

STATE OF LOUISIANA

*

NO. 2001-KA-2351

VERSUS

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COURT OF APPEAL

CARL M. FOSTER

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-728, SECTION "H"
Honorable Camille Buras, Judge

Charles R. Jones
Judge

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones,
and Judge David S. Gorbaty)

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AFFIRMED

The defendant, Carl Foster, appeals his sentence and conviction of ninety-nine years on nine counts of armed robbery without the benefit of probation, parole or suspension of sentence, and twenty years for one count of attempted manslaughter. We affirm.

Statement of the Case

Foster was charged by bill of information with nine counts of armed robbery and one count of attempted second-degree murder in violation of La. R.S. 14:64 and 14:(27) 30.1. He was tried on nine counts of armed robbery and one count of attempted second-degree murder. The ten offenses, with nine different victims, were consolidated. A twelve-person jury found him guilty as charged and he was sentenced to ninety-nine years imprisonment on each armed robbery count without the benefit of probation, parole or suspension of sentence, and twenty years imprisonment for the attempted manslaughter count. On the same day the district court denied his motion to reconsider sentence and granted his motion for appeal.

After a multiple bill hearing the district court vacated its previous

sentence on seven of the nine counts of armed robbery and re-sentenced Foster as a second felony offender to ninety-nine years imprisonment on each count again without the benefits of probation, parole or suspension of sentence. Again, the district court denied Foster's motion to reconsider sentence. This timely appeal follows.

Statement of Facts

On June 2, 2000, Foster was waiting to pick up his children at their mother's home located at 3206 Second Street in New Orleans, when police officers entered the residence and arrested him on an outstanding warrant. The arrest occurred after Officer Bryant Louis of the New Orleans Police Department's Sixth District Task Force happened to be patrolling the area and saw Foster, whom he recognized as the suspect in a series of armed robberies, entering the residence.

Herbert Davis was robbed and shot in front of his residence at 8710 Heaton Street in New Orleans shortly after 10:00 p.m. on May 7, 2000. Mr. Davis had just arrived home from work and was getting his belongings out of his vehicle when Foster approached him with a gun in his hand. Mr. Davis struggled with Foster and the gun discharged. Foster then summoned his accomplice, who had been driving the car, to join the struggle with Mr. Davis. After the second man joined the struggle Mr. Davis fell to the ground,

and the gun discharged hitting Mr. Davis in the arm. Mr. Davis' wife heard the shots and went to her front door. Mrs. Davis did not see her husband, but she saw Foster going through her husband's things. Mrs. Davis told Foster that she was going to call the police, and he responded, "I don't care who you call." Foster took four hundred dollars in cash, checks from Mr. Davis' tenants for rent, and blank checks. The two men then drove away in an older model Cadillac. Mr. Davis was hospitalized and operated on for his injury. On June 12, 2000, after giving police a description of the suspects, Mr. and Mrs. Davis were shown a photographic lineup by Detective Chris Billiot and each separately chose the photograph of Foster.

Michael Verrett, a fireman who worked part-time for a pool cleaning service, was robbed on May 17, 2000, at approximately 1:15 p.m. after he had just finished cleaning a pool on New York Street in New Orleans. Mr. Verrett was walking to his vehicle when a car stopped next to him. With gun in hand Foster demanded, "Give me your wallet." Mr. Verrett complied and walked away as Foster instructed him. On June 19, 2000, Detective Billiot showed Mr. Verrett a photographic lineup from which he chose Foster's photograph as the person who robbed him at gunpoint. At trial Mr. Verret identified his wallet that had been recovered from Foster.

Mimi Abbott and Liz McCarthy were robbed on May 30, 2000, at

approximately 8:15 a.m., as the two women stood in the driveway of a home in the Garden District, which the Abbotts were planning to purchase from the McCarthys. Foster walked up to the women and demanded that they give him what they had. Mrs. McCarthy gave him her purse. Mrs. Abbott raised her hands indicating she had nothing to give. Foster saw that Mrs. Abbott had a camera on her shoulder and he tried to grab it. Mrs. Abbott told him that she would give him the camera, and as she tried to take the camera off of her shoulder he asked her, “Do you want me to shoot you in the fucking face?” Mrs. Abbott gave Foster the camera, and he began to walk away. As he walked away he took a canvas bag Mrs. Abbott left sitting on the storm drain which contained film, papers, and Mrs. Abbott’s checkbook. The same night of the robbery Lt. Christy Williams of the New Orleans Police Department went to Mrs. Abbott’s home and showed her a photographic lineup. Mrs. Abbott chose Foster’s photo from the lineup. At trial Mrs. Abbott identified her checkbook, which had been recovered from Foster. Mrs. McCarthy did not testify at trial.

