

STATE OF LOUISIANA

*

NO. 2018-KA-0482

VERSUS

*

COURT OF APPEAL

RUDY FRANCIS

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 443-175, SECTION "B"
Honorable Tracey Flemings-Davillier, Judge

* * * * *

Judge Edwin A. Lombard

* * * * *

(Court composed of Judge Edwin A. Lombard, Judge Rosemary Ledet, Judge
Tiffany G. Chase)

LEDET, J., DISSENTS IN PART WITH REASONS

Leon Cannizzaro
District Attorney
David S. Pipes, Jr.
Assistant District Attorney
DISTRICT ATTORNEY'S OFFICE, ORLEANS PARISH
619 S. White Street
New Orleans, LA 70119

COUNSEL FOR THE STATE OF LOUISIANA

Mummi S. Ibrahim, Esq.
IBRAHIM & ASSOCIATES, LLC
1100 Poydras Street, Suite 2900
New Orleans, LA 70163

COUNSEL FOR APPELLANT/DEFENDANT

AFFIRMED

DECEMBER 28, 2018

The defendant, Rudy Francis, challenges his 2010 conviction for manslaughter in this out-of-time appeal. After review in light of the applicable law and arguments of the parties, we affirm the defendant's conviction and sentence.

Relevant Facts and Procedural History

On August 9, 2000, Larry Lawrence was murdered. On October 3, 2003, the defendant was indicted and charged with second degree murder, a violation of La. Rev. Stat. 14:30.1. He pleaded not guilty at his arraignment on December 9, 2001. After two mistrials, he was found guilty of manslaughter by a unanimous jury on September 16, 2010. He was sentenced to twenty-five years at hard labor with credit for time served. On appeal, this court affirmed his conviction and sentence. *State v. Francis*, unpub. 2011-1082 (La. App. 4 Cir. 11/7/12), 103 So.3d 746, *writ denied*, 2012-2575 (La. 5/3/13), 113 So. 3d 209.

The defendant applied for post-conviction relief on May 1, 2014, claiming actual innocence and that both his trial and appellate counsel provided ineffective assistance. The district court summarily denied the application and this court subsequently denied the defendant's writ application pertaining to that decision. *State v. Francis*, unpub. 2015-1215 (La. App. 4 Cir. 2/24/15). The Louisiana

Supreme Court granted writs in part and remanded the matter to the trial court for an evidentiary hearing on the defendant's claim of ineffective assistance based on appellate counsel's failure to challenge the sufficiency of the evidence and the excessiveness of his sentence. *State v. Francis*, 2016-0513 (La. 5/19/17), 220 So.3d 703.

On remand, the State and the defendant agreed to an out-of-time appeal in lieu of an evidentiary hearing. This appeal followed.

Applicable Law

Manslaughter

La. Rev. Stat. 14:31(A)(1) provides, in pertinent part, that manslaughter is a murder under either La. Rev. Stat. 14:30, first degree murder, or La. Rev. Stat. 14:30.1, second degree murder, but the offense is committed in sudden passion or heat of blood.

La. Rev. Stat. 14:20(A) states that a homicide is justifiable "when committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger." There are two components necessary to invoke self-defense under Article 20(A): (1) the defendant's reasonable belief that he is in imminent danger of losing his life or receiving great bodily harm; and (2) the killing of the other person is necessary to save himself from that danger. When a defendant in a homicide prosecution claims self-defense, the burden is on the prosecution to prove beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Miller*, 2014-0406, pp. 19-20 (La. App. 4 Cir. 2/25/15), 160 So.3d 1069, 1082-1083.

Burden of Proof

When a defendant asserts that he acted in self-defense and his action resulted in a homicide, it is undisputed that the burden is on the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Lynch*, 436 So. 2d 567, 569 (1983) (thus, the “issue is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that the homicide was not committed in self-defense”); *see also State v. Patterson*, 295 So.2d 792, 794 (it is well-settled that the defendant in homicide prosecution asserts he acted in self-defense, the burden is on the State to prove that the defendant otherwise). Where there was contradictory testimony as to essential facts, the State failed to meet its burden of disproving the defendant’s self-defense claim. *State v. Fenner*, 1994-1498, p 8 (La. App. 4 Cir. 11/16/95), 664 So. 2d 1315,1320.¹

