

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1152

STATE OF LOUISIANA

VERSUS

DEBRA A. FISHER

Judgment rendered June 6, 2014.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court Nos. 520121 and 526139-1
Honorable Richard A. Swartz, Judge

* * * * *

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DEBRA A. FISHER

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.



PETTIGREW, J.

The defendant, Debra A. Fisher, was charged by amended bill of information No. 520121 with one count of unlawful disposal of remains, a violation of La. R.S. 8:652 (count I), and one count of unlawful mutilation of human remains, a violation of La. R.S. 8:654 (count II). She was later charged by bill of information No. 526139-1 with one count of theft greater than five hundred dollars, a violation of La. R.S. 14:67 (count I). The defendant subsequently filed a writ application with this court, arguing the attorney general, not the district attorney, has sole prosecutorial power for counts I and II under bill of information No. 520121.¹ The defendant's writ application was denied, and she does not raise this issue on appeal. The defendant moved for appointment of a sanity commission, and following a hearing, was deemed competent to stand trial. The two bills of information were consolidated without objection. She pled not guilty to all charges, but a unanimous jury returned guilty verdicts on each count.

The defendant filed motions for new trial and post-verdict judgment of acquittal; however, these motions were denied. She was sentenced to three years at hard labor on count I and three years at hard labor on count II. Concerning the theft charge, the defendant was sentenced to ten years at hard labor, with five years suspended, along with a requirement to make restitution upon her release from prison. She was given credit for time served, with all sentences to run concurrently. The defendant filed a motion to reconsider sentence on all counts, but the motion was denied. She now appeals, arguing the State failed to meet its burden of proving that theft was committed (specifically, that the State failed to support the *corpus delicti*) and, also, that the sentence imposed on count I of bill of information No. 526139-1 is excessive. The defendant does not challenge her convictions or sentences with regard to counts I and II on bill of information No. 520121.

¹ **State v. Fisher**, 2012-1463 (La. App. 1 Cir. 11/5/12) (unpublished writ action).

FACTS

On March 6, 2012, Sergeant Jeffery Kahrs of the Slidell Police Department received notice that two women were present in the police station's lobby and that they wanted to turn themselves in for not reporting their father's death.² The two individuals, Heidi Todd and the defendant, Debra A. Fisher, indicated the body was located in a "freezer chest" in their apartment. Todd informed Sergeant Kahrs that one and one-half to two years had passed since Mr. Fisher's death, but the defendant interjected, stating it was actually three years. Sergeant Kahrs, upon realizing the apartment in question was outside of his jurisdiction, got Deputy Jason Wilson of the St. Tammany Parish Sheriff's Office involved in the case.

Deputy Wilson, along with Sergeant Calvin Lewis, interviewed the two women at the police station, and then traveled with them to their apartment, located at 176 South Military Road in Slidell. A third sheriff's deputy, Brad Roberts, met them at the scene. Upon their arrival, defendant and Todd granted consent for the officers to enter their residence, and informed them that the ice chest was located in a spare bedroom. After sweeping the apartment, the officers located the ice chest, which was tightly sealed along the edges with duct tape. Deputy Roberts cut the tape with a knife, opened the lid, and found human remains inside. The officers immediately secured the apartment as a crime scene and waited for a detective to arrive. The two women were detained but not arrested.

Dr. Michael DeFatta, the chief deputy coroner for St. Tammany Parish, examined the remains the following day. After studying the body at the apartment and, later, conducting an autopsy, Dr. DeFatta testified that he could not locate any signs of trauma or defects prior to death, and thus, determined Mr. Fisher died of natural causes. However, Dr. DeFatta also noted that the individual's hands were removed from the body after death, and that they were located in the ice chest with the body. He testified that the removal of the hands was done with "surgical precision" between

² The deceased's name was Charles Fisher.

the wrists and the arms, and that DNA testing matched the hands to the body. Dr. DeFatta stated it was difficult to pinpoint the exact date of death because of the "advanced decomposition" of the body. He testified that, because the body was sealed in an airtight container, it was essentially mummified, which altered the typical stages of decomposition. He estimated the date of death could have been as recent as a few months, or as distant as two years.

