

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

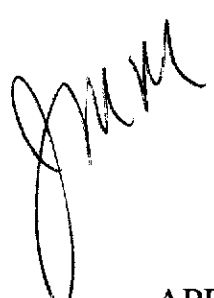
FIRST CIRCUIT

2009 KA 2261

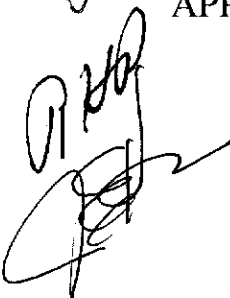
STATE OF LOUISIANA

VERSUS

DARNELL JONES

 Judgment Rendered: May 7, 2010

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 APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF ASCENSION  
STATE OF LOUISIANA  
DOCKET NUMBER 20794, DIVISION "E"

THE HONORABLE ALVIN TURNER JR., JUDGE

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**BEFORE: PARRO, KUHN, AND McDONALD, JJ.**

**McDONALD, J.**

The defendant, Darnell Jones, was charged by separate bills of information with armed robbery, use of a firearm, additional penalty, a violation of La. R.S. 14:64.3 (docket no. 20794), and aggravated burglary, a violation of La. R.S. 14:60 (docket no. 20795).<sup>1</sup> The defendant pled not guilty to the charges. Subsequently, the State amended the bill of information by removing the La. R.S. 14:64.3 charge (armed robbery, use of a firearm, additional penalty) and charging the defendant with only armed robbery, a violation of La. R.S. 14:64. The defendant was rearraigned on the amended charge of armed robbery and pled not guilty. Following a jury trial, the defendant was found guilty as charged of armed robbery. For the aggravated burglary charge, he was found guilty of the responsive offense of attempted aggravated burglary, a violation of La. R.S. 14:27 and 14:60. For the armed robbery conviction, the defendant was sentenced to fifteen years at hard labor without benefit of parole, probation, or suspension of sentence. The trial court also sentenced the defendant to five years at hard labor without benefit of parole, probation, or suspension of sentence for the offense of armed robbery, use of a firearm, additional penalty. This five-year sentence was ordered to run consecutively to the fifteen-year armed robbery sentence. For the attempted aggravated burglary conviction, the defendant was sentenced to five years at hard labor, with the sentence to run concurrently with the armed robbery sentence.

The defendant now appeals, designating four assignments of error. We affirm the armed robbery conviction and fifteen-year sentence. We vacate the additional five-year sentence under La. R.S. 14:64.3 for use of a firearm during commission of an armed robbery. We reverse the attempted aggravated burglary conviction and vacate the attempted aggravated burglary sentence. We remand for a retrial on the aggravated burglary charge.

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<sup>1</sup> The matters were consolidated for trial.

## FACTS

On August 23, 2006, at about 2:00 a.m., Eureka Asberry was sleeping with her two young sons in her bedroom in her trailer on Oak Street, Donaldsonville, in Ascension Parish. Eureka's friend, Saterius Jenkins, was sleeping in another bedroom in the trailer. The defendant, Robert Henry, and Nathan Wooden broke into the trailer. The loud noise of the break-in awoke Eureka. Saterius was awakened by Eureka yelling his name. The defendant and another assailant walked toward the back bedroom where Eureka and her children were. Eureka picked up her phone and dialed 911, but was unable to speak, because one of the assailants sprayed mace (or pepper spray) in her face. She dropped the phone on the ground. Since the 911 connection had already been made, the events that transpired in Eureka's bedroom were recorded at the 911 communication center.

Eureka testified at trial. According to her testimony, the defendant put a gun to her head and demanded to know where the "dope" was. The gun the defendant used was later identified as an SKS assault rifle with a magazine containing nine live rounds. Eureka denied having any drugs. When the defendant insisted she tell him where she had the drugs, Eureka told the defendant the drugs were in the second dresser drawer in a blue bag. It is not clear from Eureka's testimony if the defendant actually found drugs in the drawer. The defendant then took \$140 from Eureka's purse, jerked her out of the bed, and made her crawl down the hallway. Eureka's four-year-old son clung to her while she crawled. When she got to the end of the hallway, she saw the third intruder in the kitchen. The defendant again asked Eureka where the drugs were located. Eureka said they were in the cabinet. The defendant told the man in the kitchen to search the cabinets. He did and found nothing.

Shortly thereafter, the police arrived outside Eureka's trailer. The three intruders remained inside and ran to the back of the trailer while Eureka ran

outside with her four-year-old son. Several police officers surrounded the trailer and, minutes later, the defendant and Henry exited the front door to surrender. Later, Saterius exited the trailer. Because a suspect and Eureka's nine-year-old son remained inside the trailer, crisis response teams were assembled and entered the trailer. Eureka's son was found in her bedroom unharmed. Nathan Wooden was found hiding under the sofa. Police officers searched Eureka's trailer and found 2.3 ounces of powdered cocaine and 1.9 ounces of crack cocaine in the back of the sofa. Eureka testified that the drugs belonged to a friend.

