NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2004-KA-1061**
VERSUS	*	**COURT OF APPEAL**
EDGAR JONES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 432-993, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., and Judge Edwin A. Lombard)

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THE CONVICTION AND SENTENCE ARE AFFIRMED

STATEMENT OF CASE

On September 4, 2002, the State charged Edgar Jones with attempted second-degree murder, a violation of La. R.S. 14:27; 14:30.1. The defendant pled not guilty as his arraignment on September 10, 2002. The defendant's motions to suppress the evidence, identification and statement were denied, and on October 22, 2002, the court found probable cause. The defendant's first jury trial ended in mistrial on March 19, 2003. The jury in the defendant's second trial found him guilty as charged on August 20, 2003. The trial court granted the defendant's motion for appeal on October 3, 2003. On October 30, 2003, the court sentenced the defendant to thirty years at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served, sentence to run concurrently with any other sentence. On November 6, 2003, the trial judge signed the defendant's motion for appeal.

STATEMENT OF FACT

At 10:00 p.m. on July 2, 2002, Edgar Jones shot Webster Lewis at the Spur Gas Station on Read Road. Mrs. Eva Jones, the station cashier, called 911 for police and medical assistance.

Detective Bernard Crowden responded to the call. When he arrived at the location, emergency medical personnel were working on the victim. Crowden observed several bullet casings and one bullet jacket on the ground near the victim. Mrs. Jones informed Crowden that Edgar Jones, her ex-husband, shot the victim. Mrs. Jones also told Crowden that the gas station's video surveillance system recorded the shooting. Crowden secured the surveillance tape. He then relocated to the Seventh District Station where he investigated the information he received from Mrs. Jones. Crowden developed an address for the defendant, and dispatched uniformed officers to the location; however, the officers did not find the defendant or his vehicle at the address. Crowden obtained an arrest warrant for the defendant and search warrants for the defendant's residence and truck. Searches of the residence and truck failed to produce a weapon, but Crowden did recover a gun cleaning kit, one black nylon holster for a .9 millimeter handgun and an ammunition box containing four .9-millimeter bullets from the defendant's residence, as well as mail addressed to the defendant. In August 2002, the victim viewed a photographic lineup assembled by Crowden and identified the defendant as the man who shot him. The day after the shooting, the defendant turned himself in at the Seventh District Station. Crowden advised the defendant of his rights; the

defendant indicated he understood his rights. Although the defendant indicated his willingness to make a statement, he gave no inculpatory statement, rather the defendant denied any knowledge or involvement in the shooting.

Criminalist Tanesha Santemore investigated and photographed the crime scene pursuant to Detective Crowden's direction. She retrieved eight .9-millimeter bullet casings and one copper bullet fragment, which she bagged and deposited in the police property room.

The State and the defense stipulated to NOPD Officer Kenneth Leary, Jr.'s expertise in firearms inspection. Officer Leary identified the bullet casings and bullet jacket retrieved from the crime scene. He informed the court that all of the casings and bullet jacket had been discharged from the same .9-millimeter automatic weapon.

Trauma surgeon, Dr. Lisardo Garcia, operated on the victim the night of the shooting. The victim suffered near fatal injuries including two diaphragm perforations, a grade three liver laceration and a collapsed lung. Dr. Garcia packed the victim's liver to stem blood loss. The victim underwent additional surgery to remove the packing.

Mrs. Eva Jones and the defendant were married for eight years. She filed for divorce in February 2001, and the divorce was finalized in February

2002. She began dating the victim in July 2001. On the night of the shooting, the victim arrived at the station about 9:00 p.m. to help her close the business for the night. At about 10:00 p.m., the defendant drove his truck into the station parking lot. When the victim saw the defendant, he exited the store telling Mrs. Jones he would see her later. Immediately after the victim left the store, Mrs. Jones heard what she thought were firecrackers. A store patron alerted people on the premises that the noise was gunfire. Mrs. Jones witnessed the last of several shots fired by the defendant into the unarmed victim. Mrs. Jones called 911 and then aided the victim. She did not believe the victim would survive the gunshot wounds. Mrs. Jones retrieved a blanket and pillow from her car for the victim and gathered sanitary napkins to staunch the victim's loss of blood. She remained with the victim until the emergency unit transported him to the hospital. Mrs. Jones advised Detective Crowden that the station's video surveillance system recorded the incident. She gave the videotape to the detective.

