Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **27th day of January, 2021** are as follows:

PER CURIAM:

2019-K-00949 *STATE OF LOUISIANA VS. DONASTY ANWANIQUE COHEN (Parish of Rapides)*

REVERSED AND REMANDED. SEE PER CURIAM.

Lombard, J., assigned as Justice ad hoc, sitting for Retired Chief Justice Johnson, for oral argument. He now sits as Justice ad hoc for Justice Piper Griffin at the time this opinion is rendered.

Crichton, J., concurs and assigns reasons.
Lombard, J., concurs in part, dissents in part and assigns reasons.

01/27/2021

SUPREME COURT OF LOUISIANA

No. 2019-K-00949

STATE OF LOUISIANA

versus

DONASTY ANWANIQUE COHEN

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF RAPIDES**

PER CURIAM:[*]

Defendant, age 16, was charged with second degree murder, La.R.S. 14:30.1, in the death of her 27-day-old infant son. After trial, the jury found her guilty of manslaughter, La.R.S. 14:31. The district court sentenced her to serve 17 years imprisonment at hard labor without parole eligibility. The court of appeal affirmed after deleting the restriction on eligibility for parole. *State v. Cohen*, 18-0297 (La. App. 3 Cir. 5/8/19), 272 So.3d 12.

The court of appeal considered and rejected three assignments of error. The court of appeal first rejected defendant's challenge to the sufficiency of the evidence. The court of appeal found the State's evidence sufficient to prove defendant committed second degree murder, and therefore the court of appeal found no basis to overturn the apparent compromise verdict despite the absence any mitigatory factors necessary to support a conviction for manslaughter. *See generally State ex rel. Elaire v. Blackburn*, 424 So.2d 246 (La. 1982) (jury may return a legislatively provided responsive verdict, whether or not the evidence supports that verdict, as along as the evidence was sufficient to support a conviction for the charged offense). The court of appeal then

[*] Lombard, J., assigned as Justice ad hoc, sitting for Retired Chief Justice Johnson, for oral argument. He now sits as Justice ad hoc for Justice Piper Griffin at the time this opinion is rendered.

found that the sentence was not excessive, and that the district court did not err in denying defendant's challenge for cause of two prospective jurors who expressed doubt as to their ability to serve fairly and impartially as jurors in a trial involving allegations of child abuse.

In this court, defendant contends only that the district court erred in denying her challenge for cause of one prospective juror, and defendant abandons all remaining claims. In the course of reviewing the record, it became apparent that the verdict in this case was non-unanimous. The sealed jury polling slips contained in the record show that defendant was found guilty of manslaughter by vote of 11-1. The State also concedes that the verdict was non-unanimous.

In *Ramos v. Louisiana*, 590 U.S. ——, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020), the United States Supreme Court held that the Sixth Amendment right to jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense. The present matter was pending on direct review when *Ramos v. Louisiana* was decided, and therefore the holding of *Ramos* applies. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). Accordingly, defendant is entitled to a new trial, which is the same result that would follow had she prevailed in her sole claim with regard to the denial of her cause challenge. Therefore, defendant's claim regarding the denial of her cause challenge is rendered moot.

We reverse the ruling of the court below, which affirmed defendant's conviction and sentence as amended. We vacate defendant's conviction and sentence. We remand to the district court for further proceedings.

