

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0933

STATE OF LOUISIANA

VERSUS

BRIAN K. ALLEN, JR.

DATE OF JUDGMENT: DEC 21 2017

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 33,820, DIVISION A, PARISH OF LIVINGSTON
STATE OF LOUISIANA

HONORABLE JEFFREY JOHNSON, JUDGE

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State of Louisiana

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Counsel for Defendant-Appellant
Brian K. Allen, Jr.

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

CHUTZ, J.

The defendant, Brian K. Allen, Jr., was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (count 1); and possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1 (count 2). The defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. For the second degree murder conviction, the defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the conviction of possession of a firearm by a convicted felon, the defendant was sentenced to twenty years imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The sentences were ordered to run concurrently. The defendant now appeals, designating one assignment of error. We affirm the convictions and sentences.

FACTS

On March 28, 2016, Derick Stewart and his friend, Walter Felder, Jr., went to the house of William Robinson, who was having a meat boil. William, Walter's cousin, lived on Maryland Street in Denham Springs and Derick drove his car, a Toyota Camry. Derick parked on the side of the street. Derick and Walter had been talking to William in his front yard for several minutes when a gray Chevrolet Sonic with dark tinted windows backed into the empty lot of a storage facility near William's house. The Sonic belonged to the defendant's girlfriend, but the defendant was driving her car, and the front-seat passenger was Julius Scott. Having become suspicious over who was in the parked Sonic, and unable to identify the driver because of the tinted windows, Derick decided to leave and drive back to Walker, where he and Walter lived.

Derick and Walter got in the car and, just as the Camry began pulling away from the front of William's house, the defendant drove in front of the Camry and stopped, blocking the way forward. Derick put the Camry in reverse and sped

away, traveling backwards on Maryland Street, heading south toward Martin Luther King, Jr. Drive. The defendant, while driving forward, followed the Camry down the street. When Derick got to Martin Luther King, Jr. Drive, he spun the Camry around in a forward direction so that it was facing Pete's Highway (east). Before Derick was able to drive forward, the defendant got out of the Sonic and ran toward the Camry. With a .40 caliber semi-automatic pistol, the defendant fired several shots at the car. Derick was hit in the back and Walter was hit in the leg. The bullet that hit Derick exited the front of his neck.

Julius got into the driver's seat of the Sonic and drove away, leaving the defendant at the scene. Julius drove the Sonic to the defendant's grandmother's house, left the car there, and went home. Derick drove off, heading east on Martin Luther King, Jr. Drive. Just west of Plymouth Street, which is perpendicular to Martin Luther King, Jr. Drive, Derick hit a truck in the road. Derick lost control of the Camry and, just east of Plymouth Street, he hit a parked vehicle. The Camry stalled out. Derick and Walter got out of the Camry and began running. Derick ran east to the intersection of Martin Luther King, Jr. Drive and Pete's Highway, where he collapsed and died a short time later. Walter survived the gunshot wound to his leg. The defendant was apprehended the following day at his girlfriend's apartment on Florida Boulevard.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant asserts the trial court erred in denying his motion to continue trial.

The decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge and a reviewing court will not disturb such a determination absent a clear abuse of discretion. *State v. Strickland*, 94-0025 (La. 11/1/96), 683 So.2d 218, 229; see La. C.Cr.P. art. 712. Whether refusal

of a motion for continuance is justified depends on the circumstances of the case. Generally, the denial of a motion for continuance is not grounds for reversal absent a showing of specific prejudice. *State v. Roy*, 496 So.2d 583, 588 (La. App. 1st Cir. 1986), writ denied, 501 So.2d 228 (La. 1987).

The defendant contends in brief that his motion to continue should have been granted because the office of defense counsel had flooded. According to the defendant, defense counsel's "office was down for some time as a result, and then the file had to be reconstructed." The defendant notes that, specifically, defense counsel was unable to have jailhouse phone calls and/or witness statements "transcribed" for trial. Defense counsel needed this evidence, the defendant asserts, for direct and impeachment evidence.