The victim worked as a mail carrier. He recognized the defendant as a resident of one of the apartment complexes on his mail route. The victim met Mrs. Eva Jones through mutual friends in 2000 and began dating her in July 2001, after she and the defendant separated. The victim and Mrs. Jones

were romantically involved at the time of the incient. On the night of the shooting, the victim arrived at the station around 9:00 p.m. to help Mrs. Jones close the station for the night. At approximately 10:00 p.m., the defendant drove into the station parking lot. The victim exited the store, telling Ms. Jones he would see her later. As the victim walked to his vehicle, he sensed someone walking behind him. He looked over his shoulder and as he did, the defendant shot him in the back. When the defendant fired the first shot, he told the victim: "Bitch, I knew I'd get you". The victim fell to the ground after the defendant shot him a second time in the back. The defendant stood over the victim and fired several more shots, after which the defendant got into his truck and drove away. The victim underwent surgery that night and remained hospitalized for approximately a month. The victim suffered several wounds to his torso, and the bullet that pierced his right arm rendered his arm useless. He viewed a photographic lineup while in the hospital and identified the defendant as the shooter. The victim was unarmed at the time of the shooting and denied ever speaking to, or having any animosity toward, the defendant.

The defendant testified that while he and Mrs. Jones were married, she and the victim began an affair. The defendant learned of the affair from his six year old daughter. The defendant stated that his ex-wife began staying

out until the early morning hours and neglecting their children. The couple separated soon after the defendant learned of the affair, but they continued to see each other on a regular basis and even took weekend trips together. The defendant claimed that the victim's increasing presence in Mrs. Jones' life caused her to neglect her children and interfered with the couple's attempts to reconcile. The victim threatened to shoot the defendant on several occasions, taunted him and made numerous harassing phone calls to the defendant's residence. The defendant feared for his life because the victim carried a gun. On the night of the shooting, the defendant arrived at the Spur station about 10:00 p.m. to take his daughter to dinner. The defendant did not know the victim was at the station. As the defendant entered the store, the victim, who was armed with a semi-automatic weapon, exited. The victim told the defendant he was going to kill him. The defendant heard a "click" and saw the gun in the victim's hand. The defendant drew his weapon and shot the victim. A day or two after the shooting, Detective Crowden called him and asked to speak with him at the Seventh District Police Station. When the defendant arrived at the police station, officers placed him against the wall while they searched and handcuffed him. The officers began to curse him and eventually told him he was being arrested for aggravated battery. The defendant refused to make a statement and

requested an attorney, but the officers denied his request and continued to interrogate him without ever reading him his rights. The defendant had no ill feelings toward the victim. He shot the victim in self-defense and did not know he had wounded the victim until Detective Crowden spoke to him two days after the incident.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant argues that the evidence is insufficient to support a conviction of attempted second-degree murder.

In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A reviewing court must consider the record as a whole, as would any rational trier of fact. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. *State v. Mussall*, 523 So.2d 1305 (La.1988). The fact finder's discretion will be impinged upon

only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall, supra*. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. *State v. Smith*, 600 So.2d 1319 (La.1992).

The defendant in this case was charged with attempted second-degree murder. To sustain a conviction for attempted second-degree murder, the state must prove that the defendant: (1) intended to kill the victim; and (2) committed an overt act tending toward the accomplishment of the victim's death. La. R.S. 14:27; 14:30.1. Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant. La. R.S. 14:10(1); *State v. Bishop*, 2001-2548 (La. 1/14/03), 835 So.2d 434.