Detective Randy Luminais of the St. Tammany Parish Sheriff's Office testified regarding his involvement and investigation. On March 6, 2012, he traveled to the apartment, and after discussing the situation with Deputy Wilson and Sergeant Lewis, inspected the ice chest and body. Detective Luminais briefly spoke to the two women, but had them transported back to his office to conduct a more thorough interview. After taking photographs of the apartment and body, Detective Luminais returned to his office, where the two women were placed under arrest and advised of their **Miranda**³ rights. Both agreed to waive their rights, and following his interviews, Detective Luminais ultimately came to the conclusion that Mr. Fisher's death was not a homicide. However, based on his interview with the defendant, he had reason to believe that Social Security payments were still being paid on Mr. Fisher's behalf. In fact, Detective Luminais testified that the defendant told him she took funds out of Mr. Fisher's account and converted them for her own use. Specifically, he was told by the defendant that she would "use her father's account to pay the rent check and then transfer monies from that account to her account," both before and after he died. Upon learning this information, Detective Luminais contacted Agent Alan Nguyen of the Social Security Administration to aid in this portion of his investigation.

Alan Nguyen, a special agent with the Inspector General's Office of the Social Security Administration, testified that Detective Luminais contacted him requesting assistance in reference to a death involving Social Security benefits. Agent Nguyen retrieved the deceased's records, and noted that from March 2010 through December

³ **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2011, Mr. Fisher received \$1,156.80⁴ in benefits each month, and beginning in January 2012, his benefits increased to \$1,362.00 per month. Agent Nguyen testified that when a beneficiary passes away, the right to receive benefits is terminated and cannot transfer to another person. Agent Nguyen stated that Mr. Fisher's benefits were deposited directly into his bank account. Additionally, Agent Nguyen testified that once the funds were deposited into Mr. Fisher's account, he was unaware of any further fund transactions or transfers.

On March 7, 2012 (the day after Deputy Roberts opened the ice chest and located Mr. Fisher's remains), Detective Luminais, after securing a warrant for an additional search of the apartment, returned to the apartment and obtained additional photographs. During this search, Detective Luminais found the X-acto knife used to sever and remove Mr. Fisher's hands. Additionally, he found a checkbook in the name of Mr. Fisher, which, based on the defendant's statement, she used to write checks out of his account, as well as banking information, reflecting the joint account held by both defendant and Mr. Fisher. After obtaining this information, Detective Luminais subpoenaed and reviewed the bank account records. Thereafter, the defendant was also charged with theft regarding roughly \$33,000.00 in stolen Social Security benefits.

SUFFICIENCY OF THE EVIDENCE

In her first assignment of error, the defendant argues the State failed to meet its burden of establishing theft of Social Security benefits. Specifically, she argues there was insufficient evidence to support the theft conviction because the State failed to establish evidence of the *corpus delicti* of that charge independently from her uncorroborated confession made to Detective Luminais.

The standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the

⁴ According to State Exhibit 2, from March 2010 to December 2011, the deceased actually received \$1,315.00 in benefits per month.

crime, and defendant's identify as the perpetrator of that crime, beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Patton**, 2010-1841, p. 21 (La. App. 1 Cir. 6/10/11), 68 So.3d 1209, 1224; See La. Code Crim. P. art. 821. In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test; i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; **State v. Millien**, 2002-1006, p. 2 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 508-509. However, when a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the 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).

