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| **STATE OF LOUISIANA** | * | **NO. 2000-KA-2291** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **SHELIA LITTLE** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 414-505, SECTION "C"
HONORABLE SHARON K. HUNTER, JUDGE
* * * * * *
**JAMES F. MC KAY, III**
**JUDGE**
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

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**CONVICTION AND SENTENCE VACATED AND REMANDED**

**STATEMENT OF THE CASE**

On May 18, 2000, the State filed a bill of information charging the defendant-appellant Sheila Little with one count of violating La. R.S. 14:89 (A)(2) relative to the solicitation of another with the intent to engage in unnatural carnal copulation for compensation. The defendant entered a not guilty plea on May 23, 2000, after being arraigned and advised of her right to a judge or jury trial. On June 13, 2000, the defendant filed a motion to quash the bill of information which was denied. Her motion for a stay was also denied. The defendant then waived her right to a jury trial and proceeded with a judge trial. The court found the defendant guilty of attempted crime against nature. The defendant was sentenced on June 20, 2000, to thirteen months at hard labor. The State then filed a multiple bill charging her to be a third offender. She entered a plea of guilty to the multiple bill and was sentenced to twenty months at hard labor after the trial court vacated the original sentence. The defendant's motion for an appeal was granted. **STATEMENT OF THE FACTS**

On May 2, 2000, at approximately 1:00 a.m., Detective Vincent

George of the New Orleans Police Department vice section was working the area around Derbigny and Dumaine. Detective George was in an unmarked vehicle. As he drove by a house, he saw the defendant sitting on the steps. She smiled at him, so he decided investigate. The detective pulled his vehicle over approximately fifteen feet past the house; the defendant walked over and asked him what he wanted. She entered his vehicle, and they drove around discussing locations. Finally, the defendant suggested they go back to the front of her house, which the detective did. The two engaged in a conversation which included the defendant asking the detective what he was going to pay while he asked her how much she wanted. The defendant refused to give a verbal answer, and instead held up two fingers. The detective asked if she meant twenty dollars; the defendant gave a non-verbal acknowledgment. When the detective asked what he would get for the money, the defendant told him she would not say because the last time she talked about things like that, she was arrested. According to Detective George, the defendant made a hand motion towards her mouth; he asked if she meant oral sex; and she gave an affirmative response. The detective then gave his pre-arranged signal to the take-down team, which arrived and conducted an apparent traffic stop. The defendant was arrested.

During cross-examination at trial, the detective was asked about the

defendant's name and address shown on the police report which apparently did not match the defendant's name on the bill of information. Detective George indicated that the name he used was the one the defendant gave the officer who formally arrested her. He stated that a different name may be discovered at booking.

The defendant testified on her own behalf. She stated that her name is Sheila Magee and that she resides at 915 N. Claiborne. She admitted that she had two prior convictions for crime against nature. According to the defendant, she was walking from her house when a man, Detective George, pulled up and asked her how much she charged. The defendant said that he offered her forty dollars for "head" but she said no because the last time she heard "stuff" like that, she went to jail. As she was walking off, the police car came around the corner. She was stopped and handcuffed. The police pretended to search Detective George and told the defendant they were going to run the license plate of his car to see if it was stolen. They came back and told her she was under arrest for crime against nature.

**ERRORS PATENT**

A review of the record for errors patent reveals none except for the issue of the non-responsiveness of the verdict which is raised as the appellant's sole assignment of error and is discussed below.

**DISCUSSION**

The appellant argues that the crime for which the defendant was convicted, attempted solicitation for crime against nature, cannot be a responsive verdict to the crime charged because solicitation itself is an inchoate offense. She further argues that, because the return of a responsive verdict is an implicit acquittal on the greater charge, then a retrial is barred under double jeopardy.