Brandy Bazile, an occupational therapist at Touro Infirmary, was robbed on May 31, 2000, at approximately 7:15 a.m., as she exited her vehicle in the employee parking lot at Aline and Chestnut Streets. Foster approached Ms. Bazile and said, “Excuse me ma’am”, he then took out a

gun from under his shirt and demanded, "Give me your purse." Ms. Bazile asked Foster not to hurt her, and he responded by saying, "I'm not just give me your purse." Ms. Bazile tossed her purse into an empty parking space. When Foster retrieved the purse Ms. Bazile ran behind her vehicle and activated the alarm. Foster ran away after retrieving the purse. On June 5, 2000, Ms. Bazile went to the Second District police station, where Detective Ronald Livingston showed her a photographic lineup, from which she chose the Foster's photograph as the person who robbed her. At trial, Ms. Bazile identified several credit cards and a silver ring, which had been in her purse at the time she was robbed.

Anitra Riley was robbed on June 2, 2000, at approximately 7:50 p.m. in the parking lot of Lambeth House, at 150 Broadway Avenue, where she worked as an accountant. Ms. Riley noticed a black, four-door car pull into a parking spot three or four spaces away from her vehicle. As Ms. Riley exited her vehicle Foster approached her with a gun in his hand and demanded her purse. Ms. Riley refused to give him her purse, and he said, "Don't make me kill you." Ms. Riley gave Foster her purse. On the same day of the robbery Ms. Riley went to the Second District police station, where Detective Livingston showed her a photographic lineup, and she chose Foster as the person who robbed her. Ms. Riley identified her wallet,

pager, keys and insurance card all of which had been recovered from Foster at the time of trial.

Johnny Fralick and his seventy-year old mother, Caroline Landry, were robbed on June 2, 2000, between 9:00 a.m. and 9:30 a.m., in front of Ms. Landry's residence in the 5100 block of Tchoupitoulas Street. Mr. Fralick and Mrs. Landry had just returned from the bank and grocery store when Foster approached them carrying a gun. He demanded that Mrs. Landry give him an envelope of money she was holding in her hand. Mrs. Landry refused, and Foster cocked the gun as if he was going to shoot her. Mrs. Landry turned over the envelope containing four hundred and forty dollars, and Mr. Fralick gave Foster one hundred thirty-one dollars in cash. On the same day of the robbery Mr. Fralick and Mrs. Landry went to the Second District police station where Detective Livingston showed them a photographic lineup. Mr. Fralick selected Foster's photograph as the person who robbed them.

William Ermon, Jr., was robbed on June 2, 2000, at approximately 12:45 p.m. in his yard at 7926 Mullet Street, in New Orleans East. Mr. Ermon had just returned from the bank after cashing a check. As Mr. Ermon stood in his driveway he saw Foster approaching him holding a gun. Foster then demanded Mr. Ermon's money, and the victim gave Foster his bank

envelope containing four hundred thirty dollars and an additional ten dollars in his wallet. Mr. Ermon's sister, who had been sitting under a nearby tree, approached the two men and asked what was wrong. Foster pointed the gun at her and said, "This is what's wrong" and then walked away. On June 12, 2000, Mr. Ermon was shown a photographic lineup from which he selected Foster as the person who robbed him.

Officer Roderick Bardy of the New Orleans Police Department testified at trial that he participated in the arrest of Foster at the Second Street residence. After knocking on the front door of the residence and announcing their presence the officers entered the residence where they found Foster and another adult male and female. When Foster was searched pursuant to his arrest the officers found four hundred and eight dollars, a credit card in the name of Anitra Riley, and a key.