Sufficiency of the Evidence

Pursuant to *Jackson v. Virginia*, 443 U.S. 307 (1979), this court must determine that the evidence, viewed in the light most favorable to the prosecution, “was sufficient to convince a rational trier of fact that all the elements of the crime had been proved beyond a reasonable doubt.” *State v. Neal*, 00-0674, p. 9 (La. 6/29/01), 796 So.2d 649, 657 (citations omitted). When circumstantial evidence is used to prove the commission of an offense, “assuming every fact proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence.” La. Rev. Stat. 15:438. This statutory test (of La. Rev. Stat. 15:438) “works with the *Jackson* constitutional sufficiency test to evaluate

¹ A review of the jury instructions indicates that the jury was appropriately instructed as to the State’s burden of proof on this issue.

whether all the evidence, direct and circumstantial, is sufficient to prove guilt beyond a reasonable doubt to a rational jury.” *Neal*, 00-0674, p. 9, 796 So.2d at 657 (citation omitted). It is not a separate test from the *Jackson* reasonable doubt standard but, rather, it is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198, 1201 (La.1984).

A fact finder's decision concerning the credibility of a witness will not be disturbed unless it is clearly contrary to the evidence. *State v. James*, 2009–1188, p. 4 (La. App. 4 Cir. 2/24/10), 32 So.3d 993, 996.

Error Patent Review

A review of the record in light of the defendant’s argument that his sentence was excessive reveals that there is no evidence that the defendant waived his right to delay sentence after the trial court denied the motion for new trial. La. Code Crim. Proc. art. 873 states that if a motion for new trial is filed, sentence shall not be imposed until twenty-four hours after the motion is denied, unless the defendant expressly waives the delay or pleads guilty. However, such error is harmless where, as here, there is a sufficient delay between the conviction and the sentencing and there is no actual prejudice. *State v. Stovall*, 2007–0343, p. 15 (La. App. 4 Cir. 2/6/08), 977 So.2d 1074, 1084 (citing *State v. Foster*, 2002–0910, pp. 3–4 (La. App. 4 Cir. 12/11/02), 834 So.2d 1188, 1192. This error is harmless.

Assignment of Error 1

The defendant contends that the district court erred in not conducting an evidentiary hearing as instructed by the Louisiana Supreme Court order of May 19, 2017. However, contrary to the Louisiana Supreme Court instructions to hold an evidentiary hearing, the defendant (through defense counsel) agreed to an out-of-

time appeal instead of an evidentiary hearing. A defendant cannot avail himself of an alleged error unless he made a contemporaneous objection at the time of the error, *State v. Cambrice*, 2015-2362, p. 1 (La. 10/17/16), 202 So.3d 482, 483, and, in the case, the defendant did not merely fail to object, he agreed with the decision to take an out-of-time appeal in lieu of the evidentiary hearing. Moreover, the remedy for a determination that appellate counsel was ineffective for failing to challenge the sufficiency of the evidence is an out-of-time appeal. *State v. Bienemy*, 483 So.2d 1105, 1107 (La.1986). Accordingly, there is no merit in this assignment of error.

Assignment of Error 2

The defendant argues that the evidence is insufficient evidence to support his conviction for manslaughter because the State did not prove beyond a reasonable doubt that he did not act in self-defense.

The State's Evidence Presented at Trial

The State presented the following evidence at trial:

Stephanie Briscoe, a senior dispatcher with the New Orleans Police Department, identified the 911 call that was received at 12:48 a.m. on August 9, 2000, and the 911 tape was played for the jury.

Officer Reginald Coster, a New Orleans Police Department (NOPD) assigned to the Seventh District, testified that at 1 a.m. on August 9, 2000, he and his partner, Officer Larry Cager, responded to a call related to an aggravated battery by shooting at 11030 Gilford Drive in New Orleans East. When the officers arrived, emergency medical technicians (EMTs) were already on the scene, tending to the defendant who had a gunshot wound to the leg. The defendant told Officer Coster that he was sitting in a vehicle with his business partner on Elysian

Fields at Treasure Street when an unknown male walked up to the car and started shooting. The defendant was then transported to the hospital by the EMS. Subsequently, the police officers relayed information of the shooting on Elysian Fields and a Fifth District officer was dispatched to search the area for any evidence of a shooting at the location given by the defendant.

Officer Neville Payne (of the NOPD Fifth District) testified that he was dispatched to the shooting scene at the intersection of Elysian Fields and Treasure to look for a black Nissan which may have been related to the shooting. He found the vehicle parked, facing southbound, near a Burger King. The vehicle doors were closed. Upon looking into the vehicle, the officer observed a person, who was motionless, in the vehicle. He relayed this information to the dispatcher with an instruction to call EMS. The officer found the driver's side door locked but, opening the unlocked passenger door, saw that the victim in the driver's seat (who had been shot and was slumped over the console towards the passenger seat) was still wearing his seatbelt. EMS arrived and unsuccessfully attempted to revive the victim, the coroner's office was called, and homicide detectives arrived on the scene shortly thereafter.

