Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **30th day of June, 2021** are as follows:

PER CURIAM:

2019-K-01079 *STATE OF LOUISIANA VS. RANDALL PAUL BURTON (Parish of Vernon)*

REVERSED AND REMANDED. SEE PER CURIAM.

Crain, J., concurs in part, dissents in part and assigns reasons.

McCallum, J., concurs in part, dissents in part for the reasons assigned by Justice Crain.

06/30/2021

SUPREME COURT OF LOUISIANA

No. 2019-K-01079

STATE OF LOUISIANA

versus

RANDALL PAUL BURTON

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

PER CURIAM:

Defendant Randall Paul Burton was found guilty as charged of the second degree murder of Cody T. Fletcher, in violation of La. R.S. 14:30.1. The trial court sentenced him to serve life imprisonment at hard labor without parole eligibility. The court of appeal affirmed. *State v. Burton*, 2018-935 (La. App. 3 Cir. 6/5/19), 274 So.3d 122.[1] We granted defendant's application to examine whether the trial court erred in excluding evidence of the victim's dangerous character, pursuant to La. C.E. art. 404(A)(2). This evidence was relevant to defendant's claim that the homicide was justifiable, under La. R.S. 14:20(A). After examining the record, the arguments of the parties, and the jurisprudence, we find defendant is entitled to a new trial because the trial court erred when it excluded this evidence after defendant introduced appreciable evidence of an overt act or hostile demonstration by the victim. Accordingly, we vacate the sentence, set aside the conviction, and remand for further proceedings consistent

[1] The jury also found defendant guilty of possession of a firearm by a person convicted of certain felonies, La. R.S. 14:95.1. The trial court sentenced him to serve 20 years imprisonment at hard labor for this crime, running concurrently with his sentence for second degree murder. Defendant's conviction and sentence for violating La. R.S. 14:95.1 are not at issue here.

with the views that follow.

Defendant and Mr. Fletcher were friends and coworkers. During the early morning hours of February 1, 2017, defendant returned to the trailer where he lived with his girlfriend, Deborah Keel. Defendant began to argue with Ms. Keel. He ordered Mr. Fletcher, who was also present in the trailer, to leave. The details about what happened next were disputed at trial. What was not disputed is that defendant shot and killed Mr. Fletcher outside the trailer with a 20-gauge shotgun.

William Freeman, a friend of defendant and Mr. Fletcher, was outside the trailer when the shooting occurred. He testified that Mr. Fletcher exited the trailer but did not leave the property. Instead, Mr. Fletcher angrily shouted until defendant came outside with his shotgun. Mr. Freeman urged Mr. Fletcher to calm down and leave but Mr. Fletcher continued to taunt defendant. Mr. Fletcher then grabbed an unknown object from his truck[2] and angrily ran toward defendant. Defendant then shot him.

Defendant testified that he told Mr. Fletcher, who was "ranting and raving," that he did not wish to fight him, and he asked him to leave. Mr. Fletcher then charged at him "with a vengeance" to attack him with a knife. After he shot Mr. Fletcher, defendant called 911.[3] The 911 call was played for the jury. In it, defendant told the 911 operator that he shot Mr. Fletcher because he came at him with a knife.

Sheriff's deputies found a knife on the ground near Mr. Fletcher's right hand. Forensic testing revealed that there was a mixture of DNA from two or more persons

[2] When asked if he knew what the victim took out of his truck, Mr. Freeman answered, "I did not know what he grabbed. There's one thing I'm certain of, he didn't grab the Holy Bible, go up there and witness to Paul Burton's wretched soul to save him from eternal hell fire. He grabbed something with malicious intent."

