

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2010-KA-1091 C/W**
VERSUS * **COURT OF APPEAL**
WILFORD ROBERTS, JR. * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
CONSOLIDATED WITH * * * * * **CONSOLIDATED WITH**
STATE OF LOUISIANA **NO. 2010-K-1299**
VERSUS
WILFORD ROBERTS, JR.

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 488-741, SECTION "C"
Honorable Benedict J. Willard, Judge
* * * * *

Judge Dennis R. Bagneris, Sr.
* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, and Judge Max N. Tobias, Jr.)

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CONVICTION AFFIRMED, SENTENCE REMANDED

Wilford Roberts, Jr., was convicted of manslaughter and sentenced to twenty-one years at hard labor. The State filed a Multiple Bill of Information charging Roberts as a fourth felony offender. On July 30, 2010, the district court adjudicated Roberts as a third felony offender vacated the twenty-one year sentence and sentenced Roberts to thirty years at hard labor.

In the instant appeal, Roberts appeals his sentence and conviction arguing that the district court erred in denying his motion for post-verdict judgment of acquittal. In writ filed by the State, the State argues that the district court's finding that Roberts is a third felony offender instead of a fourth felony offender. For the reasons set forth below, we affirm the conviction, vacate the multiple bill adjudication and remand this matter to the district court to sentence Roberts as a fourth felony offender.

Procedural History

On July 30, 2009, the State indicted Roberts with one count of second-degree murder, a violation of La. R.S. 14:30.1. Roberts pled not guilty at his arraignment on August 7, 2009.

On October 2, 2009, the court denied Roberts' Motions to Suppress the Evidence and Identification and found probable cause.

On March 29, 2010, Roberts was convicted of manslaughter and sentenced to twenty-one years at hard labor on April 12, 2010. That same day, Roberts filed Motions for Appeal, to Reconsider the Sentence, for New Trial and for Post-Verdict Judgment of Acquittal, all of which, with the exception of the Motion for Appeal, were denied. Also that same day, the State filed a Multiple Bill of Information charging Roberts as a fourth felony offender.

Following a hearing on the multiple bill on July 30, 2010, the court adjudged Roberts a third felony offender, vacated the twenty-one year sentence and sentenced him to thirty years at hard labor. Also on July 30, 2010, the State filed its notice of intent to seek supervisory review of the court's finding that Roberts was only a third offender. The trial court ordered that the State file its application by August 20, 2010. Pursuant to the State's request for an extension of time, the court granted the State until September 17, 2010, to seek supervisory review. The State filed its writ application in this Court on September 14, 2010¹. By order dated September 24, 2010, this Court consolidated the State's writ application with the instant appeal.

Statement of Facts

NOPD Officer Kathy Robertson, assigned to the NOPD Communications Department, testified that one of the duties of her job is to maintain custody of records, specifically 9-1-1 calls. She explained that all calls are recorded, entered in a computer database and assigned item numbers. The transcription of a 9-1-1 call is referred to as an incident recall. Prior to her testimony, Officer Robertson

confirmed that she listened to the taped 9-1-1 call received in this case, and she reviewed the corresponding incident recall which was assigned Item No. D-2159309. The tape was played for the jury.

Ms. Crystal Davis, the victim's daughter, testified that when she arrived on the scene, her father had already been placed in an ambulance. She said his eyes were swollen, and his entire body was shaking but he was unresponsive. She had spoken with the victim earlier on April 17, 2009, the day of the incident. Ms. Davis said that the victim and Roberts were friends and that Roberts' nickname is "Wop." At the time of his death, the victim was sixty years old.

On the evening of April 17, 2009, Mitchell Armour was driving down the 3300 block of North Galvez Street when he noticed Roberts and the victim fighting on the adjacent sidewalk. Mr. Armour described the victim as a "little bitty fragile old man." The witness noted that Roberts, weighing close to 240 pounds, was taller and younger than the victim. When he saw the victim hit the ground, Mr. Armour called 9-1-1 and reported that the victim appeared to be seriously injured. Roberts kicked the victim in the chest or head while the victim was on the ground. Two men on the scene pulled Roberts away from the victim. Mr. Armour learned a few days later that the victim had died.

Mr. Kenneth Augustine testified that he knew the victim for years from the neighborhood and that he knew Roberts as "Wop." The witness identified a picture of the victim and Roberts. Mr. Augustine was across the street from the scene when his attention was drawn to the sound of the victim and Roberts fussing. Though he could not hear all of the argument, Mr. Augustine said that the victim

¹ *State v. Wilford Roberts*, 2010-1299 (La. App. 4 Cir. 9/14/10).

and Roberts were arguing over wine. Roberts wanted some of the victim's wine, and the victim refused to give him any. The witness then saw the victim stagger and fall into the street at which time Roberts kicked and hit the victim in his head with a 2x4 board. Mr. Augustine thought the victim was dead because of the vicious attack waged by Roberts. Augustine went to the victim's aid, and a woman pulled the victim from the street. The victim was alive. By that time, people gathered at the scene, and the police arrived and took Roberts into custody. The police officer put the board into the trunk of his vehicle.