A procedural bar to this claim was found in State v. Bullock, 99-2091 (La. App. 4 Cir. 6/14/00), 767 So. 2d 124. There, because the defendant did not object to the inclusion of attempt as a responsive verdict and actually argued for its inclusion when the State objected, and the defendant did not include the issue in the motion in arrest of judgment he filed, this Court refused to consider the issue when raised by appellate counsel. Similarly, in the instant case, there was no objection when the trial court found the defendant guilty of attempted crime against nature, nor did the defendant file any motion in arrest of judgment. Although here the State did not object to the verdict either, as it had in Bullock, the defense remained absolutely silent. Nevertheless, the appellant contends that a non-responsive verdict is an error patent on the face of the record which does not require a contemporaneous objection, citing State v. Mayeux, 498 So. 2d 701 (La.

1986).

The appellant is correct that the court in Mayeux found that a non-responsive verdict is an error patent on the face of the record which does not require an objection. In Mayeux, the defendant was charged with aggravated battery and convicted of attempted aggravated battery. On appeal, the Third Circuit found that the verdict was invalid because attempted aggravated battery was not listed in La. C.Cr.P. art. 814(A)(14). The appellate court ordered the defendant discharged on the basis that the return of the erroneous responsive verdict constituted an acquittal on the original charge. State v. Mayeux, 485 So. 2d 256 (La. App. 3rd Cir. 1986). The State sought writs in the Supreme Court. That court found that retrial of the defendant was not barred by the principal of double jeopardy because the crime for which he was convicted, attempted aggravated battery, was an unspecified crime in Louisiana and could not have the same effect as a conviction for aggravated assault, which is a specified crime albeit not a listed responsive verdict under La. C.Cr.P. art. 814. Mayeux, 498 So. 2d at 703. The court further opined that, "the fifth Amendment does not bar retrial when a jury's verdict, containing a nonwaivable defect, must be set aside by an appellate court. The jury rendered an illegal verdict. . . . It amounted simply to conviction of a non-crime. As such it could operate

neither as a conviction nor acquittal." Id. at 705.

This Court relied on Mayeux, fully discussing its subsequent history and application, in State v. Nazar, pp. 3-5, 96-0175 (La. App. 4 Cir. 5/22/96), 675 So. 2d 780, 782-83:

> On retrial the defendant was convicted as charged and his conviction and sentence were affirmed on appeal. State v. Mayeux, 526 So. 2d 1243 (La. App. 3rd Cir. 1988), writs denied, 531 So. 2d 262 (La. 1988). The defendant sought habeas corpus relief in federal district court which reversed the conviction based on double jeopardy, Mayeux v. Belt, 737 F.Supp. at 960-61. The U.S. District Court concluded that the jury in the first trial was given a full opportunity to return a verdict on the greater charge, but instead found the defendant guilty of attempt. The court had instructed the jury that a verdict of attempt could be returned if the jurors were not convinced that Mayeux was guilty of aggravated battery. The jury acquitted Mayeux of aggravated battery and the second trial unconstitutionally put him in jeopardy a second time. Although the verdict was invalid, there was no reason why it could not operate as an acquittal of the charge of aggravated battery. Id.
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> Mayeux was discussed recently in State v. Campbell, 94-1268 (La. App. 3 Cir. 5/3/95), 657 So. 2d 152, affirmed in part and reversed in part, 95-1409 (La. 3/22/96), 1996 WL 125998 [670 So. 2d 1212]. There the defendants were charged with jury tampering and convicted of attempted jury tampering. The Third Circuit relied on the federal district court opinion in Mayeux, 737 F.Supp. at 957, and reversed the convictions, entered acquittals, and discharged the defendants. The Third Circuit declared: "While we would prefer to follow the ruling of the Louisiana Supreme Court in State v. Mayeux, supra, we refuse to waste the limited judicial resources of this state in vain and futile acts." Id. at 156.
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> The Louisiana Supreme Court granted the State's application. The Court noted La. C.Cr.P. art. 598's double