Barry Mouton, an NOPD homicide detective, testified that his participation in the investigation began when he went to Charity Hospital to speak with the defendant. When Detective Mouton arrived at the hospital, the defendant was in pain but coherent and, repeating his statement to Officers Coster and Cager, described the perpetrator as a tall and thin African-American. Detective Mouton collected the defendant's clothing, as well as some personal effects, and spoke to the defendant's wife.

Detective Hamilton testified that he initially responded to the call on the Elysian Fields homicide but was instructed to go to New Orleans East (the residence at 11030 Gilford Drive) to search for evidence relating to the homicide and secure the scene. Arriving after the defendant had been transported to the hospital, he went to the defendant's vehicle where he observed blood in the vehicle and a Glock gun case on the floorboard, near the driver's seat. He also saw a trail of blood that led from the vehicle to the back patio. On the back patio, Detective Hamilton found some clothing, a bottle of peroxide, and a briefcase with a gun sticking out from the edge.

Detective Carlton Lawless testified that he assisted Detective Joel George in the investigation of the homicide on Elysian Fields. Arriving after Detective George and other officers, Detective Lawless observed the victim in the driver's seat slumped over the front console. Detective Lawless commented that it appeared to him as if the victim was trying to get to the passenger seat when he sustained multiple gunshot wounds to the body. He confirmed that the driver's side door was locked and numerous spent nine-millimeter shell casings were found on the ground near the unlocked passenger side door. The victim was identified as Larry Lawrence.

Subsequently, Detective Lawless was instructed to go to the scene in New Orleans East and, when he arrived there, Detective Hamilton told him the defendant had been shot in the leg, bloody clothes and a bottle of peroxide had been found on the patio, and there appeared to be blood on the front passenger seat of the defendant's vehicle, as well as a gun box that would hold a hand gun. Detective Lawless observed the wet spot on the driver's seat (that appeared to be blood) and found a gun box for an automatic hand gun on the rear floorboard with

some bullets but no gun. On the patio, Detective Lawless saw a black bag with something sticking out of it and, upon closer examination, found a nine-millimeter handgun in the bag that appeared to have been recently fired. The bag had a hole in it, and there were spent casings and bullets in the bag.

Detective George testified that, after arriving on the scene at Elysian Fields and Treasure Street, he learned that a male subject in a black Nissan sports car had been shot multiple times. He then relocated to the scene in New Orleans East where he met with the detectives working there and learned the defendant's vehicle was involved in the Elysian Fields incident. He had the vehicle secured and attended the victim's autopsy. Six bullets were recovered during the autopsy.

Detective George conducted interviews with people in the area of the shooting but found no witnesses to the shooting or surveillance videos of the incident. He spoke with the defendants and victims family members. The defendant was in surgery when he arrived at the hospital but, while there, Detective George learned that the bullets and spent casings found on the scene were fired from the gun found at the defendant's house. Therefore, the defendant became a suspect, was placed under arrest, and advised of his rights.

Dr. Michael DeFate, a forensic pathologist, testified as to the details of the autopsy on the victim who had nine gunshot wounds, four of which were fatal.² Dr. DeFate opined that the injuries sustained by the victim were consistent with the shooter and the victim staying in the same position the entire time of the incident but did not dispute that the trajectory of the victim's wounds could be consistent with a person struggling over a firearm as the trajectories were consistent with a firearm changing positions throughout the incident. He also acknowledged that

² The details of the autopsy can be found in this court's first appellate opinion.

wounds sustained by the victim could be consistent with the shooter backing up and continuing to fire and/or the victim physically reacting to being shot. Because the majority of the wounds were front to back, right to left, the wounds would be consistent with the victim turned or facing the passenger side of the vehicle.

Officer Kenneth Leary, an expert in firearms and ballistics, testified that spent casings and the bullets found at both scenes and retrieved from the victim's body were all fired from the gun found at the defendant's house. Officer Leary also testified that the trajectories could indicate that the victim was struggling with movement during the incident and, possibly, there was struggle for a weapon or the pushing or pulling of the weapon.

Jerome Pellerin, an attorney, testified that he handled the incorporation of the business established by defendant and the victim and, also, represented the victim's estate. He stated that, at the time of the victim's death, only the victim and defendant were shareholders in the business. Pellerin drafted a promissory note, a demand note, to protect the victim's investment in the corporation which was signed by the defendant. The defendant also executed a pledge of stock to secure the payment of the promissory note. The pledge provided that if the defendant did not repay the \$100,000, the defendant's shares of stock would go to the victim. After the victim's death, Pellerin made demand on the promissory note on behalf of the victim's estate but the promissory note had not been paid. According to Pellerin, the victim financed the business and the defendant's "sweat equity" was the basis of his shares of stock.

