

FILE FOR RECORD

STATE OF LOUISIANA 2012 JAN 24 PM 1:36

NO. 11-KA-595

VERSUS

DEPUTY CLERK
5TH CIRCUIT COURT OF APPEALS
STATE OF LOUISIANA

FIFTH CIRCUIT

MARIO A. FUNES

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 08-5641, DIVISION "E"
HONORABLE JOHN J. MOLAISON, JUDGE PRESIDING

JANUARY 24, 2012

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and Marc E. Johnson

PAUL D. CONNICK, JR.

District Attorney

TERRY M. BOUDREAUX

DESIRÉE M. VALENTI

Assistant District Attorneys

Parish of Jefferson

200 Derbigny Street

Gretna, LA 70053

COUNSEL FOR PLAINTIFF/APPELLEE

FRANK SLOAN

Attorney at Law

Louisiana Appellate Project

948 Winona Drive

Mandeville, LA 70471

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

4/11/11
SMC
M&J

Defendant, Mario Funes, appeals his convictions on three counts of second degree murder. On appeal, he argues that the trial court erred in denying his motion to quash the indictment on the basis that LSA-C.Cr.P. art. 782(A) is unconstitutional for allowing a non-unanimous jury verdict. For the following reasons, we affirm defendant's convictions.

FACTS AND PROCEDURAL HISTORY

On Thursday, October 30, 2008, at approximately 2:00 p.m., five Hispanic males, later identified as defendant and his co-defendants, entered Gomez's Bar in Marrero, Louisiana, with the intent to rob the bar, which was known to have large amount of cash on hand.¹ A gunfight ensued, during which four victims were killed and defendant was injured. The robbers were apprehended a short time later as they tried to leave the scene.

¹ Co-defendants were Jose Cornejo-Garcia, Renil D. Escobar-Rivera, Rigaberto Funes, and Pedro A. Navarrete-Duran.

On February 26, 2009, a Jefferson Parish grand jury indicted defendant and his co-defendants on four counts of second degree murder,² all in violation of LSA-R.S. 14:30.1. On March 6, 2009, defendant pled not guilty to the charges.

Defendant filed various omnibus motions, which included motions to suppress statements, identification and evidence, as well as a motion for discovery, for a bill of particulars, and for a preliminary examination. After hearings, the trial court denied defendant's motion to suppress the identification and defendant's motion to suppress the evidence.³ On January 12, 2010, defendant filed a motion to sever that was granted.

Defendant also filed a motion to quash Count II of the indictment, which was granted.⁴ At a hearing on March 22, 2010, defense counsel adopted co-defendant Rigaberto Funes' previous motion to quash the bill of indictment that included an argument requesting that LSA-C.Cr.P. art. 782(A) be declared unconstitutional for allowing a non-unanimous jury verdict. This adopted second motion to quash was denied on that date.

After a three-day trial in September of 2010, a unanimous twelve-person jury found defendant guilty on Counts I, III, and IV. Defendant was thereafter sentenced to life imprisonment on each count, without the benefit of parole, probation, or suspension of sentence, receiving credit for time served. The sentences were ordered to run consecutively. This timely appeal followed.

² The bill of information alleged that the victims were Wallace and Beauford Gomez, Wayne Hebert, and Jeffrey Carmadelle.

³ The transcript reflects that the trial court denied defendant's motions to suppress statements and identification; however, the transcript also reflects that defendant did not give a statement and the trial court denied only his motion to suppress identification. It does not appear that the trial court ruled on defendant's motions to suppress the statements, for a preliminary examination, and for a bill of particulars. However, it is well settled that a defendant waives all pending motions by permitting trial to proceed without raising the issue that his pretrial motions were neither heard nor ruled upon. *State v. Thomas*, 08-1171, p. 5 (La. App. 5 Cir. 4/28/09), 13 So.3d 595, 599.

⁴ The basis of that motion to quash was facts suggesting that one victim, Beauford Gomez, was killed by a bullet fired by another victim, Wallace Gomez.