NOPD Officer Roderick Carey testified that he arrested Roberts on April 17, 2009, for aggravated battery. When Cary arrived at the scene, he noticed the unresponsive victim lying on the sidewalk suffering from what appeared to be head trauma. The officer spoke to Mr. Augustine who told him what had occurred and identified Roberts as the assailant. Carey also noted a witness on the scene named "Keith." Officer Carey confiscated the 2x4 board allegedly used in the attack and entered into the Central Evidence and Property. Carey testified that Roberts stood 6'4" and weighed 256 pounds while the victim was about 5'7", weighing 125-130 pounds. When the victim died a few days after the attack, the homicide division took over the case.

Dr. Cynthia Gardner, a forensic pathologist employed by the Orleans Parish Coroner's Office, autopsied the victim's body. Her external examination of the body revealed abrasions on the forehead, a contusion of the chin and a bruise on the shoulder. Internally, the victim suffered a depressed skull fracture, bleeding within the brain and bruising at the base of the frontal lobe. Dr. Gardner opined that the cause of death was blunt trauma to the head consistent with being struck by

an object. Dr. Gardner determined the victim's height to be 5'6" and his weight 109.5 pounds.

The defense called Mr. Lawsel Carriere, who testified that he and Keith Perrette were sitting in Keith's pickup truck parked in the 3300 block of Galvez at the time of the incident. Also at the scene were the victim and Roberts. The victim and Roberts purchased a bottle of wine and got into an argument, which escalated to a shoving match, over the amount of wine the victim poured for Roberts. Shoving continued until the victim asked Roberts if he wanted to fight. As the pair squared off, the victim hit Roberts in the head with the wine bottle. Roberts began to walk away, but the victim picked up a stick or lawn edger and chain and stood in the middle of the street. Roberts picked up a board and hit the victim, who fell to the ground. Roberts approached the victim, hit him again with the board and kicked him in the head. Mr. Carriere said the victim started the physical altercation by hitting Roberts with the wine bottle.

Under cross-examination, Mr. Carriere stated that Roberts could have left the fight. He also said that the victim posed no threat as he was lying on the ground.

Mr. Keith Perrette also testified for the defense. Mr. Perrette said that he knew both the victim and Roberts from the neighborhood – Galvez near Piety Street. On the day of the incident, Perrette was sitting in his truck with Mr. Carriere on Galvez Street. An argument erupted between the victim and Roberts which escalated when the victim grabbed Roberts by the throat. Next, the victim grabbed a chain from Mr. Perrette's truck, but Mr. Perrette took the chain away. Things quieted down a bit, and then the victim hit Roberts in the head with a wine bottle. The victim next armed himself with a fence board and a lawn edger and

walked into the street. Roberts picked up a board and hit the victim knocking him to the ground. Mr. Perrette tried to stop the physical altercation, but Roberts was too strong. Ten or fifteen minutes later, the police arrived and told everyone to leave. At that point, Mr. Perrette drove away.

Roberts testified that he had known the victim for approximately two and a half years. They both hung out on Galvez Street in the lower Ninth Ward. On April 17, 2009, he, the victim and some other acquaintances gathered as usual on Galvez near Piety Street. There were no problems between him and the victim. On the day of the incident, Roberts purchased a bottle of wine and split it with the victim. As he sat drinking his wine, the victim hit him, without provocation, in the head with the wine bottle. When Roberts looked up, the victim had armed himself with a stick, a board and a chain. Roberts picked up a board to defend himself. He did not remember hitting the victim but said he did swing the board. Roberts felt threatened because the victim had a stick and an edger with spikes on it. He remembered seeing both Keith Perrette and Lawsel Carriere that day at the site but not Kenneth Augustine. Roberts said he remembered seeing the victim falling down and explained that he hit the victim because he was afraid of what the victim held in his hands. Roberts said he stayed at the scene and did not resist arrest.

Errors Patent

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

Assignment of Error

In a sole assignment of error, Roberts argues that the trial court erred by denying his motion for post-verdict judgment of acquittal because the evidence produced by the State is insufficient to defeat his claim of self-defense.

The constitutional standard for testing the sufficiency of the evidence, enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. *State v. Rosiere*, 488 So.2d 965 (La.1986). 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. *State v. Shaw*, 2007-1427, p. 15 (La.App. 4 Cir. 6/18/08), 987 So.2d 398, 408. 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. *Id.* The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Id.* "[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).

