

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1784

STATE OF LOUISIANA

VERSUS

KEVIN WALKER

Judgment Rendered: March 28, 2007

On Appeal from the 23rd Judicial District Court
In and For the Parish of Ascension
Trial Court No. 17,545

Honorable Alvin Turner, Jr., Judge Presiding

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Kevin Walker

Pro Se

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Handwritten initials: RAB, JCP

HUGHES, J.

The defendant, Kevin Walker, was charged by grand jury indictment with one count of second degree murder, a violation of LSA-R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He filed a motion seeking a new trial and a post-verdict judgment of acquittal, but the motion was denied. He again moved for a new trial, but the motion was denied. He was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. He now appeals, designating four counseled and two pro se assignments of error. We affirm the conviction and sentence.

COUNSELED ASSIGNMENTS OF ERROR

1. The verdict of the jury is contrary to the law and the evidence.
2. The trial court proceedings were so irregular and prejudicial that they denied the defendant a fair trial and cannot serve as the basis for a valid judgment.
3. The evidence presented to the jury was insufficient to support a conviction of second degree murder.
4. The trial court should have granted the defendant's motion for a new trial based on Richard Anderson's trial and post-trial behavior.

PRO SE ASSIGNMENTS OF ERROR

1. The trial court erred in admitting and allowing the jury to read evidence of other crimes in violation of the defendant's right to a fair trial under U.S. Const. Amends. V and XIV, the Louisiana Constitution, and *State v. Prieur*, 277 So.2d 126 (La. 1973).
2. The defendant was denied his Sixth Amendment right of confrontation when he was not allowed to cross-examine a witness on statements presented to the jury.

FACTS

On November 30, 1993, at approximately 2:10 a.m., Ascension Parish Sheriff's Deputy Glen Luna was dispatched to West Fourth Street in Donaldsonville, Louisiana. He discovered the dead victim, Rolando Butler, in the driver's seat of a Buick Electra in the eastbound lane. The victim had been shot three times on the right side of his head. Three cartridge cases were in the vehicle, and one cartridge case was on the ground just outside the door on the passenger's side of the car. All of the doors were locked except for the passenger's door.

Late in 2003, Richard Anderson contacted Ascension Parish Sheriff's Detective Glen LeBlanc concerning the victim's murder. On October 8, 2003, Anderson gave an audiotaped statement concerning the crime.

Anderson indicated he was making the statement concerning the victim's murder because the defendant wanted to kill him because he knew too much. According to Anderson, the victim was a well-known "snitch." Prior to the murder, Fabian Mills, Peter Henderson, the defendant, and Anderson were talking and drinking in front of Brown's Liquor store. None of the men had any money and they talked about finding a way "to get high" and about "jacking somebody." The defendant had either a "380" or a "9 mm" gun.

Anderson indicated he left the men and walked towards his home because Henderson and the defendant were "bad news" and he thought something bad would happen when the men were together. Before Anderson reached his home, the defendant and the victim passed him in a car. Anderson waved at the men and the men waved back, before turning toward the levee. Anderson stated, "You could have counted to five. You heard shots." The next day, Anderson heard the victim was dead.

Mills told Anderson that the defendant had shot the victim. Mills indicated the defendant had flagged the victim down, jumped into his car, shot him, and left him by the levee. Anderson asked if Mills, Henderson, or the defendant had “got no money or nothing of this deal.” Mills responded that the defendant “got the money and the dope” and “played [Mills and Henderson] for a fool.” Mills indicated the defendant told Henderson and Mills that the defendant searched the victim’s body, and found nothing. The defendant then sent Henderson and Mills to search the victim’s body.

Anderson indicated he also talked to the defendant about the victim’s murder. The defendant stated, “[M]an f[***] that. He was a rat. Man I just did everybody a favor. F[***] him. He was a rat anyway.”

Anderson also testified at trial. He indicated that in November 1993, he saw the victim and the defendant together in the victim’s car. He claimed he then heard either gunshots or firecrackers. When the State showed Anderson a transcript of his October 8, 2003 statement, he stated he had been “pressured” to give the statement. He claimed the pressure came from the detectives who had told him that if he did not tell the truth, they would lock him up for a long time.

