

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-2115**
VERSUS * **COURT OF APPEAL**
BLAISE P. FERNANDEZ * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 399-101, SECTION "E"
Honorable Calvin Johnson, Judge
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Judge Patricia Rivet Murray
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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

Defendant, Blaise Fernandez, was found guilty of first degree murder and sentenced to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. Mr. Fernandez appeals this conviction assigning as error the trial court's failure to suppress his confession and its failure to grant his motion for a mistrial. For the reasons that follow, we conclude that the trial court did not err, and affirm the conviction and sentence.

STATEMENT OF CASE

On June 18, 1998, Blaise Fernandez was indicted for the first degree murder of Dolly Anderson during the perpetration or attempted perpetration of an armed robbery in violation of La. R.S. 14:30. He pled not guilty on

June 24, 1998, and filed suppression and discovery motions. On July 21, 1998, he moved for a lunacy hearing. The trial court granted the motion for a lunacy hearing and appointed Drs. Deland and Richoux to examine Mr. Fernandez. Following the lunacy hearing on August 25, 1998, he was found competent to stand trial. On April 1 and August 6, 1999, hearings were held on Mr. Fernandez' motion to suppress a statement; the motion was denied on August 6. On February 11, 2000, after a three day jury trial, Mr. Fernandez was found guilty as charged. The sentencing phase of the trial was held on February 12, 2000, and the jury recommended life imprisonment. A motion for new trial was filed on March 17, 2000, and denied on May 23. Mr. Fernandez waived delays and was sentenced to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. This appeal followed.

STATEMENT OF FACT

On April 24, 1998, Detective Nathan McGhee was working as a New Orleans Police Department field training officer with Randall Knight, a recruit. At 10:45 p.m. Detective McGhee and Officer Knight responded to a "suspicious person" call at the corner of Alabo and St. Claude. Officers James Adams and Wilfred Eddington, each in a one-person marked police

unit, also responded to the call. When the officers arrived on the scene they learned that the call was bogus. However, while still in the area, they heard multiple gunshots coming from the area of Caffin and St. Claude. The officers proceeded to that area. When they arrived near the intersection, they saw people running out of the Popeye's restaurant. The officers advised the dispatcher of the incident.

Officer Adams parked his police vehicle on St. Claude Avenue, and the other officers went to the Caffin Avenue side of the restaurant. They looked into the restaurant and observed a subject, standing on the counter. They also observed a woman dressed in a security guard uniform lying on the floor. The subject, who was wearing a ski mask, dark colored pants and a blue jacket, was holding a gun in each hand. The subject fired two more shots at the fallen security guard, then turned, looked out the window, saw the police officers and jumped off the counter. He fled through the side door of the restaurant, and ran towards a fence at the rear, where he was cut off by Officer Eddington. The subject then turned and ran towards the front of the restaurant on St. Claude. He pointed his guns at Officer Adams, who responded by shooting at the subject, who then ran around the corner of the restaurant. He almost collided with Detective McGhee and Officer Knight, who were attempting to apprehend him. The subject fired at the officers,

and they returned fire. The subject dropped one of the guns and the two bags and ran across Caffin Avenue toward the Walgreens; Officers Adams and Knight and Detective McGhee pursued him on foot. The subject ran to the rear of Walgreens where he took off the mask and threw it and the remaining gun on the ground. He also took off the gloves he was wearing and threw them away. He then ran to Flood Street and turned left, travelling southbound towards North Rampart Street. While on Flood Street, the subject took off his jacket and threw it into a ditch on the side of the street. Detective McGhee stopped to secure the evidence, while Officers Adams and Knight continued the chase. From Flood Street, the subject turned onto North Rampart Street where he was cut off by Officer Eddington. The subject put his hand to his waist. Officer Eddington shot at the subject, and he fell to the ground, where the officer handcuffed him. The officer then returned to the crime scene with the subject, identified as Blaize Fernandez. Several witnesses to the robbery and shooting identified Mr. Fernandez as the person who had robbed the restaurant and shot the security guard.

Mr. Fernandez was taken to the Fifth District Police Station, where he was interviewed by Detectives Duane Carkum and Herman Franklin. After being advised of his Miranda rights, Mr. Fernandez gave a statement in which he confessed to having robbed the Popeye's restaurant and having

shot the security guard five times.