### **ASSIGNMENT OF ERROR 1**

In his first assignment of error, the defendant argues the attempted aggravated burglary verdict was improper because it did not comply with La. C.Cr.P. art. 782. Specifically, the defendant contends that only nine jurors voted "guilty." Accordingly, it was reversible error for the trial court to accept the vote.

Under La. C.Cr.P. art. 782(A), cases 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. See La. Const. art. I, § 17(A). Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years. La. R.S. 14:60. A person who commits attempted aggravated burglary shall be imprisoned in the same manner as for the offense attempted. See La. R.S. 14:27(D)(3). Accordingly, a conviction in this case required at least ten jurors to vote "guilty" of attempted aggravated burglary.

When the trial court was informed the jury had reached its verdicts, the trial court stated, "Hand the paper to the bailiff and I'll look at it to make sure that it's in proper order." The trial court then found the verdicts to be in proper order, and had the clerk read aloud the verdicts. The jury found the defendant guilty of armed robbery and attempted aggravated burglary. One of the defense counselors

requested that the jury be polled. Thereafter, an oral polling was conducted by the clerk.<sup>2</sup>

The clerk asked each juror to confirm his or her verdicts for *both* charges. At the conclusion of the polling, the trial court asked, "Did I get this as being 11 to one?" The clerk responded, "10 to 2." The results of the polling, in fact, indicated that eleven jurors found the defendant guilty of armed robbery, and one juror found him not guilty. Ten jurors found the defendant guilty of attempted aggravated burglary, and two jurors found him not guilty. Notably, juror Ms. Moses voted "guilty" for both charges.

Because of the apparent confusion, the trial court stated, "Let's just make sure we have it correctly." The trial court instructed the clerk to poll the jury again, and the state did not object to the second polling. However, this time, as informed by the trial court, the clerk asked each juror to confirm his or her verdict regarding only the armed robbery charge. Following this, the clerk then asked each juror to confirm his or her verdict regarding only the attempted aggravated burglary charge. The record indicates that at this point there seemed to have been a consensus among counsel, clerk, and court that there were sufficient guilty votes to confirm both convictions without discussing the results of the second polling, because the trial court simply thanked the jurors and discussed unrelated matters with them. The minutes apparently discuss only the second polling and indicate the "verdict was 10 to 2 on both charges." Our review of the results of the second polling indicates that ten jurors found the defendant guilty of armed robbery, and two jurors found him not guilty. However, only nine jurors found the defendant guilty of attempted aggravated burglary, and three jurors found him not guilty. Notably, juror Ms. Moses changed both of her "guilty" votes to "not guilty" votes.

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<sup>2</sup> The court shall order the clerk to poll the jury if requested by the state or the defendant. It shall be within the discretion of the court whether such poll shall be conducted orally or in writing. La. C.Cr.P. art. 812.

The defendant's argument that the attempted aggravated burglary guilty verdict was improper because it did not comply with La. C.Cr.P. art. 782, thus has merit. In the absence of a concurrence of ten of the twelve jurors, there was no legal verdict rendered, either of conviction or of acquittal. **State v. Cook**, 396 So.2d 1258, 1261 (La. 1981).

In its brief, the State concedes that no legal verdict was rendered:

The State after careful review of both the trial transcript and trial audio tape agrees with defendant that the jury failed to find him guilty of attempted aggravated burglary by the statutorily required 10-2 guilty vote. Rather, both the trial transcript and trial audio tape indicate that during the second polling of defendant's charge on attempted aggravated burglary, Juror Moses changed her verdict from the first polling and voted not guilty as to that charge. As such, the jury's verdict was only 9-3 for guilty of attempted aggravated burglary. Based thereon, the State agrees that defendant's conviction for attempted aggravated burglary is null and void.

Accordingly, this assignment of error has merit. The defendant's conviction for attempted aggravated burglary is reversed, and that sentence is vacated. The aggravated battery charge is remanded to the district court for retrial. See Cook, 396 So.2d at 1261.

### **ASSIGNMENT OF ERROR NO. 2**

In his second assignment of error, the defendant argues he was convicted of armed robbery by a 10-2 non-unanimous verdict in violation of the United States and Louisiana Constitutions. Specifically, the defendant contends that La. C.Cr.P. art. 782(A) violates the Sixth Amendment right to a jury trial, since it must be considered in light of the Fourteenth Amendment right to due process of law.

Whoever commits the crime of armed robbery shall be imprisoned at hard labor. La. R.S. 14:64(B). Louisiana Constitution article I, § 17(A) and Louisiana C.Cr.P. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a

criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885, pp. 15-16 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

The defendant suggests that **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), which emphasize the necessity of a unanimous verdict, "implicitly overrule the prior anomalous holding in **Apodaca**, and must be taken account of by this Court." This argument has been repeatedly rejected by this court and our supreme court. Our supreme court has recently affirmed the constitutionality of Article 782. See **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738. The **Bertrand** court specifically found that a non-unanimous 12-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. **Bertrand**, 2008-2215 at p. 8, 6 So.3d at 743.

