2d at 1309-1310.

La. R.S. 14:30 defines first degree murder as "the killing of a human being ... [w]hen the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of ... armed robbery [or] [w]hen the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." "Specific criminal 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." La. R.S. 14:10(1). Specific intent is a state of mind and, as such, need not be proven as a fact but may be inferred from the circumstances of the situation and the actions of the defendant. *State v. Brooks*, 505 So.2d 714 (La. 1987); *State v. Holmes*, 388 So.2d 722 (La. 1980).

A person may be convicted of murder even if he did not fire any shots. *State v. Hampton*, 98-0331, p. 13 (La. 4/23/99), 750 So.2d 867, 880. "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." La. R.S. 14:24. However, not all principals are automatically guilty of the same grade of offense. One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime, depending upon the mental element proved at trial. Thus, an individual may only be convicted as a principal for those crimes for which he has the requisite mental state. *State v. Brooks, supra*; *State v. Holmes, supra*.

Mr. Phillips asserts that in this case, as in *State v. Pierre*, 93-0893 (La. 2/3/94), 631 So.2d 427, there was no evidence suggesting that he counseled or procured Mr. Bannister or Mr. Smith to harm the victims, but only that he

had been inside the residence just prior to the shootings. He argues that because Mr. Trackling testified that no one said anything about shooting anyone before the three men entered the home, the jury could only speculate that he intended anything more than an armed robbery. Mr. Phillips thus contends that his convictions must be reversed.

Despite Mr. Phillips' emphasis on his whereabouts at the time the actual shots were fired, his actions prior to his entry into the residence support the conclusion that he specifically intended to kill or inflict great bodily harm on those found inside. He contacted his friend, Mr. Trackling, and specifically asked him to drive the men to rob someone. Mr. Phillips and Mr. Bannister ensured that three weapons were brought along in the car so that each assailant would be armed, and Mr. Phillips further equipped himself with gloves and a mask. When the group first arrived at the residence and found no one at home, no attempt was made to break in and search the empty house; instead, they attempted to track down their intended victim at his place of business. When they returned and saw a light go on at the house, Mr. Phillips grabbed the three-year-old child while still carrying his assault rifle and hastily entered the house with his accomplices.

Thus, from the circumstances of this crime as well as Mr. Phillips' actions, a jury could reasonably infer that he intended to use the deadly

weapons in accomplishing the stated purpose of obtaining money and drugs from those inside the home. Viewing all of this evidence in the light most favorable to the prosecutor, it cannot be said that no rational factfinder could have found Mr. Phillips guilty beyond a reasonable doubt of being a principal to three first degree murders. Therefore, the evidence was sufficient to support the convictions.

Mr. Phillips also assigns as error the trial court's failure to grant a mistrial, requested after the State purportedly elicited testimony from a police detective suggesting his involvement in another crime.

Article 770 of the Code of Criminal Procedure states that:

Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

(2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;

An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

Criminal Procedure article 771 further provides that when a remark

prohibited under Article 770 is made by someone other than a judge, district attorney or court official, the court must admonish the jury if either party requests it and, if the defendant so moves, it "may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial."

A police officer's unsolicited reference to a defendant's prior criminal activity would not require a mistrial under Article 770 unless there was a pattern of unresponsive answers or improper intent. *State v. Nuccio*, 454 So.2d 93, 101 (La. 1984); *State v. Lee*, 618 So.2d 551, 553 (La. App. 4th Cir. 1993). However, a police officer's statements could be imputable to the State if the prosecutor deliberately elicited inadmissible information from the officer. *State v. Madison*, 345 So.2d 485 (La. 1977); *State v. Overton*, 337 So.2d 1201 (La. 1976); *State v. Lepkowski*, 316 So.2d 727 (La. 1975). Under *State v. Johnson*, 94-1379, p. 15 (La. 11/27/95), 664 So.2d 94, 101, the improper mention of other crimes evidence is "a trial error, i.e., an error which occurs during the case's presentation to the trier of fact," and is thus subject to harmless error analysis. "Errors are harmless unless the reviewing court is thoroughly convinced that the remarks inflamed the jury and contributed to the verdict." *State v. Nicholson*, 96-2110, p. 13 (La. App. 4th Cir. 11/26/97), 703 So.2d 173, 180 (citations omitted).

In this case, Mr. Phillips claims a mistrial should have been ordered when on re-direct of Detective Byron Adams, the lead investigator on this case, the prosecutor explicitly asked about the date of the warrant to search his home, followed by questions regarding the dates of the other interviews that implicated him in this crime. Because the search warrant was issued as a result of a separate incident, after the instant murders but before Mr. Trackling had been questioned, Mr. Phillips argues that the jury was deliberately led to believe that he "was in trouble with the law for something else before he was linked to the instant case." He thus contends that he is entitled to a new trial.

As previously noted, however, all testimony at the trial of this case was carefully limited to avoid any mention of other criminal incidents involving Mr. Phillips and his cohorts. In fact, there had been no reference whatever to any search warrant until defense counsel asked Det. Adams about it, seeking to emphasize the lack of physical evidence against his client. Under these circumstances and based upon the testimony taken as a whole, we agree with the trial court's conclusion that the remarks did not constitute an impermissible reference to Mr. Phillips' involvement in other crimes. Moreover, when examined in context of the entire transcript, we are convinced that this testimony neither inflamed the jury nor contributed to the

verdicts of guilty. Therefore, any error in the admission of this testimony was harmless.

CONCLUSION

For the reasons assigned, Mr. Phillips' convictions and sentences for three counts of first degree murder are affirmed.

AFFIRMED