

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1808

STATE OF LOUISIANA

VERSUS

ARTHUR NICHOLAS, III

Judgment Rendered: May 6, 2011

On Appeal from the 23rd Judicial District Court
In and For the Parish of Ascension
Trial Court No. 23,209

Honorable Jane Triche-Milazzo, Judge Presiding

Ricky L. Babin
District Attorney
Donald D. Candell
Assistant District Attorney
Gonzales, Louisiana

Counsel for Appellee
State of Louisiana

Lieu T. Vo Clark
Louisiana Appellate Project
Mandeville, Louisiana

Counsel for Defendant/Appellant
Arthur Nicholas, III

Arthur Nicholas, III
Angola, LA

Defendant/Appellant
Pro Se

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

Defendant, Arthur Nicholas, III, was charged by grand jury indictment with first degree murder, a violation of LSA-R.S. 14:30.¹ Thereafter, the charge was amended to second degree murder, a violation of LSA-R.S. 14:30.1. Defendant pled not guilty to the amended charge and waived his right to trial by jury. Following a bench trial, he was found guilty as charged. The trial court sentenced the defendant to imprisonment for life, at hard labor, without benefit of probation, parole, or suspension of sentence. Defendant now appeals, arguing in one counseled and one pro se assignment of error that the evidence was insufficient to support his conviction and that the trial court erred in denying his motion for mistrial when a state witness referred to having taken polygraph examinations. For the following reasons, the defendant's conviction and sentence are affirmed.

FACTS

On Tuesday, December 18, 2007, Eric Elisar arrived at the apartment of his coworker, Mark Waddell, in Gonzales, Louisiana, at approximately 6:45 a.m. to pick him up for work. When Waddell failed to come outside, Elisar approached the apartment and found the front door partially ajar. After he went inside and discovered Waddell's body lying on the floor of his bedroom, Elisar called the police. During their investigation, the police recovered a .40 caliber shell casing from the hallway of the apartment.

An autopsy established that Waddell died from a gunshot to the head, which fractured his left cheekbone and proceeded downward, damaging the medulla oblongata, fracturing his C2 vertebra, severing his spinal cord, and lodging in his

¹ The bill of indictment also charged Michael Edward Jones, Kathy Riley, and Jerome Bougere, III with the same offense. However, the indictment was later amended to charge Bougere with being an accessory after the fact to murder. Subsequently, the indictment was amended a second time to reduce the charge against the defendant, Jones, and Riley to second degree murder. A motion to sever was filed on behalf of Michael Jones and granted by the trial court. Additionally, on the day of trial, counsel for the defendant filed an oral motion to sever his case. The motion presumably was granted, since the defendant was tried alone.

neck. Based upon an examination of the extracted bullet, the state's firearms expert concluded it was fired from the same weapon as the .40 caliber shell casing recovered from the hallway of Waddell's apartment. Blood and urine samples taken from the victim revealed a blood-alcohol level of .16 and the presence of metabolites for cocaine in his urine.

Kathy Riley, a friend of Waddell's, stated that she had gone to Waddell's apartment the weekend before his death, as she had on several prior occasions, to get high with him on cocaine. When they had consumed all the drugs she brought with her on that occasion, they called the defendant and Jerome Bougere, III, to bring over drugs for them to purchase. Riley had introduced Waddell to the defendant and Bougere a few weeks earlier so that Waddell could purchase drugs from them. In addition to selling drugs together, the defendant and Bougere are first cousins.

When Riley and Waddell ran out of money that weekend, the defendant "fronted" \$80.00 of drugs to Waddell, who told the defendant he would pay him on Monday by borrowing money from a coworker. Riley eventually left the apartment with the defendant, who agreed to give her a ride to a friend's house. On the way there, he showed her a newly-acquired .40 caliber handgun, and he stopped at an area off Ernest Floyd Road in Sorrento to try out the gun, firing several rounds from it. The defendant then dropped Riley off at her friend's house.

When Waddell went to work on Monday, he apparently attempted to borrow \$80.00 from a coworker, but was unsuccessful in doing so. Sometime between 11:00 p.m. and midnight that Monday evening, the defendant went to Bougere's town house, located only a short distance from Waddell's apartment. When Bougere opened the door, the defendant told him he was going over to rob Waddell and asked if Bougere wanted to come. Bougere declined, saying he had to go to work in the morning. According to Bougere, the defendant then parked his car in

Bougere's parking spot and walked off, accompanied by Michael Jones and Marchand Jones. Approximately five minutes later, Bougere heard a gunshot. Shortly thereafter, the defendant knocked on his door and Bougere saw the defendant's two accomplices running toward the car. Defendant told him that he had killed Waddell, to which Bougere responded that the defendant should leave because he did not want to get involved. After the defendant left, a visibly upset Bougere returned to his bedroom and told his girlfriend that the defendant had killed a man.

