NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0385**
VERSUS	*	**COURT OF APPEAL**
BRUCE TAYLOR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 423-236, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby)

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CONVICTION AND SENTENCE AFFIRMED

STATEMENT OF THE CASE

Defendant Bruce Taylor was charged by grand jury indictment on July 19, 2001 with second degree murder, a violation of La. R.S. 14:30.1. Defendant pleaded not guilty at his July 24, 2001 arraignment. On September 5, 2001, the trial court denied defendant's motion to suppress the identification. Defendant was found guilty as charged by a twelve-person jury after a two-day trial ending on October 30, 2001.

On November 20, 2001, the trial court sentenced defendant to life imprisonment at hard labor, without benefit of parole, probation or suspension of sentence. The trial court denied defendant's motion to reconsider sentence, and granted his motion for appeal.

FACTS

Defendant was charged with the second-degree murder of Leroy Batiste.

New Orleans Police Officer Raymond Young responded to a shooting on the evening of May 14, 2001. Upon arrival at the scene on Old Gentilly Road, Officer Young observed the unresponsive victim lying on the ground

bleeding.

Debra Batiste, the victim's mother, identified a photograph of the apartment at 6651 Old Gentilly Road where her daughter and the victim resided. She said a lot of people in the area picked on her son because he was a loner. Defendant lived in the same apartment complex as the victim. She said that some two weeks before he was murdered, defendant's brothers shot at the car in which the victim was riding, striking him in the leg. Defendant's two brothers were arrested in connection with that shooting. Ms. Batiste said the animosity between the victim and defendant's brothers developed because one of defendant's brother's had borrowed the victim's screwdriver and the victim had asked for it back. That was the same week the victim was first shot and wounded.

New Orleans Police Detective Danny Wharton investigated the May 4, 2001 shooting of the victim in the leg. He arrested Anthony and Alfred Moliere in connection with that shooting. Detective Wharton said the Molieres were defendant's brothers.

Detective Fred Bates investigated the murder of the victim, responding to a call received at approximately 11:00 p.m. on May 14, 2001. The victim had been transported to Charity Hospital by the time the detective arrived at the scene. He noted that the victim's vehicle had three

bullet holes in it from the earlier shooting incident. Seven .380 caliber cartridge casings, made by two different manufacturers, were recovered at the homicide scene. An eighth casing was discovered the next day.

While at the scene the day after the murder, Detective Bates said a citizen slipped him a note. He conversed with that person several blocks from the scene. Based upon that information, he developed defendant as a suspect and prepared a photo lineup. Detective Bates said a witness, Osborne Parker, subsequently came forward and identified the defendant by name, stating that he had grown up with defendant. Detective Bates showed Parker the photo lineup anyway, and the witness immediately selected defendant's photo. When Detective Bates expressed concern for Parker's safety, the witness was adamant in saying that the killing was wrong and he wanted to see justice. Deective Bates learned that defendant was in custody already. A search of defendant's home did not turn up any weapons, or any clothing connected to the case. A .380 caliber firearm was located in the victim's residence, but ballistics tests showed that it was not connected to the case. Detective Bates stated that .380 caliber handguns were commonly used on the street.

Detective Bates testified that Osborne Parker worked as a waiter at a restaurant in eastern New Orleans frequented by police officers. Detective

Bates recognized Parker, but had never met him before he came forward as a witness. Detective Ernest Rome referred Parker to him. Detective Bates did not know whether Detective. Rome had previously met Parker.

Dr. James Traylor qualified by stipulation as an expert in the field of forensic pathology, autopsied the victim. Defendant sustained six gunshot wounds, including one to the mouth that damaged the tongue. At least two of the gunshot wounds were potentially fatal, and were fatal. The victim died of "spinal cord shock." Dr. Traylor also noted a very recent gunshot wound to the victim's left leg.

Osborne Parker testified that he used to live around defendant. He had known him almost his entire life, but was not a close friend. Parker also knew the victim from the apartment complex, but was not a good friend and never hung out with him. On the night of the murder, Parker saw defendant sitting in his doorway. Parker was looking for Keyoka Riley, whom he referred to as his "sister," but who was not a blood relation. Parker asked defendant if he had seen her. Defendant replied that he had not seen her, and then said to Parker that "I'm just kind of messed up," "I'm just kind of fu---- up right now in the head."

