

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2011-KA-1091**  
**VERSUS** \*  
**ARTHUR J. SIMMONS** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
\* \* \* \* \*

**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 455-726, SECTION "G"**  
**Honorable Julian A. Parker, Judge**

\* \* \* \* \*  
**Judge Madeleine M. Landrieu**  
\* \* \* \* \*

(Court composed of Chief Judge Charles R. Jones, Judge Edwin A. Lombard,  
Judge Madeleine M. Landrieu)

Leon A. Cannizzaro, Jr.  
District Attorney  
Scott G. Vincent  
Assistant District Attorney  
619 South White Street  
New Orleans, LA 70119

**COUNSEL FOR STATE OF LOUISIANA**

Christopher A. Aberle  
LOUISIANA APPELLATE PROJECT  
P.O. Box 8583  
Mandeville, LA 70470-8583

**COUNSEL FOR ARTHUR J. SIMMONS**

**AFFIRMED**

After the trial court granted Arthur Simmons' motion for post-verdict judgment of acquittal and this Court reversed on appeal, Mr. Simmons appeals his sentences arguing that the trial court erred by sentencing him without ever having ruled on his motion for new trial. For the reasons that follow, we affirm the defendant's sentences.

#### **FACTS AND PROCEEDINGS BELOW**

The State of Louisiana charged Mr. Simmons on January 26, 2005 with one count each of simple arson and simple burglary. The State subsequently amended count one to attempted simple arson. Mr. Simmons pled not guilty to both counts. The trial court appointed a sanity commission to determine if Mr. Simmons was competent, but it ultimately found him competent to proceed. On June 20, 2005, a jury found Mr. Simmons guilty as charged on both counts. Mr. Simmons filed a motion for post-verdict judgment of acquittal and in the alternative, for a new trial. On February 15, 2007, the trial court granted the defendant's motion for post-verdict judgment of acquittal.

The State appealed this ruling, and this Court reversed the trial court's judgment, reinstated the convictions, and remanded the case to the trial court to rule on the defendant's motion for new trial and for sentencing. State v. Simmons, 2007-0741 (La. App. 4 Cir. 4/16/08), 983 So. 2d 200. On remand, the matter was repeatedly reset until November 10, 2010, at which time the trial court sentenced Mr. Simmons to concurrent six-month terms on each count. The trial court also granted his motion for appeal.

A full recitation of the facts adduced at trial can be found in this Court's earlier opinion. *State v. Simmons, supra*. Briefly, Mr. Simmons was convicted of stealing tools from a trailer and attempting to burn the trailer, which was on a lot that was used for Christmas tree sales. Two witnesses, both of whom had prior convictions, testified that they saw Mr. Simmons attempting to close the fence to the lot while in possession of a shopping cart containing several hundred pounds of equipment that had been taken from the trailer. Inside the trailer, witnesses found a lit candle, a lit can of Sterno, books of matches, and what appeared to be an accelerant spread around the trailer. The defendant denied that he had broken into the trailer, tried to set it on fire, or had been in possession of the stolen property. He insisted that another man had been pushing the cart and had offered to sell him the stolen goods, but he had declined the offer, and at that point the witnesses had arrived. The defendant also insisted that he was disabled at that time and that he physically could not have lifted the stolen goods. His counsel did not introduce

medical evidence at trial to support this assertion, apparently because he was unable to authenticate the evidence.

The trial court subsequently granted the defendant's motion for post-verdict judgment of acquittal after a hearing at which defense counsel was able to authenticate his client's medical records. The court found that the defendant's physical disability would have precluded him from being able to perform the acts that the witnesses testified that he performed, and that the witnesses' testimony was perjured. The trial court then held that the evidence did not support the jury's verdict.

## **ISSUE**

In his present appeal, the defendant's sole assignment of error is the trial court's failure to rule on his motion for new trial, as ordered by this Court in the earlier appeal. Mr. Simmons asks this court to vacate his sentences and remand the case for the trial court to rule on his motion. The State responds that a remand is not necessary in this case because the sole issue that could be imputed to the motion for new trial would be the sufficiency of evidence adduced at trial, which this Court has already considered in the State's appeal and has found to be sufficient to support both convictions.

## **DISCUSSION**

Mr. Simmons' motion was a combined motion for post-verdict judgment of acquittal and in the alternative, for a new trial. The bulk of the motion asserted that the evidence was insufficient to support his convictions. He argued that the

only evidence tying him to the crimes was the testimony of two convicted felons, whom he asserted perjured themselves. He pointed to his “devastating back injury” to support his argument that he could not have physically committed the crimes. He asserted that those factors should lead the trial court to grant his motion for post-verdict judgment of acquittal. His only reference to a new trial was the sentence: “In the alternative, and if this Court does not believe that a judgment of acquittal is appropriate, then defendant is entitled to a new trial.” Mr. Simmons asserted no specific basis for his entitlement to a new trial.

La. C.Cr.P. art. 852 provides: “A motion for a new trial shall be in writing, *shall state the grounds upon which it is based*, and shall be tried contradictorily with the district attorney.” (Emphasis added). The grounds for a new trial are provided in art. 851:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

- (1) The verdict is contrary to the law and the evidence;
- (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;
- (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;
- (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or

(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

Art. 856 states that a motion for new trial “shall allege all grounds known and available to the defendant at the time of the filing of the motion.” The article further provides that the trial court may allow a defendant to supplement his motion by urging a new ground or may allow a defendant to file an additional motion for new trial “prior to the court’s ruling on the motion.”

The portion of Mr. Simmons’ motion that pertains to his request for a new trial does not set forth a ground upon which it is based; it is merely a request that the court grant a new trial if it was disinclined to grant the motion for post-verdict judgment of acquittal. The record clearly shows that the motion was alleged in the alternative, effectively requesting that the trial court consider the motion for new trial only in the event the court denied the defendant’s motion for post-verdict judgment of acquittal. Given that the trial court *granted* the post-verdict judgment of acquittal, we conclude that the court was not required to rule on the defendant’s motion for new trial. Moreover, we find that the defendant’s failure to allege specific grounds for his motion for new trial left nothing for the trial court to review.

For this reason, we reject Mr. Simmons’ sole assignment of error.

## **DECREE**

Accordingly, the defendant’s sentences are affirmed.

**AFFIRMED**