

STATE OF LOUISIANA  
COURT OF APPEAL  
FIRST CIRCUIT

NO. 2019 KA 0409R

STATE OF LOUISIANA  
VERSUS

KIRBY R. THOMAS

Judgment Rendered: DEC 30 2020

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On Appeal from the  
23rd Judicial District Court  
In and for the Parish of Assumption  
State of Louisiana  
Trial Court No. 17-123

Honorable Jason Verdigets, Judge Presiding

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BEFORE: HIGGINBOTHAM, PENZATO, AND LANIER, JJ.

*TMH  
WIL III by TMH  
akp*

## HIGGINBOTHAM, J.

Defendant, Kirby R. Thomas, was charged by bill of indictment with four separate offenses: counts one and two for possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A); count three for attempted second degree murder, violations of La. R.S. 14:27 and La. R.S. 14:30.1; and count four for being a convicted felon in possession of a firearm, a violation of La. R.S. 14:95.1. Before trial commenced, the State amended count one to possession of more than 28 grams, but fewer than 200 grams, of cocaine, a violation of La. R.S. 40:967(C), and dismissed count two. Defendant pled not guilty to all counts. After a trial by jury, defendant was found guilty as charged of amended count one and count four, and guilty of the responsive offense of attempted manslaughter, violations of La. R.S. 14:27 and La. R.S. 14:31, for count three.<sup>1</sup> The verdicts for counts one and four were eleven-to-one, with a unanimous verdict on count three. The trial court imposed a term of five years imprisonment at hard labor on count one, to be served concurrently with consecutive terms of twenty and ten years imprisonment at hard labor for counts three and four respectively.

This court affirmed defendant's convictions on all three counts and his sentences on counts one and three on appeal, but remanded the conviction on count four for resentencing. **State v. Thomas**, 2019-0409 (La. App. 1st Cir. 10/25/19), 289 So.3d 1030, 1045. However, the Louisiana Supreme Court granted defendant's writ application and remanded the case to this court "to conduct a new error patent review in light of **Ramos v. Louisiana** [, 590 U.S. \_\_\_, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020)]." **State v. Thomas**, 2019-01819 (La. 6/22/20), 297 So.3d 727 (per curiam). The supreme court noted the remand order "does not pertain to defendant's

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<sup>1</sup> The charged counts were listed in a different order on the jury verdict form, but for purposes of this opinion, we will refer to the charged counts as listed in the indictment.

conviction for [count three] attempted manslaughter, which was by unanimous verdict” and otherwise denied the application. **Id.**

In the trial court, at the conclusion of the State’s case, defendant objected to being subject to a non-unanimous jury verdict, but did not do so with any specificity or alleging any specific constitutional ground. On error patent review, the minutes reveal the jury verdicts on counts one and four were eleven-to-one.<sup>2</sup>

In **Ramos**, 140 S.Ct. at 1397, the United States Supreme Court overruled **Apodaca v. Oregon**,<sup>3</sup> 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) and held that the right to a jury trial under the Sixth Amendment of the United States Constitution, incorporated against the States by way of the Fourteenth Amendment of the United States Constitution, requires a unanimous verdict to convict a defendant of a serious offense. The **Ramos** Court further noted that its ruling applied to those defendants convicted of felonies by non-unanimous verdicts whose cases are still pending on direct appeal. **Ramos**, 140 S.Ct. at 1406. Thus, given the **Ramos** Court’s declaration of the unconstitutionality of non-unanimous jury verdicts, defendant’s convictions and sentences on counts one and four, which are based on non-unanimous jury verdicts, must be vacated.

Finding that defendant’s convictions and sentences on counts one and four must be vacated and set aside, we remand those two counts alone for a new trial.

**CONVICTIONS AND SENTENCES FOR COUNT ONE, POSSESSION OF COCAINE, AND COUNT FOUR, FELON IN POSSESSION OF A FIREARM, ARE VACATED AND SET ASIDE. REMANDED TO THE DISTRICT COURT FOR A NEW TRIAL ON ONLY THOSE TWO COUNTS.**

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<sup>2</sup> Defendant also raised this claim in his original appeal.

<sup>3</sup> Oregon’s non-unanimous jury verdict provision of its state constitution was challenged in **Apodaca. 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 in criminal cases.