[3] Ms. Keel testified that defendant did not attempt to render aid after he shot Mr. Fletcher and that he waited approximately 30 minutes before he called 911. According to Ms. Keel, defendant initially proposed hiding the body and he asked her to get a shower curtain to wrap up the victim's body. Defendant denied this. Ms. Keel testified it was Mr. Freeman who suggested calling 911 because defendant acted in self-defense.

on the knife's handle. Defendant was the major contributor of DNA to the mixture. Mr. Fletcher was excluded as the major contributor. The minor contributor (or contributors) could not be identified because the sample was insufficient to permit identification. Defendant claimed that he had recently borrowed the knife and had sharpened it before he returned it to Mr. Fletcher.

During the trial, defendant repeatedly sought to introduce character evidence of Mr. Fletcher's reputation for violence in support of his claim that he shot Mr. Fletcher in self-defense. Each time, the trial court excluded this evidence because it found defendant had not established "evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense," as required by La. C.E. art. 404(A)(2)(a). The trial court acknowledged that defendant claimed that Mr. Fletcher charged toward him with a knife, and that a knife was found by Mr. Fletcher's body. The trial court observed, however, that DNA on the knife came from defendant and not from Mr. Fletcher. Relying on the totality of the evidence, the trial court found that defendant's testimony was uncorroborated. The trial court concluded that there was no credible evidence that Mr. Fletcher had a knife in his hands, and the court found that merely running at defendant while unarmed did not constitute overt act or hostile demonstration. For these reasons, the trial court ultimately ruled that evidence that Mr. Fletcher had a reputation for violence and that he would not back down from a fight (which was proffered by the defense) was inadmissible.

The court of appeal affirmed and found that the trial court's evidentiary ruling was correct. The court of appeal stated that "the evidence is more than sufficient for the jury to reasonably reject Burton's assertion that Cody [Fletcher] was 'coming at him' with a knife." *Burton*, 2018-935, p. 28, 274 So.3d at 142. Therefore, defendant "failed to meet the burden to prove a hostile demonstration that would warrant introduction of

character evidence of the victim." *Id.*

Defendant argues that the trial court erred because La. C.E. art. 404(A)(2) only requires appreciable evidence, not proof, of an overt act or hostile demonstration on the part of the victim before the character evidence can be admitted. According to defendant, the trial court stepped beyond its role as gatekeeper and instead intruded on the jury's role in weighing the evidence when it assessed his and Mr. Freeman's credibility. We agree.

A homicide is justifiable when it is "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." La. R.S. 14:20(A)(1). When justification is raised by the accused, the State must prove beyond a reasonable doubt that the crime was not committed in self-defense. *State v. Matthews*, 464 So.2d 298, 299 (La. 1985).

Although evidence of a person's character or a trait of his character is generally inadmissible for the purpose of proving that he acted in conformity therewith on a particular occasion, it may be introduced to support a plea of self-defense. *See* La. C.E. art. 404(A)(1)(a). In such circumstances, a defendant is entitled to introduce evidence of the decedent's prior threats or violent character "for two distinct purposes: (1) to show defendant's reasonable apprehension of danger which would justify his conduct; and (2) to help determine who was the aggressor in the conflict." *State v. Lee*, 331 So.2d 455, 460 (La. 1975).

Victim character evidence is admissible provided the defendant "first produces evidence that the decedent had made a hostile demonstration or overt act against the accused at the time of the incident." *See Lee*, 331 So.2d at 458; *see also* La. C.E. art. 404(A)(2)(a) (barring victim character evidence "in the absence of *evidence* of a hostile

demonstration or an overt act"). Article 404 was enacted along with the Code of Evidence by 1988 La. Acts 515. Before that, La. R.S. 15:482 governed the introduction of evidence of threats or dangerous character of an injured party. Before its amendment by 1952 La. Acts 239, La. R.S. 15:482 required "*proof* of hostile demonstration or overt act on the part of the person slain or injured." The statute was amended in 1952 to require only "*evidence* of hostile demonstration or of over act on the part of the person slain or injured."

