

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1359

STATE OF LOUISIANA

VERSUS

GILES McGHEE

Judgment Rendered: MAR 06 2015

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On Appeal from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 1201595

The Honorable Bruce C. Bennett, Judge Presiding

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

The defendant, Giles McGhee, was charged by grand jury indictment with two counts of first degree murder, violations of La. R.S. 14:30. The State filed notice that it would not seek the death penalty. Subsequently, the defendant entered a plea of not guilty on both counts. Following a trial by jury, the defendant was found guilty as charged on both counts. The trial court denied the defendant's motion for post verdict judgment of acquittal and motion for new trial. The defendant was sentenced on both counts to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence, to be served consecutively. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, assigning error to the trial court's denial of his oral motion for mistrial based on his claim that the trial court violated his constitutional right to a full voir dire. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On April 5, 2012, at approximately 5:52 a.m., Hammond Police Department officers were dispatched to Mallard Drive in Hammond, after the reported shooting of victims Tamica Muse and Karum Smith. The shootings were reported by Muse's daughter, Tremecia Matthews, who was in her bedroom when she heard an angered voice, which she identified as the defendant's, just before gunshots were fired. After hearing what she assumed was the front door being slammed shut, Matthews called out to her mother and subsequently, after her mother did not respond, discovered the victims in her mother's bedroom. When the officers arrived, Muse (the female victim who had a tumultuous romantic relationship with the defendant) and Smith (Muse's boyfriend at the time) were lying in Muse's bed with apparent gunshot wounds. Muse suffered two gunshot wounds, including a fatal brain injury, and Smith died from a gunshot wound to the head that severed the carotid artery. The

defendant was apprehended when his vehicle crashed during police pursuit. He was transported to the Louisiana State Police headquarters, where he provided an alibi during a transcribed police interview. The defendant's stepdaughter, Nicole Flippen, initially corroborated the defendant's alibi that he was at her house in Baton Rouge at the time of the shootings. Thereafter, however, she admitted that she had been untruthful, and that the defendant asked her to lie for him when he confessed to her that he committed the shootings.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that the trial court violated his constitutional right to a full voir dire examination by limiting his examination of the prospective jurors. The defendant notes that the trial court interrupted defense counsel four times while attempting to question the prospective jurors on the first panel about availability, their understanding of the burden of proof, reasonable doubt, and the defendant's right not to testify. The defendant notes that the trial court lectured the prospective jurors regarding his right not to testify but failed to ask them whether they would hold it against the defendant if he did not testify. The defendant further argues that during the lecture on the subject, the trial court tainted the jury panel and made highly prejudicial comments by implying that the reason a defendant might not want to testify is to hide information such as prior convictions. The defendant concludes that the trial court abused its discretion in limiting the voir dire and in denying his motion for mistrial.

An accused in a criminal case is constitutionally entitled to a full voir dire examination and to the exercise of peremptory challenges. La. Const. art. I, § 17A. Pursuant to La. Code Crim. P. art. 786, the court, the State, and the defendant shall have the right to examine prospective jurors. The scope of the examination shall be within the discretion of the court. The purpose of voir dire examination is to determine the qualifications of prospective jurors by testing their competency and

impartiality and discovering bases for intelligent exercise of cause and peremptory challenges. **State v. Williams**, 457 So.2d 610, 613 (La. 1984); **State v. Burton**, 464 So.2d 421, 425 (La. App. 1st Cir.), writ denied, 468 So.2d 570 (La. 1985). Because of the difficulty of the concepts and values which must be understood and applied by each juror in his deliberations, counsel for each side is entitled to an opportunity to assess the personality and comprehension of each prospect as a unique human being before accepting him as a juror or challenging him for cause or peremptorily. **State v. St. Amant**, 413 So.2d 1312, 1319 (La. 1981) (on rehearing).