Parker eventually found Ms. Riley, and they walked to a store across the highway. On the way back, he heard gunshots, and looked over to see

someone standing over the victim shooting him. Parker said the person shooting the victim was wearing the same clothing that he had just seen defendant wearing—black jeans and a dark shirt, with a bandanna around his neck. He admitted that he did not immediately recognize defendant, but he thought about it afterward, when defendant told him that he had been in the shower at the time of the shooting. The shooter ran through a cut in the apartment complex. Parker conceded that the shooter did not run directly to defendant's apartment, which he said was perhaps two apartment buildings away from the scene of the shooting. Parker said he went to his apartment immediately after the shooting to telephone police, and proceeded to the scene and attempted to comfort the victim, who was still conscious. Parker described how blood was coming out of the victim's mouth and he was twitching as if he was trying to talk.

Parker saw defendant approximately twenty minutes after the shooting. At that time defendant was wearing a white shirt and shorts, and related that he had been in the shower. Parker said that, considering what had happened with defendant's brothers, he thought defendant was lying. He felt that defendant's explanation about being in the shower seemed contrived. When Parker was asked why he came to testify, he explained that he called police because everyone else was afraid to say anything. He

emphasized that he had seen the victim on the ground dying, indicating that it greatly disturbed him and prompted his action. He said he got in touch with Detective Bates and said he had some information that might help. Parker said he did not have anything against defendant or the victim, and that he prayed and asked God whether he was doing the right thing. When asked if he saw the killer in the courtroom, Parker identified defendant.

Parker conceded on cross-examination that he had testified that the shooter "basically" looked like defendant. He was asked whether the shooter he saw "basically" looked like defendant, looked "similar" to him, "could have been" him, or that "maybe" it was him Parker replied "[a]ll of that." Questioned further as to whether he meant not definitely, Parker said that he was saying it was him. Defense counsel pointed out that "basically" did not mean, "it was him," to which defendant said "[o] kay." Parker admitted that he gave his name to police when he called 911 immediately after the shooting, but conceded that he spoke to no officers at the scene, and told no one that defendant was the shooter. Parker admitted that he knew a lot of police officers. He did not recognize a detective named Detective. Ernest Rome, but said that could have been the detective he asked about getting in touch with Detective. Bates. He did not know that detective's name. Parker said he heard that Detective. Bates had left business cards on

doors around the apartment complex. Parker admitted that the district attorney's office gave him money for a "down payment" on a house, but later said it was $512 to rent a house. He vehemently denied that was why he got involved. He protested the suggestion that he was bribed for his testimony, saying that was why he did not want to get involved in the first place. Parker admitted that he was not in the house anymore, explaining that he lost it when he lost his job.

Parker testified on redirect examination that he did not contact Detective. Bates immediately after the shooting because he did not want to get involved and because he felt that police would solve the crime, considering the "feuding" between defendant's brothers and the victim. Parker said the district attorney's office placed him in a witness protection program and asked him to look for a house. He said when he moved out of the house the landlord was supposed to return the money to the district attorney's office. He replied in the negative when asked whether he made any money from the case.

It was stipulated that if Officer Kenneth Leary were called as a witness he would be qualified as an expert in the examination of firearms and would testify that the seven spent .380 cartridge casings all came from one gun, but not the gun that was seized from the victim's residence.

Bruce Moliere, defendant's father, testified that he lived at 6666 Chef Menteur Highway. He was in his room sleeping when the victim was shot, and said that as far as he knew defendant was at home in the shower. Mr. Moliere testified on cross examination that his wife woke him up, and he went outside to find defendant standing there "soaking wet." He did not otherwise know that defendant had been in the shower at the time of the shooting. Mr. Moliere, his wife, defendant, and defendant's brothers, Anthony and Alfred, lived in the apartment.