This court addressed the effect of the 1952 amendment in *State v. Lee*, *supra*:

> As amended by Act 239 of 1952, La.R.S. 15:482 provides: "In the absence of *evidence* of hostile demonstration or of overt act on the part of the person slain or injured, evidence of his dangerous character or of his threats against accused is not admissible." (Italics ours.) The 1952 amendment specifically permitted dangerous character evidence, if "evidence" instead of "proof" (the pre-1952 wording) was made of the overt act or hostile demonstration.
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> Prior to the 1952 amendment, this court had held that by the pre-1952 wording the "proof" of the overt act must be established To the satisfaction of the trial judge before evidence of the decedent's dangerous character or of his threats against the accused could be received. *State v. Terry*, 221 La. 1109, 61 So.2d 888 (1952), 14 La.L.Rev. 226–28 (1953); *State v. Tobias*, 218 La. 226, 48 So.2d 905 (1950). *State v. Thornhill*, 188 La. 762, 178 So. 343 (1938); *State v. Richardson*, 175 La. 823, 144 So. 587 (1932); *State v. Dreher*, 166 La. 924, 118 So. 85 (1928). Chief Justice O'Niell repeatedly dissented from these rulings, strongly urging that by them the trial judge, by rejecting the credibility of defense witnesses on a merit-issue, was permitted to invade the trial jury's function of evaluating the evidence. *See*: 11 La.L.Rev. 231–32 (1951); Note, 2 La.L.Rev. 376 (1940).
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> The legislative intent reflected by the 1952 amendment was to overrule legislatively our decisions that permitted the trial judge's discretion to determine incredible the defendant's evidence of an overt act and thus, without jury evaluation of it to withhold from the jury evidence tendered by the defendant in support of his position that he was acting reasonably in self-defense. This is the explicit purport of the amendment, and the prior academic and judicial criticism of the former interpretation (unique to Louisiana) re-enforces our view that such was the legislative intent.

Id., 331 So.2d at 459. Therefore, this court concluded in *Lee*:

> The trial court thus committed error in its ruling, for it ignored the effect

> of the 1952 amendment. By it, *when appreciable evidence is in the record relevantly tending to establish the overt act, the trial court cannot exercise its discretion to infringe on the fact-determination function of the jury by disbelieving this defense testimony* and thus, deny the accused a defense permitted him by law.

Lee, 331 So.2d at 459 (citations omitted and emphasis added).

Article 404 of the Louisiana Code of Evidence contains the "evidence" language from its precursor La. R.S. 15:482. Recently, in *State v. Williams*, 2019-00490 (La. 4/3/20), — So.3d —, 2020 WL 1671569, we reiterated that "a trial court is not entitled to exercise[] a credibility determination to refuse the defendant the right to have the jury determine the merits of [his] plea of self-defense." *Williams*, 2019-00490, p. 3 (internal quotation marks omitted), citing *State v. Edwards*, 420 So.2d 663, 669 (La. 1982). In *Williams*, the trial court had prohibited the defendant from introducing evidence of the victim's prior threats because the only evidence of an overt act by the victim was the testimony of a witness who the court found lacked credibility. We found the trial court erred in *Williams* because, while "the evidence of an overt act is almost certainly worthy of disbelief by a jury, . . . it still qualifies as appreciable within the meaning of the article as interpreted by the jurisprudence." *Williams*, 2019-00490, p. 4.[4]

The trial judge here likewise erred in making credibility determinations to refuse the defendant the right to have a jury determine the merits of his plea of self-defense.

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[4] While we found the trial judge in *Williams* erred in excluding the evidence based on witness credibility, we also found defendant was ultimately not entitled to introduce evidence of these specific acts as they might relate to defendant's state of mind because there was no evidence defendant was aware of them:

> However, defendant denied any knowledge of or familiarity with the victim before the day of the incident. Defendant's denial of any knowledge of the victim at all stands as a formidable obstacle to his attempt to introduce this evidence to establish his apprehensive state of mind.

Williams, 2019-00490, p. 6.

In doing so, the court infringed on the fact-determination function of the jury by disbelieving the testimony of defendant and Mr. Freeman. The State all but concedes as much by arguing, "There was *no credible evidence* presented of an overt act by Mr. Fletcher prior to being murdered by the defendant." State's brief, p. 25 (emphasis added).

