

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

NO. 2011 KA 0240

STATE OF LOUISIANA

VERSUS

JOSHUA SADLER

Judgment Rendered: June 10, 2011

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On Appeal from the  
19th Judicial District Court  
in and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 03-09-0274

Honorable Richard D. Anderson, Judge Presiding

\* \* \* \* \*

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

*TMH*  
*J.2.B.*  
*J.E.K.*  
*by J.2.B.*

## **HIGGINBOTHAM, J.**

The defendant, Joshua Sadler, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty. The defendant was tried by a jury and convicted as charged. Polling of the jury revealed the verdict was ten-to-two. The defendant filed a motion for post verdict judgment of acquittal. At the conclusion of a hearing, the trial court denied the motion. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals urging, in a single assignment of error, his conviction by a non-unanimous verdict violated his rights under the United States and Louisiana Constitutions. Finding no merit in the assignment of error, we affirm the defendant's conviction and sentence.

### **FACTS**

On December 22, 2008, at approximately 7:00 p.m. the victim, Cary Ray Dungan, picked up his friend, Robert O'Connell, and went to Lambert's bar in Baton Rouge to celebrate O'Connell's birthday. Kacey Atkinson, a female acquaintance of Dungan's, later met the men at the bar. According to Atkinson, she often went out with Dungan in exchange for monetary payment.<sup>1</sup> Later that night, the group left Lambert's and went to Dancer's nightclub on Airline Highway. While at the club, Dungan used cash to purchase drinks for his friends.

At sometime thereafter, Atkinson spoke to the defendant on the telephone. The defendant later arrived at Dancer's and sat in the back of the club. According to Atkinson, the defendant stayed at Dancer's for approximately fifteen to twenty minutes and then he left. The defendant did not make any contact with Atkinson at Dancer's.

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<sup>1</sup> At trial, Atkinson testified that at the time of the shooting, she and the defendant were romantically involved and lived together. She further testified the defendant was aware that Dungan often gave her money. The defendant also knew that Atkinson was out with Dungan on the night in question. However, Atkinson denied any involvement in the incident.

Eventually, the group left Dancer's, and Dungan drove O'Connell home to his apartment on Sherwood Forest Boulevard. Atkinson accompanied Dungan. Dungan and Atkinson visited with O'Connell briefly at his home before deciding to leave. After Dungan and Atkinson exited the apartment, the defendant walked up with a gun and, according to Atkinson, hit Dungan on his head with the gun and demanded that he "get in the truck." Dungan reached into his vehicle, grabbed a handgun and shot the defendant. The defendant responded with several gunshots.

The defendant sustained a gunshot wound to his neck and elbow. Dungan was shot in his upper abdomen, right thigh, and left thigh. The injury to the abdomen perforated Dungan's colon and left kidney, causing massive hemorrhage to his abdomen. The injury was fatal.

The defendant initially denied shooting the victim. In an initial statement to the police, the defendant claimed that he and two other individuals followed Dungan from Dancer's and planned to rob him. The defendant claimed one of his accomplices shot the victim and the defendant ran away. The defendant later confessed to shooting Dungan and admitted that he acted alone. He claimed that he simply approached Dungan and ordered him to "freeze." Dungan then retrieved a gun from his vehicle and shot the defendant in the neck. The defendant claimed he was running away when he started shooting back towards Dungan.

### **NON-UNANIMOUS JURY VERDICT**

In his sole assignment of error, the defendant argues the ten-to-two verdict is in violation of the United States and Louisiana Constitutions. While the defendant concedes that the verdict is in conformity with the present state of the law, the defendant maintains that, in light of recent jurisprudence, LSA-C.Cr.P. art. 782A and LSA-Const. art. I, § 17A (providing for jury verdicts of ten-to-two in cases in which punishment is necessarily confinement at hard labor) violate the Sixth and Fourteenth Amendments of the United States Constitution.

The punishment for second degree murder is life imprisonment with confinement at hard labor. See LSA-R.S. 14:30.1B. We have previously held in **State v. Smith**, 06-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352, that:

Louisiana Constitution article I, [§ 17A and LSA-C.Cr.P. art. 782A] 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's reliance on **Blakely v. Washington**, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); **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) is misplaced. These Supreme Court decisions do not address the issue of the constitutionality of a non-unanimous jury verdict; rather, they address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. Nothing in these decisions suggests that the jury's verdict must be unanimous for a defendant's conviction to be constitutional. Accordingly, [LSA-Const. art. I, § 17A and LSA-C.Cr.P. art. 782A] are not unconstitutional and, hence, not violative of the defendant's Sixth Amendment right to trial by jury.

Our Supreme Court has also affirmed the constitutionality of Article 782. See **State v. Bertrand**, 08-2215 (La. 3/17/09), 6 So.3d 738, 739. The **Bertrand** Court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. **Id.**, 6 So.3d at 743.

For these same reasons, we find this assignment of error is without merit. Considering the foregoing, we affirm the defendant's conviction and sentence.

**CONVICTION AND SENTENCE AFFIRMED.**