NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2018 KA 1280

STATE OF LOUISIANA

VERSUS

JERMAINE RUFFEN

Judgment rendered FEB 2 8 2019

* * * * *

On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 10-13-0798, Sec. II

The Honorable Richard D. Anderson, Judge Presiding

* * * * *

Hillar C. Moore, III
District Attorney
Christopher J.M. Casler
Assistant District Attorney
Baton Rouge, Louisiana

Attorneys for Appellee
State of Louisiana

Prentice L. White
Baton Rouge, LA

Attorney for Defendant/Appellant
Jermaine Ruffen

* * * * *

BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

The defendant, Jermaine Ruffen,[1] was charged by grand jury indictment with one count of second degree murder (count I), a violation of La. R.S. 14:30.1, and one count of attempted second degree murder, a violation of La. R.S. 14:27 and La. R.S. 14:30.1 (count II). He pled not guilty on both counts. Following a trial by jury, the defendant was found guilty as charged on both counts. On count I, he was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. On count II, he was sentenced to fifty years imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court ordered the sentences to run concurrently. The defendant now appeals, raising one counseled assignment of error and three pro se assignments of error. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On the evening of June 20, 2013, Baton Rouge Police Officer Wallace Britton was performing a follow-up investigation of a burglary on Clayton Street in Baton Rouge. Around midnight, he heard rapid gunshots that were "too close to ignore" and drove his police car toward the sound of the shots to check on the situation. On his way, Officer Britton saw a man and woman on the sidewalk. When Officer Britton asked if they had heard anything, they pointed him in the direction of the gunshots. Officer Britton proceeded to drive in that direction, made a right turn when he reached Evangeline Street, and continued going north on McClelland Street. At this point, he encountered the defendant at the intersection of Byron Avenue and McClelland Street. Officer Britton testified that the defendant was walking "hastily . . . like he was really trying to get

[1] The record contains various spellings of the defendant's last name. We adopt the spelling used in the grand jury's indictment as the official charging instrument.

somewhere." Officer Britton also testified that he encountered the defendant only a minute or less after he initially heard the shots. Officer Britton called to the defendant and asked whether he had heard anything, to which the defendant replied that he had not. Officer Britton testified that the defendant's demeanor changed and that the defendant looked at Officer Britton "nervously." Because Officer Britton found the defendant's behavior to be suspicious given the close proximity of the gunshots, he exited his police car and asked the defendant to step over to the car. The defendant started running and discarded an object on the ground, which was later found to be a .40 caliber Glock pistol. Officer Britton ultimately apprehended the defendant and detained the defendant in his police car. Officer Britton was then notified that two people had been shot and that one had died. Officer Britton was unaware of any murders that night when he first came into contact with the defendant. Officer Britton transferred the defendant to the violent crimes unit upon the request of one of the investigating detectives. Officer Britton indicated in his testimony at trial that the defendant was wearing a black t-shirt and brown, "tannish" pants.

The same evening, June 20, 2013, Sheirica Ellis and her husband, Anthony Jones, were visiting family. According to Ellis, the two had gone to help Jones's cousin's girlfriend repair a flat tire, then pulled onto a driveway on Evangeline Street. Ellis testified that "[t]hey had a guy come from behind the tree, side of the house, wherever, and he just started shooting and wouldn't stop." The bullets came through the driver's side of the car. Because of the number of bullets being fired into the car, Ellis initially believed that there was more than one shooter. She then saw, however, that there was only one shooter. Despite being struck multiple times by bullets, Ellis called 911 and identified the shooter as being dark-skinned and wearing a black shirt. At trial, Ellis testified that she had never met the

defendant or had any kind of association with him before that night. Jones died as a result of multiple gunshot wounds, and Ellis spent nearly two weeks in the hospital recovering from her severe injuries. Approximately two days after the shooting, while recuperating in the hospital, Ellis saw the defendant on the local news in an orange jumpsuit in police custody and informed the lead detective on the case, Detective Belford Johnson, that the defendant was the person who shot her and Jones.