In *State v. James*, 339 So.2d 741, 746 (La. 1976), this court found that "[t]he self-serving, contradicted testimony of the defendant that [the victim] leaned toward a place the defendant believed he kept a gun is not appreciable evidence tending to establish an overt act."[5] Therefore, the *James* court concluded that the trial judge properly excluded evidence of the victim's reputation for violence. In *Williams*, this court recognized that the court in *James* had placed a notable limit on the appreciable evidence standard. *Williams*, 2019-00490, pp. 3–4. That limit, however, does not apply here.

In the present case, unlike in *James*, defendant did not provide only self-serving and contradicted testimony as the sole evidence tending to establish an overt act. Mr. Freeman corroborated defendant's testimony that Mr. Fletcher was enraged and charged at him with an object to attack. Furthermore, the DNA evidence did not contradict defendant's testimony that Mr. Fletcher had a knife but instead simply did not confirm (or refute) it. While defendant was the major contributor of DNA found on

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[5] This court summarized the pertinent testimony in *State v. James* as follows:

> As his own first witness the defendant [Leslie James] testified that although he had not been directly threatened by [Henry] Marshall, he heard rumors that Marshall intended to harm him. In an attempt to settle any differences between them, the defendant and his girl friend, Judy Kahoe, got into a car with the [Mr. Marshall and Michelle Lacoste]. The defendant testified that, after a short ride, Marshall leaned forward. He then shot him, thinking he was reaching for an automatic pistol, which he believed was kept under the dashboard.
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> On re-direct, Judy Kahoe testified that she did not see Marshall move forward.

James, 339 So.2d at 746. Leslie James also shot and killed Ms. Lacoste.

the knife, the minor contributor(s) could not be identified. The State's expert testified that, while Mr. Fletcher could be excluded as the major contributor, the sample was not adequate to include or exclude him or anyone else as a minor contributor. Therefore, the trial court erred in evaluating the credibility of Mr. Freeman and assigning a particular weight to the DNA evidence, which were for the jury to determine, in deciding that the totality of the evidence presented justified excluding evidence of the victim's reputation for violence.

Under the harmless-error test of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the question is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828; *see also State v. Gibson*, 391 So.2d 421, 426–27 (La.1980). In *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Supreme Court clarified that the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.*, 508 U.S. at 279, 113 S.Ct. at 2081; *see also State v. Code*, 627 So.2d 1373, 1384 (La.1993).[6]

Chapman makes it clear that the burden of proving harmless error rests squarely

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[6] Defendant contends the erroneous exclusion of evidence of the victim's dangerous character is a structural error that cannot be deemed harmless because it denied him his constitutional right to present a defense, in violation of *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Defendant's position is contrary to *Chapman* itself, in which the United States Supreme Court declined to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. *See Chapman*, 386 U.S. at 21–22, 87 S.Ct. at 827; *see also Weaver v. Massachusetts*, 582 U.S. —, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017).

This court has also previously considered whether a trial court's error in excluding evidence of prior threats or acts of violence by a victim was harmless under the *Chapman* standard. *See, e.g., State v. Martin*, 458 So.2d 454 (La. 1984). The *Martin* court found the trial court erred in excluding evidence that the victim, Gloria Martin, who was defendant James Martin's wife, had attempted to run him over five years before he shot and killed her. Nonetheless, citing La.C.Cr.P. art. 921 and *Chapman v. California*, the *Martin* court found the error was harmless because the prior incident was remote in time and the jury was presented with evidence of a more recent incident in which Ms. Martin was

on the shoulders of the party benefitting from the error. *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828 ("Certainly error ... casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."). Therefore, it was incumbent on the State here to show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. The State, however, has never attempted to assert that the error was harmless; it has always been the State's sole position that the trial court did not err.