ASSIGNMENT OF ERROR – *Constitutionality of LSA-C.Cr.P. art. 782(A)*

In his only assignment of error, defendant challenges the constitutionality of LSA-C.Cr.P. art. 782(A), which allows for a non-unanimous jury verdict.⁵ In particular, he argues that that article violates the Sixth and Fourteenth Amendments of the United States Constitution. Defendant recognizes that the United States Supreme Court in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), held that the Constitution does not compel unanimity for verdicts in state criminal cases, but questions the vitality of *Apodaca* after the decision in *McDonald v. City of Chicago*, __ U.S. __, 130 S.Ct. 3020, 3035, 177 L.Ed.2d 894 (2010).

The State asserts that this claim has no merit, arguing that Louisiana courts have long rejected the claim that a non-unanimous jury verdict is unconstitutional, citing *State v. Bertrand*, 08-2215 (La. 3/17/09), 6 So.3d 738; *State v. Jones*, 381 So.2d 416 (La. 1980); and *State v. Simmons*, 414 So.2d 705 (La. 1982). Additionally, the State points out that the *McDonald* court footnoted *Apodaca* as an exception to the general rule requiring unanimous jury verdicts in state criminal trials, stating the following:

There is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials.

McDonald, supra, 130 S.Ct 3020, 3035, fn. 14 (citations omitted).

The State further notes that this assignment of error is moot because the jury verdict was unanimous. The State's position on this point has merit.

⁵ LSA-C.Cr.P. art. 782(A) provides, in pertinent part, that “[c]ases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.” This article is a counterpart to LSA-Const. art.1, § 17(A), which provides: “A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.”

In *State v. Jacobs*, 07-887, pp. 3-4 (La. App. 5 Cir. 5/24/11), 67 So. 3d 545-46, defendant was convicted of two counts of second degree murder under LSA-R.S. 14:30.1 by a unanimous twelve-person jury verdict. This Court found that the defendant did not have standing to challenge the constitutionality of LSA-C.Cr.P. art. 782(A) because he was convicted by a unanimous jury verdict on both counts. *Jacobs*, 07-887 at 82, 67 So.3d at 535 (citing *Burch v. Louisiana*, 441 U.S. 130, 132 n. 4, 99 S.Ct. 1623, 1624, 60 L.Ed.2d 96 (1979)). Likewise, defendant in this case was convicted by unanimous verdicts on each count. Thus, defendant lacks standing to challenge the constitutionality of LSA-C.Cr.P. art. 782(A).

Defendant's assignment of error is accordingly denied as moot.

Further, even if defendant had standing to challenge this statute, the United States Supreme Court has long held that non-unanimous juries do not violate a defendant's Sixth Amendment right to trial by jury, made applicable to the states by the Fourteenth Amendment. *State v. Thomas*, 10-220, p. 11 (La. App. 5 Cir. 11/9/10), 54 So.3d 678, 685, *writs denied*, 10-2758 (La. 4/25/11), 62 So.3d 89, 10-2752 (La. 5/20/11), 63 So.3d 974 (citing *Apodaca, supra*; and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)). In *State v. Belgard*, 410 So.2d 720, 726 (La. 1982), the Louisiana Supreme Court followed the United States Supreme Court's jurisprudence, explaining that "[t]his court has consistently held C.Cr.P. art. 782 does not violate the Sixth or Fourteenth Amendments to the United States Constitution." *Thomas*, 10-220 at 12, 54 So.3d at 685.

ERRORS PATENT DISCUSSION

The record was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 556 So.2d

175 (La. App. 5 Cir. 1990). A review of the record shows no errors patent requiring correction.

CONCLUSION

For the above reasons, we find no merit to defendant's assignment of error on appeal. Accordingly, defendant's convictions are affirmed.

AFFIRMED

MARION F. EDWARDS
CHIEF JUDGE

SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD
FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON

JUDGES



FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

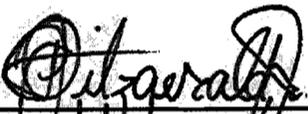
MARY E. LEGNON
FIRST DEPUTY CLERK

TROY A. BROUSSARD
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **JANUARY 24, 2012** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



PETER J. FITZGERALD, JR.
CLERK OF COURT

11-KA-595

TERRY M. BOUDREAUX
ASSISTANT DISTRICT ATTORNEY
PARISH OF JEFFERSON
200 DERBIGNY STREET
GRETNA, LA 70053

FRANK SLOAN
ATTORNEY AT LAW
LOUISIANA APPELLATE PROJECT
948 WINONA DRIVE
MANDEVILLE, LA 70471