

STATE OF LOUISIANA

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NO. 2017-KA-0164

VERSUS

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COURT OF APPEAL

TRUNG LE

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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BELSOME, J., DISSENTS IN PART AND CONCURS IN PART WITH REASONS

I concur only in the vacating of the defendant’s conviction and sentence for manslaughter, but dissent from the remainder of the majority’s opinion.

I disagree that a review of the trial testimony and evidence pertinent to the attempted manslaughter charge, even when viewed in the light most favorable to the State, establishes that the defendant *was not* acting in self-defense of himself or others. The testimony critical to this issue consists of two eyewitnesses, Mr. Bienvenuti and Mr. Odom, and the testimony from Lieutenant Gernon who was allowed to give his opinion of the how the incident occurred by reviewing video footage.

The testimony presented in this case creates an unusual situation because there were only two witnesses to testify that they were *present and saw* the shooting. Those witnesses were presented by the State, but their testimony supported the defendant’s contention that he acted in self-defense. More specifically, both testified that the unknown male shooter approached their group of friends standing at the corner in an aggressive manner and that the unknown male shooter made a reference to having a “40” which they inferred meant he was armed with a forty-caliber gun. Both testified that the unknown male shooter

pulled out his gun, and in response to this threat, the defendant stepped forward and fired to protect himself and his friends. Moreover, Mr. Odom specifically denied in his trial testimony that the unknown male shooter who approached the group on Bourbon Street was one of the two males from an earlier encounter. He was adamant that he had never seen the unknown shooter before he approached their group.

The State sought to refute the relevant testimony offered by Mr. Bienvenuti and Mr. Odom by impugning and impeaching them. As to Mr. Bienvenuti, he was admittedly intoxicated and probably under the influence of MDMA¹ at the time of the incident. Even so, the State does not dispute that Mr. Bienvenuti was already turning away from the unknown male shooter when he was shot by him, suggesting he had seen him brandish his weapon.

As to Mr. Odom, the State showed that he and the defendant fled the shooting scene and then traveled to Mississippi together. As to both witnesses, the State elicited ample evidence that they refused to cooperate with the police and failed to identify the defendant when given the opportunity to do so or tell the police the details of the incident, in particular, that the defendant was their friend who acted to protect them and himself.

Notably, the State decided not to call the three other people who were with the defendant at the time of the shooting, thereby inferring that their testimony would have been cumulative to the testimony of Mr. Bienvenuti and Mr. Odom that the unknown male shooter had drawn a weapon prior to the defendant firing his weapon.

The State presented the testimony of other victims of the shooting although the defendant was not charged in relation to their injuries. Yet, the victims were only able to identify themselves in the video footage and testified as to why they

¹ MDMA stands for methylenedioxymethamphetamine, which is often referred to as “ecstasy.”

were on Bourbon Street on the night of the shooting, the nature of their injuries, and the residual impact the shooting had on their lives, if any, but none of them saw the actual shooting or shooters and could not offer relevant testimony as to the defendant's actions.

The State, in an effort to contradict Mr. Bienvenuti and Mr. Odom's testimony regarding the use of force in self-defense, called Lieutenant Gernon to testify. Importantly, Lieutenant Gernon was *not present* at the time of the shooting and testified solely as to his opinion of what the video footage revealed. One of those observations was that the unknown male shooter returned fire within two seconds of the defendant firing his weapon. Additionally, his interpretation of what he believed the video footage depicted included: (1) the unknown male shooter had one or two beer bottles in his left hand, (2) the unknown male shooter had nothing in his right hand, (3) then had a gun in his right hand, which he fired eleven times, and (4) then fled the scene while still holding two beer bottles in his left hand and nothing in his right hand again.

The only direct evidence presented by the State to meet its burden to the jury of proving beyond a reasonable doubt that the defendant did not act in self-defense was the video footage which was shown repeatedly to the jury in conjunction with witness testimony and is part of the record before this Court. Relying on that video, the State argued that the unknown male shooter could not have been openly brandishing his gun prior to the defendant firing because no one in the general crowd reacted prior to hearing the defendant's shots. No one other than Mr. Bienvenuti and Mr. Odom testified to seeing any gun from either shooter, all the other witnesses that were present recalled reacting to the *sound* of gunshots not because they saw a gun. In addition to that, the video footage is not very clear, and there is no dispute that the unknown male shooter was armed and fired his weapon repeatedly within two seconds of the defendant firing his gun. Like the defendant,

the unknown male shooter fled the scene and did not come forward to cooperate in the police investigation.

The video footage was shown and discussed over and over. The parties did not agree in many respects about what the footage showed, although there was substantial agreement that it reflected the unknown male shooter approaching the defendant's group, coming face to face with Mr. Odom, being pushed back by Mr. Odom, raising his arm up, and then the shooting started. The parties did not agree on whether a gun was in the unknown shooter's hand prior to the defendant firing. The parties agreed that the defendant fired first.

Considering the evidence, the jury presumably accepted the State's witness's Lieutenant Gernon's conclusions that at the time the defendant began shooting, the unknown shooter was only holding two beer bottles and was able to draw a gun with his other hand and begin shooting within two seconds. Otherwise, just viewing the video footage it is impossible to determine with any certainty, that the unknown shooter did not draw his gun first. Lieutenant Gernon used mere speculation, based on the crowd's reaction in the video footage, to contradict Mr. Bienvenuti and Mr. Odom's eyewitness account of the incident.

On this record, even viewing the evidence in the light most favorable to the State, no reasonable juror could have found that the State proved beyond a reasonable doubt that the defendant did not act in self-defense or defense of others. Accordingly, I would vacate the defendant's conviction and sentence for attempted manslaughter.

Additionally, although I agree with the majority's opinion as it pertains to the vacating of the manslaughter conviction, I disagree on the imposition of the lesser included offense of negligent homicide. Given my conclusion that the State failed to carry its burden of proof on the issue of self-defense coupled with the fact

that it was not the defendant's bullet that killed the victim, I cannot find sufficient evidence for negligent homicide.²

² I agree with the majority that it is not necessary for the defendant to be the shooter that killed the victim in order to be guilty of negligent homicide. However, to find that the defendant's actions were a gross deviation from the standard of care expected under like circumstances would require that the State had disproved the defendant's self-defense claim, which they did not. Unlike in *Parker*, this defendant saw his attacker and the attacker was brandishing a gun.