In this case, the defendant's actions demonstrated his intent to the kill. The evidence shows that the victim was unarmed at the time of the shooting and that he did not speak to the defendant prior to the attack. The victim testified that after the initial shot, the defendant continued to shoot him even as he lay on the ground, incapacitated and attempting to flee the barrage of

bullets. Moreover, the convenience store surveillance videotape shows the defendant approach the unsuspecting victim from behind and shoot him in the back. Further, the tape captures the defendant standing over the seriously wounded and helpless victim and continuing to shoot the victim until the defendant's gun ran out of ammunition. The near fatal nature and number of the victim's wounds clearly indicate that the defendant intended to kill the victim. The evidence is sufficient to support the conviction. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment, the defendant charges trial court error in the denial of his motion for mistrial based upon the State's comment on the defendant's post-arrest silence.

During closing argument, the State noted:

> Next, we heard from Detective Crowden that the day after, the defendant came and turned himself in. The defendant refused to give a . . .statement at that time . . .

The defense objected and at a sidebar conference moved for mistrial. The court denied the request.

Under La. C.Cr.P. art. 771, when the prosecutor or a witness makes a reference to a defendant's post-arrest silence, the trial court is required, upon the request of the defendant or the State, to promptly admonish the jury. In

such cases where the trial court is satisfied that an admonition is not sufficient to assure the defendant a fair trial, the court may grant a mistrial upon motion of the defendant. *State v. Kersey*, 406 So.2d 555, 559 (La.1981). The granting of a mistrial is within the discretion of the trial court if the trial court is satisfied that an admonition is not sufficient to assure the defendant a fair trial. *State v. Procell*, 365 So.2d 484, 491 (La.1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2164, 60 L.Ed.2d 1046 (1979). A brief reference to a defendant's post-arrest silence does not mandate a mistrial or reversal when the trial as a whole was fairly conducted, the proof of guilt is strong, and the prosecution made no use of the silence for impeachment purposes. *State v. Ledesma,* 01-1314 (La. App. 5 Cir. 4/30/02), 817 So.2d 390.

Under the circumstances of this case, a mistrial was not mandatory. At the request of the defense, the judge admonished the jury:

> Ladies and gentlemen, I'm going to caution you and instruct you that any reference made by the State as to the defendant not making a statement or invoking his right to counsel at the time of questioning by law enforcement is to be disregarded by you. You are to draw no negative inference from a defendant or an accused (sic) invocation of his right to a lawyer, his right to counsel, and not make any assumptions or negative inference from that.
>
> Cautioning you and admonishing you to disregard any statement made in that regard that might have been made during the course of closing argument.

Considering the overwhelming evidence of the defendant's guilt, the trial judge did not abuse her discretion in denying the defendant's motion for mistrial.

It is worth noting that during the State's case in chief, the defense did not object to Detective Crowden's testimony that the defendant refused to give a recorded or written statement. In fact, the defense aggressively cross examined the detective on the issue and even sought to discredit the police investigation by emphasizing to the jury that the detective failed to obtain a waiver of rights of arrestee form from the defendant.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In a third assignment, the defendant argues the trial court erred in admitting still photographs made from the Spur station surveillance videotape.

The defendant admits that the videotape from which the still photographs were made was played in full for the jury. He objects, however, that the still pictures made from the tape were taken out of context, were not authenticated and did not reflect the entirety of the tape.

The State showed the videotape during Mrs. Jones' testimony. She verified the tape as depicting the Spur station premises, both inside the

convenience store and the exterior parking lot, and the gas pumps. She identified herself, the victim and customers entering, exiting and moving around the store. She also correlated actions on the tape to the gunshots heard after the defendant drove into the station parking lot.

The State showed the victim the still photos during direct examination. He identified the pictures as images of the interior and exterior of the Spur station, of him on the ground after being shot by the defendant, and another of the defendant standing over and shooting him as he lay on the ground. Further, the victim verified that the pictures accurately depicted the sequence of events the night of the shooting.

