

STATE OF LOUISIANA

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NO. 2002-KA-0069

VERSUS

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COURT OF APPEAL

JONATHAN MCDONALD

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 382-897, SECTION "A"
Honorable Charles L. Elloie, Judge

JUDGE

JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin
and Judge Max N. Tobias, Jr.)

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AFFIRMED.

STATEMENT OF CASE

The defendant, Jonathan McDonald, was charged by bill of information on May 2, 1996, with the attempted second degree murder of Darrell Jones. The defendant pled not guilty at arraignment. Trial by jury was held on April 22, 1997. The defendant was found guilty as charged. On May 6, 1997, the trial court denied the defendant's motion for post verdict judgment of acquittal and motion for new trial. On May 7, 1997, the court sentenced the defendant to ten years at hard labor without benefit of probation, parole, or suspension of sentence. On September 28, 2001, the defendant filed an application for post-conviction relief alleging, among other things, that he had been denied his right to appeal. In a judgment dated October 15, 2001, the trial court granted the defendant an out-of-time appeal.

STATEMENT OF FACT

The victim testified that he and the defendant were acquaintances for approximately a year and a half prior to the incident which led to the present

charges. At some point in time, the victim came into possession of an amplifier for an automobile stereo for which the defendant contended he owed him fifty dollars. On the Wednesday before the shooting, the defendant appeared at the victim's apartment demanding that he pay him for the amplifier. The victim testified that he told the defendant that he did not have the money at that time but that he would pay him when he was able. He testified that the defendant responded, "Forget it, you gonna lose it all now; I don't want the fifty." A few days following the argument, the victim's vehicle, a 1982 Chevrolet Blazer, was set on fire. As a result, the victim moved the truck to an empty lot beside his grandmother's house.

The victim testified that on the morning of March 31, 1996, he and his brother Delridge Jones were asleep at their grandmother's, Lizzie Mathis', residence. Ms. Mathis testified that at approximately 10:00 or 10:30 a.m., she heard a loud explosion; she went to the side door and observed the defendant on the victim's Blazer with a big gun. She screamed for her grandson, Frank Brooks, to bring her gun. Brooks went back inside the house and retrieved a .25 caliber pistol Ms. Mathis kept in the home. Ms. Mathis testified that when the defendant heard this, he got down off the truck and ran along the side of the house towards the street.

The victim testified that he had been awakened by the sound of

gunfire, ran to the sound of his grandmother screaming and followed her out the door. He observed the defendant fire a shot at his truck and then run towards the street. The victim testified that he chased after the defendant until he aimed the gun at him and then ran back to his grandmother. He then wrestled over the pistol with his grandmother momentarily. The victim testified that after he gained possession of the gun, he turned towards the defendant who was aiming the gun at him. He testified that as soon as he made eye contact with him, the defendant shot him. The victim and Ms. Mathis were near the front of the lot at this time. Brooks and Delridge Jones both testified that they remained behind, and although they observed the victim as he was shot, they could not see the defendant as he was around the side of the house.

The victim testified that he was hit in the neck, arm and under his armpit and fell to the ground. Ms. Mathis, who was but a few paces from him, testified that she fell on top of him to prevent him from being shot again. She testified that the defendant continued to fire the shotgun spraying the house with bullets. She stated that the defendant emptied the weapon. She also identified several photographs depicting bullet holes in her living room wall and in the corresponding outside wall on the side of her house.

Police Officer Arthur J. Harrison testified that two spent shotgun

shells were recovered near the victim's vehicle and four spent shotgun shells on Arts and North Galvez Streets. He also testified that the Raven 25 semi-automatic pistol was recovered with five live rounds still in it. Officer Harrison identified a photograph taken at the crime scene at his direction and under his observation depicting two bullet holes in the hood of the truck. One of the shotgun pellets fired by the defendant struck the victim in the spine causing him to be paralyzed from the chest down.