In conclusion, we find the trial court erred in excluding evidence of the victim's dangerous character, which was relevant to defendant's claim that the homicide was justifiable, after defendant introduced appreciable evidence of an overt act or hostile demonstration by the victim. The court of appeal erred in affirming the trial court's ruling. We further find that the State has not shown that the trial court's error was harmless. Therefore, defendant is entitled to a new trial. We vacate the sentence, set aside the conviction, and remand for further proceedings.

REVERSED AND REMANDED

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alleged to have threatened and attacked Mr. Martin. *Id.*, 458 So.2d at 459.

SUPREME COURT OF LOUISIANA

No. 2019-K-1079

STATE OF LOUISIANA

VS.

RANDALL PAUL BURTON

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Vernon

CRAIN, J., concurring in part, dissenting in part.

I agree the trial court erred by excluding evidence of the victim's reputation for violence. I disagree with the majority's conclusion the error was not harmless.

The defendant's self-defense claim rested entirely on testimony from himself and William Freeman, neither of whom were believed by the jury or the trial court. Contrary to the defendant's claim, the evidence is that he was the aggressor in the altercation. When he arrived home, the defendant instructed the victim to leave. The victim complied, exiting the trailer without incident. Then, the defendant, safely inside his own home, decided to grab a loaded shotgun, open his door, and walk outside to confront the victim. Seconds later, the defendant shot and killed the victim.

According to Deborah Keel, whose testimony is relegated to a footnote in the majority opinion, the first mention of a knife came after the shooting, but not from the defendant. Instead, the defendant told Keel to get a shower curtain for the body, explaining, "[T]he only way that I don't have to go to jail is if we do something with his body." When the defendant asked what they should do with the victim's truck, Freeman said to call the police, because the victim "had a knife" and it was self-defense. The defendant replied, "Oh yeah." This dubious story collapsed entirely when DNA testing of the knife found at the scene identified only the defendant as a

major contributor. The trial court and jury reasonably did not believe either the defendant or Freeman, instead believing they staged the scene to support a self-defense theory.

Against this backdrop, the majority finds the exclusion of the reputation evidence was not harmless error. I disagree. The only sources of the proffered reputation evidence are two witnesses the jury found to have no credibility: the defendant and Freeman. The jury unequivocally rejected their testimony about the victim's actions after the defendant walked outside brandishing a loaded shotgun. If the jury did not believe the self-defense theory, I must conclude it would have also rejected these same witnesses' testimony about the victim's reputation. The jury did not believe them.

When a witness willfully or deliberately testifies falsely to a material fact, a jury is free to reject the entirety of his testimony as being unworthy of belief. *See State v. Prestridge*, 399 So. 2d 564, 578 (La. 1981); *State v. Mills*, 13-0573 (La. App. 1 Cir. 8/27/14), 153 So. 3d 481, 493, *writ denied*, 14-2027 (La. 5/22/15), 170 So. 3d 982. Here, had the jury believed the victim held a knife at the time he was shot, then I would agree that the victim's reputation for violence may have affected the jury's consideration of defendant's self-defense theory. But, the jury reasonably rejected that theory and concluded the defendant staged the scene to support his claim of self-defense. I believe there is no reasonable doubt the victim's reputation for violence would not have altered the jury's conclusion that the defendant was unworthy of belief. That reputation evidence, although improperly excluded, would not have affected the verdict.

I also disagree with the suggestion that we are precluded from making a harmless-error determination because "the State . . . has never attempted to assert that the error was harmless." Rather, the State has argued there was no error. This

court has both the authority and the obligation to review the record *de novo* to determine an error's harmfulness. *State v. Corley*, 633 So. 2d 151, 154 (La. 1994). A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance that does not affect substantial rights of the accused. La. Code Crim. Pro. art. 921. Reviewing courts have this responsibility whether requested by the State or not. If the record establishes a verdict is surely unattributable to the trial court's error, this court must declare the error harmless and affirm the conviction. I would do so in this case and affirm the conviction and sentence.