Linda Moliere, defendant's mother, testified that her sister knocked on her door to inform her that the victim had been shot. She said defendant was in the shower with his girlfriend, Phyeka Spencer. Mrs. Moliere knocked on the bathroom door and told defendant about the shooting. She said defendant and his girlfriend got out of the shower and went outside. Mrs. Moliere knew the Batistes only as people who lived across the street. She said she once signed a petition to remove the victim from the complex because he had shot at someone in the complex. Mrs. Moliere said Anthony and Alfred Moliere also were her sons, and that after the victim was killed they were released from jail. Mrs. Moliere conceded on cross examination that she did not know when defendant and his girlfriend got into the shower, or how long they had been in there at the time she knocked on the bathroom

door.

Pheyka Spencer testified that defendant was her fiancé. They were in the shower at the Moliere apartment when Mrs. Moliere knocked on the door to tell them someone had been killed. They got dressed and went outside. She never talked to police about the case, but contacted the district attorney's office. She was told by one prosecutor that he could not help her that he was on the other side. Ms. Spencer was told she did not have to come to the grand jury, but she went anyway. She testified before the grand jury, and said she told them the same thing she testified to at trial. Ms. Spencer denied that she walked up to Detective Bates and tried to talk to him. Ms. Spencer was confronted with her grand jury testimony in which she stated that she had seen "him," apparently referring to Detective Bates, that he was at the scene of the crime, and that when she went to talk to him he said he could not help her. Ms. Spencer testified that she did not recall saying that before the grand jury. She said she had no idea what time she and defendant took their shower that night. Again, she was confronted with her grand jury testimony wherein she stated that it had been about nine-thirty. She did not recall that testimony. She said they were in the shower for two hours having sex, and replied in the affirmative when asked whether the shower was running the whole time. When asked whether the water got

cold, she said off and on. She claimed that defendant was inside of the apartment from the time he got home from work until the time they went outside after the murder. Ms. Spencer admitted calling defendant's mother from the courthouse when the grand jury was meeting to tell her that Osborne Parker was testifying.

Devin Scott testified that he knew both the victim and defendant. He and four friends were sitting on a car when they heard two gunshots. He looked down the street to see a man standing over the victim shooting him. Afterward, the man ran through an alleyway. He said the man was wearing a red bandanna over his face. He saw defendant outside, soaking wet, after everything happened. Scott testified during cross-examination that Osborne Parker was walking up the driveway from the store when the first shots rang out. A woman told Parker to grab her baby. Parker ran inside, and when Scott looked back, the man was standing over the victim shooting him. Scott said that in addition to the red bandanna, the shooter was wearing all black or all dark clothing.

Keyoka Riley testified that she knew defendant from living in the Desire Project. Osborne Parker was living with her on May 14, 2001, at her mother's apartment at 6654 Chef Menteur Highway. Ms. Riley testified that on the night of the shooting, she and Parker had gone to the store. On their

way back home she heard shots. Parker ran into their apartment, and he held the door open for her to bring in her daughter. Ms. Riley said Parker entered before her. She did not see anyone shooting. She said on cross-examination that she did not see what Parker saw. She stated that she had asked Parker why he was going to testify against defendant, and he said something to the effect that he did not know, that he was just doing it. She indicated that she did not think it was a good idea for him to testify. She said on redirect examination that she did not see how Parker could have seen anything from where they were. She said that if he did see somebody, he could not have seen exactly who it was because it was dark. Parker never told her he saw defendant shoot the victim, she said, emphasizing that they talked about everything.

Osborne Parker testified on rebuttal that Keyoka Riley told him that she was going to testify for defendant because she did not want anything to happen to him, meaning Parker.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant argues that the evidence was insufficient to sustain his conviction.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> 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, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). 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 since 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; Green; 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 (La.1992) at 1324.
>
> In addition, 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). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. 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).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Defendant's argument is that the testimony of Osborne Parker is insufficient to convict him. Parker freely admitted that he did not see the shooter's face. However, Parker said that before the shooting he had seen defendant wearing black jeans and a dark shirt, with a bandanna around his neck, and that the shooter was wearing these same items of clothing. Devon Scott, one of defendant's witnesses, testified that the shooter was wearing black or all dark clothing and a red bandana over his face.

When asked whether he immediately recognized defendant as the shooter—at the time of the shooting—Parker replied "not really." He said he did not think about it until after the shooting, when defendant told him he had been in the shower at the time of the shooting. When asked on direct examination if the shooter and defendant had the same description, Parker replied "basically." Under cross-examination, defendant agreed that "basically" meant that it might have been him. However, Parker also said under cross-examination that he was saying that defendant was the shooter. When Parker was asked by the prosecutor whether he saw the person who

shot the victim in the courtroom that day, Parker identified defendant.