Edward Mauri, a private investigator, testified that he was employed by defense counsel to investigate the shooting. He related that he interviewed Debra Valdery, who at the time lived across the street from the lot where the victim was shot. According to Officer Mauri, Ms. Valdery told him that she heard at least three shots fired from a handgun during the incident of March 31, 1996. She also told Officer Mauri that she had bullet holes in her garbage can that she believed came from the direction of the Mathis house. Ms. Valdery could not be sure that the garbage can had no holes in it prior to the shooting. Officer Mauri testified further that Ms. Valdery said she had been listening throughout the incident but only heard a handgun being fired three times and did not hear any shotgun blasts.

The evidence established that the .25 caliber pistol was recovered with five bullets in the clip and that it could not hold more than seven bullets in

total.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In this assignment of error, the defendant contends the trial court committed error when it charged the jury relative to the elements of attempted second degree murder. In order to find a defendant guilty of attempted second degree murder, the State must prove that the defendant had the specific intent to kill. State v. Butler, 322 So.2d 189 (La. 1975). At trial, the court instructed the jury by defining second degree murder and then provided the definition of an attempt. In doing so, the court's instruction relative to the elements of the crime charged incorrectly stated that it is the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm. The specific intent to commit great bodily harm is not an element of the crime of attempted second degree murder. State v. Butler; State v. Hongo, 96-2060 (La. 12/02/97), 706 So.2d 419.

Accordingly, the trial court's instruction was error.

As noted by appellate counsel, no objection to the erroneous jury charge was entered. La. C.Cr.P. Art. 801 provides that "[a] party may not assign as error the giving or failure to give a jury charge or any portion

thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error.” Furthermore, La. C.Cr.P. Art. 841 provides that “[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.” Accordingly, the failure to enter a contemporaneous objection precludes appellate review of this issue. See State v. Porter, 2000-2286 (La. App. 4 Cir. 12/27/01) 806 So.2d 64; State v. Hongo.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment of error, the defendant contends he was denied effective assistance of counsel when his attorney failed to object to the erroneous jury charge on the elements of attempted second degree murder.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, State v. Prudholm, 446 So.2d 729 (La. 1984); however, where, as here, the record discloses sufficient evidence to rule on the merits of the claim, the interests of judicial economy justify consideration of the issues on appeal. State v. Ratcliff, 416 So.2d 528 (La.1982); State v. Garland, 482 So.2d 133 (La. App. 4 Cir.1986).

To prevail on an ineffective assistance of counsel claim, a defendant must satisfy the two-prong test enunciated in Strickland v. Washington, 466

U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Strickland test requires that a defendant prove that counsel's performance was deficient and also that the deficient performance actually prejudiced the defense to such an extent that there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Strickland, 466 U.S. at 694, 104 S.Ct. At 2068.

The deficient performance prong of Strickland has clearly been met. As the Louisiana Supreme Court stated in State v. Hongo, "the rule of Butler has been well-established with over twenty years duration and a reasonably competent attorney would know of it and properly object when presented with the instant erroneous jury charge." 96-2060 at p. 6 (La. 12/02/97), 706 So.2d at 422.

As to the second prong, the testimony and evidence established a strong showing that the defendant fired the shotgun with the specific intent to kill. As noted by the State, rather than making good his escape, the defendant stopped and waited, taking aim with the shotgun and firing at the victim as he came from the side of the house. The nature and gravity of the victim's injuries further demonstrate the lethal intent of the shot fired.

Furthermore, as in State v. Hongo, the jury “was presented with a binary choice between the State’s version of what occurred and the defendant’s.” Id., 96-2060 at p. 5, 706 at 422. Although the defendant did not testify, counsel for the defendant alleged that the defendant’s actions were justified as he acted in self-defense. Counsel did not argue that the evidence supported a finding that the defendant had the intent to only inflict great bodily harm. Furthermore, the State did not argue that a finding that the defendant acted with the intent to inflict great bodily harm would support a guilty verdict. Accordingly, the defendant cannot establish actual prejudice from the erroneous inclusion of intent to inflict great bodily harm. The assignment of error lacks merit.

For the foregoing reasons, the defendant’s conviction and sentence are affirmed.

AFFIRMED.