

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2003-KA-1643**  
**VERSUS** \* **COURT OF APPEAL**  
**TYRONNE HUNTER** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 413-800, SECTION "D"**  
**Honorable Frank A. Marullo, Judge**

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**Judge David S. Gorbaty**

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(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

Eddie J. Jordan, Jr.  
District Attorney  
Nick Orechwa  
Assistant District Attorney  
619 South White Street  
New Orleans, LA 70119  
COUNSEL FOR PLAINTIFF/APPELLEE

Laura Pavy  
LOUISIANA APPELLATE PROJECT  
P.O. Box 750602  
New Orleans, LA 70175-0602  
COUNSEL FOR DEFENDANT/APPELLANT

**AFFIRMED**

Tyronne Hunter appeals his conviction for first-degree murder arguing that a jury charge given by the trial court was unconstitutional. For the following reasons, we affirm the conviction and sentence.

**STATEMENT OF THE CASE:**

On April 6, 2000 Tyronne Hunter was indicted for the first-degree murder of Charles Dangerfield. Hunter was originally found to be incompetent to proceed and was remanded to the Feliciana Forensic Facility. However, on October 25, 2001 the court found him competent to proceed. The matter was reset repeatedly, and on April 7, 2003 trial commenced. A twelve-person jury found him guilty as charged, and after the penalty phase of the trial, the jury recommended a sentence of life imprisonment. The trial court sentenced him to life imprisonment without benefits of parole, probation, or suspension of sentence. This appeal followed.

**FACTS:**

Late on the evening of February 6, 2000 Charles Dangerfield was shot

to death on the sidewalk outside the Canal Bus Stop Lounge located in the 2800 block of Canal Street. Dangerfield sustained nine gunshot wounds; two of the wounds, one to the back of his head and one through his aorta, were lethal wounds. Dangerfield had a blood-alcohol level of .03, and there was cocaine in his urine. Two bullets were removed from his body during his autopsy.

Timothy Allen testified he was the N.O.P.D. detective who investigated the shooting. He testified there were two shooting victims at the bar when he arrived; Dangerfield's body was lying outside the bar, while inside the bar the officers found Keith Franklin, who had also been shot and was lying near the pay telephone just inside the front door. Det. Allen stated the defendant, Tyronne Hunter, who was wearing a red jogging suit, was already in custody when he arrived. Det. Allen stated he spoke with Franklin, just prior to Franklin being taken to the hospital. He testified that he spoke with many witnesses that night, including Keith Washington who identified Hunter as the shooter. Det. Allen testified he also spoke with Guy Harrol, who identified Hunter as the man he saw enter the bar with a gun just after Harrol heard gunshots outside the bar. Det. Allen testified that after he finished processing the crime scene, he arrested Hunter and advised him of his rights. He then took Hunter to the First District police station, where he

again advised Hunter of his rights and spoke briefly with him. Det. Allen stated Hunter told him he had no information on the shootings, then Hunter insisted that if the gun were found his fingerprints would not be on it. Det. Allen testified he also had swabs taken of Hunter's hands, but he did not know the results of this test.

Det. Allen testified he then visited Keith Franklin at the hospital and showed Franklin two photographic lineups which included pictures of Hunter and Hunter's brother Dwayne, who Det. Allen had learned was also at the bar that night. Det. Allen stated Franklin chose Hunter's photo as that of the shooter and Dwayne's photo as the person who was with Hunter that night.

After Det. Allen testified he did not remember a report of three suspects, the defense played the 911 dispatch tape which indicated there were three possible perpetrators, two of whom were wearing red jogging suits and one of whom was clothed in blue. Det. Allen testified Dwayne Hunter was wearing blue, but he also insisted that Tyrone Hunter was the only person in the bar when he arrived who was wearing a red jogging suit. He further testified that only one witness indicated the shooter was dressed in blue clothing. Det. Allen identified this witness as Daniel Ross, who did not come forward that night but was interviewed at a later date.

Det. Allen testified he learned that after the shooting the perpetrator had gone out the back door into the back yard and then had returned empty-handed. He testified officers looked around the back yard but could not find the gun. However, the next day the owner of the bar contacted the police and told them he had found a gun and a magazine, wrapped in a T-shirt, around the corner of the building.

