

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 KA 0086

STATE OF LOUISIANA

VERSUS

KEVIN SHEPPARD

Judgment Rendered: SEP 21 2018

Handwritten signatures: "Ry", "akp", "MT".

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Docket Number 33,532

Honorable Thomas Kliebert, Jr., Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

GUIDRY, J.

The defendant, Kevin Sheppard, was charged by grand jury indictment with second degree murder, a violation of La R.S. 14:30.1. He entered a plea of not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. He was then sentenced to a term of life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant filed a motion to reconsider sentence, which the district court denied. He now appeals, alleging two counseled assignments of error and one pro se assignment of error. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On December 24, 2014, the defendant, Michael Lomas, brothers Jacob and Joshua Perez, and the victim, Lewis Sanchez,¹ were sitting inside of Lomas's girlfriend's SUV in Ascension Parish when Lomas and Joshua began arguing over a past debt for drugs. During their argument, Joshua stated, "f*** everybody." Thereafter, the defendant, who was sitting in the front passenger's seat, turned around and fired multiple shots into the backseat, hitting both Sanchez and Joshua, who were sitting in the backseat on the driver's side and middle seat, respectively. Jacob contacted 911. The defendant fled the scene in the SUV with Lomas driving. After they stopped at another location, the defendant drove the SUV to the levee in Carville and set it on fire. He then walked to his brother's apartment, which was nearby, and fell asleep. The following morning, he turned himself in after discovering via Facebook that he was wanted in connection with the murder. He initially denied involvement in the shooting and told detectives that he was with a female during the incident. At trial, the defendant testified that he originally lied to detectives about being with a female that night, but although he was at the scene,

¹ Sanchez's first name is spelled "Louis" in the trial transcript.

he was not involved in the shooting. The defendant claimed that he was walking around when he heard the gunfire. He further claimed that Lomas told him that someone had shot at him and that Lomas asked him to help get rid of the SUV, because he would not be able to return it to his girlfriend in that condition. At trial, Lomas and the Perez brothers testified that it was the defendant who fired the shots that injured Jacob and killed Sanchez.

NON-UNANIMOUS JURY VERDICT

In related counseled assignments of error, the defendant argues that the district court erred in denying his request for a jury instruction that the jury's verdict should be unanimous and in accepting the non-unanimous verdict as a legal one. Specifically, the defendant contends that the non-unanimous jury verdicts allowed by Article I, Section 17 of the Louisiana Constitution and La. C.Cr.P. art. 782 violate the Louisiana Constitution and both the Sixth and Fourteenth Amendments to the United States Constitution.

The State argues in its brief that the defendant failed to preserve these assignments of error for review. It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the district court below. A party must raise the unconstitutionality in the district court, the unconstitutionality must be specially pleaded, and the grounds outlining the basis of unconstitutionality must be particularized. See State v. Hatton, 07-2377, p. 14 (La. 7/1/08), 985 So. 2d 709, 718-719. Contrary to the State's assertion, it appears that the defendant properly preserved this issue for appellate review. Defense counsel noted that it was raising "the normal 10 to 2 verdict objection" and then clarified, "we would object to the non-unanimous verdict structure that's in Louisiana law. . . . It violates [the defendant's] constitutional rights, Your Honor." In arguing his motion for post-verdict judgment of acquittal, defense counsel again raised the non-unanimous jury verdict

issue, noting, “this was a 10 to 2 verdict, and . . . we’re one of only two states left in the country that sends people to jail for life based on those types of verdicts.”

The crime of second degree murder is punishable by life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. See La. R.S. 14:30.1. Louisiana Constitution article I, Section 17A and La. C.Cr.P. art. 782(A) 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,² 406 U.S. 404, 413-14, 92 S. Ct. 1628, 1634, 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.