The evidence suggests that the victim was killed within a relatively short time after Parker saw and talked to defendant, when defendant was wearing the black pants, dark shirt and bandanna. Parker testified that it was approximately twenty minutes after the shooting that he saw defendant in the white shirt and shorts. When asked whether he believed defendant when defendant told him that he had been in the shower, Parker replied in the negative, stating that he had just seen him twenty minutes before then.

Parker also testified that after first seeing defendant in the bandanna and dark clothing, he went on to find Ms. Riley, and they walked to a nearby store. Parker, as well as Ms. Riley, who testified for defendant, testified that they were on their way back from the store when they heard the first shots. Parker was asked how long he was at the store, and he said five or ten minutes, noting that it was close to the apartment complex. Parker said they were halfway up the driveway when he heard the shots. Devon Scott also testified that Parker was walking up a driveway from the store when the shots rang out.

Linda Moliere, defendant's mother, testified that her sister knocked on her door to inform her that the victim had been shot, and Mrs. Moliere then knocked on the bathroom door to inform defendant of the shooting.

Defendant was supposedly in the shower with Phyeka Spencer, his girlfriend. Ms. Spencer testified that she and defendant had been in the shower "hours" when defendant's mother knocked on the door. She replied in the affirmative when asked whether the water had been running for "two hours."

It could reasonably be inferred from the evidence that defendant's girlfriend lied when she said that she and defendant had been in the shower two hours. One could conclude that defendant could not have been in the shower for two hours at the time his mother knocked on the door, because Parker had seen him and talked to him well within two hours, at which time defendant was wearing black/dark pants, a dark shirt and a bandanna, the same clothing both Parker and Devon Scott said the shooter was wearing. Although the timeline is unclear, it appears all but certain that two hours did not elapse between the time Parker talked to defendant before the shooting and the time Parker saw defendant outside after the shooting.

It cannot be questioned but that defendant had a motive to kill the victim. The victim had identified defendant's two brothers as having shot him some ten days before he was murdered. Those two presumably had been arrested based on the victim's identification of them, and were in jail. They were released from jail after the victim was murdered. There is no

evidence that Osborne Parker harbored any animosity toward defendant or his family.

The testimony of Devon Scott and Keyoka Riley, Parker's "sister," conflicts with that of Parker in some important respects. Parker testified that he saw the shooter standing over the victim shooting, and saw the shooter run away. Scott and Ms. Riley testified that Parker had gone inside before the last shots were fired. Ms. Riley testified that she did not see how Parker could have seen anything, based on the distance alone, and that if he had, he could not have seen exactly who it was because it was dark.

Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could concluded from the evidence that a very short time before the shooting, defendant was seen wearing the same or virtually identical clothing as that worn by the shooter; that defendant's alibi witness, his girlfriend, lied when she testified that she and defendant had been in the shower for two hours, until after the shooting; that in fact defendant had not been in the shower at the time of the shooting; and that defendant had a motive for killing the victim. The question arises as to whether it is a reasonable hypothesis of innocence that someone other than defendant, wearing identical or virtually identical clothing to the clothing he was wearing shortly before the shooting, shot and killed the victim and

escaped into the night undetected, coincidentally providing a stroke of luck for defendant's brothers, who consequently escaped prosecution for their shooting of the victim ten days before he was killed. The question also arises whether it is a reasonable hypothesis of innocence that Osborne Parker did not see defendant before the shooting, but either saw the shooter or learned what clothing the shooter had been wearing, and lied when he testified that he had seen defendant wearing similar clothing before the shooting.

Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that it was defendant who fatally shot Leroy Batiste.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, defendant avers that the trial court erred in admitting hearsay testimony, and in permitting the State to refer to that hearsay testimony in its rebuttal argument.

Defendant refers to testimony by Detective. Bates that when he returned to the crime scene the day after the murder, he was given a note by someone indicating that the individual wished to speak with him. Detective.