SUFFICIENCY

In his sole counseled assignment of error and his first pro se assignment of error, the defendant contends that the evidence was insufficient to show that he, and not another individual, committed the shooting of the deceased victim and the surviving victim. The defendant urges that the surviving witness's identification of him is unreliable because she saw him on the local news in handcuffs being placed into a police car. The defendant also argues that Ellis's identification is unreliable because she underwent extensive surgeries after being shot in the head and that the police should have asked her to identify him in a photo lineup. The defendant further claims that DNA testing of the firearm located by another officer after the defendant's arrest did not produce any evidence to tie the defendant to the shootings. According to the defendant, no evidence was produced to show that this firearm was the weapon that was fired in the shootings. Additionally, the defendant insists that his flight from Officer Britton was not indicative of criminal intent or a guilty mind because he was in a high-crime area and it was reasonable for him to believe Officer Britton had already targeted him for a crime at the time the officer stepped out of the police car. He contends that the jury improperly relied on his refusal to answer Officer Britton's questions as a sign of

consciousness of guilt, as he was not under arrest at the time he was approached by Officer Britton and was free to avoid any questioning by the officer.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; **State v. Crowson**, 2010-1283 (La. App. 1st Cir. 2/11/11), 2011 WL 2135102 *6 (unpublished), writ denied, 2011-0528 (La. 11/23/11), 76 So.3d 1146; **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 and 2000-0895 (La. 11/17/00), 773 So.2d 732.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **State v. Forrest**, 2016-1678 (La. App. 1st Cir. 9/21/17), 231 So.3d 865, 870, writ denied, 2017-1683 (La. 6/15/18), 257 So.3d 687.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. **State v. Magee**, 2017-1217 (La. App. 1st Cir. 2/27/18), 243 So.3d 151, 157. Thus, specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. **Id**. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. James**, 2017-1253 (La. App. 1st Cir. 2/27/18), 243 So.3d 717, 721, writ denied, 2018-0419 (La. 1/8/19), 259 So.3d 1024.

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended. La. 14:27(A). It is immaterial whether, under the circumstances, he would have actually accomplished his purpose. **Id**. The gravamen of attempted second degree murder is the specific intent to kill and the commission of an overt act tending toward the accomplishment of that goal. Although the statute for the completed crime of second degree murder allows for a conviction based on "specific intent to kill or to inflict great bodily harm," attempted second degree murder requires specific intent to kill. See La. R.S. 14:30.1(A) (1) & 14:27(A); **State v. Martin**, 2011-1843 (La. App. 1st Cir. 5/2/12), 92 So.3d 1027, 1031, writ denied, 2012-1244 (La. 11/9/12), 100 So.3d 836.

With regard to the defendant's claim that the surviving witness's identification of him was unreliable, we note that from her vantage point of the passenger seat in the car, she saw him in her peripheral vision standing outside the driver's door and that there was a light on at the time. We also note that she identified the defendant on the 911 call as being dark-skinned and wearing a black shirt. This description matched the shirt the defendant was wearing at the time Officer Britton apprehended him. Detective Johnson testified that Ellis identified the defendant as the shooter only "a couple of days" later when she saw him on the local news while she was recuperating in the hospital.

Ellis testified that she was shot in the face and that she underwent three reconstructive surgeries. She also testified that the police never presented her with a lineup from which to identify the defendant. However, nothing in the record supports the defendant's contention that Ellis's surgeries and time spent recovering affected her identification of him, or the defendant's claim that the police should have showed Ellis a photo lineup. Ellis testified at trial emphatically that she recognized the defendant on television because he was the person who shot her and her husband and that she saw him twice—once at the shooting, and then again on television. Additionally, Detective Johnson acknowledged that the normal practice is to show a victim a photo lineup, but because Ellis had already identified the defendant on television, showing her a lineup would have been "kind of pointless."

In regard to the defendant's claim that DNA testing of the firearm did not produce any evidence to tie him to the shootings, it is true that the State's DNA expert testified there was no DNA on the .40 Glock pistol to detect through the amplification process. The defendant, however, fails to mention that a latex glove was found at the scene of the shooting on Evangeline Street. The State's DNA expert tested the latex glove and obtained a limited DNA profile from the sample,

from which the defendant could not be excluded. According to the expert, assuming one contributor, the possibility of finding the same DNA profile if the DNA had come from an unrelated random individual other than the defendant was approximately one in 2.3 billion for the black community. Additionally, the State's expert in firearm examination, Jeff Goudeau, testified that all sixteen shell casings recovered from the crime scene were determined to have been fired in the .40 Glock pistol that the defendant discarded. The pistol itself was determined to have a maximum capacity of sixteen live rounds, and its slide was locked to the rear, indicating that it had been fired until it ran out of ammunition. Goudeau further testified that the bullets recovered from the autopsy of the deceased victim had rifling patterns consistent with bullets fired from a .40 Glock.