Anderson agreed he had stated that approximately five seconds after he saw the victim and the defendant together, he heard gunshots. He disagreed he had stated that the defendant had told him that the defendant had done everyone a favor and that the victim was a rat. The State introduced Anderson’s statement to the contrary into evidence without objection from the defense.¹

Peter Richard Henderson also testified at trial. He indicated that on the night of the victim’s murder, he, Fabian Mills, and the defendant were at

Henderson's mother's house, smoking drugs. The men planned to rob the victim.

The victim stopped by the home, and the defendant got into the victim's car and left with him. Henderson and Mills waited a few minutes and then got into Henderson's mother's car and followed the victim and the defendant. Henderson and Mills passed the victim and the defendant as they "made the round of the project" and came back down the street. Henderson saw the victim's car "backed in." The light was on in the cabin, and Henderson saw someone in the vehicle, but not the defendant. Henderson and Mills drove around, searching for the defendant. They found him at his home. They asked him "what he got," and he said he did not get anything and told them to go back and check the body. Henderson and Mills went back to the victim's body, checked his pockets, and then returned to the defendant.

Henderson indicated the defendant on the night of the murder had a 9mm Beretta and following the murder sold the gun to Jermaine Ester.

Henderson also indicated he spoke to the defendant about the victim's murder afterwards. The defendant told Henderson that the defendant had "smoked" the victim. The defendant pointed his gun at Henderson and showed him how the victim's body had jumped in the vehicle as it was shot.

On cross-examination, Henderson indicated he was housed in a special unit of the prison because he heard voices. He also claimed he had been diagnosed with schizophrenia. He conceded he was incarcerated for attempted aggravated battery and attempted armed robbery, he had been arrested for attempted first degree murder and armed robbery, and he had been incarcerated for possession with intent to distribute cocaine and simple

¹ Defense counsel expressly stated, "No objections, Your Honor."

robbery. He specifically denied shooting the victim, but conceded he was on drugs on the night of the murder.

Henderson also conceded he spoke to the police on two occasions concerning the victim's murder, and only provided the details of the crime after being granted immunity from prosecution for the crime. He denied that the murder weapon had been given to Ester by him.

Jermaine Ester also testified at trial. In February or March of 1994, he was arrested for possession of a firearm or illegal carrying of a firearm. In approximately March of 1994, he had purchased the weapon, which he believed was a 9mm Beretta, from the defendant for \$300.

On cross-examination, Ester conceded he had been arrested for possession with intent to distribute cocaine, aggravated assault, illegal carrying of a firearm on school premises, possession of a firearm on school premises, and had been incarcerated for distribution of cocaine. Ester denied purchasing the gun from Peter Henderson.

The State also introduced State Exhibit #4, a 9mm Beretta handgun, into evidence at trial. A bullet jacket removed from the left side of the victim's head was matched to the weapon, as were all four cartridge cases found at the crime scene. Dr. Alfredo Suarez, forensic pathologist, testified regarding bullet fragments removed from the victim and gave his opinion that the barrel of the weapon used had been in contact with the victim's skin.

SUFFICIENCY OF THE EVIDENCE

In counseled assignments of error numbers one and three, the defendant argues a rational trier of fact could not conclude the State presented evidence of his guilt beyond a reasonable doubt on the basis of the testimony of Anderson, Henderson, and Ester.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. **State v. Wright**, 98-0601, p. 2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writ denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, writ denied sub nom. State ex rel. Wright v. State, 2000-0895 (La. 11/17/00), 773 So.2d 732.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at p. 3, 730 So.2d at 487.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm or when the offender is engaged in the perpetration or attempted perpetration of armed robbery, first degree robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm. LSA-R.S. 14:30.1(A)(1) and (A)(2) (in effect at the time of this offense, prior to amendment by 1997 La. Acts No. 899, § 1).

Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **State v. Buchanon**, 95-0625, p. 4 (La. App. 1 Cir. 5/10/96), 673 So.2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So.2d 923. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Henderson**, 99-1945, p. 3 (La. App. 1 Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

After a thorough review of the record, we are convinced that a reasonable juror could find that the evidence presented in this case, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and the defendant's identity as the perpetrator of that offense against the victim. The verdict rendered against the defendant indicates the jury accepted the testimony of the State's witnesses. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385, p. 9 (La. App. 1 Cir. 11/5/99), 745 So.2d 217, 223, writ denied sub nom. State ex rel. Johnson v. State, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p. 32

(La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Lofton**, 96-1429, p. 5 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

This assignment of error is without merit.