Bates said he met with this person, and that he developed defendant as a suspect based on information he received from that person. Defense counsel had objected to the line of questioning at the outset on the ground of hearsay. The objection was overruled by the trial court, which stated that the detective could explain that he did something as a result of information received from another, but could not tell the jury what anyone may have told him. Defendant admits that Detective. Bates did not go into many specific details.

Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801(C); State v. Castleberry, 98-1388, p. 18 (La. 4/13/99), 758 So. 2d 749; State v. Raby, 98-1453, pp. 8-9 (La. App. 4 Cir. 6/2/99), 738 So. 2d 699, 703. Hearsay is not admissible except as otherwise provided by the Code of Evidence or other legislation. La. C.E. art. 802; State v. Richardson, 97-1995, p. 13 (La. App. 4 Cir. 3/3/99), 729 So. 2d 114, 121.

Defendant points to no specific statements by Detective. Bates that constitute hearsay, but cites two pages of his testimony in the trial transcript. Detective. Bates' testimony that the note given to him stated that someone wanted to speak to him and that the person did not want to talk to him at the

scene constituted hearsay. However, this information did not refer to defendant at all. Detective. Bates also testified to the description of the suspect he received from that individual—someone named "Bruce," who was a few years older than the victim, and who was a brother of the Molieres. This was hearsay.

Defense counsel did not specifically object to this testimony by Detective. Bates. Even assuming that counsel's preemptive general hearsay objection at the outset of Detective. Bates' testimony about his development of defendant as a suspect was sufficient to preserve this issue for review, the admission of the hearsay was harmless error. The erroneous admission of hearsay evidence is subject to harmless error review. State v. Dangerfield, 2000-2359, p. 20 (La. App. 4 Cir. 4/3/02), 816 So. 2d 885, 900.

The factors to be considered in determining if the error was harmless include the following: (1) the importance of the witness' testimony in the prosecution's case; (2) the presence or absence of evidence corroborating or contradicting the witness' testimony on material points; (3) the extent of cross examination permitted; and (4) the overall strength of the prosecution's case. Id.

As to the first factor, the prosecutor argued in rebuttal that Detective. Bates' development of defendant as a suspect corroborated Osborne Parker's

identification of defendant as the shooter. The prosecutor began this part of his rebuttal with the comment that Detective. Bates had spoken to three people before he even spoke to Osborne Parker. However, that was the only reference to Detective. Bates speaking to anyone, and the prosecutor did not specifically state in his rebuttal that anyone gave information to Detective. Bates, much less information that defendant killed the victim or was even involved. The prosecutor's rebuttal was that Detective. Bates' investigation led him to focus on defendant as a suspect independent of anything Osborne Parker told him, not that other people had identified defendant as the shooter. It was not Detective. Bates' hearsay that was the focus of the State's rebuttal, but the fact that Detective. Bates had already developed defendant as a suspect before Osborne Parker came forward.

As to the second factor in the harmless error review for hearsay, the presence or absence of evidence corroborating or contradicting the witness' testimony on material points, Osborne Parker's testimony covered any hearsay references by Detective. Bates. More importantly, the jury learned from the second and third witnesses to testify, the victim's mother and Detective. Wharton, that defendant was the brother of two individuals who had been accused of shooting and wounding the victim only days before the victim was killed. The evidence clearly establishes that Detective. Bates

would have focused on defendant at some point as a possible suspect. As to the third factor, the defendant was afforded full cross-examination of Detective. Bates. As to the fourth factor, the State's case was weak. Nevertheless, considering Detective. Bates' slight hearsay references, and the fact that the evidence established that defendant was a natural suspect, the admission of Detective. Bates' hearsay testimony was harmless error.

As to the prosecutor's reference to the hearsay during rebuttal argument, other than the prosecutor's reference to Detective. Bates talking to three people, implying, perhaps, that the detective received information from them, the rebuttal was proper. The trial court did not err in permitting the prosecutor to point out to the jury that Detective. Bates developed defendant as a suspect prior to Osborne Parker coming forward. A conviction generally will not be reversed for improper closing argument unless the court is thoroughly convinced that the remarks influenced the jury and contributed to the verdict. State v. Cousin, 96-2973, p. 16 (La. 4/14/98), 710 So. 2d 1065, 1073 (prosecutor's closing argument directly referring to hearsay evidence amounting to a confession by the defendant not harmless error). The prosecutor's reference to Detective Bates talking to three people, even assuming it was a reference to hearsay, when viewed in the context of Detective. Bates' development of defendant as a suspect, when considered in

light of the circumstances previously discussed, does not rise to the level of reversible error.