Kevin Dennie, a friend of Waddell's, stopped by Waddell's apartment on his way home from work at approximately 11:30 to 11:45 p.m. on Monday night. Waddell had called him shortly before, but Dennie was at work and did not take the call. However, he was worried about Waddell, who had seemed desperate for money and almost suicidal in a conversation they had held a few days earlier. On the evening in question, Dennie noticed that, although the front door to Waddell's apartment was shut, the lock was not engaged. He banged on the door six to eight times, but received no response. He left, thinking that Waddell was sleeping.

A few days after Waddell's murder, Riley was once again riding in a car with the defendant and remarked that it was funny that Waddell was killed with a .40 caliber gun on the Monday that he was supposed to pay the defendant, who happened to own a .40 caliber gun. Defendant hit her in the face, cutting her lip. He told her not to tell anyone about the gun or that he knew Waddell. While he was telling her this, he took out the gun and brandished it in a threatening manner.

Thereafter, Riley took detectives to the area in Sorrento where the defendant earlier had test fired the gun and they recovered six shell casings from that location. The state's firearms expert determined that the shell casings were fired from the same gun that killed Waddell.

After the defendant was arrested for the instant offense, he telephoned Bougere from jail and asked him to pick up his clothes and things from his apartment in Baton Rouge because he and his wife, Jessica Nicholas, were "beefing." Defendant's wife gave the clothes to Bougere in a plastic trash bag. After arriving home, he found there was also a gun in the bag. Bougere's girlfriend told him to get it out of the house because of their children, so he called his ex-wife and asked her to keep it until the defendant was released. Bougere then put the gun in a shoebox and brought it to his ex-wife's house in Donaldsonville.

Subsequently, after Bougere also was arrested in connection with the instant matter, he directed the police to where the gun, a .40 caliber semiautomatic Beretta handgun, was hidden at his ex-wife's house. Testing at the State Police Crime Laboratory confirmed that the gun was the murder weapon. It also established that the six shell casings recovered by the police in Sorrento were fired from the same gun. Additionally, a partial DNA profile was obtained from a contact swab collected from the gun. DNA analysis revealed that the defendant could not be excluded as a possible contributor to the DNA found on the gun, and the probability of the DNA profile coming from a randomly selected individual other than the defendant was approximately 1 in 1.04 million.

Moreover, the defendant admitted to the police that he owned a .40 caliber Beretta and that he had fired it in the presence of Riley in the area where the police recovered the six shell casings. However, he claimed that, after he had a "falling out" with Bougere in early December, he left the gun at Bougere's town house.

SUFFICIENCY OF THE EVIDENCE

In his sole counseled assignment of error, the defendant contends the evidence was insufficient to support his conviction for second degree murder. Specifically, he argues that the only direct evidence of his involvement in the murder was the self-serving testimony of Bougere, an admitted drug dealer with a

propensity for lying. Defendant argues this propensity is demonstrated by the fact that Bougere admitted to maintaining relationships with three women at the same time and lying to them all. Additionally, Bougere admitted that when initially questioned by the police, he told them that Riley had accompanied the defendant to Bougere's town house on the night of the murder, although that was a lie. Bougere testified at trial that he did not know why he had lied about Riley being present, but that he had made a mistake in doing so.

Defendant asserts that Bougere also was lying about when and how he acquired possession of the murder weapon. At trial, Bougere testified that the defendant telephoned him from jail and asked him to pick up the defendant's clothes from his wife. When Bougere did so, he found the gun in the plastic bag with the clothes. Although he testified that he could not recall the date this occurred, there was testimony from a detective that Bougere told him he picked up the gun on December 20, 2007. Further, his ex-wife told the police that she saw the shoebox that contained the gun on December 20, 2007. Thus, the defendant contends it is clear that Bougere lied about how and when he came into possession of the gun, since the defendant was not arrested until December 29, 2007.

Finally, the defendant asserts that Bougere had a clear motive to lie, considering that he had made a deal with the state to testify against the defendant in exchange for a reduction of the charge against him from first degree murder to accessory after the fact to murder. Defendant suggests still another motive might be that he shot Bougere in the shoulder years earlier because of a disagreement they had over a woman. Defendant notes that one of the women Bougere was involved with, Christina Williams, told the police Bougere wanted to get the gun from the defendant's wife so that he could use it to set the defendant up for the murder.

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 also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660. The **Jackson v. Virginia** standard of review incorporated in LSA-C.Cr.P. art. 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, in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. When a case involves circumstantial evidence and the trier-of-fact reasonably rejects the hypothesis of innocence presented by defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Louisiana Revised Statutes 14:30.1 provides, in pertinent part, that:

A. Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of . . . armed robbery, first degree robbery, second degree robbery, simple robbery, . . . even though he has no intent to kill or to inflict great bodily harm.

