

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1791

STATE OF LOUISIANA

VERSUS

JODY L. SWAFFORD

Judgment Rendered: May 6, 2011

**Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 432816**

Honorable William J. Crain, Judge Presiding

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State of Louisiana**

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Jody L. Swafford**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

The defendant, Jody L. Swafford, was charged by grand jury indictment with first degree murder, a violation of LSA-R.S. 14:30.¹ The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for postverdict judgment of acquittal, which was denied. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

From Florida, the defendant went to Slidell in St. Tammany Parish following Hurricane Katrina to find work cutting and removing trees. The defendant met Timothy Murray, a North Carolina man, who ran a tree cutting service, and the two began working together. Murray also began working with Carl Glass, Jr., a fifty-seven-year-old man who was also in the tree cutting business and lived on Pearl Acres Road in Slidell. Glass allowed Murray to park his RV in Glass's yard and live in it. Over time, Murray became aware that Glass carried a lot of money. Murray told the defendant about the money and they eventually decided to rob Glass.

On April 8, 2006, the defendant and Murray entered Glass's home under the pretense of visiting him. As Murray spoke to Glass, who was sitting in a chair wearing only boxer shorts and socks, the defendant approached Glass from behind and wrapped his arm around Glass's neck in what is commonly known as a "sleeper hold." As the defendant held Glass, Murray repeatedly struck Glass in the face and

¹The State did not seek the death penalty.

head. Glass died from the attack. The defendant took Glass's wallet, which contained \$950.00, and he and Murray left.

The defendant had borrowed a car, a Chevrolet Cavalier, from his friend Sabrina Jones. Instead of returning the car to Jones, the defendant and Murray drove to a lake off of I-59 and jumped into the water to rinse off the blood on their bodies and clothes. They changed clothes, which they had brought with them, and went to several bars in Mississippi. They then went back to Louisiana and drove around St. Tammany buying crack cocaine with the robbery money they took from Glass. Eventually, they drove to Shreveport where they met up with Murray's friend Julie Webber. The defendant and Murray abandoned Jones's car at a hotel in Shreveport, and the three of them drove to Mississippi and then to Jacksonville, Florida in Webber's car. The defendant left Murray and Webber in Jacksonville, and made his way to Tampa, Florida. Murray and Webber went to North Carolina. About ten days after Glass was killed, the defendant turned himself in to the authorities in Florida and gave a recorded statement to Detectives Marco Demma, Jr., and Chad Farrell, both with the St. Tammany Parish Sheriff's Office.²

In his statement, the defendant told the detectives that he put Glass in a sleeper hold to choke him out. However, Glass struggled and fell on top of the defendant. The defendant claimed that while on the floor, he released Glass from the hold and that at that point, Murray repeatedly struck Glass in the face. The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to support the first degree murder conviction. Specifically, the defendant contends the State did not prove he killed Glass or that he had the

²Murray also turned himself in and was interviewed by the same detectives in North Carolina.

specific intent to kill Glass.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). See LSA-C.Cr.P. art. 821(B); State v. Ordodj, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of one of a list of enumerated felonies, including simple robbery. See LSA-R.S. 14:30(A)(1). Thus, while the defendant contends the State failed to prove he intended to kill Glass, the State was required to prove that the defendant, during the commission of a simple robbery (or aggravated burglary), had the specific intent *either* to kill Glass or to inflict great bodily harm upon Glass.

Specific 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). Such state of mind can be

formed in an instant. State v. Cousan, 94-2503 (La. 11/25/96), 684 So. 2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. State v. Graham, 420 So. 2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. State v. McCue, 484 So. 2d 889, 892 (La. App. 1st Cir. 1986).

In his taped statement to Detectives Demma and Farrell, the defendant admitted that the reason he and Murray went to Glass's home was to rob him. After Glass invited them inside, the defendant approached Glass from behind while Glass was sitting down in his boxer shorts. The defendant stated he applied a "sleeper hold" to Glass's neck and tried to "choke him out."³ However, Glass was too big for the defendant and a struggle ensued. The defendant said he and Glass fell to the ground. When Glass landed on top of the defendant, the defendant let go of Glass. However, since Glass would not "go to sleep," Murray repeatedly punched Glass. When the defendant got out from under Glass, the defendant took Glass's wallet, which was in Glass's pants near his bed. The defendant told the detectives that Glass was alive when he and Murray left. The defendant also stated, "I did not kill that man."

