

STATE OF LOUISIANA * NO. 2011-KA-0648
VERSUS * COURT OF APPEAL
JEREMY PATTERSON * FOURTH CIRCUIT
* STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 481-693, SECTION "D"
Honorable Frank A. Marullo, Judge

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Charles R. Jones
Chief Judge

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(Court composed of Chief Judge Charles R. Jones, Judge James F. McKay, III and Judge Madeleine M. Landrieu)

MCJAY, J., DISSENTS
LANDRIEU, J., CONCURS WITH REASONS

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AUGUST 24, 2012

**VACATED AND
REMANDED**

The Appellant, Jeremy Patterson, appeals his conviction of second degree murder and sentence of life imprisonment without benefit of parole. Finding that the district court committed a legal error, we vacate the conviction of Patterson and remand for a new trial.

By a grand jury indictment filed November 6, 2008, Patterson and a co-defendant, Tyrone Reynolds, were charged with second degree murder.¹ Patterson subsequently failed to appear for his arraignment, and an alias capias was issued. He was later arraigned, and entered a not guilty plea. A hearing on Patterson's motion to suppress the identification began in March 2010. The district court ordered the State to produce the witnesses who identified Patterson from photographic lineups, and the State noted its intent to file a writ. We granted the writ application of the State and reversed the district court.² In June 2010, the district court resumed the hearing on the motion to suppress the identification, and denied the motion. Patterson was then tried and found guilty as charged. His motions for new trial and for post-verdict judgment of acquittal were denied. He waived sentencing delays, and the district court sentenced him to serve life

¹ Reynolds was found not guilty following a jury trial that concluded on October 1, 2009.

² State v. Patterson, 10-0339, unpub., (La. App. 4 Cir. 3/8/10).

imprisonment at hard labor without benefit of parole. Patterson timely filed the instant appeal.

The victim was killed on a Sunday morning, July 20, 2008. The coroner testified that the victim received four gunshot wounds, none of which would have killed him immediately. In fact, she testified that he could have been conscious and speaking even after he was shot. One shot entered the victim's shoulder; the other three shots entered areas of his buttocks.

Testimony received by two witnesses and the physical evidence revealed that the incident began on the corner of Feliciana and Humanity Streets in New Orleans near where the victim's car was parked. The victim was seen running from Feliciana Street down Humanity Street, the two streets running perpendicular to each other, towards Clouet Street. The Appellant, who is also known as Bambi, was seen chasing and shooting at the victim. Jules Gettridge and Lynell Rovaris were outside on the corner of Humanity and Clouet Streets, and witnessed the shooting.³ Both testified that the victim fell after being shot; the victim was able to get up, and tried to get away. Ms. Rovaris testified that the victim was able to get away from Patterson momentarily because Patterson's gun jammed. The victim made it to the 3300 block of Clouet Street, where he was again shot by Patterson. Patterson left in the direction he came from towards Feliciana Street. Seconds later Tyrone Reynolds appeared, and he also shot the victim as he lay on the ground. He too left in the direction of Feliciana Street.

³ Ms. Rovaris testified that when the shooting began, she was in shock and could not move. Though Mr. Gettridge, her boyfriend, was standing next to her, she did not know what he did when the shooting started. Mr. Gettridge testified that he did not speak to the police after the shooting occurred. He explained that he knew the families of both men and initially did not want to get involved. Nevertheless, he testified for the first time at Patterson's trial.