It is well settled that an accused party cannot be legally convicted on her own uncorroborated confession without proof that a crime had been committed by someone; in other words, there can be no conviction without proof of the *corpus delicti*. **State v. Celestine**, 452 So.2d 676, 678 (La. 1984). The *corpus delicti* must be proven by evidence that the jury may reasonably accept as establishing that fact beyond a reasonable doubt. **State v. Willie**, 410 So.2d 1019, 1029 (La. 1982), cert denied, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 723 (1984). This independent proof need not go to every element of the offense; and, it may be direct or circumstantial in nature. **State v. Thibodeaux**, 98-1673, p. 12 (La. 9/8/99), 750 So.2d 916, 926, cert denied, 529 U.S. 1112, 120 S.Ct. 1969, 146 L.Ed.2d 800 (2000). Once the *corpus delicti* has been independently established, a confession alone may be used to identify the accused as the perpetrator of the crime. **Celestine**, 452 So.2d at 678.

The trier of fact 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 fact finder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932.

As defined in La. R.S. 14:67(A), theft consists of the following elements: (1) the misappropriation or taking of anything of value, (2) which belongs to another, (3) without consent or by means of fraudulent conduct, practices, or representations, and (4) with the intent to permanently deprive the other of the object of the misappropriation or taking. Theft is a specific intent crime. See State v. Odom, 2002-2698, p. 11 (La. App. 1 Cir. 6/27/03), 861 So.2d 187, 195, writ denied, 2003-2142 (La. 10/17/03), 855 So.2d 765. 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." La. R.S. 14:10(1). Specific intent may be inferred from the circumstances of a transaction and from the actions of the accused. Further, specific intent is an ultimate legal conclusion to be resolved by the fact finder. **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.

The defendant did not testify at trial. However, in a video recorded statement to Detectives Luminais and Smith of the St. Tammany Parish Sheriff's Office, which was played before the jury, the defendant admitted several times that she continued to receive and use Mr. Fisher's Social Security benefits after he died:

Detective Smith: So why did y'all put him in the ice chest?

Defendant: Because he was the only one that [had] money coming in; we would have been out on the streets.

.....

Detective Luminais: For two years you've been getting money from him.

Defendant: Yes sir, I have.

Detective Luminais: For two years you've been collecting money from your father who's been dead, stuffed in a freaking ice chest.

Defendant: Yes, sir.

.....

Detective Smith: His, um, his Social Security check, how does that come?

Defendant: It was, um, deposited into his account?

Detective Smith: What account is that?

Defendant: Checking account.

Detective Smith: Where at?

Defendant: At um, Capital One.

Detective Smith: Is that a joint account?

Defendant: We have a joint checking account also.

Detective Smith: Ok. The checking account that the money was deposited into--

Defendant: --was his--

Detective Smith: --was his also, you didn't have access to that?

Defendant: Yeah, I did.

Detective Smith: Ok, so you were joint on that account as well?

Defendant: No.

Detective Smith: No?

Defendant: What we did was, because he had a joint account with me, that account was connected, um, like when you go online for banking and stuff, both of the accounts would come up. We would pay the rent off of his, and then move the money into the joint account to pay bills.

Detective Smith: Ok. So you weren't joint on his account that the Social Security check was going into right?

Defendant: Right.

Detective Smith: Ok. So, but the account that he was joint on with was also attached to the other account, so that is how you moved money out of that account—

Defendant: Yeah.

Detective Smith: Ok. And that was all stuff that you did online?

Defendant: Right.

Both the testimony of witnesses and independent physical evidence at the scene of the crime corroborated the defendant's confession. First, Agent Nguyen testified that a person's right to Social Security benefits terminates after they die, and the right cannot be passed on to another individual. Furthermore, after the interview with the defendant, Detective Luminais returned to the apartment, where he located Mr. Fisher's personal checkbook, as well as information and paperwork reflecting the joint account held by the defendant and Mr. Fisher. Photographs of this information were taken and presented to the jury. Afterwards, Detective Luminais subpoenaed and reviewed the bank records from these accounts, whereby the defendant was also charged with theft of roughly \$33,000.00 in Social Security benefits.