IRREGULAR AND PREJUDICIAL TRIAL COURT PROCEEDINGS

In counseled assignment of error number two, the defendant argues the trial court erred: in granting the State's request for a continuance; in allowing State Exhibit #2 into evidence in violation of the defendant's Sixth Amendment confrontation rights and LSA-C.E. art. 607(D)(2); in excluding the testimony of Patrick Washington concerning Van Johnson as hearsay; and in excluding the testimony of Phoebe Anderson for violation of the sequestration order. In pro se assignment of error number one, the defendant argues the trial court erroneously admitted State Exhibit #2 into evidence in violation of the defendant's right to a fair trial, LSA-C.E. art. 404(B), and **State v. Prieur**, supra. In pro se assignment of error number two, the defendant argues the trial court erroneously admitted State Exhibit #2 into evidence in violation of the defendant's Sixth Amendment confrontation rights.

A motion for continuance based upon the absence of a witness must state: facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial; facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and facts showing due

diligence used in an effort to procure attendance of the witness. LSA-C.Cr.P. art. 709.

On September 22, 2005, following voir dire, but prior to the presentation of testimony, the State requested a twenty-four hour recess because Jermaine Ester and Richard Anderson were not present. The State indicated Ester had been given open court notice on September 19, 2005, and Anderson had been served at his domicile on September 20, 2005. The State further indicated it had made every attempt to secure the presence of the witnesses, including sending people out to Anderson's home and two other addresses. The State advised the court that approximately thirty minutes earlier, Anderson's mother had informed the State that it was common for Anderson to check himself into detoxification centers. The State indicated it would search for Anderson at the detoxification centers from Baton Rouge to Baker.

In regard to Ester, the State indicated it knew he was employed with Turner Industries, and the State would contact that company to determine whether Ester was on location somewhere where the State could "pick him up."

The defense objected to any continuance on the basis of the unavailability of Ester and Anderson. The trial court asked the defense if it could articulate any prejudice to the defendant from the trial being continued. The defense indicated it did not know whether the witnesses it had subpoenaed would be able to return if the trial did not proceed as planned.

The court asked the defense witnesses who were present if a continuance to another date would cause them an inconvenience. Patrick Mills indicated he was looking for work, but added he could return on another date. Melody Williams indicated she was the receptionist in a busy office, but she

could not say that returning on another date would be a hardship for her. Emma Sanders indicated she could come back on another date. The court continued the trial to September 28 and September 29, 2006.

There was no abuse of discretion in the granting of the continuance. The trial court considered the efforts made by the State to procure the attendance of Jermaine Ester and Richard Anderson and the lack of prejudice to the defense from a continuance.

With regard to State Exhibit #2, the October 8, 2003 audiotaped statement of Anderson, was admitted into evidence without objection by the defense. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. LSA-C.Cr.P. art. 841; LSA-C.E. art. 103(A)(1). Accordingly, the challenges to the admissibility of State Exhibit #2 were not preserved for appeal.

The defense presented testimony at trial from Detective Kevin Hanna. Detective Hanna indicated he interviewed Patrick Washington on December 8, 1993. When the defense asked what Detective Hanna found after checking into the information given by Washington, the State objected, arguing the defense was attempting to elicit hearsay. On defense proffer, Detective Hanna indicated Patrick Washington had stated that Van Johnson had solicited his assistance. The defense told Detective Hanna that the defense was only interested in the results of the investigation following Washington's statement. The State objected, arguing the question was confusing. The court asked the defense what statement it was attempting to elicit from Detective Hanna. The defense answered that it was trying to elicit that Detective Hanna's investigation ended without uncovering

“anything positive that [the defendant] committed the crime.” The court sustained the State’s objection.

