

STATE OF LOUISIANA

*

NO. 2017-KA-0789

VERSUS

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COURT OF APPEAL

CARDELL A. HAYES

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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JENKINS, J., CONCURS WITH REASONS

I respectfully concur in the result reached by the majority, affirming defendant’s convictions. I agree with the majority in finding that the evidence presented at trial is sufficient to sustain defendant’s convictions for manslaughter and attempted manslaughter, that the trial court did not abuse its discretion in denying defendant’s motion for new trial, and that defendant failed to preserve for appellate review the issues raised in assignments of error numbers 3 and 5. Regarding assignment of error number 4, in which defendant argues that the trial court abused its discretion by allowing victim impact testimony during the guilt phase of trial, while I find no merit to defendant’s argument, I write separately to further address this assignment of error and to emphasize the importance of raising specific grounds of objection on the record.

First, I note that defendant and the State incorrectly refer to Mr. McAllister’s testimony as “victim impact.” Louisiana jurisprudence recognizes and permits “victim impact” evidence or testimony, relating either to the individuality of the victim or the impact of the crime on the victim’s survivors, during the penalty phase of capital cases. *See State v. Bernard*, 608 So.2d 966 (La. 1992); *State v. Taylor*, 93-2201, pp. 7-11 (La. 2/28/96), 669 So.2d 364, 369-70; *State v. Williams*, 96-1023, pp. 21-24 (La. 1/21/98), 708 So.2d 703, 720-22; *see also*, La. C.Cr.P. art.

905.2. Victim impact evidence “is relevant and admissible at the penalty phase of a capital trial in order to permit the jury to assess meaningfully defendant’s moral culpability and blameworthiness”; but, such evidence “generally is not used to prove essential elements of a crime.” *State v. Lambert*, 98-0730, p. 22 (La. App. 4 Cir. 11/17/99), 749 So.2d 739, 755 (citations omitted). “[V]ictim-impact evidence’ has a highly specific meaning;” evidence not offered in the penalty phase to illustrate the impact of the crime should not be described as victim impact. *State v. Hoffman*, 98-3118, p. 25 (La. 4/11/00), 768 So.2d 542, 567. While “some facts about the victim, including some personal characteristics, are frequently developed at the guilt phase of the trial (on issues such as self defense and justification)”, such evidence is not victim impact, and the admissibility of such evidence should be determined in light of its relevancy under La. C.E. arts. 401 et seq. *Bernard*, 608 So.2d at 971; see *Lambert*, 98-0730, pp. 21-22, 749 So.2d at 755; *Hoffman*, 98-3118, pp. 24-25, 768 So.2d at 567.

In regards to defendant’s objections on the record to Mr. McAllister’s testimony, the record reflects that defendant objected to the testimony more than once, and two of those objections arguably preserved for appellate review the issue raised by assignment number 4. The majority notes defendant’s first objection, at the outset of Mr. McAllister’s testimony, on the grounds that the State failed to sequester him during opening statements. During the course of Mr. McAllister’s testimony, defendant also objected on the grounds of prejudice to the jury and character evidence. In light of the latter two objections, and considering defendant’s argument, in assignment of error number 4, that the State went beyond the proper scope of examination by eliciting testimony about the victim’s good character, thereby prejudicing him and violating his constitutional rights to due process and a fair trial, I find it appropriate to review the merits of this assignment of error.

As to the merits, defendant contends that the State elicited prejudicial testimony from Mr. McAllister “detailing the good moral qualities of the victim, the tremendous impact on the victim’s family, and the impact on the New Orleans Saints franchise.” Thus, the issue raised is whether this testimony is relevant and, even if relevant, whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. La. C.E. arts. 401, 403.

In reviewing the testimony, I note that the State asked Mr. McAllister to describe the victim as a teammate and colleague; asked him to describe the victim “as a person”; and asked if there were other teammates present to show their support for the victim’s family. In responding to these questions, Mr. McAllister offered a general description of Mr. Smith as a respected teammate who gave back to his community; he described the victim as a “caring person” with whom he had been close for several years; and he confirmed that there were other teammates who had come to show support for the family. My review of the testimony reveals no overly detailed or emotional description of the victim or his good qualities, and very little detail about the impact on the victim’s family or the New Orleans Saints organization. *See Hoffman*, 98-3118, pp. 24-25 (La. 4/11/00), 768 So.2d at 567 (finding that even if witness testimony about the victim’s good character was irrelevant, “it was hardly prejudicial, considering it merely humanized the deceased victim and did not overly detail the victim’s good qualities.”). Also, in consideration of defendant’s defense of justification, some facts about the victim’s character and moral quality are relevant. *See Bernard*, 608 So.2d at 971. Reviewing the testimony at issue in light of applicable law and jurisprudence regarding the relevance of evidence, I find no abuse of discretion in the trial court failing to rule that the probative value of the testimony was substantially

outweighed by its possible prejudicial effect.¹ Moreover, considering the evidence and testimony presented in this case, I find the verdict rendered was surely unattributable to any error in admitting Mr. McAllister's testimony. *See Lambert*, 98-0730, p. 23, 749 So.2d at 755-56; *Taylor*, 93-2201, pp. 11-12, 669 So.2d at 371.

Finally, considering this Court has found defendant failed to preserve multiple issues for appellate review, it is worth reemphasizing that our appellate review is limited to the record preserved during trial. A defendant cannot avail himself of an alleged error without having made a contemporaneous objection stating the specific ground of the objection. La. C.Cr. P. art. 841. An important purpose of the contemporaneous objection rule is to require counsel to call an error to the trial judge's attention at the time when the trial court can correct any error. *State v. Halley*, 16-0713, p. 3 (La. App. 4 Cir. 2/8/17), 212 So.3d 596, 599 (quoting *State v. Arvie*, 505 So.2d 44, 47 (La. 1987)). "The rule also prevents defense counsel from 'sitting on' an error and gambling unsuccessfully on the verdict, and later resorting to appeal on an error which might have been corrected at trial." *Arvie*, 505 So.2d at 47. Under unique facts and circumstances, an appellate court may disregard the contemporaneous objection rule where the alleged error may cast substantial doubt on the reliability of the fact-finding process. *Id.* at 48. However, the facts of this case, and the alleged errors to which defendant failed to object, do not warrant an exception to the contemporaneous objection rule.

¹ In ruling on defendant's objections of prejudice and character evidence, it appears from the record that the trial court ruled it was victim impact evidence.