We note initially that defense counsel's motion to continue was not timely filed. She filed the written motion on February 1, 2017, and trial of the matter began on February 7, 2017. A motion for a continuance shall be in writing and it shall be filed at least seven days prior to the commencement of trial. See La. C.Cr.P. art. 707. We note further that in defense counsel's filed motion to continue, there is no mention at all of any flooding or of her having to reconstruct the file. The untimeliness issue notwithstanding, we see no reasons to disturb the trial court's ruling. The defendant has failed to show how he was prejudiced by the denial of the continuance.

The Public Defender's Office began representing the defendant on May 9, 2016. According to minute entries, court was cancelled on August 18, 2016 (due to flooding); and by October 13, 2016, court was convened to take up the defendant's case. As noted, trial did not begin until February 7, 2017.

At the February 6, 2017 hearing on the motion to continue, defense counsel informed the trial court that, while a few of the grounds for the motion "have now been mooted," she nevertheless sought a continuance because the CDs of witness

statements and the “voluminous jailhouse calls” had not been transcribed. Defense counsel conceded that while she had been provided discovery in June of the prior year (2016), as well as shortly thereafter, they had some “weather events that caused our office to flood out.” Once the office was up and running, they “had to reconstruct the file and start from scratch, which would have put us approximately [sic] September.”

Defense counsel possessed recordings of the witness statements and calls made by the defendant from jail about two months prior to the flood. Following the flood, and the time it took to “reconstruct the file,” defense counsel had those same recordings for another five months, prior to the start of trial. As the prosecutor noted at the hearing, “So you are looking at seven or eight months that they would have had an opportunity to transcribe before the trial date.” The trial court further noted that the State itself had never transcribed these recorded statements, and that defense counsel had ample opportunity to get the statements transcribed but, inexplicably, chose not to. Specifically, the trial court found that the recorded statements:

were made available within 60 days of the time that the homicide may have actually occurred and certainly from June until February of this year, there was ample time for that to have taken place.

It is further my understanding that the D.A. does not have transcripts of these statements. So it is not as if they have some advantage that the defense does not have and as I had indicated pursuant to our conversation, had the D.A. had those transcripts, I would have required them to provide a courtesy copy to you, but they in fact do not have them either. My appreciation is that the indication or the decision to get those transcribed did not occur until very recently.

Based on the fact that it was almost nine months ago that they became available, eight months ago I think is a better statement, I am not going to grant a continuance with respect to that matter and I don’t see any [undue] advantage or disadvantage to the defense. Had they thought they were critical, in preparation of their defense, they could have raised it prior to the timing of this motion[], more specifically when we had these hearings in January and a firm date was set and there was no mention of any of these reasons.

Based on the foregoing, the trial court did not abuse its discretion in denying the motion to continue. The defendant had the contents of the recorded statements and phone calls well before the start of trial; and he has made no showing of specific prejudice in his own decision not to have those recordings transcribed. See *State v. Jones*, 395 So.2d 751, 753 (La. 1981).

The assignment of error is without merit.

SENTENCING ERROR

Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error. See *State v. Price*, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-24 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

Whoever is found guilty of violating the provision that prohibits the possession of a firearm by a convicted felon shall be imprisoned at hard labor for not less than ten nor more than twenty years,¹ without benefit of probation, parole, or suspension of sentence, and be fined not less than one thousand dollars nor more than five thousand dollars. La. R.S. 14:95.1(B). At the sentencing hearing, the trial court failed to impose the mandatory fine.² Accordingly, the defendant's sentence is illegally lenient. Since the sentencing error, however, is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See *Price*, 952 So.2d at 123-25.

CONVICTIONS AND SENTENCES AFFIRMED.

¹ As amended by 2017 La. Acts No. 281, § 1, the new sentencing provision is not less than five nor more than twenty years.

² The minutes also reflect no fine was imposed.