Detective Carl Thibadoux of the Sixth District testified at trial that he also participated in the arrest of Foster. He further testified that he conducted a search of the residence on Second Street after Officer Clarence Mitchell obtained consent from Marion Shiloh, the lessee of the home. Detective Thibadoux testified that he found a gun, some keys, a picture of Foster, and Foster's drivers license underneath a bed in the home. The officer also impounded and searched the vehicle that Foster was driving, and

when it was searched the officers found a set of keys, a pager, and a checkbook with the name of Anitra Riley on it.

Detective Billiot testified at trial that he prepared the photographic lineups shown to some of the Foster's victims.

Detective Ronald Livingston testified at trial that he conducted the follow-up investigation relative to the robberies of Anitra Riley, Brandy Bazile, and Johnny Fralick and Caroline Landry. The Detective further testified that Mr. Fralick, Ms. Riley, and Ms. Bazile positively identified Foster from a photographic lineup.

Sgt. Lynn Fletcher of the New Orleans Police Department Sixth District Robbery Unit testified at trial that she participated in the arrest of Foster and the search of the Second Street residence. Sgt. Fletcher further testified that she found a wallet belonging to Michael Verrett with the trash in a large garbage bag in the backyard of the residence. Sgt. Fletcher also participated in a search of Foster's room at the Royal Hotel at 4950 Chef Menteur Highway. The search turned up three credit cards in the name of Brandy Bazile, a metal ring, and tax documents and receipts showing the name of Foster.

Lt. Christy Williams testified at trial that in June 2000, she was commander of the New Orleans Police Department Sixth District Robbery

Squad, and that she conducted an investigation into a series of armed robberies which occurred in the Second, Third, and Sixth Districts. Lt. Williams further testified that she compiled a photographic lineup for Mimi Abbott, who positively identified Foster. Lt. Williams testified that she spoke to Foster at the Sixth District station where he denied any involvement in any of the armed robberies. Lt. Williams obtained a search warrant for Foster's hotel room and was present when Sgt. Fletcher searched the room.

Marion Shiloh testified at trial that she knew Foster because he was the father of her grandchildren. Mrs. Shiloh further testified that Foster visited his children at her home two or three days a week, but he did not live there. Mrs. Shiloh further testified that she voluntarily consented to the police search of her home, and that she was surprised to know that the police found a loaded gun under the mattress in one of her bedroom.

Foster testified at trial on his own behalf denying any involvement in the crimes charged against him. He further testified that he was employed as a barber and as a carpenter's assistant. He testified that he lived with his sister and her husband, but he stayed at the Chef Menteur hotel temporarily due to an argument with his sister. Foster denied that the officers found evidence from the victims in his room. Additionally, Foster testified that he won twenty-three hundred dollars found in his hotel room at the casino.

Errors Patent

A review of the record reveals no errors patent.

Discussion

Assignment of Error No. 1:

In his first assignment of error, Foster argues that the district court abused its discretion by denying his motion to sever the ten counts against him and therefore, the denial of his motion was prejudicial and deprived him of a fair trial.

La.C.Cr.P. art. 493 provides that:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

La. C.Cr.P. art. 493.2 provides that:

Notwithstanding the provisions of Article 493, offenses in which punishment is necessarily confinement at hard labor may be charged in the same indictment or information with offenses in which the punishment may be confinement

at hard labor, provided that the joined offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Cases so joined shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

La. C.Cr.P. art. 495.1 provides that:

If it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires.

Generally, the trial court is vested with much discretion in its determination of whether to grant a motion to sever, and such a determination should be upheld in the absence of an abuse of that discretion.

State v. Brooks, 541 So.2d 801 (La. 1989).

If the evidence of the other crime would be admissible under *Prieur*, clearly the two charges may be joined without prejudice to the defendant. *State v. Jackson*, 99-2195, p.5 (La. App. 4 Cir. 10/6/99), 746 So.2d 638, 641, citing *State v. Dickinson*, 370 So.2d 557 (La. 1979).

In *State v. Jackson*, *supra*, citing *State v. Labuzan*, 480 So.2d 420, 422 (La. App. 4 Cir. 1985), quoting *State v. Washington*, 386 So.2d 1368 (La. 1980), we stated that determining whether prejudice may result from the joinder, the court should consider:

...whether the jury would be confused by the various counts; whether the jury would be able to segregate the various charges and evidence; whether the defendant could be confounded in presenting his various defenses; whether the crimes charged would be used by the jury to infer a criminal disposition and finally, whether, especially considering the nature of the charges, the charging of several crimes would make the jury hostile...