Finally, with regard to the defendant's claim that the jury improperly relied on his refusal to answer Officer Britton's questions as a sign of guilt and that his flight from Officer Britton was not a sign of *mens rea*, we note that nothing in the record indicates the jury convicted him based on these facts. Officer Britton testified simply that the defendant fled from him when he started to get out of his police car to speak with him further about the gunshots; thus, he was merely explaining how and why he made initial contact with the defendant and the circumstances surrounding his apprehension of the defendant.

Any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of counts I and II and the defendant's identity as the perpetrator of those offenses. The verdicts rendered against the defendant indicate the jury accepted the testimony of Sheirica Ellis and rejected the defendant's attempts to discredit her.

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Dyson**, 2016-1571 (La. App. 1st Cir. 6/2/17), 222 So.3d 220, 228, writ denied, 2017-1399 (La. 6/15/18), 257 So.3d 685. No such hypothesis exists in the instant case. Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. When there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Ford**, 2017-0471 (La. App. 1st Cir. 9/27/17), 232 So.3d 576, 586. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. **Id**.

In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). In accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder, a court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law. See **State v. Mire**, 2014-2295 (La. 1/27/16), __ So.3d __, __, 2016 WL 314814 *8 (per curiam).

This assignment of error is without merit.

DEFECTIVE INDICTMENT

In pro se assignment of error two, the defendant claims that the indictment is defective because it was not brought in open court by an East Baton Rouge Parish grand jury and because there is not a minute entry or transcript showing that the minute clerk of court, the foreperson, and the district attorney were present. He also claims that the absence of the presiding judge and the court reporter is fatal to the indictment. The defendant further claims that the minute clerk's failure to poll the grand jury members and to sign the indictment is fatal to the indictment. Finally, the defendant claims that the foreperson did not write down the charge against the defendant or the date of the indictment's return.

We note that although the defendant filed a pro se motion to quash at the trial court level, the substance involved the allegedly untimely institution of prosecution, which the trial court denied because the State and defense counsel had entered into a joint motion to continue the matter for status, thereby triggering the one-year rule for the State in La. Code of Crim. P. art. 580[2] and extending the time period in which the State could institute prosecution. The arguments the defendant raises are also not contained in a motion for new trial or a motion for post judgment verdict of acquittal. An irregularity cannot be availed of after the verdict unless it was objected to at the time of the occurrence. La. Code Crim. P. art. 841(A). Further, this court has held that the defendant is precluded from raising a new basis for his motion to quash on appeal. **State v. Pelas**, 99-0150 (La. App. 1st Cir. 11/5/99), 745 So.2d 1215, 1217. Thus, to preserve an issue for appellate review, a party must state an objection contemporaneously with the occurrence of

[2] Louisiana Code of Criminal Procedure article 580 provides that "[w]hen a defendant files a motion to quash...the running of the periods of limitation...shall be suspended until the ruling of the court thereon; but in no case shall the state have less than one year after the ruling to commence the trial."

the alleged error, as well as the grounds for the error. **State v. Cockerham**, 2017-0535 (La. App. 1st Cir. 9/21/17), 231 So.3d 698, 708, writ denied, 2017-1802 (La. 6/15/18), 245 So.3d 1035. The contemporaneous objection rule has two purposes: to put the trial judge on notice of the alleged irregularity so that he may cure the problem, and to prevent the defendant from gambling on a favorable verdict and then resorting to appeal on errors that might easily have been corrected by an objection. **Id**. Accordingly, the defendant did not properly preserve for appellate review the arguments raised herein regarding the allegedly defective indictment.

This assignment of error is without merit.

INCOMPLETE RECORD/INEFFECTIVE ASSISTANCE OF COUNSEL

In his third pro se assignment of error, the defendant claims that the trial record is incomplete, and therefore, appellate counsel could not provide effective assistance because he was unable to properly prepare an effective appellate brief based upon a review of all records in the case. Specifically, the defendant claims that his appellate counsel "obtained only the records transcribed by the court reporter from the courthouse to research and prepare the assignment of errors" and did not have access to the pre-trial motions, motion hearings transcripts, voir dire transcripts, and minute entry and hearing transcripts of the grand jury indictment.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). In reviewing claims of ineffective assistance of counsel on direct appeal, the Supreme Court of the United States has expressly observed that appellate counsel need not advance every argument, regardless of merit, urged by the defendant. **Evitts v. Lucey**, 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985). Courts give great deference to

professional appellate strategy and applaud counsel for winnowing out weaker arguments on appeal and focusing on one central issue if possible, and at most a few key issues. This is true even where the weaker arguments have merit. **State v. Joseph**, 2016-1541 (La. App. 1st Cir. 6/2/17), 223 So.3d 528, 530.