In *State ex. rel. Elaire v. Blackburn*, 424 So.2d 246, 251 (La.1981), the Louisiana Supreme Court held that a defendant must "make a contemporaneous objection to the instruction on responsive verdicts in order to complain on appeal of the insufficiency of evidence supporting the responsive verdict." Citing La. C.Cr.P. art. 814. See also *State v. Williams*, 99-1581, p. 10 (La.App. 4 Cir. 6/14/00), 766 So.2d 579, 684. It is sufficient that this objection be made after the jury is charged, but before the jury begins to deliberate. *State v. Rideau*, 2005-

0462, p. 18 (La.App. 4 Cir. 12/6/06), 947 So.2d 127, 138. In adopting this rule, the

Court reasoned:

"[i]t would be unfair to permit the defendant to have the advantage of the possibility that a lesser "compromise" verdict will be returned (as opposed to being convicted of the offense charged) and then to raise the complaint for the first time on appeal, that the evidence did not support the responsive verdict to which he failed to object.

State ex. rel. Elaire v. Blackburn, 424 So.2d at 251-252.

In the present matter, the record on appeal shows no objection to any of the potential responsive verdicts for second degree murder, as listed in La. C.Cr.P. art. 814(3). Accordingly, this Court need only consider if the evidence was sufficient to support a conviction of the greater offense, second-degree murder. See *State ex. rel. Elaire*, 424 So.2d at 251.

In a homicide case, the state bears the burden of proving beyond a reasonable doubt that the killing was not committed in self-defense. La. R.S. 14:19; *State v. Jefferson*, 2004-1960 (La. App. 4 Cir. 12/21/05), 922 So.2d 577.

In this case Roberts was charged with second degree murder, which La. R.S. 14:30.1 defines as “ the killing of a human being [w]hen the offender has a specific intent to kill or to inflict great bodily harm[.]” The State produced ample evidence at trial of this matter to defeat Roberts’ claim of self-defense.

Mr. Kenneth Augustine testified that the victim did assault or threaten Roberts; the glass bottle the victim allegedly struck Roberts with and the manual edger the victim allegedly armed himself with were not found on the scene; and there was no evidence of any injuries suffered by Roberts.

Although Roberts and defense witnesses testified that the victim armed himself with an edger, they also said that the victim did not advance toward Roberts with a weapon. The evidence also shows that the victim was several feet

from Roberts – a car’s length by Roberts’ account – when he left the scene of the altercation and armed himself with a board he used to crush the victim’s head. While Roberts argues he had the right to stand his ground and not retreat, he did not have the right to leave the scene in order to arm himself and then return with the board with which he inflicted the fatal injuries.

As for Roberts’ claim of self-defense, the record contains evidence that he continued to beat the victim even after the initial blow with the board which caused the victim to fall to the ground. Mitchell Armour and Kenneth Augustine, as well as the defense witness, Lawsel Carriere, all testified that Roberts continued to beat the victim with the board and continued to kick the victim while the victim was incapacitated on the ground. Lawsel Carriere specifically stated that the victim was no threat to Roberts as the victim lay on the ground. Even Roberts testimony did not help his claim of self-defense. Roberts said the victim hit him with the wine bottle without provocation. However, every eyewitness to the attack stated that Roberts and the victim engaged in a verbal altercation, pushing and shoving each other before the match escalated to the use of a weapon. Roberts went so far as to testify that he left the victim in order to arm himself with the board he eventually used to kill the victim but that the brutal beating of the victim was “accidental.” The evidence shows that Roberts was not in imminent danger, and his use of deadly force was not justified.

In *State v. Barthelemy*, 2009-0391 (La. App. 4 Cir. 2/24/10), 32 So. 3d 999 this Court acknowledged that a trier of fact’s determination with regard to credibility of a witness is entitled to great weight:

It is not the function of the appellate court to reassess the credibility of witnesses or to reweigh the evidence; the reviewing court’s function is to determine the constitutional sufficiency of the evidence presented. *State v.*

Johnson, 619 So.2d 1102, 1109 (La.App. 4 Cir. 5/13/93). Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the fact finder. *State v. Brumfield*, 93-2404 (La.App. 4th Cir.1994), 639 So.2d 312; *State v. Garner*, 621 So.2d 1203 (La.App. 4 Cir.1993). Moreover, conflicting testimony as to factual matters is a question of weight of the evidence, not sufficiency. *State v. Jones*, 537 So.2d 1244, 1249 (La.App. 4 Cir.1989); *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Such a determination rests solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witness. *Id.* A trier of fact's determination as to the credibility of a witness is a question of fact entitled to great weight, and its determination will not be disturbed unless it is clearly contrary to the evidence. *State v. Vessell*, 450 So.2d 938, 943 (La.1984).

Id., 99-1963, pp. 8-9, 770 So.2d at 471.