Even if there was error in admitting the still photographs, the error is harmless. An error is harmless, when it can be shown beyond a reasonable doubt that the complained-of error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As a trial error, as opposed to a structural error, it may be quantitatively assessed in the context of the other evidence presented. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. *Sullivan*

v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *State v. McQuarter*, 2000-1553 (La. App. 4 Cir. 6/6/01), 788 So. 2d 1266. Even without the still photographs, the evidence of the defendant's guilt in this case is overwhelming. The victim and the defendant's ex-wife unequivocally testified that the defendant shot the victim. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 4

In his final assignment, the defendant argues his thirty-year sentence is excessive.

Article I, Section 20 of the Louisiana Constitution of 1974 prohibits the imposition of excessive punishment. A sentence is unconstitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Dorthey*, 623 So.2d 1276, 1280 (La.1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *State v. Hogan*, 480 So.2d 288, 291 (La.1985). Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. *State v. Sepulvado*, 367 So.2d 762, 767 (La.1979). However, a trial court is given wide

discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Lobato*, 603 So.2d 739, 751 (La.1992).

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La.C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. *State v. Algere*, 2000-0033 (La. App. 4 Cir. 2/14/01), 780 So.2d 1131. If adequate compliance with La.C.Cr.P. art. 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 the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *Id.*

A conviction for attempted second degree murder carries a sentence of imprisonment at hard labor for not less then ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. La. R.S. 14:27,14:30.1. The defendant in this case received thirty years, a mid-range sentence. Prior to imposing sentence, the court reviewed a PSI report which provided extensive details of defendant's social history, including his education and work experiences. The report indicates the defendant is a first

offender with four adult arrests resulting in one misdemeanor conviction and this felony conviction. In sentencing the defendant, the trial judge noted:

> . . .[the pre-sentence investigation report reveals] an adult record consisting of a conviction for renting a moveable with a false statement, arrest for theft, domestic violence, and then this last arrest for attempted second degree murder. A lack of criminal history in this case, however, the Court, in considering the sentencing guidelines of [La. C.Cr.P. art.] 894.1, has considered those guidelines. . .
>
> The Court feels that you are in need of correctional treatment and a custodial environment that can be provided most effectively by your commitment to an institution, and three that any lesser sentence than the sentence this Court is about to impose would certainly deprecate the seriousness of the offense.
>
> The Court, taking into account the aggravating circumstances as articulated in 894.1, takes into account the trial record in this case, showing that the victim in this case was shot eight times. The Court had a chance to see the video tape in this matter several times and, notwithstanding your defense of self-defense, with the video tape showing that Mr. Lewis, Mr. Webster Lewis, in this case was unarmed, unarmed as he was shot trying to roll away from you advancing on him still firing at him. . .
>
> The presentence investigation report [indicates that] . . . Mr. Lewis . . . is still permanently injured from being shot . . . He . . . cannot bend his right arm at the elbow and therefore, he cannot feed himself, comb his hair or do any of the other things he would usually do with his dominant hand.
>
> * * *
>
> I listened to the facts of the case and while I can understand how things can drive a person to the point or the brink of desperation or exasperation or jealousy or rage, I still can't understand how you could shoot an unarmed person eight times. . . you are lucky . . .that you are not looking at a second degree murder charge or first degree murder charge if somebody in that very, very busy gas station, especially the child that was there, had inadvertently crossed into your path while you were on your rampage.

In *State v. Moore,* 37,935 (La. App. 2 Cir. 1/28/04), 865 So.2d 227,

writ den., 2004-0507 (La. 7/2/04), 877 So.2d 142, the second circuit concluded that a forty year sentence for attempted-second degree murder conviction was not excessive. Likewise, in *State v. Robicheaux*, 03-1063 (La. App. 5 Cir. 12/3/003), 865 So. 2d 149, the fifth circuit found that the defendant's sentence of fifty years for attempted second-degree murder was not constitutionally excessive.

After careful review of the record, it is apparent that there exists an adequate factual basis for the sentence imposed. The sentence imposed upon the defendant by the trial court is not constitutionally excessive. Furthermore, there is no showing that the trial court abused its discretion. This assignment is without merit.

For these reasons, we hereby affirm the conviction and sentence.

THE CONVICTION AND SENTENCE ARE AFFIRMED