The erroneous admission of the hearsay, and the prosecutor's obtuse reference to it in rebuttal argument was harmless error.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, defendant claims that the trial court erred in permitting the prosecutor to impeach defendant's girlfriend, Phyeka Spencer, with her grand jury testimony. The prosecutor confronted Ms. Riley with her grand jury testimony that on the night of the homicide she and defendant got into the shower at 9:30 p.m., testimony she said she said did not remember giving. Ms. Spencer also was confronted with her grand jury testimony in which she stated that she had seen "him," apparently referring to Detective Bates, that he was at the scene of the crime, and that when she went to talk to him he said he could not help her. She had testified at trial that she did not talk to Detective Bates at the scene. The trial court overruled defendant's objections to the use of the grand jury testimony.

La. Const. Art. 5, § 34(A), relating to the establishment of parish grand juries, mandates that the secrecy of grand jury proceedings be provided by law. La. C.Cr.P. art. 433 specifies who may be present during

grand jury sessions. La. C.Cr.P. art. 434 mandates that members of the grand jury, all other persons present at grand jury sessions, and all persons having confidential access to information concerning grand jury proceedings shall keep secret the testimony of grand jury witnesses, under penalty of contempt. La. C.Cr.P. art. 434 sets forth two exceptions: (1) after the indictment, such persons may reveal statutory irregularities to defense counsel, the attorney general, the district attorney, or the court, and may testify concerning them; and (2) such persons may disclose grand jury testimony to show that a witness committed perjury in her testimony before the grand jury. A third exception was established by the court in State v. Peters, 406 So. 2d 189 (La. 1981), where the court held that a prosecutor must disclose to the defendant any grand jury testimony constituting material exculpatory evidence as per Brady v. Maryland.

Under La. R.S. 14:124, generally, it shall constitute perjury whenever any person testifies as a witness before the grand jury to a material fact and later testifies contradictorily to or inconsistently with that prior statement. However, in State v. Terrebone, 236 So. 2d 773 (La. 1970), the court held that the exception in La. C.Cr.P. art. 434 allowing the use of grand jury testimony to show that a witness committed perjury applies to situations where the witness is actually being prosecuted for the crime of perjury. The

court held in Terrebone that the exception does not mean that the State can use the record of the grand jury proceeding to impeach a witness during trial of the defendant indicted pursuant to that grand jury proceeding. In State v. Ivy, 307 So. 2d 587 (La. 1975), the court reiterated its holding in Terrebone, but held that the State's use of grand jury testimony to cross examine a defense witness was harmless error. The court found that the evidence of guilt—eyewitness testimony of three individuals—was overwhelming, while the State's use of the grand jury testimony was limited to the cross examination of only one witness, the daughter of the defendant. Accord State v. Bush, 91-0150 (La. App. 4 Cir. 3/15/94), 634 So. 2d 79 (citing Terrebone and Ivy for the proposition that the testimony of a witness before a grand jury is inadmissible at trial to prove a witness' prior inconsistent statement).

In State v. Poland, 2000-0453, pp. 6-7 (La. 3/16/01), 782 So. 2d 556, 559-560, the court cited two of its prior decisions to set forth the purposes underlying the grand jury secrecy requirement, stating:

> In State v. Revere, 232 La. 184, 194-95, 94 So.2d 25, 29 (1957), this court discussed the need for secrecy in grand jury proceedings:
>
> > Not only has the grand jury been, traditionally, an inquisitorial body charged with determining whether probable grounds for suspicion of a crime exists, but, from its very beginning, its sessions have been surrounded by a

> cloak of seclusion and secrecy that has been jealously guarded and preserved during the intervening centuries as the only means of insuring that it be permitted the freedom of action necessary for a vigorous and effective discharge of its duties. The reasons underlying this necessity for secrecy are manyfold. Among them are: (1) It promotes freedom in the disclosure of crime; (2) prevents coercion of grand jurors through outside influence and intimidation and thus permits a freedom of deliberation and opinion otherwise impossible; (3) protects the safety and freedom of witnesses and permits the greatest possible latitude in their voluntary testimony; (4) prevents perjury by all persons appearing before the grand jury; (5) prevents the subornation of perjury by withholding facts that, if known, the accused or his confederates might attempt to disprove by false evidence and testimony; (6) avoids the danger of the accused escaping and eluding arrest before the indictment can be returned; and (7) keeps the good names of the persons considered, but not indicted, from being besmirched. Thus it may be seen that the secrecy that has from time immemorial surrounded the grand jury sessions is not only for the protection of the jurors and the witnesses, but for the state, the accused, and, as has been said, for society as a whole.