Detective Demma testified at trial that he was not at the crime scene, but he did review the evidence from the scene, including photographs of the defendant's bloody T-shirt and the blood patterns on the floor where Glass was killed. Detective Demma opined that the blood transfer from Glass's wounds to the defendant's T-shirt was indicative of the defendant holding Glass in a choke hold while Murray struck Glass in the face. Also, there was blood on an area of the floor, which was smeared and contained footprints. Glass was wearing socks when

³To "choke out" a person with a sleeper hold is to cause that person to temporarily pass out due to restricted blood flow to the brain.

he was killed, and the bottoms of his socks were bloody. Thus, he stated, these factors, and the blood patterns on the defendant's T-shirt, as well as the lack of "castoff," or blood against the wall, were inconsistent with the defendant's claim that he was under Glass on the ground while Glass was being struck by Murray. According to Detective Demma, the crime scene, as depicted in the photographs and evidence, showed that Glass was neither kneeling nor lying on the ground, but was standing as defendant choked and held him from behind while Murray struck him in the face.

Dr. Michael Defatta, a forensic pathologist who performed the autopsy on Glass, testified at trial that Glass had received several blows to the face and had nasal bone fractures underneath the bruising of the nose. There was also a small bruise on the right side of his neck. Further, regarding injuries to Glass's neck, Dr. Defatta stated:

Now, examination on the internal examination of the strap muscles of the neck revealed multiple areas of bleeding or hemorrhage. . . . As we peeled back each of these areas, we found areas of multiple bleeding in that. That suggested some type of strangulation. The eyes of Mr. Glass, also the white parts were bloody, they were red, which goes along again with some type of strangulation.

* * * * *

The brain itself was bloody. There was what's known as subarachnoid hemorrhage of the . . . left temporal lobe, . . . associated with the blows to the head. Given this, from a trauma standpoint, the strangulation is the most important cause.

Dr. Defatta further noted that Glass had areas of hemorrhage on both sides of his neck. He stated that with the type of choke hold at issue, wherein the chin is placed in the crook of the arm, if applied long enough and if the victim struggles, then "that type of struggle can certainly result in a hemorrhage." He stated that the cause of death was asphyxia due to strangulation and blunt force traumatic injuries.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that

hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987). In finding the defendant guilty, the jury clearly rejected the hypothesis that the defendant meant only to place a “sleeper hold” on Glass and that when Glass struggled and fell to the ground, the defendant released Glass. The jury's verdict reflected the reasonable conclusion that the defendant wrapped his arm around Glass's neck and maintained a constricting, unrelenting grip around Glass's throat and neck while Murray continually struck Glass in the face and head. Also, given the severity of the beating Glass sustained, the jury could have reasonably concluded that the defendant struck Glass, as well. Each participant in the attack aided the other in bringing about Glass's death, and the guilty verdict indicates the jury found from the un rebutted evidence that the defendant killed Glass and that he had the specific intent to kill Glass or, at the very least, intended to inflict great bodily harm upon him.⁴ See LSA-R.S. 14:24; see also Moten, 510 So. 2d at 61-62.

We note, as well, that a finding of purposeful misrepresentation reasonably raises the inference of a “guilty mind,” as in the case of flight following an offense or the case of material misrepresentation of facts by the defendant following an offense. Lying has been recognized as indicative of an awareness of wrongdoing. State v. Captville, 448 So. 2d 676, 680 n.4 (La. 1984). The facts in this case established acts of both flight and material misrepresentation by the defendant. After attacking and killing Glass, the defendant fled to another state. Further, when the defendant gave his statement to the detectives, he attempted to minimize his level of culpability by suggesting that he only briefly choked Glass, that

⁴The defendant did not testify and presented no rebuttal testimony.

Murray made him choke Glass, and that Murray beat Glass because the choke did not work.

The jury heard all of the testimony and viewed all of the evidence presented at trial and rejected the defendant's assertion that he did not kill Glass. Thus, the jury found the defendant guilty as charged. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83. Moreover, even if the record contains some evidence which conflicts with the testimony accepted by a trier of fact, such evidence does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985).

After a thorough review of the record, we find that the evidence supports the jury's unanimous verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the first degree murder of Carl Glass, Jr. See State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in allowing the State to introduce into evidence a gun that was found in the trunk of Sabrina Jones's car when the car had been abandoned by the defendant and Murray after driving it around for several days. Specifically, the defendant contends the gun was not relevant since it was not alleged to have been used in the commission of the offense.