A defendant in any case bears a heavy burden of proof when alleging prejudicial joinder of offenses as grounds for a motion to sever. Factual, rather than conclusory, allegations are required. *State v. Davis*, 92-1623, p.9 (La.5/23/94), 637 So.2d 1012, 1019.

In the instant case, Foster argues that although some of the offenses can be characterized as signature crimes, the others vary dramatically. Four of the armed robberies took place in uptown New Orleans in the early morning hours, and the robberies took place in the victim's driveway or a parking lot. The other three robberies vary from the previous four and from

each other. One of the three occurred at night and involved an accomplice. In another the perpetrator remained in a vehicle during the robbery. The remaining robbery took place on the victim's property. Foster argues that the joinder of the offenses was prejudicial because there was no physical evidence to corroborate the eyewitness testimony in two of the non-signature crimes. Therefore, because there was a lack of physical evidence Foster avers the joinder of the offenses corroborated the eyewitness identifications. Additionally, Foster maintains that the joinder of the offenses permitted the jury to infer a criminal disposition and created hostility in the jury for him. We disagree.

In *State v. Jackson*, 99-2195 (La. App. 4 Cir. 10/6/99), 746 So.2d 638, the defendant was charged with one count of aggravated rape, five counts of aggravated kidnapping, five counts of armed robbery, and one count of aggravated crime against nature. The defendant sought severance of the counts arguing the incidents were distinct because the first seven counts related to the abduction of three women early in the morning; the crimes occurred within a span of twenty to thirty minutes and the defendant acted alone. The last four counts related to a late night kidnapping, and the crimes occurred from 1:00 a.m. to the early morning hours. Additionally, in one incident the defendant acted alone. The trial court agreed citing *State v.*

Hamilton, 364 So.2d 585 (La. 1978), and granted the defendant's motion for severance. However, this Court found that *Hamilton* interpreted a prevision version of La. C.Cr.P. art. 495.1 and that *State v. Celestine*, 452 So.2d 676, 680 (La. 1984), was applicable. *Celestine*, and later cases interpret the 1978 amended version of La. C.Cr.P. art. 495.1, which holds that there is no prejudice when the facts are simple and distinct and the jury can keep the evidence separate in the deliberations.

In the instant case it does not appear that the district court abused its broad discretion in denying Foster's motion to sever offenses. Though the facts of each offense varied slightly, the facts were simple and Foster does not claim he was confounded in presenting his defense. Additionally, in the instant case as in *Jackson*, the jury was given separate jury verdict sheets for each count. The jury was also instructed to consider the evidence for each count separately. This assignment of error is without merit.

Assignment of Error No. 2:

In his second assignment of error, Foster argues that the district court abused its discretion in denying the challenge of a potential juror for cause where the juror failed to indicate that she would not be able to deliberate each of the counts independently.

This Court in *State v. Flowers*, 2000-0513 p.4 (La. App. 4 Cir.

3/7/01), 782 So.2d 685, 689 citing *State v. Cross*, 93-1189, pp. 5-7 (La.

6/30/95), 658 So.2d 683,686-687, addressed the requirements for review of a

denial of a challenge for cause:

The La. Const. art. I Section 17 guarantees that “[t]he accused shall have the right to full voir dire examination of prospective jurors and the challenge jurors peremptorily. The number of challenges shall be fixed by law.” La.C.Cr.P. art. 799 provides the defendant in a death penalty case with twelve peremptory challenges. Therefore, when a defendant uses all of his peremptory challenges, a trial court’s erroneous ruling depriving him of one of his peremptory challenges constitutes a substantial violation of his constitutional and statutory rights, requiring reversal of the conviction and sentence. A defendant must object at the time of the ruling on the refusal to sustain a challenge for cause of a prospective juror. Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been reversible error warranting reversal of the conviction and sentence, defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all of his peremptory challenges. The trial court is vested with broad discretion in ruling on challenges for cause, and his ruling will be reversed only when a review of the entire voir

dire reveals the judge abused his discretion. (Citations omitted)

La. C.Cr.P. art.797 provides in part that:

The state or the defendant may challenge a juror for cause on the ground that:

(1) The juror lacks a qualification required by law;

(2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;

(3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;

(4) The juror will not accept the law as given to him by the court;

Foster argues that the exchange between the defense and potential juror Hattie Mae McGhee demonstrates that Ms. McGhee could not consider each count independently. The following exchange took place in open court:

Mr. Green: You feel like you can deliberate each count individually?