Sgt. Gerard Winbush, who qualified as an expert firearms examiner, testified he tested the gun found in the back yard of the bar and examined the bullets retrieved during Dangerfield's autopsy and bullet fragments and spent casings found at the scene. He testified the bullets and the shell casings were fired from the gun. Off. Edward Delery, who qualified as an expert in fingerprint examination and identification, testified he tested the gun and its magazine and found no identifiable prints. He stated the rust on the gun and the magazine would have interfered with lifting any prints from them, and he further testified it was unlikely he could have found any prints on the casings because any prints on them would have been destroyed due to conditions that exist during firing.

Abram Chartain testified he owned the Canal Bus Stop Lounge. He testified he found the gun and the magazine, both wrapped in a T-shirt, outside the back corner of the bar the day after the shooting. He further

testified that Dangerfield was not employed at the bar that night, but Dangerfield was helping out as a bouncer at the time he was shot.

Guy Harrol, III, testified he was the manager of the bar on the night of the shooting. He admitted he had a prior conviction for possession of marijuana. Harrol testified Dangerfield and Daniel Ross were working the door of the bar that night. He stated the bar was featuring a lap dancer, and Hunter was a customer who became enraged when the lap dancer left him for another patron when Hunter's money ran out. Harrol testified Hunter became embroiled in an argument with the dancer's next customer, and Harrol intervened, telling Hunter to either calm down or leave. Harrol testified Dangerfield then told Harrol to let Hunter stay, indicating Hunter's companions said they would calm down Hunter. Soon, however, Hunter became involved in another altercation with another customer, and Harrol told Dangerfield to give Hunter his money back and make him leave. Harrol testified Dangerfield and Ross then escorted Hunter out the door and stayed at the door to make sure he did not return.

Harrol testified that sometime later he heard gunshots outside the bar and then saw Hunter come back inside the bar. Harrol testified he quickly went inside the DJ booth, which was bulletproof, and saw Hunter shoot Franklin, who was standing at a pay phone right inside the door. Harrol

testified he saw Hunter walk back towards the bar and kitchen and saw him hit another man with the butt of his gun, telling the man that the man was going to “respect” him. Harrol testified the man resembled, but was not one of the men with whom Hunter had argued earlier. Harrol testified Hunter then walked over to the DJ and put a gun to his head, telling him that the DJ did not know him. The DJ agreed, and then Hunter ran out the back door. Harrol testified Hunter did not have the gun when he reentered the bar shortly thereafter. Harrol positively identified Hunter as the man he saw shoot Franklin and insisted Hunter was the only person in the bar that night wearing a red jogging suit. On cross-examination, Harrol admitted that when he testified before the grand jury he did not state he saw Hunter shoot Franklin; instead, he testified he heard shots, saw people running, and then ran into the DJ booth. He also admitted he did not tell the police that night that he saw Hunter shoot Franklin. He insisted, however, that he never told anyone that he did *not* see Hunter shoot Franklin.

Keith Franklin testified he was shot inside the bar that night. He admitted he was in custody at the time of trial on a federal drug conviction for possession with the intent to distribute cocaine. Franklin testified he was in the back of the bar playing pool the night of the shooting. He testified he saw a fight in the bar earlier, but he did not really see who was involved. He

testified that as he was trying to leave through the front door, someone told him to get back, and then he heard shots being fired. He testified he turned to run back inside and then was shot, falling by the pay phone. He insisted he did not see who shot him, but he testified he saw someone wearing a red jogging suit walk past him with a gun. Franklin testified he then got up and walked outside, and someone took him to the hospital. Franklin insisted he did not remember talking to the police while in the hospital, nor did he remember viewing any photo lineups, although his mother and his girlfriend told him he did so. However, he identified his signature on the backs of the photographs. Franklin also insisted he did not see who shot him because the bouncer was in the way, nor did he hear any shots prior to being shot. He further testified he did not hear the shooter threaten anyone else in the bar.

Keith Washington testified he was in the bar with Keith Franklin on the night of the shootings. He admitted he was also incarcerated on a federal charge of possession with the intent to distribute cocaine. Washington testified he saw Hunter get into a fight involving the lap dancer, and the bouncer intervened and calmed Hunter down. Later, as he and Franklin were leaving, they saw Dangerfield standing at the front door. Washington testified he saw Hunter walking quickly up the sidewalk toward the bar with something in his hand. Washington testified he saw Hunter raise his arm.