Defense Evidence Presented at Trial

The defense presented the following evidence:

The defendant, Rudy Francis, testified on his own behalf, stating that he was born and raised in New Orleans, had worked for Bellsouth, was a union steward, was a member of the NAACP, the Urban League and Operation Push. He acknowledged an arrest when he was seventeen years old, explaining that it occurred when he was driving a vehicle recently purchased by a friend that had been reported as stolen prior to the purchase and the prior owner failed to inform the police that the vehicle had been recovered. He also acknowledged a December 2006 issuing a worthless check charge, explaining that he wrote a check thinking that his pension check would be credited to his checking account before the check was presented. After the check was returned as NSF, he made restitution but charges were pressed to which and he pleaded guilty.

The defendant testified that he and the victim met while employed with Bellsouth. They subsequently opened a business, Quick Connect, together and had two offices, one in Gretna and a second location at Gentilly and Elysian Fields. He acknowledged that the victim had loaned him money but asserted that he paid the victim back. He acknowledged his signature on a letter concerning \$11,800, but did not recall it. The defendant testified that the victim was not really involved in the daily running of the business and described him as a person with a short fuse.

On the morning of the incident, the defendant went to the West Bank location where the victim was ranting about the staff. According to the defendant, the victim was cursing and threatening the employees. The defendant stated that there had been other times when the victim was violent. On one occasion, the defendant went with the victim to see someone in Kenner who owed the victim money. On the way there, the victim told the defendant what he was going to do to the guy. When they arrived there, the victim kicked the front door. The guy came

out, and the victim and the guy began wrestling in the front of the house. The defendant was able to pull the victim away and get him in the car. Another time, the defendant and the victim had a meeting with the staff of the West Bank location. The victim had a miniature baseball bat and threatened to hit someone. Another incident occurred when the victim grabbed an employee by the throat and picked him up out of his chair. One time, the defendant went with the victim to pick up his vehicle from a repair shop. The victim and one of the repair shop employees got into a fight. The defendant also testified that the victim acted hostile towards his girlfriend and some of the women who worked for him.

The defendant testified that he was the person who usually closed the business at night. On the night of the incident, the victim came into the office around 10:30 p.m. and they discussed the victim's behavior earlier that day. The defendant's wife called around 11:30 p.m. to tell him that he had left his house keys at home, and she would leave the patio door unlocked. On his way home, however, the victim called and asked him to meet back at the office. The victim called back a few minutes later and they decided to meet near the Burger King. When they both arrived at the designated place, the defendant parked his vehicle behind the victim's vehicle and got into the victim's vehicle. The victim got out of his vehicle and walked to the passenger side. The defendant noticed that the victim had his (the defendant's) briefcase that he had left it at the office. The victim asked him why he had the gun in the briefcase and told him he was going to treat the defendant like all the other "MFers." The defendant attempted to get out of the victim's car but the victim was blocking the way. The victim shot him through the briefcase, and the defendant was struck in the leg. The defendant fell into the vehicle. The victim got back into the driver's seat and put the briefcase on the

floor. The victim and the defendant struggled for the briefcase, and the gun went off. The defendant got out of the victim's car, got into his car, and drove home. He fell twice trying to get to the patio door. He fell on the patio and scooted to the patio door. He started banging on the door, and his oldest daughter came out and found him. He pulled himself half-way through the door. He did not recall speaking with any of the police officers.

The defendant acknowledged that Jerome Pellerin, an attorney, prepared documents for the business and, included in those documents, was a pledge of stock in favor of the victim. He admitted he did not tell his family the truth about the shooting because he did not want them to know what happened and he was scared. He testified that he purchased the gun about six months prior to the incident for protection because he was working late at night. He denied financial difficulties or that the defendant had loaned him \$100,000, although he conceded that the victim had previously loaned him money and helped pay for one of his daughter's wedding. He admitted that he filed for bankruptcy four times – in 1992, 1993, 1997 and 2001. On cross-examination, the defendant admitted that the bank accounts involved in the bank fraud charges were closed accounts and that the incident involved a series of checks. He stated, however, that he did not realize the accounts were closed.