Still outside of the presence of the jury, in response to defense questioning, Detective Hanna indicated Patrick Washington had indicated that three to four days prior to the victim’s murder, Van Johnson had approached Washington and asked for his help to rob the victim of his money and “dope” and kill him. Additionally, Washington told Detective Hanna that after the victim’s murder, Van Johnson had \$900 cash and was happy.

On cross-examination, Detective Hanna indicated that he learned that medical records indicated that “around that time” Johnson had broken his leg and was in a cast. Additionally, Detective Hanna indicated he did not find any merit to Washington’s statement.

The defense also called Patrick Washington as a witness. When Washington began stating what Van Johnson had asked him, the State objected, and the court sustained the objection.

The trial court correctly found that testimony from Patrick Washington concerning statements allegedly made to him by Van Johnson was inadmissible hearsay. Moreover, the jury was presented with the fact that there were other persons of interest in the case, including Van Johnson, through the testimony of Ascension Parish Sheriff’s Department Lieutenant Benny Delaune. On cross-examination, Lieutenant Delaune indicated the victim’s girlfriend had a previous boyfriend, Albert Landry, who did not get along with the victim; that Van Johnson had talked about robbing the victim because the victim was known to carry money; and that Claudel Tassin had been seen on the night of the murder with “blood all over him.”

The defense called Phoebe Katina Anderson as a witness at trial. The State objected, arguing Phoebe Anderson had violated the sequestration order by speaking to the defendant during a break in the proceedings.

In response to questioning by the court, Phoebe Anderson indicated the court had advised her that she was sequestered as a witness, was prohibited from talking about the case, and was to remain outside the courtroom until called. She also indicated, however, she had entered the courtroom during a recess and said a prayer with the defendant. The State reurged its objection to Phoebe Anderson testifying, arguing it had no way of knowing what she had discussed with the defendant. The court excluded the testimony of Phoebe Anderson, and the defense objected to the ruling of the court.

On defense proffer, Phoebe Anderson indicated she was Richard Anderson's sister. She indicated she had a relationship with the defendant and he had fathered her eleven-year-old daughter. She indicated Richard Anderson had a serious drug problem and Cynthia Dominique had given him money to support his drug habit. Phoebe Anderson alleged that Richard Anderson had told her he made the statement that the defendant had killed the victim because Dominique had paid him to make the statement. Phoebe Anderson also alleged that Richard Anderson had been declared mentally retarded.

There was no abuse of the sound discretion of the trial court in excluding the testimony of Phoebe Anderson. Phoebe Anderson admitted she had violated the sequestration order.

The purpose of sequestration is to assure that a witness will testify as to his own knowledge of the events, to prevent the testimony of one witness from influencing the testimony of others, and to strengthen the role of cross-examination in developing facts. The resolution of sequestration problems is

within the sound discretion of the trial court. **State v. Nevers**, 621 So.2d 1108, 1112 (La. App. 1 Cir.), writ denied, 617 So.2d 906 (La. 1993).

These assignments of error are without merit.

MOTION FOR NEW TRIAL

In assignment of error number four, the defendant argues the trial court erred in denying the motion for new trial filed on the basis of Richard Anderson's trial and post trial behavior, in particular, the fact that he "recanted the professed recantation" of his trial testimony.

Louisiana Code of Criminal Procedure article 851 provides, in pertinent part:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

* * *

(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

Prior to sentencing, the defense moved for new trial, in pertinent part, alleging:

4.

In particular, the defendant sets forth the following as grounds for a new trial:

* * *

(C) New and material evidence that, notwithstanding the exercise of due and reasonable diligence, by the defendant, was not available to him and, if this evidence had been introduced at the trial, it would probably have changed the verdict or judgment of guilty.

5.

The names of the witnesses who will testify and the evidence they will provide is listed as:

(A) Richard Anderson – He will recant his previous testimony given at the trial of this case and will state the

reasons for giving false testimony[.]

Initially, we note the defendant failed to designate that the hearing on the motion for new trial be transcribed. See LSA-C.Cr.P. art. 914.1. The minutes of the hearing indicated the motion was denied and the defense objected for the record.

There was no abuse of discretion in the denial of the motion for new trial. In his brief, the defendant concedes that Richard Anderson recanted his alleged recantation of his trial testimony. Accordingly, there was no “new and material evidence” to support the motion for new trial.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.