Terrance Williams was in front of his grandmother's house at 3318 Clouet Street when the shooting began. Upon hearing gunshots and seeing the victim running towards him, Mr. Williams also ran. He did not witness the shooting. After things quieted down, Mr. Williams went to where the victim was lying. He tried to assist the victim by pulling him from out of the sun, and he attempted to resuscitate him. The victim told him that Patterson shot him. Ms. Rovaris subsequently approached and asked the victim for his mother's telephone number; the phone number that he gave was off by one number. Mr. Williams called 911. The tape of the 911 call was played for the jury.⁴

The lead detective on the case was Nicholas Gernon. Detective Gernon described the evidence found on the scene. A spent casing and a live 9mm Luger round were found in the middle of the street near the victim's vehicle. A trail of blood extended from that area to where the victim was found on Clouet Street. Four spent casings were found on Clouet Street. A large pool of blood was on the sidewalk near the victim's body. The detective testified that two additional spent casings were subsequently found by the fire department near where the victim came to rest; the fire department was hosing down the area after the body was removed to rid the area of blood.

After processing the scene, Detective Gernon contacted Lynell Rovaris. He met with Ms. Rovaris at police headquarters, where she gave a recorded statement. She also identified Patterson from a six-person photographic lineup. Ms. Rovaris testified that she has personally known Patterson for five years. Detective Gernon

⁴ Prior to the playing of the tape, it was authenticated by Cindy Woods, an Assistant Communications Supervisor for the New Orleans Police Department.

obtained an arrest warrant for Patterson's arrest and a search warrant for his last known residence. The search of the residence did not result in the seizure of any evidence.

Detective Gernon met with Terrence Williams on July 20, 2008 at his grandmother's house. Mr. Williams also gave a statement and identified Patterson from a six-person lineup. Like Ms. Rovaris, Mr. Williams knew Patterson. Patterson was the father of the niece of Mr. Williams, who referred to Patterson as his partner.

On July 22, 2008, Detective Gernon returned to the crime scene and met with an ATF agent. Using a canine, the detective and the ATF agent recovered three spent .380 shell casings that were old and weathered near an abandoned store on Clouet Street. The back of the store was marked with graffiti bearing the name "Bambi."⁵ In a grassy lot near the crime scene, a loaded 9mm Glock was found; the weapon was not the weapon used to kill the victim.⁶

The victim's car was searched. Detective Gernon found a photograph of the victim with Patterson and another man at a nightclub. Testimony at trial revealed that the victim and Patterson were friends. Latent fingerprints were also lifted from the exterior and interior of the victim's car. Only four of eleven prints lifted were suitable for comparison. Three of the prints belonged to the victim, and one print belonged to Joshua Simmons.⁷ Mr. Simmons was not pursued as a suspect

⁵ At trial, Patterson showed the jury his arm bearing a tattoo of Bambi.

⁶ The weapon was tested by Sergeant Byron Winbush, whom the parties stipulated was an expert in the examination of firearms. He also tested two bullets recovered from the victim's body and the spent casings found on the crime scene the day of the murder. The two bullets and casings were found to have been fired from the same weapon. Other fragments taken from the victim's body could not be identified.

⁷ Officer Dickerson processed the victim's car for fingerprints. Officer Joseph Pollard, who the parties stipulated was an expert in the examination of latent fingerprints, identified the four prints.

because the detective learned that he was the victim's good friend; he was a pallbearer at the funeral.⁸

Jules Gettridge admitted to a prior conviction for possession of cocaine. At the time of trial, Terrance Williams was on probation for possession of crack, and he had a prior conviction for possession of marijuana.⁹

Our review of the record reveals that there are no errors patent.

Patterson raises six (6) assignments of error:

1. The district court committed a reversible error in denying his request to backstrike a juror;
2. Louisiana Law allowing non-unanimous jury verdicts in noncapital cases is racially discriminatory in violation of the Equal Protection Clause;
3. Counsel was ineffective for failing to challenge the non-unanimous verdict on equal protection grounds;
4. The district court erred by allowing the jury to hear the 911 tape made by unavailable witnesses in violation of the Confrontation Clause;
5. The district court abused its discretion by denying defense counsel's request for a continuance; and
6. The district court erred by interfering with the jury's verdict.¹⁰

By his first assignment of error, Patterson asserts that the denial of his request to backstrike by the district court constituted reversible error.