The jury in this case considered the evidence and weighed the credibility of the witnesses. The jury was aware of the various inconsistencies and the differing versions offered by the State and Roberts as to what led to the fatal beating and chose to credit the testimony of the State's witnesses over that of Roberts. There was sufficient evidence to support the jury's finding of guilt, including the invalidity of Roberts' self-defense claim. This assignment has no merit.

Consolidated writ No. 2010-K-1299

In the consolidated writ application, the State argues that the trial judge abused his discretion by finding Roberts to be a third, rather than a fourth felony offender, as charged by State.

At the hearing on the multiple bill, Officer Joseph Pollard testified as an expert in analysis, examination and comparison of fingerprints. Officer Pollard said that he took Roberts' fingerprints in court prior to the start of the multiple bill hearing.

Officer Pollard then identified State's Exhibit 2, *in globo*, as a cert packet which included a certified copy of the Bill of Information, *Boykin* plea form, docket master, minute entry evidencing the guilty plea, screening action form and

arrest register from Orleans Parish Criminal District Court case number 353-319. Roberts' name appeared on each of those certified documents, including the Bill of Information and the date of birth on the arrest register was April 26, 1960. Officer Pollard testified that he compared State's Exhibit 1 to the fingerprints on the back of the Bill of Information and concluded the prints were one and the same and belonged to Roberts.

Next, Officer Pollard identified State's Exhibit 3, *in globo*, as a cert packet which included a certified copy of the Bill of Information, *Boykin* plea form, docket master, minute entry evidencing the guilty plea, screening action form, and arrest register from Orleans Parish Criminal District Court case number 433-645. Roberts' name appeared on each of the certified documents, including the Bill of Information, and the date of birth on the arrest register was April 26, 1960. The officer testified that he compared State's Exhibit 1 to the fingerprints on the back of the Bill of Information and concluded the prints were one and the same and belonged to Roberts.

Finally, Officer Pollard identified State's Exhibit 4, *in globo*, as a cert packet which included a certified copy of a Bill of Information, *Boykin* plea form docket master, minute entry evidencing the guilty plea, screening action form and arrest register from Orleans Parish Criminal District Court case number 445-568. Roberts' name appeared on each of the certified documents, including the Bill of Information, and *Boykin* plea form, and the date of birth on the arrest register was April 26, 1960. Officer Pollard testified that he compared State's Exhibit 1 to the fingerprints on the *Boykin* plea form and concluded the prints were one and the same and belonged to Roberts.

On cross-examination, Officer Pollard testified that in State's Exhibit 2, case number 353-319, Roberts was sentenced to three years and four months. He stated that the fingerprints on the back of the Bill of Information in case number 445-568 were not suitable for comparison. Thereafter, the trial court ruled that based upon the information gleaned by the defense during cross-examination, the State proved that Roberts was only a third felony offender. The trial court found that the State used the fingerprints from the *Boykin* plea form instead of the fingerprints from the Bill of Information when establishing Roberts' identify.

To obtain a multiple offender conviction, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. *State v. Neville*, 96-0137 (La.App. 4 Cir. 5/21/97), 695 So.2d 534, 538-39. In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race and date of birth. See, e.g., *State v. Westbrook*, 392 So.2d 1043 (La.1980). Where a prior conviction resulted from a plea of guilty, the State must show that the defendant was advised of his constitutional rights and that he knowingly waived those rights prior to this plea of guilty, as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). *State v. Howard*, 2000-2700 (La. App. 4 Cir. 1/23/02).

In this case, the State did present sufficient evidence at the multiple bill hearing which proved that Roberts was a fourth felony offender. The uncontroverted testimony of Officer Pollard testified that the defendant was the same person that entered guilty pleas in the three prior felonies (case number 353-

319, 433-645 and 445-568). The officer testified that he took Roberts' fingerprints on the day of the multiple bill hearing and identified those fingerprints as State's Exhibit 1. He compared State's Exhibit 1 to the fingerprints on the back of the Bill of Information in case number 353-319 and 433-645 and concluded that the prints were one and the same and belonged to Roberts. Next, he said that the fingerprints on the Bill of Information in case number 445-568 were not suitable for comparison. However, he further testified that the fingerprints on the *Boykin* plea form were suitable for comparison and concluded that the prints on the *Boykin* plea form and State's Exhibit 1 were one and the same and belonged to Roberts.

The trial court erred in finding Roberts was only a third felony offender. Based on the testimony of Officer Pollard and the exhibits that the State introduced during the hearing, the State presented evidence which clearly established that Roberts was a fourth felony offender.

Decree

For the reasons stated above, we affirm the conviction but vacate the multiple bill adjudication and sentence as a third offender. We therefore grant the writ and remand this matter to the trial court to sentence Wilford Roberts, Jr. as a fourth felony offender.

CONVICTION AFFIRMED, SENTENCE REMANDED