Defendant does not contest that a second degree murder occurred in the instant case. Rather, he argues there was no direct evidence, other than Bougere's testimony, that he shot and killed Waddell. Where the key issue raised by the defense is the defendant's identity as the perpetrator, rather than whether or not the

crime was committed, the state is required to negate any reasonable probability of misidentification. **State v. Johnson**, 99-2114, p. 4 (La. App. 1 Cir. 12/18/00), 800 So.2d 886, 888, writ denied, 2001-0197 (La. 12/7/01), 802 So.2d 641.

After a thorough review of the record, we are convinced the evidence supports the guilty verdict returned by the trial court. The state presented evidence that Waddell owed the defendant money that was due on the day he was murdered, and that Waddell had attempted unsuccessfully to borrow money from a coworker that day. Further, Bougere testified that the defendant came by his town house shortly before midnight on that evening and told him he was going to rob Waddell, soon after which Bougere heard a gunshot. According to Bougere, the defendant then came back and told him he had murdered Waddell. Dale Evans, who was living with Bougere at the time, testified that Bougere appeared upset when he returned to the bedroom after talking to the defendant, and that he told her the defendant had killed a man, although she was not certain whether he was joking. She also testified that she heard what sounded like fireworks or "black caps" going off that night. She testified that Bougere did not leave the town house after he arrived home about 7:30 or 8:00 p.m. that evening.

Bougere also testified that he acquired possession of the murder weapon, a .40 caliber Beretta handgun, when he picked up a bag of the defendant's possessions and found the gun inside the bag. Defendant admitted to the police that he owned such a gun and had test fired it in the area of Sorrento where the police recovered the six shell casings. The state's firearms expert concluded the bullet that killed Waddell, the shell casing recovered from Waddell's hallway, and the six shell casings recovered in Sorrento were all fired from the same gun. Further, the state presented testimony from an expert DNA analyst that the defendant could not be excluded as a possible contributor to the DNA found on the murder weapon. Bougere, however, was excluded as a possible contributor.

The state also presented evidence of the defendant's extreme reaction when Riley commented that Waddell was killed with the same caliber gun that the defendant owned, on the same day he was supposed to pay the defendant. Defendant reacted violently, assaulting Riley and demanding in a threatening manner that she remain silent both about the gun and about the fact that he knew Waddell.

Since the defendant waived a jury trial, the trial court was the trier-of-fact in this case. The trial court heard all of the testimony and viewed all of the evidence presented to it at trial, including the details of the agreements the prosecution made with Bougere and Riley² in exchange for their testimony. Defense counsel had the opportunity to fully cross-examine the state witnesses on all aspects of their testimony, including their credibility and motivation for testifying. The trial court also heard the defendant's closing arguments specifically attacking Bougere's credibility. After hearing all of the evidence, including testimony as to prior lies and inconsistent statements made by Bougere, the trial court found the defendant guilty of the instant offense. In doing so, the trial court clearly rejected the defendant's theory that someone other than the defendant fired the gunshot that killed Waddell and accepted the state's evidence establishing that the defendant was the person who shot and killed Waddell.

The trier-of-fact is free to accept or reject, in whole or in part, the testimony of any witness. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a trier-of-fact's determination of guilt. **State v. Lofton**, 96-1429, p. 5 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368-69, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. We are constitutionally

² At trial, Riley testified she had been advised by the district attorney's office that the murder charge against her would be dismissed for lack of evidence. Additionally, it was agreed that, in exchange for her testimony, she would plead guilty on unrelated charges of possession of a Schedule II drug, possession of drug paraphernalia, issuing worthless checks, and unauthorized use of a movable, and would be released for the time she had already served in jail, which she calculated was approximately thirty-four months.

precluded from acting as a “thirteenth juror” in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83.

As previously noted, the finding of guilt in this case indicates the trial court accepted the testimony of the state witnesses and rejected the defense’s theory that someone other than the defendant killed Waddell. See State v. Andrews, 94-0842, p. 7 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 453. We cannot say that the trial court’s determination was irrational under the facts and circumstances presented to it. See Ordodi, 946 So.2d at 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the trier-of-fact and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trier-of-fact. See State v. Calloway, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Thus, we are convinced that, viewing all of 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 second degree murder.

This assignment of error lacks merit.

MOTION FOR MISTRIAL

In a sole pro se assignment of error, the defendant contends the trial court erred in denying his motion for mistrial when Bougere referred during his testimony to having taken two polygraph examinations. Defendant argues this inadmissible testimony was prejudicial, because Bougere’s testimony was crucial to the state’s case and his credibility was questionable, given the numerous inconsistencies and lies in his statements to the court.