⁸ The detective testified that another suspect was not pursued because he had a verified alibi.

⁹ The defense attempted to show that Patterson accused Lynell Rovaris just prior to the shooting of taking a GPS from his car and pawning it.

¹⁰ In November 2011, Patterson filed a motion for leave to file a pro se supplemental brief, which we granted. In his supplemental brief, Patterson raised three (3) additional assignments of error, which are listed above as numbers 4-6.

Following the first round of voir dire, defense counsel indicated that he wished to withhold his decision as to whether to peremptorily strike juror number sixteen, Suzanne K. Dumez. The court informed counsel that he would not be able to backstrike, noting that no such right existed. Juror number sixteen became part of the jury panel, and counsel noted his objection.

At the conclusion of the second round of voir dire, defense counsel moved to backstrike juror number five from the first panel, Ryan McCall, indicating to the court that he meant to excuse him but that he was having trouble with his seating chart. The district court denied the request, and counsel noted his objection. During the trial, counsel moved for a mistrial based on the district court's refusal to backstrike juror number five when he had peremptory strikes remaining. He also moved for a new trial prior to sentencing on this basis.

Backstriking of jurors is authorized by La. C.Cr.P. art. 799.1, which provides:

Notwithstanding any other provision of law to the contrary, and specifically notwithstanding the provisions of Article 788, in the jury selection process, the State and the defendant may exercise all peremptory challenges available to each side, respectively, prior to the full complement of jurors being seated and before being sworn in by the court, and the State or the defendant may exercise any remaining peremptory challenge to one or more of the jurors previously accepted. No juror shall be sworn in until both parties agree on the jury composition or have exercised all challenges available to them, unless otherwise agreed to by the parties.

This article was added in 2006 to codify the holding of earlier cases that recognized a party's right to backstriking. See State v. Taylor, 93-2201 (La. 2/28/96), 669 So. 2d 364; State v. Watts, 579 So. 2d 931 (La. 1991); State v.

Hailey, 02-1738 (La. App. 4 Cir. 9/17/03), 863 So. 2d 564. Courts have routinely held that the failure to allow a party to utilize backstrikes is an error, but such error is subject to a harmless error test. Taylor; Hailey; State v. Plaisance, 00-1858 (La. App. 4 Cir. 3/6/02), 811 So. 2d 1172.

In Taylor, the Supreme Court agreed that the district court erred by failing to allow the defendant to exercise backstrikes of accepted jurors. The Court nonetheless found that such error was harmless, given the fact that the voir dire transcript showed that counsel had a full opportunity to examine and challenge any potential jurors. In Hailey, although the defendant objected at trial to the prohibition on backstriking, he did not specify whom he would have backstruck. At the hearing on his motion for new trial he listed three jurors he would have struck, giving reasons for only two. We noted:

In the instant case, just as in *State v. Crotwell*, 2000-2551 (La. App. 1 Cir. 11/9/01), 818 So. 2d 34, defense counsel did not, at any point during the jury selection process or at the conclusion thereof, note any jurors in particular that he would have backstruck. There is no jurisprudence to the effect that defense counsel is required to do so in order to preserve his backstrike claim for review. However, the effect of not requiring a defendant to specify at trial who he would have backstruck is to permit a defendant to gamble upon receiving a favorable jury verdict, and then, upon the return of an unfavorable verdict, scour the voir dire transcript for jurors whom he can claim he would have backstruck. As previously noted, at the hearing on defendant's motion for new trial, defense counsel only gave reasons for why he would have backstruck two jurors, Ms. Foster and Mr. Small. Defendant makes no argument on appeal as to Lovell Taylor, the third juror to whom defendant referred. While Ms. Taylor said she had served on one jury in which the defendant was found guilty of armed robbery, a number of other prospective jurors eventually accepted also had served on prior juries

that had found defendants guilty. Defendant has failed to show any prejudice as a result of being denied a right to backstrike Ms. Taylor.