> jeopardy provision that a defendant who is found guilty of a lesser degree of the offense cannot thereafter be tried for that offense. It noted its holding in Mayeux and the federal court decision which subsequently overturned Mayeux's second conviction after retrial on double jeopardy grounds. The Court declared: "We need not reconsider here the continuing validity of State v. Mayeux in light of its subsequent history." 1996 WL 125998. The Supreme Court distinguished Campbell, which involved a verdict of attempted jury tampering, which is not a non-crime under Louisiana law. According to the elements of the crime, attempted jury tampering is jury tampering. The Court did not state that the jury's return of the "lesser" verdict of attempt necessarily or implicitly acquitted the defendants of any material element of the charged crime. The Court concluded that the trial court's error in listing the responsive verdicts rendered the jury's verdicts "insolubly ambiguous" and due to the confusion the jury verdicts did not clearly convict or acquit the defendants. The Court affirmed the reversal of the defendants' convictions and sentences, but vacated the Third Circuit's order discharging the defendants and remanded the case to the district court for further proceedings. Id.
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> The Louisiana Supreme Court sidestepped a discussion of its Mayeux opinion which remains binding on this Court. Therefore, the trial court erred by changing its verdict to guilty of simple battery. The original verdict of guilty of attempted simple battery is a non-crime and invalid (just as Mayeux's guilty verdict of attempted aggravated battery was a [sic] for a non-crime). Although this Court finds the reasoning of the federal district court in Mayeux v. Belt, 737 F.Supp. at 957, persuasive, we follow State v. Mayeux, 498 So. 2d at 701, which holds that the verdict of guilty of a non-crime cannot serve as an acquittal or a conviction for double jeopardy purposes.

See also State v. Self, 2000-633 (La. App. 3 Cir. 11/14/00), 772 So. 2d 337.

The appellant cites State v. Baxley, 93-2159 (La. 2/28/94), 633 So. 2d 142, in which the crime against nature statute was attacked as

unconstitutional on various grounds. The defendant had been charged with violating La. R.S. 14:89(A)(2), solicitation, and the Supreme Court found that the legislature could constitutionally prohibit public, commercial sexual conduct. The defendant also argued that he could be convicted of attempted crime against nature as a responsive verdict if the trial court found that he merely discussed uncompensated fellatio with the undercover officer. The Court noted that the trial court had apparently accepted this argument; the Supreme Court then stated:

> This reasoning is erroneous. LSA-R.S. 14:89(A)(1) prohibits a person from engaging in certain sexual conduct. Mere discussion or solicitation without a financial aspect cannot constitute an attempt to engage in conduct prohibited by LSA-R.S. 14:89(A)(1). Under LSA-R.S. 14:27, a person is guilty of an attempted crime if the person, "having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object." Thus, an act furthering a crime against nature is required before a court can find a defendant guilty of attempted crime against nature under LSA-R.S. 14:89(A)(1). Solicitation alone does not constitute an attempt to commit a crime. See LSA-R.S. 14:28 Comments.
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> It is generally recognized by legal authorities and other jurisdictions that solicitation of another to commit a crime is only preparatory to the crime and not an overt act which would support a conviction for attempt of the crime solicited. Solicitation is preparation rather than perpetration. To call solicitation an attempt is to delete the overt act element necessary for an attempt. [Citations omitted.]

Baxley, pp. 7-8, 633 So. 2d 145.

Considering Baxley, it appears that the trial court should not have returned a

verdict of attempted solicitation for crime against nature as such the crime does not exist. Furthermore, a contemporaneous objection is not required to preserve the error of a non-responsive verdict for a crime that does not exist. This case is remanded to the trial court for a new trial on the original charge pursuant to State v. Mayeux, which held the verdict of guilty of a non-crime cannot serve as an acquittal or a conviction for double jeopardy purposes. Accordingly, the defendant's conviction and sentence is vacated and the matter is remanded to the trial court for a trial on the original charge.

**CONVICTION AND SENTENCE VACATED AND REMANDED**