When other police officers entered the restaurant they found a woman , Dolly Anderson, wearing a uniform lying on the floor. She was bleeding profusely, and appeared to be in critical condition. The officers called an emergency medical unit. The technicians administered first aid and transported Ms. Anderson to Charity Hospital, where she died. An autopsy revealed that Ms. Anderson had sustained a gunshot wound to the right posterior shoulder, to the right posterior arm and to the right hip; the latter was the fatal wound. The shot to the hip lacerated the femoral artery, and Ms. Anderson died from acute blood loss.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER 1

Mr. Fernandez contends that the trial court erred when it denied his motion for mistrial. He argues that he was entitled to a mistrial because of juror misconduct.

La. C.Cr.P. art. 775 provides in pertinent part that:

A mistrial may be ordered, and in a jury case the jury dismissed, when:

* * * * *

(6) False statements of a juror on voir dire prevent a fair trial.

Upon motion of a defendant, a mistrial shall be ordered, and in

a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.

Mistrial is a drastic remedy which should be declared only when unnecessary prejudice results to defendant. State v. Lewis, 95-0412, p. 4 (La. App. 4 Cir. 9/28/95), 662 So.2d 77, 79. The determination of whether prejudice has resulted so as to require mistrial lies in the sound discretion of the trial court. A trial court has discretion to determine whether a fair trial is impossible, or whether an admonition is adequate to ensure a fair trial when there are no specific statutory grounds for a mandatory mistrial, and the trial court's ruling will not be disturbed on review absent an abuse of discretion. Lewis. The standard to judge whether a trial court should grant a mistrial is whether the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. State v. Johnson, 94-1172, p. 2 (La. App. 4 Cir. 12/15/94), 648 So.2d 43, 44.

The law is clear that a relationship between a juror and the participants is not necessarily a disqualifying fact. State v. Fairley, 25,951, p.3 (La. App. 2 Cir. 5/4/94), 645 So.2d 213, 216. The existence of a relationship, even one of blood or marriage, is not sufficient to disqualify a juror unless it is shown that the relationship is sufficient to preclude the juror from arriving at a fair verdict. Id., citing State v. Peterson, 446 So.2d 815

(La. App. 2d Cir. 1984). The law does not require that a jury be composed of individuals who are totally unacquainted with the defendant, the prosecuting witness, the prosecuting attorney, and the witnesses who may testify at trial. It requires that jurors be fair and unbiased. Id., citing State v. Shelton, 377 So.2d 96 (La. 1979).

In the case at bar, one of the jurors notified the trial court, immediately prior to the beginning of deliberations, that she felt uncomfortable in deliberating as she realized during trial that she lived in the same neighborhood as Mr. Fernandez. She told the trial court that she was concerned about her family's well-being if he were convicted. The transcript reflects that the juror was brought into the judge's chambers where an in camera discussion was held, outside the presence of the other members of the jury. The in camera discussion was not recorded, but the trial court summarized it on the record as follows:

BY THE COURT:

Darnell Picou, a juror in this case, reports that she was upset and that she didn't think that she could continue to deliberate in this case, because she discovered that - - not discovered, it dawned on her that the area in which this murder allegedly happened; and specifically, the area where the defendant lives is an area where she frequents. And because of that, although she doesn't know the defendant or any of the other people involved in this, she may have seen one or two of them. She doesn't know anyone. She thinks that the fact that she lives in the area, frequents the area, that she may have a problem being part of this jury. And that if the jury returns a guilty verdict, there may be something that happens untoward to her or her family. I told Miss Picou that was insufficient in terms of a reason to

be removed from this jury. That simply was insufficient, and that she is to continue to deliberate. She had to continue to be a part of the jury and to participate in the discussions and to deliberate, and to come to some conclusion in this case, if she can. But what she was saying to me is insufficient as a basis or a reason to remove her from the jury, and I simply wanted to make that part of the record.

BY MR. THOMAS:

On behalf of Mr. Fernandez, I have to move for a mistrial. I specifically remember talking to Miss Picou. And when we found out where she lived in the neighborhood and asked her if she was afraid of repercussions, whether she knew anybody connected to the case, the one that had heard the most about the case, the same lady - - and looking at the Code of Criminal Procedure 789, I don't think she can be removed. She just doesn't want to perform. The whole process is skewed, if she lied to us and was fraudulent in her responses to the questions on voir dire.