Counsel must be afforded a wide latitude in conducting voir dire examination. **State v. Chapman**, 410 So.2d 689, 696 (La. 1981). On the other hand, a trial court has the discretion to limit voir dire examination as long as the limitation is not so restrictive as to deprive defense counsel of a reasonable opportunity to determine bases for challenges for cause and for the intelligent exercise of peremptory challenges. **State v. Duplessis**, 457 So.2d 604, 606 (La. 1984). In imposing limitations on voir dire examination, a trial court must act with great caution to avoid an abuse of its sound discretion to determine the scope of the examination. **State v. Jones**, 596 So.2d 1360, 1367 (La. App. 1st Cir.), writ denied, 598 So.2d 373 (La. 1992). When the accused asserts that he has been deprived of his constitutional right to full voir dire examination, a reviewing court must examine the entire voir dire in order to determine whether or not there has been such a deprivation. **Duplessis**, 457 So.2d at 606. Voir dire examination, which goes to the determination of the qualifications of prospective jurors by testing their competency and impartiality, is proper. See State v. Stacy, 96-0221 (La. 10/15/96), 680 So.2d 1175, 1178; **State v. Hall**, 616 So.2d 664, 668-69 (La. 1993). The proper scope of examination lies within the discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a clear abuse of discretion. **State v. Tilley**, 99-0569 (La. 7/6/00),

767 So.2d 6, 15, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001); **Stacy**, 680 So.2d at 1178; **Hall**, 616 So.2d at 668-69.

Louisiana Code of Criminal Procedure article 770, in pertinent part, provides:

Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

* * *

(3) The failure of the defendant to testify in his own defense;

Generally, Article 770(3) prohibits both direct and indirect references to a defendant's failure to testify. **State v. Johnson**, 541 So.2d 818, 822 (La. 1989). This prohibition protects a defendant from unfavorable inferences that may otherwise be drawn from his silence and, therefore, helps implement a defendant's Fifth Amendment right against self-incrimination. *Id.* If the reference to the defendant's failure to testify is direct, a mistrial must be granted; however, an indirect reference requires a mistrial only if the court determines that the comment was intended to draw the jury's attention to the failure to testify. **State v. Hamilton**, 92-1919 (La. 9/5/96), 681 So.2d 1217, 1225, cert. denied, 520 U.S. 1216, 117 S.Ct. 1705, 137 L.Ed.2d 830 (1997).

A mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. Moreover, determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal absent an abuse of that discretion. *Id.*

In **Jones**, 596 So.2d at 1367, we found it improper for a trial court to arbitrarily impose a time limitation on the defendant's voir dire examination. The

defendant in **Jones** was charged with simple burglary of an automobile. The trial court limited voir dire by defense counsel to twenty minutes per panel, each panel consisting of sixteen prospective jurors. Although we warned that “[a] court imposing such an arbitrary limitation flirts with reversible error on grounds of deprivation of a defendant’s constitutional right to full voir dire examination,” we declined to reverse because the defendant failed to show he was prejudiced by imposition of the time limitation. **Jones**, 596 So.2d at 1367. In finding the error harmless, we noted that the trial court had undertaken an exhaustive explanation and inquiry to determine the prospective jurors’ qualifications by testing their competency and impartiality. We also found that much of defense counsel’s voir dire consisted of inquiries unnecessarily repetitious of those of the trial court. Significantly, the defendant in **Jones** used only slightly in excess of half of the allotted twenty minutes; and the record did not reveal any interruption by the court of defense counsel’s voir dire. Accordingly, we concluded that the potential deprivation of the constitutional right to full voir dire examination inherent in time limitations had not materialized. **Jones**, 596 So.2d at 1367.

As the defendant in the instant case notes on appeal, during the voir dire examination of the first panel, the trial court interrupted defense counsel when he asked the potential jurors if they had any pressing engagement that would prevent them from giving the trial their full attention. Before asking this particular question, defense counsel notably conceded that the prosecutor had already asked the potential jurors the same line of questioning. In interrupting defense counsel, the trial court noted it too had already questioned the potential jurors in that regard and asked defense counsel to refrain from being repetitive. The defendant also notes that the trial court interrupted defense counsel’s line of questioning regarding the burden of proof. Specifically, the defendant refers to the trial court’s response after a potential juror indicated that defense counsel would have to “prove the innocence” of his