Washington called a warning, and Dangerfield told him he would handle it. As Hunter came up to the bar, Washington ran to the side, and the shooting started. Washington testified Hunter was the only person at the scene with a gun. He testified he later went inside the bar and saw Franklin had been shot. Washington admitted he went home and got his gun when he realized Franklin had been shot. Washington testified he identified Hunter on the scene as the person who shot Dangerfield, but he admitted he did not see Hunter pull the trigger. He testified he saw maybe two other men with Hunter that night. He also admitted that he asked his attorney to see if he could get a lesser sentence in his drug case if he testified in this case.

Daniel Ross testified he was a security guard who was a patron at the bar that night. He testified he helped Dangerfield escort a man wearing a jogging suit from the bar because the man had caused a disturbance. He testified he was standing outside the bar with Dangerfield when the same man, who he identified as Hunter, ran back up and shot Dangerfield, emptying his gun into Dangerfield's body. Ross testified he then ran from the scene, and when he returned the man was gone. Ross admitted he did not speak with the police that night, but he insisted he did not do so because Hunter was already in custody. He also admitted he spoke with an officer approximately a month after the shooting and told the officer the man who

shot Dangerfield was wearing blue, but he indicated he did so because he was frightened. He further admitted he did not make a photo identification of Hunter for the same reason. He testified he did not come forward because he thought Hunter had already been convicted of the crime, and it was not until the night before his testimony that someone contacted him and told him the trial was in progress. He testified his supervisor told him he had to testify at trial. He admitted he saw Dangerfield's brother at a bar the night before his testimony, but he testified he saw the brother after he had already spoken with the other man, and he insisted he and Dangerfield's brother did not talk about the case.

Frederick Hart testified he was in the bar shooting pool when he heard gunshots. He testified he tried to leave through the back door, but when he saw other people coming back in that door, he turned and jumped behind the bar. He testified that when he tried to run, a man in a red jogging suit walked up to him and pointed a gun at him. Hart testified the man asked him if he was "him." Hart testified he said he was not, and the man hit him with the gun. He testified he fell behind the bar and waited until he judged it was safe, and then walked home. He testified he thought the man the police had in a police car when he left was the man who hit him.

## **DISCUSSION:**

### **A. Errors Patent**

A review of the record reveals there are no errors patent.

### **B. Assignment of Error:**

By his sole assignment of error, Hunter contends the trial court erred in its instruction to the jury defining “reasonable doubt.” He argues the court’s instruction was erroneous because it implied the jurors could not find a reasonable doubt based upon a lack of evidence.

In *State v. Bunley*, 2000-0405, p. 14 (La.App. 4 Cir. 12/12/01), 805 So.2d 292, 302-302, *writ denied*, 2002-0505 (La. 1/24/03), 836 So.2d 41, this Court set forth the standard for determining whether an error in the court’s instruction to the jury warrants reversal of a defendant’s conviction:

When considering an allegedly improper jury instruction, a reviewing court must determine whether it is "reasonably likely" that the jury applied the challenged instruction in an unconstitutional manner, not whether it is possible that the jury misapplied the instruction. In determining whether it is reasonably likely that the jurors misapplied the instruction, the challenged terms are considered in relation to the instructions as a whole. *State v. Lennon*, 95-0402 (La.App. 4 Cir. 9/15/95), 661 So.2d at 1049, citing *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 1241, 127 L.Ed.2d 583 (1994); *State v. Smith*, 91-0749 (La.5/23/94), 637 So.2d 398, 402, cert. den., 513 U.S. 1045, 115 S.Ct. 641, 130 L.Ed.2d 546 (1994).

The test is whether, taking the instruction as a whole, reasonable persons of ordinary intelligence would understand the charge. *State v. West*, 568 So.2d 1019 (La.1990).

A conviction will not be reversed on the ground of an erroneous jury charge unless the disputed portion, when considered in connection with the remainder of the charge, is erroneous and prejudicial. *State v. Motton*, 395 So.2d 1337 (La.1981); *State v. Jordan*, 97-1756 (La.App. 4 Cir. 9/16/98), 719 So.2d 556.

As noted by Hunter, La. Code Crim. Proc. art. 804 provides in pertinent part: “The court may, but is not required to, define . . . ‘reasonable doubt’ . . .” See *State v. Harrison*, 93-1259 (La.App. 4 Cir. 1/13/94), 631 So.2d 531. The portion of the jury instruction to which Hunter refers follows:

If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant’s guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt you must acquit the accused.