BY THE COURT:

I am going to deny the motion for mistrial. I agree with you, though. Her basis for being removed from this jury is insufficient to that, absolutely insufficient to form a basis to form removal from this jury. I am not going to do that. I deny the motion for mistrial. I note an objection on behalf of the defendant to the denial of the mistrial.

Mr. Fernandez's attorney argues that this juror lied during voir dire.

The transcript of voir dire was not included in this appellate record. It, therefore, is impossible for this court to determine exactly what the juror was asked and her response. In connection with the motion for the mistrial, Mr. Fernandez' counsel suggested that the juror was not candid with him during voir dire because she did not advise him, as she supposedly told the court during the in camera discussion, that she feared repercussions from the jury

verdict. Counsel argued that the whole process was “skewed” if she lied and was fraudulent in her responses to the voir dire questions.

The trial court rejected this argument, and we cannot say that it abused its discretion in doing so. Even had this juror not been completely candid about her fear of repercussion during voir dire examination, this fact would not have substantially prejudiced Mr. Fernandez so as to deprive him of “any reasonable expectation” of a fair trial. The trial court correctly determined that the drastic remedy of mistrial was not necessary under these circumstances.

ASSIGNMENT OF ERROR NUMBER 2

Mr. Fernandez also contends that the trial court erred when it denied the defendant’s motion to suppress statement. We disagree.

In State v. Labostrie, 96-2003, pp. 4-5 (La. App. 4 Cir. 11/19/97), 702 So.2d 1194, 1197, this court stated:

The State has the burden to prove, beyond a reasonable doubt, that a statement made by a defendant was freely and voluntarily given and was not the product of threats, fear, intimidation, coercion, or physical abuse. State v. Seward, 509 So. 2d 413 (La. 1987); State v. Bourque, 622 So. 2d 198 (La. 1993). Thus, the State must prove that the accused was advised of his/her Miranda rights and voluntarily waived these rights in order to establish the admissibility of a statement made during custodial interrogation. State v. Brooks, 505 So. 2d 714 (La. 1987), cert. denied Brooks v. Louisiana, 484 U.S. 947, 108 S.Ct. 337, 98

L.Ed.2d 363 (1987); State v. Daliel, 557 So. 2d 283 (La. App. 4th Cir. 1990). A waiver of Miranda rights need not be explicit but may be inferred from the actions and words of the accused; however, an express written or oral waiver of rights is strong proof of the validity of the waiver. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); State v. Harvill, 403 So. 2d 706 (La. 1981). Whether a statement was voluntary is a question of fact; thus, the trial judge's ruling, based on conclusions of credibility and the weight of the testimony, is entitled to great deference and will not be disturbed on appeal unless there is no evidence to support the ruling. State v. Parker, 96-1852, pp. 12-13 (La. App. 4th Cir. 6/18/97), 696 So. 2d 599, 606.

In the present case, Detectives Franklin and Carkum testified that Blaize Fernandez had been arrested and advised of his Miranda rights prior to giving a statement about the robbery and shooting, and that he waived his rights and gave the statement, which Officer Carkum typed as the interview progressed. Mr. Fernandez signed the statement, which included an affirmative waiver of constitutional rights.

On appeal, Mr. Fernandez argues that he was forced into making the statement. Specifically, he claims that Officer Eddington beat him when he was apprehended and that Detective Carkum beat him during the interview process. However, he has offered nothing to support these claims.

On the contrary, both Detective Carkum and Officer Eddington denied beating Mr. Fernandez. Detectives Carkum and Franklin testified that that

they did not force or threaten him into making a statement. Deputy Stephanie Bush, an Orleans Parish Criminal Sheriff Deputy, who was in charge of the booking office at Central Lockup on April 24, 1998, testified that Mr. Fernandez did not tell her that he had been beaten by the arresting officers. She also testified that injured arrestees are not accepted at Central Lockup until they have received medical treatment. There was nothing in the booking records to indicate that Mr. Fernandez reported being beaten and/or injured.

The trial court assessed the credibility of the witnesses and determined that the State had met its burden in proving that Mr. Fernandez's statement that he robbed the restaurant and shot the security guard five times was given freely and voluntarily. In light of the testimony and evidence presented by the State, the trial court did not abuse its discretion when it denied Mr. Fernandez's motion to suppress this statement.

CONCLUSION

Mr. Fernandez's conviction and sentence are affirmed.

AFFIRMED