When the claim of ineffective assistance of appellate counsel is based on failure to raise the issue on appeal, the prejudice prong of the **Strickland**[3] test requires the petitioner to establish that the appellate court would have granted relief, had the issue been raised. **Joseph**, 223 So.3d at 530.

The defendant failed to establish prejudice in this matter. Appellate counsel has not alleged that the record was incomplete, and indeed, filed a brief on behalf of the defendant challenging the sufficiency of the evidence. The defendant fails to establish how he is prejudiced by the alleged incomplete record, and none of his pro se claims have merit.

This assignment of error is without merit.[4]

REVIEW FOR ERROR

The defendant requests that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Harrison**, 2017-0852 (La. App. 1st Cir. 11/1/17), 233 So.3d 109, 110.

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[3] **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[4] On January 25, 2019, the defendant filed a pro se "motion to remand for a new trial" in this matter. This motion is actually an untimely supplemental pro se brief. This court has previously allowed the defendant to file a late supplemental brief. We dismiss the untimely motion to remand.

CONCLUSION

For the foregoing reasons, the defendant's convictions and sentences are affirmed. The defendant's January 25, 2019 motion to remand for a new trial is dismissed.

CONVICTIONS AND SENTENCES AFFIRMED; MOTION TO REMAND DISMISSED.

278 So.3d 971 (Mem)
Supreme Court of Louisiana.

STATE of Louisiana
v.
Jermaine RUFFEN

No. 2019-KO-00564
|
September 06, 2019

Applying For Writ Of Certiorari, Parish of East Baton Rouge, 19th Judicial District Court Number(s) 10-13-0798, Court of Appeal, First Circuit, Number(s) 2018 KA 1280;

Opinion
Writ application denied.

All Citations

278 So.3d 971 (Mem), 2019-00564 (La. 9/6/19)

2020 WL 615069
Supreme Court of Louisiana.

STATE OF LOUISIANA
V.
JERMAINE RUFFEN

No. 2019-KO-00564
|
January 22, 2020

IN RE: **Jermaine Ruffen** - Applicant Defendant; Applying for Reconsideration, Parish of East Baton Rouge, 19th Judicial District Court Number(s) 10-13-0798, Court of Appeal, First Circuit, Number(s) 2018 KA 1280;

Opinion

***1** Application for reconsideration denied.

BJJ

JLW

JDH

SJC

JTG

Supreme Court of Louisiana January |22, 2020

SUPREME COURT OF LOUISIANA

No. 19-KO-00564

STATE OF LOUISIANA

v.

JERMAINE RUFFIN

ON WRIT OF CERTIORARI TO THE FIRST CIRCUIT COURT OF APPEAL, PARISH OF EAST BATON ROUGE

JOHNSON, C.J., concurs in the denial and assigns reasons.

The defendant was apparently convicted by a jury verdict of 10-2. The defendant raised a *pro se* objection to the non-unanimous jury verdict while his case was on direct review in the First Circuit Court of Appeal.[1] Because the Court of Appeal considered the defendant's objection to be an untimely supplemental brief, it did not consider the issue. The defendant tried again to raise the issue with this Court.

As I explained in my dissent in *State* v. *Hodge*, 19-KA-0568 and 19-KA-0569 (La. 11/19/19), I believe the evidence is now clear that Louisiana's non-unanimous jury scheme that originated with Louisiana's 1898 Constitutional Convention, has racist origins and continues to have a racially disparate effect today. Therefore I believe that non-unanimous jury verdicts violate the Equal Protection clause. However, because this Court cannot consider issues raised on appeal for the first time that were not raised in the district court, I concur in the denial of the defendant's application for reconsideration.

I write separately to note the diligence with which this defendant has pursued this issue, despite his counsel.

Johnson, C.J., concurs and assigns reasons.

Crain, J., recused.

All Citations

--- So.3d ----, 2020 WL 615069 (Mem), 2019-00564 (La. 1/22/20)

Footnotes

STATE OF LOUISIANA V. JERMAINE RUFFEN, --- So.3d ---- (2020)

2019-00564 (La. 1/22/20)

1 Defendant, sentenced to life in prison without the possibility of parole, tried to raise the issue *pro se* because his appointed counsel from the Louisiana Appellate Project did not do so in the three pages of law and argument he submitted on behalf of his client. From the record before us, it is not clear whether counsel at defendant's 2018 trial for second degree murder objected to the 10-2 jury verdict.

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