During direct examination of Bougere, the prosecutor questioned him as to why the trial court should believe his trial testimony when Bougere admitted

having lied on prior occasions. The following exchange occurred between the prosecutor and Bougere:

Q. Are you telling this judge the truth?

A. Yes, sir.

Q. Did you go in that house with Arthur Nicholas?

A. No, I was at home with my girl. Me and her stayed in the house. I ain't never went across there.

Q. So, you understand that you have access, you're right here (indicating)? Okay? You end up with the gun, you've got three women, you lying all over the place. I want you to tell this judge why she ought to believe you. You got the deal. You got out of jail.

A. I was juggling the women, and I was -- I was selling the dope, but I ain't never killed nobody. I ain't -- that wasn't me, you know. I -- that what -- that's what happened. That's all I can, you know -- **I took two lie detector tests to prove that I wasn't there**, and I -- [Emphasis added.]

At this point, defense counsel objected and the trial court sustained the objection before counsel could state the grounds thereof. Defense counsel then moved for a mistrial due to the inadmissible reference to the polygraph tests. Defense counsel particularly noted that the trial court had earlier granted, without objection from the defendant, a motion in limine filed by the state to exclude any reference to polygraph tests. Defense counsel further argued that the prosecutor's line of questioning led to the outburst by the witness.

The prosecutor responded that the inadmissible reference was an unexpected, unsolicited response not intentionally elicited by him. The trial court denied the motion on the basis that the reference was an unsolicited response that had occurred during a bench trial. The prosecutor then asked the trial court to "admonish itself" to disregard the statement, and the trial court stated that it would give the statement no weight in its deliberations.

It is well established that polygraph test results or any reference to a witness taking such a test are inadmissible for any purpose at the trial of guilt or innocence

in a criminal case, whether intended as substantive evidence or as relating to the credibility of a witness. However, an impermissible reference to a polygraph test constitutes reversible error only if there is a reasonable possibility that the error complained of might have contributed to the conviction. See LSA-C.Cr.P. art. 921; **State v. Legrand**, 2002-1462, pp. 10-11 (La. 12/3/03), 864 So.2d 89, 98, cert. denied, 544 U.S. 947, 125 S.Ct. 1692, 161 L.Ed.2d 523 (2005).

Since the defendant's motion for mistrial in this case is based on a state witness making a reference to his polygraph tests, rather than to remarks or comments made by a judge, district attorney, or court official, the provisions of LSA-C.Cr.P. art. 770 are not applicable herein. See **State v. Pooler**, 96-1794, p. 37 (La. App. 1 Cir. 5/9/97), 696 So.2d 22, 48, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288. Nor is LSA-C.Cr.P. art. 771(2) applicable. This provision provides permissive grounds for a mistrial when a prejudicial remark or comment is made by a witness or person other than the judge, district attorney, or a court official, and the trial court is satisfied that an admonition is not sufficient to assure the defendant a fair trial. However, Article 771 is designed to guard against improprieties that occur in the presence of a jury. Therefore, it cannot provide grounds for a mistrial in a bench trial. See **State v. Marshall**, 359 So.2d 78, 83 (La. 1978); **State v. Marshall**, 479 So.2d 598, 604 (La. App. 1 Cir. 1985).

The only provision that could provide a basis for mistrial in this instance is LSA-C.Cr.P. art. 775, which sets forth additional permissive grounds for mistrial, including situations where "prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial" The determination of whether or not a mistrial should be granted under Article 775 is within the sound discretion of the trial court. The trial court's ruling will not be disturbed on appeal absent an abuse of discretion. **State v. Young**, 569 So.2d 570, 583 (La. App. 1 Cir. 1990), writ denied, 575 So.2d 386 (La. 1991).

Mistrial is a drastic remedy which is only authorized where substantial prejudice will otherwise result to the accused. **Pooler**, 696 So.2d at 45. Further, an unsolicited statement is not chargeable to the state solely because it was in direct response to questioning by the prosecutor. Although a prosecutor might have more artfully formulated the question that provoked a witness's response, where the remark was not deliberately obtained by the prosecutor to prejudice the rights of the defendant, it is not the basis for a mistrial. See Pooler, 696 So.2d at 45.

In the instant case, the single reference by Bougere to the fact that he had taken two polygraph tests did not prejudice the defendant's bench trial. The trial court concluded the impermissible reference by Bougere was an unsolicited response. Moreover, the trial court specifically stated it would not consider that testimony during its deliberations. By virtue of its training and knowledge of the law, the trial court was fully capable of disregarding the inadmissible reference to the polygraph tests. See State v. Anderson, 2002-273 (La. App. 5 Cir. 7/30/02), 824 So.2d 517, 521, writ denied, 2002-2519 (La. 6/27/03), 847 So.2d 1254. See also State v. Lewis, 359 So.2d 123, 125 (La. 1978). Under such circumstances, the defendant's right to a fair trial was not prejudiced. We find no error or abuse of discretion in the trial court's denial of the motion for mistrial.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.