Ms. Storey: Yes.

Mr. Green: Allright [sic]. Ms. McGhee, what do you think ma'am?

Mrs. McGhee: I think that you can't have an opinion, you know, unless you know the evidence. You know, unless you heard what was being said or done.

Mr. Green: Right. You can't have an opinion as to whether he's guilty or not until you've heard evidence, right. My question is after you've heard the evidence, and you are sitting there deliberating, if you are not sure about whether he committed a crime in count one, are you going to be influenced to say, "He's probably guilty of count one just because there are nine other counts against him."

Ms. McGhee: Well, how could you judge that, you know, if you don't know with the nine counts, but you know the first count, you done heard that evidence. But you don't know about the nine counts. How can you form an opinion?

Mr. Green: Well, you are going to hear all the evidence at one time, okay? You are going to hear all the evidence about ten counts. Then you are going to go deliberate and you are probably going to start with count one, I would imagine. And when you deliberate count one, and I'm just asking you to assume with me for a moment, you just assume that in count one you are not sure whether he's guilty of that charge or not, are you going to say, "Well, even though they haven't really proven it, they have nine other charges against him, so he's probably guilty of something. I might as well find him guilty on this count?" Do you understand what I'm saying?

Ms. McGhee: I understand what you are saying.

Mr. Green: Okay.

Ms. McGhee: But do you understand what I'm saying? I cannot form an opinion, you know, only. You know, if you are telling me to judge one thing, and you got nine more other things, you got to go with one after another.

Mr. Green: Right. That's right, one at a time, one at a time.

Ms. McGhee: I can't form an opinion.

Mr. Green: All right [sic].

A review of the transcript of the voir dire proceeding reveals that the district judge admits she too thought Ms McGhee was saying she could not consider each count separately. However, the district judge found that once Ms. McGhee had an opportunity to explain that it appeared that she could consider the counts one by one. We find that the the transcript supports this finding. The district court did not abuse the liberal discretion allowed in ruling on challenges for cause. This assignment of error is without merit.

Assignment of Error No. 3:

In his third assignment of error Foster argues that the armed robbery sentences are excessive under the circumstances of this case.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment.

State v. Sepulvado, 367 So.2d 762 (La. 1979). A sentence is

unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the needless and purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. *State v. Labato*, 603 So.2d 739 (La. 1992).

Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Soco*, 441 So.2d 719 (La. 1983).

If adequate compliance with Article 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of his case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Quebedeaux*, 424 So.2d 1009 (La. 1982).

The trial judge is given wide discretion in imposing a sentence, and a sentence imposed within the statutory limits will not be deemed excessive in the absence of manifest abuse of discretion. *State v. Walker*, 96-112, p.4 (La. App.3 Cir. 6/5/96), 677 So.2d 532, 535, citing *State v. Howard*, 414 So.2d 1210 (La. 1982).

In *State v. Gordon*, 582 So.2d 285, (La. App. 1 Cir. 1991), the First

Circuit found the trial court was justified in imposing the maximum sentence of one hundred ninety-eight years for armed robbery upon the defendant being adjudicated a second felony offender.

Here, Foster was sentenced to ninety-nine years for each of his nine counts of armed robbery. A review of the transcript of the sentencing proceedings reveals that the district court considered Foster's prior felony conviction of illegal discharge of a weapon, as well as the fear, trauma, and shock conveyed by the testimony of the victims in determining the sentences imposed. Additionally, the sentences imposed fall within the statutorily mandated sentencing range. Therefore, Foster has failed to rebut the presumption that the sentences are constitutional. This assignment of error is without merit.

Decree

For the reasons stated herein, the convictions and sentences of the defendant, Carl Foster are hereby affirmed.

AFFIRMED