In State v. Bertrand, 08-2215 (La. 3/17/09), 6 So. 3d 738, the Louisiana Supreme Court held non-unanimous jury verdicts were not unconstitutional. It noted that La. C.Cr.P. art. 782 “withstands constitutional scrutiny.” As further noted, the Court was “not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court’s still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned.” Bertrand, 08-2215 at p. 8, 6 So. 3d at 743. Relying on Bertrand, the Fourth Circuit Court of Appeal upheld the constitutionality of non-unanimous jury verdicts in non-capital felony cases in State v. Barbour, 09-1258 (La. App. 4th Cir. 3/24/10), 35 So. 3d 1142, writ denied, 10-0934 (La. 11/19/10), 49 So. 3d 396. The United States Supreme Court denied certiorari in Barbour, thereby declining to

² Oregon’s non-unanimous jury verdict provision was challenged in Apodaca v. Johnson v. Louisiana. 406 U.S. 356, 92 S. Ct. 1620, 32 L.Ed.2d 152 (1972), decided with Apodaca, upheld Louisiana’s then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

address the issue of non-unanimous jury verdicts. Barbour v. Louisiana, 562 U.S. 1217, 131 S. Ct. 1477, 179 L.Ed.2d 302 (2011).

The defendant's reliance on the jurisprudential developments by the United States Supreme Court in McDonald v. City of Chicago, Ill., 561 U.S. 742, 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010) is misplaced. The McDonald Court, while holding that the Second Amendment right to keep and bear arms is fully applicable to the States through the Fourteenth Amendment, did nothing to alter the well-established jurisprudence holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials. See McDonald, 130 S. Ct. at 3035 n.14. The McDonald Court specifically stated that, although the Sixth Amendment requires unanimous jury verdicts in federal criminal trials, it does not require unanimous jury verdicts in state criminal trials. See McDonald, 130 S. Ct. at 3035 n.14; State v. Bishop, 10-1840, p. 11 (La. App. 1st Cir. 6/10/11), 68 So. 3d 1197, 1205, writ denied, 11-1530 (La. 12/16/11), 76 So. 3d 1203. Moreover, the defendant's argument challenging the constitutionality of non-unanimous jury verdicts has been repeatedly rejected by this court. See State v. Huey, 13-1227, p. 9 (La. App. 1st Cir. 2/18/14), 142 So. 3d 27, 33, writ denied, 14-0535 (La. 10/3/14), 149 So. 3d 795, cert. denied, ____ U.S. ____, 135 S. Ct. 1507, 191 L.Ed.2d 443 (2015); State v. Smith, 06-0820, p. 16 (La. App. 1st Cir. 12/28/06), 952 So. 2d 1, 23-24, writ denied, 07-0211 (La. 9/28/07), 964 So. 2d 352; State v. Caples, 05-2517, pp. 15-16 (La. App. 1st Cir. 6/9/06), 938 So. 2d 147, 156-57, writ denied, 06-2466 (La. 4/27/07), 955 So. 2d 684.

The Bertrand Court found that a non-unanimous twelve-person jury verdict is constitutional and that La. C.Cr.P. art. 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. Bertrand, 08-2215 at p. 8, 6 So. 3d at 743. Regarding the equal protection argument that such verdicts have an insidious racial component, the Bertrand Court noted that the issue had already been decided as

meritless by a majority of the United States Supreme Court in Apodaca. Bertrand, 08-2215 at p. 8, 6 So. 3d at 743. While Apodaca was a plurality rather than a majority decision, the United States Supreme Court, as well as other courts, have cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. Bertrand, 08-2215 at pp. 6-7, 6 So. 3d at 742-43. Thus, La. C.Cr.P. art. 782(A) is not unconstitutional and, therefore, not in violation of the defendant's constitutional rights. See State v. Hammond, 12-1559, p. 4 (La. App. 1st Cir. 3/25/13), 115 So. 3d 513, 515, writ denied, 13-0887 (La. 11/8/13), 125 So. 3d 442, cert. denied, 572 U.S. 1090, 134 S. Ct. 1939, 188 L.Ed.2d 965 (2014). Considering the foregoing, these assignments of error lack merit.

PROSECUTORIAL MISCONDUCT

In his sole pro se assignment of error, the defendant argues the State was guilty of prosecutorial misconduct for leading witnesses, testifying as a witness, and “improperly influenc[ing] the minds of the jury to only pointing the finger at [the defendant].”