client. As the defendant further notes, when defense counsel questioned the individual panel members as to whether they would hold it against the defendant if he did not testify, the trial court interceded and in part stated, “Once again, let me intervene and instruct the jury that the defendant is not required to testify and is not required to present any evidence on his behalf whatsoever. This is a Fifth Amendment privilege and you should not hold that against him.” The trial court added, “... there are many reasons why a defendant might choose not to take the stand other than the fact that he’s guilty ... for example, under our laws if a defendant has been convicted of previous crimes, and I’m not saying this defendant has, but that can be brought out on the stand and the jury can find out about it.” The trial court went on to explain that defense counsel may strategically decide not to put the defendant on the stand so that previous convictions would not be held against him even though he may be innocent in the current case. In giving other examples of why a defendant may not take the stand or may be strategically advised by defense counsel not to take the stand, the court noted that a defendant may have a speech impediment or, “just may not come across as a believable defendant even though he’s innocent.”

Subsequent to the announcement of the second panel, as the panel reconvened after a lunch break, the trial court noted that defense counsel had a motion that would be deferred until later that day.¹ After the third panel was selected, the motion for mistrial at issue was stated for the record. The defense counsel’s specific argument was that the trial court “altered the flow of the voir dire” and tainted the jury pool by interrupting defense counsel to admonish him in front of the jury for being repetitive. In denying the motion for mistrial, the trial court explained that the interruptions were necessary to provide instructions on the law and to avoid

¹ The defendant also made an unrelated motion for mistrial not at issue in the instant appeal regarding the trial court’s references to the public defender’s office.

repetitiveness regarding areas that had been covered. After the jury selection, defense counsel asked the trial court to reconsider its ruling on the motion for mistrial. Still focusing on the trial court's interruptions, defense counsel argued that the trial court limited the defense questions as to whether the potential jurors would accept the law as given. In upholding its former ruling, the trial court concluded that there was no limitation of defense counsel regarding arguments or questions, the court provided clarifications, and full and fair voir dire examination was allowed. The trial court contended it merely showed concern, in the interest of judicial economy, regarding repetition of questions that had already been asked.

Regarding the defendant's argument on appeal that the trial court tainted the jury panel by implying that the reason a defendant might not want to testify is to hide information such as prior convictions, we note that the defendant did not contemporaneously object to the comments, nor did they form the basis for any subsequent motion for mistrial.² Thus, the defendant is precluded from raising this issue on appeal. La. Code Crim. P. art. 841; see also **State v. Medious**, 98-419 (La. App. 5th Cir. 11/25/98), 722 So.2d 1086, 1089, writ denied, 98-3201 (La. 4/23/99), 742 So.2d 876.

While the defendant on appeal contends that the trial court did not specifically question the jurors concerning their availability, we note that the trial court specifically asked, "Anything going on in your lives that you haven't told me about already such that you can't be a fair and impartial juror if selected, for the rest of this week? Anything going on?" Additionally, in interrupting defense counsel after a potential juror suggested that the defendant would have to prove his innocence, the trial court was advising the defense counsel to question the jurors regarding their ability to be fair and impartial. At that point, the trial court gave the prospective

² As noted, the motion for mistrial at issue on appeal was limited to the trial court's interruptions and admonishments regarding defense counsel's repetitiveness.

jurors a detailed instruction regarding the presumption of innocence of the defendant and the State's burden of proof. Although the defendant also contends that he was limited in questioning the jurors regarding the reasonable doubt, the voir dire shows that the trial court, prosecution, and defense counsel thoroughly informed the potential jurors of the concept of reasonable doubt and the State's burden of proof. Further the trial court questioned the potential jurors regarding their ability to accept and apply the law on the defendant's presumed innocence and the State's burden of proof. When considering the voir dire in its entirety, the defendant was not deprived of his right to a full voir dire examination. Our review of the record of the voir dire examination as a whole convinces us that the defendant was afforded full and fair examination of the prospective jurors. Accordingly, because the defendant failed to show he was prejudiced or any significant limitation on the voir dire examination, we find the trial court did not abuse its discretion in denying the motion for mistrial. The defendant was not deprived of any reasonable expectation of a fair trial. The sole assignment of error lacks merit.

CONVICTIONS AND SENTENCES AFFIRMED.