This assignment of error is without merit.

### **ASSIGNMENT OF ERROR NO. 3**

In his third assignment of error, the defendant argues the trial court erred in sentencing him for the conviction of aggravated burglary. Specifically, the defendant contends he should have been sentenced for the responsive offense of attempted aggravated burglary. Further, the defendant reiterates his position that the guilty verdict for attempted aggravated burglary was infirm.

Because the defendant's conviction for attempted aggravated burglary is reversed, the sentencing issue is moot. The trial court sentenced the defendant to five years at hard labor for the attempted aggravated burglary conviction. Since

this conviction is reversed, the five-year sentence is vacated. In its brief, the State “agrees that defendant’s sentencing for said null and void conviction must be vacated.”

Accordingly, the defendant’s sentence for the reversed attempted aggravated burglary conviction is vacated. As noted above, the matter is remanded for retrial on the aggravated burglary charge.

#### **ASSIGNMENT OF ERROR NO. 4**

In his fourth assignment of error, the defendant argues the trial court erred in imposing the “additional penalty” to his armed robbery sentence for the use of a firearm. Specifically, the defendant contends the sentencing enhancement under La. R.S. 14:64.3 should not have been considered by the trial court when it sentenced him for the armed robbery conviction. This argument has merit.

The defendant was initially billed for the offense of “ARMED ROBBERY - ADDITIONAL PENALTY, La. R.S. 14:64.3” (docket no. 20794). The bill of information makes no mention of La. R.S. 14:64, the armed robbery statute. Under La. R.S. 14:64.3, when the dangerous weapon used in the commission of the crime of armed robbery is a firearm, the offender shall be imprisoned for an additional period of five years without benefits.

Prior to the start of voir dire, after a bench conference, the trial court stated that the District Attorney’s Office was going to amend the armed robbery with the use of a firearm additional penalty under La. R.S. 14:64.3 to armed robbery under La. R.S. 14:64. After some discussion about rearraigning the defendant, the trial court stated in the presence of trial counsel and the defendant:

Based upon the assertion of the Assistant District Attorney, Mr. Larry Buquoi, the State will proceed under 14:64, armed robbery instead of under 14:64.3; therefore, defense counsel and the State will only voir dire the jury on 14:64 and on the aggravated burglary charge which is 14:60. There will be no mention of 14:64.3 because of the District Attorney amending the charge to 14:64, and the parties have



agreed, as I stated before, that the defendant will be rearraigned once the jury selection is completed on the 14:64.

Following voir dire, the defendant was rearraigned. The clerk stated, "State of Louisiana versus 20,794, Darnell Jones, you're charged with armed robbery. How do you plead?" The defendant responded, "Not guilty." Prior to opening statements, the clerk read aloud, in pertinent part, that the defendant, under docket no. 20794, was charged with armed robbery, and that he pled not guilty.

It is clear from the foregoing that the State specifically removed the "additional penalty" charge under La. R.S. 14:64.3, and sought to charge the defendant, under an amended bill of information and arraignment, with only armed robbery under La. R.S. 14:64. These actions indicate it was the intent of the State to no longer seek an enhancement of the armed robbery sentence. See State v. Robinson, 2006-464, pp. 3-4 (La. App. 5th Cir. 12/12/06), 947 So.2d 783, 784-85. In its brief, the State agrees the trial court erred in imposing the extra sentence:

The State after amending the Bill of Information to charge defendant with armed robbery in violation of [La.] R.S. 14:64, did not file any written notice to defendant of its intent to seek enhancement of the sentence under [La.] R.S. 14:64.3. The imposition of the additional penalty is neither self-operative nor imperative absent charging defendant with the use of a firearm or timely moving for enhancement of the sentence. . . . As such, the imposition of the additional penalty must be vacated.

The trial court erred in imposing the additional sentence under La. R.S. 14:64.3(A). Accordingly, the five-year sentence at hard labor without benefit of parole, probation, or suspension of sentence is vacated.

**ARMED ROBBERY CONVICTION AFFIRMED; FIFTEEN-YEAR ARMED ROBBERY SENTENCE UNDER LA. R.S. 14:64 AFFIRMED; ADDITIONAL FIVE-YEAR SENTENCE UNDER LA. R.S. 14:64.3 FOR USE OF A FIREARM DURING COMMISSION OF ARMED ROBBERY VACATED; ATTEMPTED AGGRAVATED BURGLARY CONVICTION REVERSED; ATTEMPTED AGGRAVATED BURGLARY SENTENCE VACATED; REMANDED FOR RETRIAL ON AGGRAVATED BURGLARY CHARGE.**