Based on our review of the evidence, we find that the jury did not act irrationally under the facts and circumstances presented to them, and reasonably rejected the defendant's hypothesis of innocence of the State failing to corroborate the defendant's confession. See State v. Ordodi, 2006-0207, pp. 14-15 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder 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). Based on a thorough review of the evidence, in the light most favorable to the prosecution, we find the State presented sufficient evidence to establish the *corpus delicti* and corroborate the defendant's confession.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In her second assignment of error, the defendant argues the sentence imposed on count I of bill of information No. 526139-1 is excessive. Specifically, she argues that due to a change in the theft sentencing provisions in August 2010, her sentence should be reduced.

The Eighth Amendment to the United States Constitution and Article I, § 20 of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Craddock**, 2010-1473, pp. 6-7 (La. App. 1 Cir. 3/25/11), 62 So.3d 791, 795-796, writ denied, 2011-0862 (La. 10/21/11), 73 So.3d 380. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. Louisiana Code of Criminal Procedure Article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231, p. 4 (La. App. 1 Cir. 5/9/03), 849 So.2d 566, 569; **State v. Lewis**, 489 So.2d 1055, 1061 (La. App. 1 Cir.), writ denied, 493 So.2d 1218 (La. 1986).

Prior to August 15, 2010, theft of five hundred dollars or greater resulted in a penalty of up to ten years at hard labor. La. R.S. 14:67(B)(1) (prior to amendment by 2010 La Acts No. 585, §1). However, as amended, La. R.S. 14:67(B)(1) provides for a penalty of up to ten years at hard labor for theft of fifteen hundred dollars or more, while La. R.S. 14:67(B)(2) provides a penalty of up to five years at hard labor for theft of an amount between five hundred and fifteen hundred dollars. In her brief, the

defendant argues that because the "jury was only asked to find that Ms. Fisher had committed a theft of property having a value of \$500 or more," she should be sentenced under the newer penalty provision of La. R.S. 14:67(B)(2). Further, she argues that since the "crime for which Ms. Fisher was convicted did not actually exist" after August 2010, her punishment should be reduced.

It is well established that the law in effect at the time of the commission of the offense is determinative of the penalty which the convicted accused must suffer. **State v. Sugasti**, 2001-3407, p. 4 (La. 6/21/02), 820 So.2d 518, 520. A defendant must be sentenced according to the sentencing provisions in effect at the time of the commission of the crime, and "[t]he mere fact that a statute may be subsequently amended, after the commission of the crime, so as to modify or lessen the possible penalty to be imposed, does not extinguish liability for the offense committed under the former statute." **State v. Narcisse**, 426 So.2d 118, 130 (La. 1983), cert denied, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983).

Citing **State v. Carr**, 99-2209 (La. 5/26/00), 761 So.2d 1271, the defendant argues that under the rule of lenity, ambiguity in the sentencing provisions should be resolved in her favor. However, upon a review of the record, there is no ambiguity that needs to be resolved. On March 6, 2012, the defendant indicated to both Sergeant Kahrs and Detective Luminais that her father had been dead for at least two years, which clearly places her under the sentencing provisions prior to August 15, 2010. Additionally, because Mr. Fisher continued to receive more than \$1,300.00 per month in Social Security benefits prior to the August 15, 2010 amendment (a total of more than \$9,000.00), defendant certainly meets the requirement of theft of more than five hundred dollars. As such, defendant's maximum penalty for the theft charge is up to ten years imprisonment at hard labor and a fine of not more than three thousand dollars. La. R.S. 14:67(B)(1) (prior to amendment by 2010 La. Acts No. 585, §1).

At the sentencing hearing, the trial court considered the factors set forth in Article 894.1, and specifically noted that the defendant was in need of correctional treatment, which could be provided most effectively through institutional commitment,

and that any lesser sentence would depreciate the seriousness of her crimes. Considering the trial court's careful review of the circumstances, and the "wide discretion" given to lower courts, we find no abuse of discretion regarding the sentence imposed on the theft charge, as it was not grossly disproportionate to the severity of the offense and defendant's actions.

This assignment of error is without merit.

CONCLUSION

For the above reasons enumerated, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.