The Reverend Moses Gordon (pastor of the Fellowship Missionary Baptist Church), Michael Smith (a former co-worker), Dwight Jarrett (a former lobbyist for the AFL-CIO), and the defendant's wife of thirty-eight years, Delcena Francis, all testified as to the defendant's good character. Mrs. Francis admitted that the victim had loaned her husband money, identified her signature and her husband's

signature on a promissory note for \$11,800, but asserted that the victim had been paid back by her husband.

Analysis

It is undisputed that the fatal shots were fired by the defendant's gun. The jury was presented with the forensic evidence indicative of the victim twisting and turning in response to being shot or, possibly, a struggling with the defendant over the gun. The jury also heard the defendant's testimony, the testimony of his family and friends, the police testimony regarding the defendant's changing story as to the events the night of the murder, and evidence concerning the defendant's financial situation and possible motive for the murder of his business partner. After weighing all the evidence and assessing the credibility of the witnesses, the jury found that the defendant was not acting in self-defense when he shot the victim multiple times and our review of the supports a finding that the jury had sufficient evidence to conclude that the defendant was not acting in self-defense when he shot the victim nine times. Because the jury's credibility determination is not clearly contrary to the evidence, we affirm the defendant's conviction.

Assignment of Error 3

The defendant argues that the trial court abused its discretion when it denied his motion to quash and motion for new trial based upon the State's failure to turn over documents pertaining to an alleged promissory note. However, this argument goes beyond the scope the remand ordered by the Louisiana Supreme Court and is not appropriate for review.

Assignment of Error 4

The defendant asserts that the sentence imposed is excessive because: (1) the trial court failed to observe the twenty-four hour delay for sentencing after denying

defendant's motion for new trial; (2) the State failed to file a motion pursuant to La. Code Crim. Proc. art. 893.1;³ (3) the record does not include the alleged La. Code Crim. Proc. art.893.1 motion, which affects his constitutional right to a complete review on appeal; and (4) the sentence imposed is excessive.

As discussed in our errors patent review, the failure to observe the twenty-four hour delay for sentencing after denying the defendant's motion for a new trial is meritless because any error was harmless. With regard to the issues raised by the defendant related to La. Code Crim. Proc. art. 893, a review of the appellate record and the supplemental transcript of September 10, 2010, reflects that the State filed the appropriate motion on that date and served it on defense counsel in open court.

With regard to the defendant's claim that the sentence imposed was excessive, a sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense but may only be set aside on appeal based upon a finding that it constitutes a manifest abuse of the district court's broad discretion. *State v. Smith*, 2001-2574, p. 7 (La.1/14/03), 839 So.2d 1, 4. Thus, we review a claim of excessive sentence to determine if the district court adequately complied with the statutory guidelines in La. Code Crim. Proc. art.

³La. Code Crim. Proc. art. 893.1 provides:

A. If the district attorney intends to move for imposition of sentence under the provisions of Article 893.3, he shall file a motion within a reasonable period of time prior to commencement of trial of the felony or specifically enumerated misdemeanor in which the firearm was used.

B. The motion shall contain a plain, concise, and definite written statement of the essential facts constituting the basis for the motion and shall specify the provisions of this Chapter under which the district attorney intends to proceed.

894.1 and whether the facts of the case warrant the sentence imposed. *State v. Trepagnier*, 97-2427, p. 10 (La. App. 4 Cir. 9/15/99), 744 So.2d 181, 189.

In the present matter, the district court requested a pre-sentence investigative report prior to the sentencing hearing. The report did not provide a recommendation on the sentence to be imposed, observing only that the maximum sentence for manslaughter is forty years. The district court considered several letters sent in support of the defendant and heard testimony at the sentencing hearing from the defendant and a character witness for the defendant. The district court also heard testimony from the victim's daughter, brother, aunt and fiancée. In sentencing the defendant, the district court recognized numerous mitigating factors, including the defendant's employment and involvement with community organizations. The district court referenced the letters received in support of the defendant, recognizing that the defendant has touched a number of lives in the city. The district court observed, however, that the defendant showed no remorse and, even if his actions were in self-defense, he could have expressed appropriate sentiments to the victim's family. The district court stated that while there may not have been evidence sufficient to support second degree murder, there was evidence that the defendant did pull the trigger on the gun that killed the victim. Referencing La. Code Crim. Proc. art. 893.3, the district court observed that the State produced clear and convincing evidence that a firearm was actually used and discharged during a violent crime and sentenced the defendant to twenty-five years at hard labor.

Upon review, we do not find that the trial court abused its great discretion in the sentence imposed or that the sentence is excessive.

Conclusion

After review of the record in light of the applicable law and arguments of the parties, we affirm the defendant's conviction and sentence.

AFFIRMED.