REVERSED AND REMANDED

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CRICHTON, J., additionally concurs and assigns reasons:

In light of the jury's non-unanimous verdict in this tragic case, I agree with the majority's reversal and remand pursuant to *Ramos v. Louisiana*, 590 U.S. ——, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020). However, I write separately to emphasize the lack of any direct evidence in this record. It is well settled that when circumstantial evidence forms the basis of a conviction, the evidence, "assuming every fact to be proved that the evidence tends to prove . . . . must exclude every reasonable hypothesis of innocence." *State v. Holliday*, 17-1921, p. 5 (La. 1/29/20), ___ So.3d ____, citing La. R.S. 15:438 and *State v. Jacobs*, 504 So.2d 817, 820 (La. 1987) (all direct and circumstantial evidence must meet the Jackson test); *State v. Porretto*, 468 So.2d 1142, 1146 (La. 1985) (La. R.S. 15:438 serves as an evidentiary guide for the jury when considering circumstantial evidence). As my colleague Justice *ad hoc* Lombard also notes, it is perilous territory to charge this defendant with second-degree murder on the mere theory that she was the child's caregiver while presenting absolutely no other evidence to show how or when this infant was mortally wounded.

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LOMBARD, J., concurs in parts and dissents in part and assigns reasons,

It is indisputable that *Ramos v. Louisiana,* 590 U.S. ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), is applicable in this case, but it is also axiomatic that when the issues on appeal relate to both the sufficiency of evidence and one or more trial errors, the reviewing court should first determine the sufficiency of the evidence by considering the entirety of the evidence. *State v. Hearold,* 603 So.2d 731, 734 (La.1992). Under *Jackson v. Virginia,* 443 U.S. 307 (1979), if the reviewing court determines that the evidence was insufficient, then the defendant is entitled to an acquittal, and no further inquiry as to trial errors is necessary. *Hearold,* 603 So.2d at 734. Therefore, Louisiana appellate courts address the sufficiency of the evidence before other issues.

Like *Ramos,* the standard for testing the sufficiency of the evidence under *Jackson* is a constitutional one, requiring that the evidence, direct or circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt. *Jackson,* 443 U.S. at 319. Thus, in order to sustain a conviction, the State's case must "exclude[] every reasonable hypothesis of innocence." *State v. Captville,* 448 So.2d 676, 678 (1984); *see also*

State v. Crawford, 2014-2152 (La. 11/16/16), 218 So. 13, 36 (Knoll, J. dissents in part; concurs in part) (reasonableness is the touchstone of the *Jackson* inquiry; "[i]f the jury's verdict is not reasonable, the defendant's conviction cannot be maintained").

In this case, the record is devoid of *any* evidence to support the defendant's conviction. The pathologist report concluded that the cause of death was blunt force trauma inflicted three to five days before the infant's death. All four members of the household denied any knowledge of how the baby was injured and denied ever injuring the infant or observing anyone else doing so.[1] Nonetheless, although the State had no evidence to show how, when, or by whom the victim was injured, the State charged the defendant with second-degree murder on the theory that, according to the infant's father and his family, the defendant was the primary caregiver and spent the most time with the infant.[2] This is a novel theory and dangerous precedent.

The defendant's conviction in this case is an outlier: doubly constitutionally infirm. There is no definitive guidance as to which constitutional issue should be considered first here but, as a practical matter, remanding the matter for a new trial means that the defendant – whose imprisonment, based on a constitutionally infirm conviction, is invalid – will remain in prison for the duration of the long legal process for a new trial, a process egregiously exacerbated by the present global pandemic. Therefore, although I agree with the majority that *Ramos* is applicable, I believe that this matter should be resolved on the sufficiency of the evidence in the interest of both justice and judicial efficiency.

Accordingly, I respectfully concur in part and dissent in part.

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[1] The defendant and Kenneth Anderson, both sixteen years old, lived with their infant child, the one-month-old victim, in the home of Anderson's grandmother, Susan Willis. Anderson's younger brother, Kalib, age fifteen, also lived in the Willis home where the defendant, Anderson, and the infant shared a bedroom.

[2] The non-unanimous jury found the defendant guilty of the responsive verdict of manslaughter and the district court sentenced her to 17 years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The court of appeal affirmed the defendant's conviction, amended the sentence to delete and illegal prohibition on parole, and affirmed here sentence as amended. *State v. Cohen,* 18-0297 (La. App. 3 Cir. 5/8/19), 272 So.3d 12.