Even when the prosecutor’s statements and actions are excessive and improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have seen the evidence and heard the arguments. State v. Bridgewater, 00-1529, pp. 31-32 (La. 1/15/02), 823 So. 2d 877, 902, cert. denied, 537 U.S. 1227, 123 S. Ct. 1266, 154 L.Ed.2d 1089 (2003). The touchstone of Due Process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Consequently, the aim of Due Process is not punishment of society for the misdeeds of the prosecutor, but avoidance of an unfair trial to the accused. While a prosecutor should prosecute with “earnestness and vigor” and “may strike hard blows,” he is “not at liberty to strike foul ones.” State v. Kitts, 17-0777, p. 43 (La. App. 1st Cir. 5/10/18), ___ So. 3d ___, ___,

2018 WL 2172726 at *19 (quoting Berger v. U.S., 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed. 1314 (1935)).

Louisiana Code of Criminal Procedure article 771, in pertinent part, provides that upon request of the defense, the court shall promptly admonish the jury to disregard a remark or comment made during the trial when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant in the mind of the jury when the remark is made by the district attorney and is not within the scope of La. C.Cr.P. art. 770. On motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial. A mistrial under La. C.Cr.P. art. 771, however, is at the trial court's discretion and should be granted only where the prosecutor's prejudicial remarks make it impossible for the defendant to obtain a fair trial. See Kitts, 17-0777 at p. 43, WL 2172726 at *19.

The defendant first references the following exchange between the State and Jacob Perez (the brother of Joshua Perez and the friend of Lewis Sanchez):

[State]: So your brother drank approximately half a bottle of peach Ciroc vodka by shots; is that right?"

[Jacob]: Yes, sir.

[State]: So now he's in the car arguing with the driver. Were they arguing about money or drugs? What [were] they arguing over?

[Defense]: Objection; leading.

The Court: Sustained.

We note the above colloquy referenced an argument between Joshua Perez and Lomas. The defendant was not referenced.

The defendant also references the following exchange between the State and the defense during the testimony of Jacob Perez:

[State]: The defendant shoots your brother, he's lying in the street dying --

[Defense]: Objection.

The Court: Sustained.

[State]: What's the objection?

[Defense]: He's testifying. [The State] is testifying. He's not asking a question.

The Court: Sustained.

Additionally, the defendant references the following:

[State]: And did you tell the jury the truth about what happened when your brother got shot and Mr. Louis got shot?

[Jacob]: Yes, I did.

[State]: And was it the truth that [the defendant] shot your brother and Mr. Louis.

[Defense]: Objection, Judge, it's up to the jury.

[State]: Was it the truth?

[Defense]: Judge, objection.

[Jacob]: Yeah.

The defendant also references the following exchanges between the State and Lomas:

[State]: Was Josh still arguing?

[Lomas]: Yes, sir.

[State]: Do you know why [the defendant] shot him?

[Lomas]: No, sir. I believe --

[Defense]: Objection, Judge, speculation.

[State]: I mean did [the defendant] say anything before he shot or he just -- tell the jury what he did. He just reached back there and started shooting?

[Defense]: Objection, Judge, he's leading.

The Court: Sustained.

* * *

[State]: And what happened to Mr. Louis when [the defendant] shot?

[Lomas]: I don't know exactly what happened but I got out the car so I didn't know until way later what happened to Mr. Louis.

[State]: So you didn't immediately know –

[Lomas]: No, sir.

[State]: -- how many bullets hit how many people; is that right?

[Lomas]: Yes, sir.

[State]: You just knew [the defendant] shot at least into the back of the car, right?

[Defense]: Objection, Judge, he's testifying.

[State]: I'm just asking him tell us what you knew.

[Lomas]: Yes, sir.

[State]: Tell us. Say it.

[Defense]: Asked and answered already.

[Lomas]: I seen [the defendant] shoot in the back seat.

[State]: And as a result, the next thing you know Mr. Louis was dead in the back seat, right?

[Defense]: Objection, Judge, leading.

[Lomas]: No, sir.

The Court: Don't lead him.

[State]: And after you saw [the defendant] shoot in the back seat what did you observe with Mr. Louis?

[Lomas]: I didn't see Mr. Louis. I didn't know where he was. I ran.

According credit to the good sense and fair mindedness of the jurors, we find no reversible error due to the alleged prosecutorial misconduct in this case. Prejudice, if any, to the defendant from the alleged improper questions was mitigated. Many of the defense objections to the State questions were sustained. Further, independently of the challenged questions, the State presented direct

testimony from Jacob Perez that the defendant shot Sanchez, from Joshua Perez that the defendant shot him four times from the front seat of the vehicle, and from Lomas that the defendant shot Joshua Perez and Sanchez. We also note that following the alleged improper questions, the defense neither requested an admonition nor moved for a mistrial. In any event, there would have been no basis to grant a mistrial because the challenged comments did not make it impossible for the defendant to obtain a fair trial.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.