* * *

While a defendant has a constitutional right under the Louisiana State Constitution to peremptorily strike prospective jurors, there is no constitutional right to backstrike, only a statutory right. Considering the facts and circumstances of the instant case, defendant has failed to show that he was prejudiced by the trial court's denial of his statutory right to backstrike or that because he could not backstrike he was thereby denied his constitutional right to peremptorily strike prospective jurors. The error was harmless. That is, the verdict actually rendered in this case was surely unattributable to the error.

Hailey, at pp. 8-9, 863 So. 2d at 569.

In the case at hand, the district court's refusal to allow defense counsel to backstrike juror number five was error; an error that is subject to harmless error analysis. "To determine whether an error is harmless, the proper analysis 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'." State v. Snyder, 98-1078, p. 15 (La. 4/14/99), 750 So. 2d 832, 845 [citations omitted].

Patterson argues that the error was not harmless for two reasons. First, he urges that the jury verdict was ten-two, which followed the jury's attempt to return an invalid verdict.¹¹ Second, Patterson argues that the evidence was not overwhelming as it was based solely on the testimony of three unbelievable witnesses.

The State has countered that the error may be deemed harmless for the following reasons: (1) Patterson and his attorney were in court when the alleged wrong juror was excused yet failed to object at that time; (2) counsel had a full opportunity to examine and challenge any potential jurors; (3) the evidence was overwhelming; and (4) though the jury initially returned an incorrect verdict, it took the jury only eleven minutes to correct its verdict.

The State argues that Patterson and his attorney were in court when the stricken jurors were dismissed, and the selected jurors remained. The State argues that defense counsel did not then move to strike juror number five even though he could visibly see that he remained on the jury.

In the matter *sub judice*, Patterson named juror number five as the juror he would have backstruck. Patterson is not required to give a reason for peremptorily challenging that juror. Furthermore, the error of the district court in precluding Patterson from backstriking coupled with a verdict that was much less than unanimous are circumstances that indicate that the guilty verdict rendered in *this* case is *not* surely unattributable to the error. These facts distinguish this appeal from Hailey and Taylor, where the defendants in those cases did not specify whom they would have struck. We find that the district court erred in precluding Patterson from exercising his statutory right to backstrike. Considering the facts and circumstances of the instant case, Patterson has shown that he was prejudiced by the district court's denial of his statutory right to backstrike where the verdict of

¹¹ The defense indicates that the first verdict returned was 9-3; however, the polling slips from the invalid verdict are not part of the record. A per curium issued by the district court reflects only that the verdict slips were done incorrectly. Attached to the per curium is the corrected verdict slips reflecting that the vote was 10-2.

the jury was less than unanimous. The less than unanimous verdict suggests that the evidence as viewed by the jury was not overwhelming. These circumstances indicate that the error of the district court was not harmless and that the guilty verdict actually rendered in this trial was surely unattributable to the error. We find that this assignment of error has merit.

Additionally, based upon our review of the record, we also find that Patterson was denied effective assistance of counsel. Counsel for Patterson demonstrated that he was less than competent in failing to object to the removal of juror number five when the removed jurors were released and in his performance at trial. As previously stated, when counsel for Patterson moved to backstrike juror number five, counsel informed the court that there was some confusion with his seating chart. The legal error of his counsel clearly contributed to the outcome of this case. Thus, in light of the error of the district court in not allowing Patterson to exercise his right to backstrike, and considering that Patterson had ineffective assistance of counsel, we vacate the conviction and sentence of Jeremy Patterson, and remand for a new trial.

We pretermitted a discussion of the remaining assignments of error raised by Patterson.

DECREE

For the foregoing reasons, we vacate the conviction of second degree murder and sentence of life imprisonment without benefit of parole of Jeremy Patterson, and remand this matter to the district court for a new trial.

**VACATED AND
REMANDED**