At the conclusion of the State's case, the prosecutor sought to introduce State's Exhibit 62, which was "the gun that was recovered in the trunk of the car after Swafford and Murray abandoned the vehicle." Defense counsel objected on the grounds of relevance, and the trial court overruled his objection.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. State v. Lockett, 99-0917 (La. App. 1st Cir. 2/18/00), 754 So. 2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So. 2d 115.

Louisiana Code of Evidence article 404(B)(1) provides:

Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

There was no testimony or evidence introduced at trial that connected the gun found in Jones's trunk to the defendant. The only mention of the gun during the trial was during the direct examination of Jones about the condition her car was found in after the defendant and Murray had used it for several days. Jones was shown photographs of the interior of her car, one of which depicted a case of bullets in the center console. The following colloquy then took place:

Q. When you gave this car -- when Swafford took this car, there wasn't bloodstains all over the center console, were there?

A. No, sir.

Q. There was no bloodstains on the seat?

A. No, sir.

Q. And there were no bullets on the center console?

A. No, sir.

Q. Did you ever have bullets in your car?

A. No, sir.

Q. Did you ever have a gun in your trunk?

A. Never.

Q. I'm going to show you what's been marked for identification as S-62. Have you ever seen this gun?

A. No, sir.

Q. Did you leave this gun in the trunk of your car?

A. No, sir.

Q. Are you absolutely certain?

A. I'm positive.

At the conclusion of its case, the State introduced all of the evidence presented at trial, including the gun found in the trunk of Jones's abandoned car. Objecting on the grounds of relevance, defense counsel argued there was nothing tying the defendant to the gun, and the gun was not relevant to the offense. Without explanation, the trial court overruled the objection.

While the reason for introducing the gun into evidence is not clear, it appears the State offered it possibly as other crimes evidence (illegal possession of a firearm) or, at the least, to show that the defendant was of bad character. Whatever the State's intent, the gun was not relevant evidence. Relevant evidence is evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. LSA-C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403. A trial judge's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of discretion. State v. Freeman, 2007-0470 (La. App. 1st Cir. 9/14/07), 970 So. 2d 621, 625, writ denied, 2007-2129 (La. 3/14/08), 977 So. 2d 930.

No gun was used in the commission of the offense. In his statement to the detectives, the defendant admitted that he and Murray attacked Glass with their hands. No gun was used to gain entry into Glass's home and, according to the defendant's taped statement, no gun was taken from Glass's home. Further, there was no testimony or evidence at trial that tied the gun specifically to the defendant. No fingerprint evidence was offered. The defendant did not testify, and no one testified regarding ownership of the gun, except for Jones, who indicated she had never had a gun in the trunk of her car. The evidence of the gun had no independent relevancy besides ostensibly showing a criminal disposition or bad character on the part of the defendant. See LSA-C.E. art. 404(B)(1). The gun had no bearing on any of the facts or evidence used to prove the instant offense and, as such was not admissible. See LSA-C.E. art. 402. Accordingly, the trial court abused its discretion in allowing the introduction of inadmissible evidence.

The erroneous admission of such evidence is a trial error subject to harmless-error analysis on appeal. See LSA-C.Cr.P. art. 921; State v. Johnson, 94-

1379 (La. 11/27/95), 664 So. 2d 94, 102. The test for determining whether an error is harmless is whether the verdict actually rendered in this case “was surely unattributable to the error.” Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993); Johnson, 664 So. 2d at 100.

In the instant matter, we find the defendant was not prejudiced by the introduction of the gun into evidence. The evidence at trial clearly established that no gun was used in the beating death of Glass. The testimony of Detective Demma and Dr. Defatta, and, most importantly, the defendant’s own words via his recorded admission to the detectives, clearly established the defendant’s guilt. As such, the guilty verdict rendered was surely unattributable to any evidence of a gun being found in the trunk of Jones’s abandoned car, and any error in allowing such evidence to be presented to the jury was harmless beyond a reasonable doubt. See Sullivan, 508 U.S. at 279, 113 S. Ct. at 2081; LSA-C.Cr.P. art. 921.

This assignment of error is likewise without merit.

CONVICTION AND SENTENCE AFFIRMED.