This doubt must be a reasonable one. That is one that is founded upon a real and tangible basis. It is not upon a mere caprice, or a fancy, or a conjecture. It must be such a doubt that it would give rise to an uncertainty raised in your mind by the reason of the unsatisfactory character of the evidence, one that would make you feel that you did not have an abiding conviction of the defendant’s guilt.

Mr. Hunter argues this charge was unconstitutional because it led the jury to believe it could not find a reasonable doubt through a lack of evidence, thereby lessening the State's burden of proof.

We find this claim to lack merit. Initially, the transcript indicates that the trial court further defined "reasonable doubt" and then specifically advised the jury that it could consider the lack of evidence in determining whether the State met its burden of proving Hunter guilty beyond a reasonable doubt:

Ladies and gentlemen, a reasonable doubt is not a mere possible doubt. It should be an actual doubt. It is such a doubt that a reasonable man or woman would seriously entertain. It is a serious doubt for which you can give a good reason.

So, probably the best way to look at what a definition of a reasonable doubt is, is when you have a doubt in your mind as to the evidence in this case, or a doubt about one of the elements that have to be proved up in this case, and there are two essential elements in this case, and there is also an essential element of intent of a human being. If you have a doubt, and you are in the jury room and you can say to the other eleven people that sit with you in making this decision, "I have a doubt." And, they can ask you why. And, why means I have a doubt, "I don't believe the witness. *Lack of evidence.*" But, you can articulate and say, "Here is my reason why I have the doubt."

\* \* \*

So, if you are back in the back and deciding

the case and someone says, “I have doubt.” The other eleven can say, “Why do you have that doubt?” And, it can’t just be a feeling. “Oh, I don’t feel it, or whatever.” That is not a reasonable doubt because the State is not charged with the responsibility of proving the case beyond all doubt, only beyond a reasonable doubt.

You are prohibited by law and by your oath from going beyond the evidence to seek for doubts upon which to acquit the defendant or go beyond the evidence to convict the defendant.

You must confine yourself strictly to a dispassionate consideration of the testimony given upon the trial. You must not resort to any extraneous facts or circumstances in reaching your verdict. That is you must not go beyond the evidence to find facts and circumstances creating doubt, but you must restrict yourself to the evidence that you have heard on the trial of the case. *However, the lack of evidence from the testimony adduced at the trial may be relied upon as the basis for the establishment of a reasonable doubt. Lack of evidence can be the reason for the doubt.* [Emphasis added]

Thus, contrary to Hunter’s argument, the court explicitly instructed the jurors they could consider the lack of evidence in determining whether there was a reasonable doubt as to Hunter’s guilt.

Moreover, in *State v. Washington*, 522 So.2d 628 (La.App. 4 Cir. 1988), this Court held the court need not advise the jury specifically that it could consider the lack of evidence as a basis for finding a reasonable doubt.

This court noted:

Although the charge does not specifically instruct the jury to consider both "proven and unproven" facts or the "lack of evidence", as in [*State v.*] *Rault*, [445 So. 2d 1203 (La. 1984)] the charge in the instant case advised the jurors that a reasonable doubt justifying a verdict of not guilty would arise if they considered "all of the facts of the case" and found unsatisfactory evidence upon any single point that was indispensably necessary to constitute guilt. Consequently, we conclude that the charge substantially complies with LSA-Cr.P. art. 804.

*Washington*, 522 So.2d at 631. In addition, in *State v. Lennon*, 95-0402 (La.App. 4 Cir. 9/15/95), 661 So.2d 1047, this Court upheld the constitutionality of a reasonable doubt jury instruction that contained not only the phrase "real tangible basis" but also "substantial," "actual doubt," "hesitate to act," and "moral certainty." This Court found these phrases merely "distinguish[ed] reasonable doubt from speculation, conjecture, and mere possible doubt, concepts expressed with the same sentences as the questioned terms. When read in context, those terms clearly address the existence rather than the magnitude or degree of doubt and inform the jury that reasonable doubt is not speculative doubt." *Lennon*, at p. 4, 661 So.2d at 1049-1050.

Accordingly, for the foregoing reasons, we affirm the conviction and sentence.

**AFFIRMED**