In In re Grand Jury, 98-2277 (La.4/13/99), 737 So.2d 1, 6, this court, quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-219, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979), elaborated further on the need for secrecy of grand jury proceedings:

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if

> pre-indictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule. For all these reasons, courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury.

2000-0453, pp. 6-7, 782 So. 2d at 559-560.

In the instant case, the State's use of the grand jury testimony falls under no recognized exception. Therefore, the trial court erred in overruling defendant's objections to the use of that grand jury testimony. However, like in Ivy, the State made very limited use of the grand jury proceedings in the instant case, using two excerpts from the testimony of one witness in the cross examination of that witness at trial. Unlike in Ivy, however, the evidence against defendant in the instant case cannot be considered overwhelming. Nevertheless, none of the reasons for maintaining secrecy of grand jury proceedings is applicable in the instant case. Under these circumstances, it cannot be said that the ends of justice, including the

promotion of the goals underlying the grand jury secrecy rule, would be served by reversing defendant's conviction on this ground.

There is no reversible error here.

ASSIGNMENT OF ERROR NO. 4

In his last assignment of error, defendant argues that the trial court imposed the mandatory life sentence without inquiring into any possible mitigating factors and failed to order a pre-sentencing investigation report, the latter being one of the grounds asserted in defendant's motion to reconsider sentence, which the trial court denied. Defendant prays that the matter be remanded for a pre-sentence investigation report and the re-evaluation of his motion for reconsideration of sentence. Defendant does not directly assert that his sentence was excessive.

The ordering of a pre-sentence investigation report is discretionary with the trial court. La. C.Cr.P. art. 875(A)(1) ("the court may order … a pre-sentence investigation."); State v. Hayden, 98-2768, p. 27 (La. App. 4 Cir. 5/17/00), 767 So. 2d 732, 748.

A trial court's failure to order a PSI will not be reversed absent an abuse of discretion. Hayden, 98-2768, p. 28, 767 So. 2d at 748-749. Defendant fails to show how the trial court abused its discretion in failing to

order a pre-sentence investigation for a person facing a mandatory life sentence for the second degreed murder of a witness to prevent that witness from testifying against defendant's two brothers.

La. Const. art. I, § 20 explicitly prohibit excessive sentences. State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99). However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979.

A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately considered the mitigating and aggravating factors in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127.

However, the underlying purpose of La. C.Cr.P. art. 894.1 is to provide an explanation for a particular sentence in those cases where the trial court is given discretion to choose a sentence tailored to the offender's circumstances from within a legislatively-provided sentencing range; when the trial court does not have to choose a sentence from within a given range, it complies with La. C.Cr.P. art. 894.1 when it informs the defendant he is receiving the statutorily mandated sentence. State v. Washington, 99-1111, p. 26 (La. App. 4 Cir. 3/21/01), 788 So. 2d 477, 497, writ denied, 2001-1096 (La. 5/13/02), 816 So. 2d 866; State v. Burns, 97-1553, p. 7 (La. App. 4 Cir. 11/10/98), 723 So. 2d 1013, 1018.

In the instant case, the trial court informed defendant that it was imposing the only sentence available for it to impose—life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

Accordingly, the trial court effectively complied with La. C.Cr.P. art. 894.1. As to the issue of excessiveness, defendant points to no mitigating factors that would have justified the trial court imposing anything other than the mandatory life sentence. Defendant points to no prior decision by a Louisiana appellate court, or the Louisiana Supreme Court, holding that a mandatory life sentence imposed on a defendant convicted of second-degree murder was constitutionally excessive.

There is no merit to this assignment of error.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED