

State v. Robinson

Supreme Court of Louisiana. December 19, 2023 374 So.3d 982 (Mem) 2023-00661 (La. 12/19/23) (Approx. 1 page)

374 So.3d 982 (Mem)
Supreme Court of Louisiana.

STATE of Louisiana

v.

Nathaniel O. ROBINSON

No. 2023-K-00661
December 19, 2023

Applying For Writ Of Certiorari, Parish of Orleans Criminal, Criminal District Court
Number(s) 537-889, Court of Appeal, Fourth Circuit, Number(s) 2021-KA-0254.

Opinion

*1 Writ application denied.

Genovese, J., would deny on the showing made.

Griffin, J., would grant.

All Citations

374 So.3d 982 (Mem), 2023-00661 (La. 12/19/23)

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State v. Robinson

Court of Appeal of Louisiana, Fourth Circuit. April 13, 2023 --- So.3d --- 2023 WL 2926359 2021-0254 (La.App. 4 Cir. 4/13/23) (Approx. 12 pages)

2023 WL 2926359

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Court of Appeal of Louisiana, Fourth Circuit.

STATE of Louisiana

v.

Nathaniel O. ROBINSON

NO. 2021-KA-0254

April 13, 2023

Synopsis

Background: Defendant was convicted in the District Court, Orleans Parish, No. 537-889, Criminal District, Kimya M. Holmes, J., of video voyeurism, attempted indecent behavior with a juvenile, and indecent behavior with a juvenile, and sentenced to total of 15 years' imprisonment. Defendant appealed. The Court of Appeal, 336 So.3d 567, remanded. On remand, District Court reviewed record and conducted further proceedings to ascertain whether verdicts were non-unanimous and provided per curiam to Court of Appeal stating outcome of review and proceedings.

Holdings: The Court of Appeal, Lobrano, J., held that:

- 1 convictions were not obtained in violation of defendant's constitutional right to unanimous verdict;
- 2 video of defendant having sex with his wife was relevant; and
- 3 imposition of consecutive sentences was not constitutionally excessive.

Affirmed.

Atkins, J., concurred in part and dissented in part with reasons.

Appellate ReviewTrial or Guilt Phase Motion or Objection

West Headnotes (12)

Change View

1 Criminal Law  Assent of required number of jurors
A non-unanimous jury verdict in a federal or state felony trial is unconstitutional.
U.S. Const. Amend. 6.

2 Criminal Law  Assent of required number of jurors
Defendant's convictions for video voyeurism, attempted indecent behavior with a juvenile, and indecent behavior with a juvenile were not obtained in violation of his constitutional right to unanimous verdict, where district court judge asked jury whether at least ten of the 12 jurors agreed to verdicts and jury foreperson answered affirmatively, no polling of jury occurred, and there was no other evidence in record, transcripts, or clerk's office that jury's decision was less than unanimous. U.S. Const. Amend. 6.

3 Criminal Law  Verdict
Non-unanimous jury issue is error patent that appellate court must review even if defendant did not object in form of polling jury.

4 Criminal Law  Special types of photographs; enlargements, motion and sound pictures, X-rays
Disorderly Conduct  Admissibility

APPENDIX C

Disorderly Conduct  Admissibility**Infants**  Conduct, circumstances, and character of defendant

Video of defendant having sex with his wife was relevant to show lewd and lascivious behavior on part of defendant, in prosecution for video voyeurism, attempted indecent behavior with a juvenile, and indecent behavior with a juvenile; video that defendant recorded of his wife and saved to his computer tended to show that defendant acted with specific intent to arouse or gratify his sexual desires when he secretly videotaped minor victim while she was nude and, on one occasion, while she was wearing a t-shirt and her pants were pulled down and saved video footage on his computer. La. Code Evid. Ann. art. 401.

5 Criminal Law  Evidence calculated to create prejudice against or sympathy for accused

Term "unfair prejudice," as used in the rule requiring the probative value of relevant evidence to substantially outweigh the danger of unfair prejudice, speaks to capacity of some concededly relevant evidence to lure fact finder into declaring guilt on ground different from proof specific to offense charged. La. Code Evid. Ann. art. 403.

6 Criminal Law  Relevance

Absent clear abuse of discretion, trial court's ruling on relevancy of evidence should not be disturbed on appeal. La. Code Evid. Ann. art. 401.

7 Disorderly Conduct  Privacy, surveillance, and eavesdropping

To prove that a defendant committed video voyeurism, the State must prove three elements: (1) that defendant used an image-recording device for the purpose of observing, viewing, photographing, filming, or videotaping another person; (2) that the person did not consent to being observed, photographed, or videotaped; and (3) that the defendant committed the act for a lewd or lascivious purpose.

8 Infants  Indecency and indecent liberties in general

To convict defendant of indecent behavior with juvenile, state must prove three elements: (1) age difference of more than two years between defendant and victim, who was not yet 17; (2) defendant committed lewd or lascivious act upon person or in presence of child; and (3) defendant intended to arouse or gratify either his own or victim's sexual desires.

9 Criminal Law  Special types of photographs; enlargements, motion and sound pictures, X-rays

Probative value of video of defendant having sex with his wife to show lewd and lascivious behavior on part of defendant substantially outweighed any prejudicial effect, in prosecution for video voyeurism, attempted indecent behavior with a juvenile, and indecent behavior with a juvenile. La. Code Evid. Ann. art. 403.

10 Sentencing and Punishment  Separate acts**Sentencing and Punishment**  Cumulative or consecutive sentences

Imposition of consecutive sentences based on defendant's convictions for video voyeurism, attempted indecent behavior with a juvenile, and indecent behavior with a juvenile was not constitutionally excessive; convictions related to 17 videos made by defendant of minor victim, 16 of the videos were made while she was showering and one video was made while she was in another room of the house, and district court found that the 16 videos made by defendant of victim while she was showering captured five separate visits to bathroom, such that none of the six consecutive sentences were for same course of conduct. U.S. Const. Amend. 8; La. Const. art. 1, § 20; La. Code Crim. Proc. Ann. art. 883.

11 Sentencing and Punishment  Cruelty and unnecessary infliction of pain**Sentencing and Punishment**  Proportionality

A sentence is "excessive" and unconstitutional if it is grossly out of proportion to the severity of the crime or if it is nothing more than the purposeless and needless imposition of pain and suffering. U.S. Const. Amend. 8; La. Const. art. 1, § 20.

12 **Criminal Law**  **Sentencing**
Sentencing and Punishment  **Discretion of court**
 Trial judge has broad discretion when imposing sentence, and reviewing court may not set sentence aside absent manifest abuse of discretion.

APPEAL FROM CRIMINAL DISTRICT COURT ORLEANS PARISH NO. 537-889, SECTION "DIVISION D", Judge Kimya M. Holmes,

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(Court composed of Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Dale N. Atkins)

Opinion

Judge Joy Cossich Lobrano

*¹ This matter was previously before this Court. In *State v. Robinson*, this Court remanded this matter to the district court with instructions to review the record and to conduct further proceedings to ascertain whether the verdicts convicting Defendant, **Nathaniel O. Robinson** ("Defendant"), were, in fact, non-unanimous; and this Court ordered the district court to provide a *per curiam* on the *Ramos* issue,¹ stating the outcome of its review and proceedings. 21-0254, p. 33 (La. App. 4 Cir. 2/18/22), 336 So.3d 567, 587. The district court subsequently provided a *per curiam* to this Court. For the reasons discussed below, we affirm Defendant's convictions and sentences.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The underlying facts of this case are set forth in this Court's previous opinion. See *Robinson*, 21-0254, pp. 1-2, 336 So.3d at 569-70. The procedural history germane to this appeal is that on August 7, 2019, a jury found Defendant guilty of seventeen counts of video voyeurism; seventeen counts of attempted indecent behavior with a juvenile; and one count of indecent behavior with a juvenile. *Id.* at pp. 2-3, 336 So.3d at 570. When the jury returned with its verdicts, *² the district court asked if there were at least ten jurors who agreed with the verdicts, and the jury foreperson responded affirmatively. *Id.*, 21-0254, p. 4, 336 So.3d at 571. After the jury foreperson read the verdicts, the district court asked if there were any motions, to which counsel for Defendant responded, "Not now by the defense, Judge." Subsequently, the district court sentenced Defendant to a total of fifteen years with the sentences on certain counts running consecutive to some counts and concurrent with other counts. *Id.*, 21-0254, pp. 3-4, 336 So.3d at 570.

¹ "At the time of Defendant's trial in August 2019, Louisiana law accepted non-unanimous jury verdicts in felony trials, and Louisiana jurisprudence upheld the constitutionality of such verdicts." *Id.*, 21-0254, p. 30, 336 So.3d at 585 (citing *State v. Bertrand*, 08-2215 (La. 3/17/09), 6 So.3d 738). However, after Defendant's trial, on April 20, 2020, the United States Supreme Court rendered its decision in *Ramos*. Therein, the United States Supreme Court reviewed whether the federal Sixth Amendment right to trial "by an impartial jury" in criminal prosecutions calls for a unanimous jury verdict. *Robinson*, 21-0254, p. 31, 336 So.3d at 585 (citing *Ramos*, 140 S.Ct. at 1394). The United States Supreme Court further reviewed whether that right applies in state criminal trials via the Fourteenth Amendment. *Id.* "The United States Supreme Court definitively ruled that the Sixth Amendment right to a jury trial requires a unanimous jury verdict to convict a defendant of a serious offense in a federal or state criminal prosecution." *Id.* (citing *Ramos*, 140 S.Ct. at

1395-97). Thus, per *Ramos*, a non-unanimous jury verdict in a federal or state felony trial is unconstitutional. *Id.*, 21-0254, p. 31, 336 So.3d at 586. Additionally, *Ramos* invalidated the convictions by non-unanimous jury verdicts for defendants whose cases are still on direct appeal. *Id.*, 21-0254, pp. 31-32, 336 So.3d at 586 (citing *Ramos*, 140 S.Ct. at 1406-08; *3 *State v. Myles*, 19-0965, p. 1 (La. App. 4 Cir. 4/29/20), 299 So.3d 643, 644; *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987) (providing for the retroactivity of new rules in the prosecution of criminal matters)).

Considering the foregoing and the fact that the record before this Court did not demonstrate unanimous verdicts for Defendant's convictions, this Court found merit in Defendant's fourth assignment of error, wherein he contended that his "convictions were obtained in violation of his constitutional right to a unanimous verdict."² *Id.*, 21-0254, p. 30, 336 So.3d at 585. As detailed in our prior Opinion, this Court issued orders to the district court and the Clerk of Criminal District Court ("Clerk of Criminal Court") in an attempt to locate the jury polling slips, if any existed, and to determine "the steps made to locate the slips, including any information discovered as to the number of jurors voting to convict Defendant." See *Robinson*, 21-0254, pp. 4-5, 336 So.3d at 571. In response, the Clerk of Criminal Court filed correspondence with this Court, stating that "[f]ollowing a thorough inspection of the Clerk's Office it was determined that no jury polling slips were found in the record. Additionally, no jury polling slips were ever placed under seal concerning the referenced matter." *Id.*, 21-0254, p. 5, 336 So.3d at 571.

Ultimately, this Court followed *State v. Norman*, 20-00109 (La. 7/2/20), 297 So.3d 738, and remanded this matter for the district court to review the record and conduct further proceedings to ascertain whether the verdicts were, in fact, non-unanimous and to provide a *per curiam* to this Court on the *Ramos* issue and stating the outcome of its review and proceedings. *Id.*, 21-0254, p. 33, 336 So.3d at 586-87. The district court's *per curiam* set forth the following:

*4 This Court has been instructed by the Court of Appeal to author a *Per Curiam* after reviewing the record and conducting further proceedings as to the question of jury unanimity in the above captioned matter.

Nathaniel O. Robinson was tried by jury, with this Court's predecessor presiding over the proceedings, on August 6[] and 7[], 2019. After deliberation, the jury returned verdicts of guilt on 34 counts: 17 counts of video voyeurism of a juvenile, 16 counts of attempted indecent behavior with a juvenile, and one count of indecent behavior with a juvenile. Mr. Robinson was subsequently sentenced by the trial court on September 13, 2019.

This Court finds that there is no evidence that jury polling was ever requested by the defense, and therefore was not conducted following the verdict rendered by the aforementioned trial jury. This Court has conducted a thorough inquiry into the issue of jury unanimity or nonunanimity as detailed below:

This Court ordered, on July 26[], 2021, that the Orleans Clerk of Criminal Court unseal and provide Jury Polling Slips to the Fourth Circuit Court of Appeal, should any exist under seal (see Exhibit 1, *in globo*). The Orleans Criminal Clerk of Court reported that none were placed under seal. This Court thereafter sent correspondence via facsimile, confirmed transmitted, to the Clerk of the 4th Circuit Court of Appeal, on August 6, 2021 detailing the steps taken to ascertain whether polling had been conducted after the verdict; which is attached herein (see Exhibit 1, *in globo*).

After the record was located for inspection by the Court, the Court examined the record and found no evidence of polling slips. The verdict forms, signed and properly executed by the jury foreperson are located within the record. The minutes of trial do not reflect polling was requested by defense counsel after the verdict was rendered.

This Court confirmed with the court reporter of the trial, Crystal Ballast, that the trial transcript that was generated and lodged at the Fourth Circuit Court of Appeals is complete and correct. This Court notes that within the trial transcript, at p.310, lines 7-15, after the verdict was read in open court, the trial judge, the Hon. Paul Bonin, asked on the record whether any additional motions lay, and that defense counsel responded in the negative. There is no evidence that the defense counsel, acting on behalf of Mr. Robinson, ever requested polling for any of the counts.

This Court re-examined the record pursuant to the instant Writ of Mandamus, and finds

again that the record does not reflect that polling was ever requested. Therefore, no polling of jurors was *5 conducted after conclusion of trial. The trial transcript indicates that the trial court inquired as to whether the defense intended to make any motions, and that the defense counsel did not elect to move for polling. After this inquiry by the trial court, the verdicts were accepted and made a part of the court record as valid verdicts, and the jury was discharged (see trial transcript, p. 310). There is no indication in the minutes that polling was requested by the State or defense.

It is therefore the opinion of this Court that the defendant did not make any request for polling of jurors upon the rendering of the verdict and prior to discharging the jury in accordance with [La.] C.Cr.P. [a]rl[.] 812,³ and this Court is therefore unable to ascertain whether the verdicts were unanimous due to the defendant's failure to make a request for jury polling prior to recordation of the verdicts.

We now discuss how to resolve Defendant's fourth assignment of error in light of the district court's above *per curiam* and *Ramos*. We further address Defendant's second and third assignments of error, namely, that "[t]he [district] court erred in permitting the State to introduce an unrelated sex tape of [Defendant] and his wife" and that "[t]he sentence in this case is unconstitutionally excessive."⁴

DISCUSSION

***Ramos* Claim**

2 As stated previously, in his fourth assignment of error, Defendant asserted that his "convictions were obtained in violation of his constitutional right to a unanimous verdict." Our review of the record and the district court's *per curiam* reveals that the question as to whether the verdicts convicting Defendant were unanimous remains unresolved and no polling of the jury occurred: because the *6 presiding district court judge asked whether at least ten jurors agreed to the verdicts and the jury foreperson answered affirmatively, we know only that at least ten of the twelve jurors agreed. This means that the jury votes convicting Defendant could have been 10-2; 11-1; or 12-0. Therefore, we must determine what to do in light of this uncertainty and the lack of jury polling.

Our review of the jurisprudence reveals that the courts of appeal have reached different results on whether to review a non-unanimous jury claim in the absence of an objection or a request for polling of the jury by the defense. In *State v. Bradley*, the Louisiana Second Circuit Court of Appeal ("Second Circuit") faced an analogous situation to the matter *sub judice*: the record did not demonstrate that the defendant's four convictions for second degree rape were by a non-unanimous jury vote, and counsel for the defendant had not requested polling of the jury with respect to those convictions. 53,550, p. 7 (La. App. 2 Cir. 11/18/20), 307 So.3d 369, 374. The Second Circuit deemed the matter of the non-unanimity of the jury "to be waived" and affirmed the defendant's convictions, stating that "the matter was clearly before the parties and the court gave defense counsel the opportunity to make a request to have the jury polled on those convictions." *Id.*, 53,550, p. 9, 307 So.3d at 374. Similarly, in *State v. Thompson*, the Louisiana First Circuit Court of Appeal ("First Circuit") stated that "because [defense] counsel did not poll the jury and its verdict was otherwise unrecorded, defendant is precluded from raising the [non-unanimous jury] issue on appeal, even on error patent review." 20-0023, p. 6 (La. App. 1 Cir. 4/16/21), 324 So.3d 113, 117.

However, this Court has held that "a challenge to the unanimity of the verdict is an error patent under Louisiana law; and, as such, an objection to the jury's verdict, in the form of polling the jury, is not required." *7 *State v. Lamizana*, 21-0409, p. 7 (La. App. 4 Cir. 3/23/22), — So.3d —, —, 2022 WL 869670, *4 (citing *State v. Monroe*, 20-00335 (La. 6/3/20), 296 So.3d 1062). See also *State v. Taylor*, 19-00946, p. 1 (La. 6/3/20), 296 So.3d 1020, 1021; *State v. Corn*, 19-01892, p. 1 (La. 6/3/20), 296 So.3d 1043, 1044 (holding that "[i]f the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings, the court of appeal should nonetheless consider the issue as part of its error patent review" (citing La. C.Cr.P. art. 920(2))). Additionally, we note that in *State v. Fortune*, this Court remanded the matter for a *per curiam* for a resolution of the *Ramos* issue, and the district court's *per curiam* stated that "[a]lthough no formal polling of the jury was taken during the sentencing of this matter, and jury slips are not available as part of the record, this Court confirms the representations of both counsel for the defense and the prosecution as found in the sentencing transcript of this Court, that the jury returned a non-unanimous verdict of 10-2." 19-0868, p. 2 (La. App. 4 Cir. 11/18/20), 310 So.3d 604, 604. In response to the *per curiam*, this Court vacated the

defendant's conviction and sentence and remanded the matter for a new trial, despite the defendant's failure to poll the jury. *Id.*, 19-0868, p. 2, 310 So.3d at 605

3 Our review of the relevant laws and jurisprudence leads us to disagree with the interpretations contained in *Bradley* and *Thompson*. Though *Bradley* contends that a non-unanimous jury claim is something that a defendant can "waive" by failing to object in the form of polling the jury, this Court has specifically held that a non-unanimous jury issue is an error patent, which constitutes an exception to the contemporaneous objection rule. See *State in Interest of C.H.*, 21-0516, pp. 17-18 (La. App. 4 Cir. 1/26/22), 335 So.3d 451, 462; *State v. Lamizana*, 21-0409, — So.3d at —, 2022 WL 869670, *4. Therefore, we decline to follow the holdings of *8 the Second Circuit and the First Circuit in *Bradley* and *Thompson*, respectively. Instead, we follow the Louisiana Supreme Court's directive in *Taylor and Corn*, as well as the precedent set by this Court in *Lamizana* and *Fortune*: in light of *Ramos*, a non-unanimous jury issue is an error patent that an appellate court must review even if the defendant did not object in the form of polling the jury.

Here, there is nothing in the record to affirmatively indicate that the verdicts convicting Defendant were anything but unanimous. The district court asked the jury foreperson if there were at least ten jurors in agreement, and the response was affirmative. There is no other evidence in the record, transcripts, or clerk's office that the jury's decision was less than unanimous. Unlike *Fortune*, there are no representations by trial counsel or confirmation by the presiding district judge that the jury was not unanimous. Accordingly, we find that Defendant's fourth assignment of error lacks merit.

Admission of Sex Tape

4 In his second assignment of error, Defendant contends the trial court erred by allowing the introduction of a sex tape of Defendant having sex with his wife. At trial, the defense objected to the relevancy of the video, and the objection was overruled. Defendant was willing to stipulate that a video of him having sex with his wife was located on his computer. The State would not agree to the stipulation, and the video was played. The State claims the sex tape is relevant to show lewd and lascivious behavior on the part of Defendant, which is an element of the offenses of video voyeurism and indecent behavior with a juvenile with which Defendant was charged.

5 6 "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more *9 probable or less probable than it would be without the evidence." La. C.E. Art 401. However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time." La. C.E. Art 403. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged." *State v. Simmons*, 21-0547, p. 5 (La. App. 4 Cir. 11/24/21), 332 So.3d 158, 161, *writ denied*, 22-00112 (La. 3/15/22), 334 So.3d 397 (citing *State v. Smith*, 19-607, p. 3 (La. App. 5 Cir. 1/21/20), — So.3d —, —, 2020 WL 356010, *2). Absent a clear abuse of discretion, a trial court's ruling as to relevancy should not be disturbed on appeal. *State v. Whittaker*, 463 So.2d 1270 (La. 1985).

7 8 To prove that a defendant committed video voyeurism, the State must prove three elements, namely that (1) defendant used an image-recording device for the purpose of observing, viewing, photographing, filming, or videotaping another person; (2) that the person did not consent to being observed, photographed, or videotaped; and (3) that the defendant committed the act for a lewd or lascivious purpose. *Robinson*, 21-0254, pp. 29-30, 336 So.3d at 584 (citing *State v. Breedlove*, 51,055, p. 5 (La. App. 2 Cir. 1/11/17), 213 So.3d 1195, 1201). To convict a defendant of indecent behavior with a juvenile, the State must prove three elements, namely (1) an age difference of more than two years between the defendant and the victim, who was not yet seventeen; (2) the defendant committed a lewd or lascivious act upon the person or in the presence of a child; and (3) the defendant intended to arouse or gratify either his own or the victim's sexual *10 desires. *Robinson*, 21-0254, pp. 25-26, 336 So.3d at 582 (citing *State v. Dukes*, 19-0172, p. 10 (La. App. 4 Cir. 10/2/19), 281 So.3d 745, 753).

9 The sex tape of Defendant and his wife tends to prove that Defendant recorded this sexually explicit material and saved it on his computer for purposes of future sexual gratification. This evidence is relevant to the charged offenses as it tends to show that

Defendant acted with the specific intent to arouse or gratify his sexual desires when he secretly videotaped the victim while she was nude and on one occasion, while she was wearing a T-shirt and her pants were pulled down, and saved this video footage on his computer. Further, the probative value of this evidence substantially outweighs any prejudicial effect.

Excessive Sentence

10 In his third assignment of error, Defendant argues the district court's imposition of consecutive sentences is constitutionally excessive. Defendant's argument regarding his sentences is confined to the propriety of consecutive sentences, rather than the actual length of the individual sentences.

11 12 The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment, while art. I, § 20 of the Louisiana Constitution also prohibits the imposition of excessive punishment. *State v. Wilson*, 14-1267, p. 23 (La. App. 4 Cir. 4/29/15), 165 So.3d 1150, 1165. "[A] sentence is excessive and unconstitutional if it is grossly out of proportion to the severity of the crime or if it is nothing more than the purposeless and needless imposition of pain and suffering." *State v. Bonanno*, 384 So.2d 355, 357 (La. 1980). A trial judge has broad discretion when imposing a sentence, and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Batiste*, 06-0875, p. 17 (La. App. 4 Cir. 12/20/06), 947 So. 2d 810, 820.

*11 La. C.Cr.P. art. 883 sets forth the general rule for concurrent versus consecutive sentences:

If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently.

Defendant's convictions relate to seventeen video recordings made by him of the victim, sixteen of which were made while she was showering and one while she was in another room in the house. The district court found that the sixteen video recordings of the victim in the bathroom captured five separate visits to the bathroom. The district court sentenced Defendant to a total of fifteen years with the sentences on certain counts running consecutive to some counts and concurrent with other counts. Specifically, the district court imposed the following sentences: counts 1, 2, 3, 18, 19, and 20 were ordered to run concurrent with each other at two years each; counts 4, 5, 6, 7, 21, 22, 23, and 24 were ordered to run concurrent with each other at two years each; counts 8, 9, 10, 25, 26 and 27 were ordered to run concurrent with each other at two years each; counts 11, 12, 13, 28, 29, and 30 were ordered to run concurrent with each other at two years each; counts 14, 15, 16, 31, 32, and 33 were ordered to run concurrent with each other at two years each; and counts 17 and 34 were ordered to run concurrent with each other at three years and five years, respectively. Each set of concurrent sentences was ordered to run consecutively to every other set of sentences. See *Robinson*, 21-0254, pp. 3-4, 336 So.3d at 570.

*12 The district court ordered that the concurrent sentences for each separate incident of video recording run consecutively to one another. As such, the district court did not impose consecutive sentences for the same course of conduct. We find that the district court did not abuse its discretion in imposing the sentences consecutively.

CONCLUSION

For the foregoing reasons, we affirm Defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED

ATKINS, J., CONCURS IN PART AND DISSENTS IN PART WITH REASONS

ATKINS, J., CONCURS IN PART AND DISSENTS IN PART WITH REASONS

I concur in the result as to all but one issue addressed in the majority's opinion. Contrary to the majority's conclusion that Defendant's fourth assignment of error, his *Ramos* claim, lacks merit, I find merit in Defendant's claim. I would vacate Defendant's convictions and

sentences and remand this matter for a new trial.

In his fourth assignment of error, Defendant asserted that his "convictions were obtained in violation of his constitutional right to a unanimous verdict." Under *Ramos*, "[a] jury must reach a unanimous verdict to convict" a defendant of a serious offense. *Ramos v. Louisiana*, 590 U.S. —, 140 S.Ct. 1390, 1391, 206 L.Ed.2d 583 (2020) (emphasis added). When this case previously came before us, we found that "[t]he United States Supreme Court definitively ruled that the Sixth Amendment right to a jury trial requires a unanimous jury verdict to convict a defendant of a serious offense in a federal or state criminal prosecution." *State v. Robinson*, 2021-0254, p. 31 (La. App. 4th Cir. 2/18/22), 336 So.3d 567, 585 (citing *Ramos*, 140 S.Ct. at 1395-97). Thus, per *Ramos*, a non-unanimous jury verdict in a federal or state felony trial directly violates the Sixth Amendment as incorporated against Louisiana under the Fourteenth Amendment. *State v. Norman*, 2020-00109, p. 1 (La. 7/2/20), 297 So.3d 738 (per curiam).

As noted by the majority, our review of the record and the district court's *per curiam* reveals that the question as to whether the verdicts convicting Defendant were unanimous remains unresolved. No polling of the jury occurred. Because the presiding district court judge asked whether at least ten jurors agreed to the verdicts and the jury foreperson answered affirmatively, we know only that at least ten of the twelve jurors agreed. This means that the jury votes convicting Defendant could have been 10-2; 11-1; or 12-0. *Ramos* mandates a unanimous jury verdict for felony convictions, and my review of the record does not affirmatively establish that the verdicts were unanimous. *Ramos* is a profound, sweeping change from "the racist origins of the Jim Crow era law" that touches on basic fundamental fairness and due process. *Norman*, 297 So.3d at 738 (Johnson, C.J., dissenting). To satisfy basic fundamental fairness, the record must affirmatively indicate unanimity and nothing else, unlike the record before us that indicates three possibilities for verdicts in this matter. This is a case of first impression in this Court where the unanimity of the jurors cannot be determined upon remand to the district court. Allowing this Court to set aside the unanimity requirement would open the door to allowing additional, serious violations of the Constitutional rights of future *Ramos* appellants when the record is similarly unclear. For these reasons, I would vacate Defendant's convictions and sentences and remand this matter for a new trial.

All Citations

--- So.3d ----, 2023 WL 2926359, 2021-0254 (La.App. 4 Cir. 4/13/23)

Footnotes

- 1 *See Ramos v. Louisiana*, 590 U.S. —, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020).
- 2 This Court also pointed out the non-unanimity of Defendant's verdict as part of our error patent review. *See Robinson*, 21-0254, p. 22, 336 So.3d at 580.
- 3 Louisiana Code of Criminal Procedure art. 812(A) states, in part, that "[t]he court shall order the clerk to poll the jury if requested by the state or the defendant."
- 4 In our prior Opinion, we pretermitted discussion of Defendant's second and third assignments of error. *Robinson*, 21-0254, p. 33, 336 So.3d at 586-87. Further, we reviewed the merits of Defendant's first assignment of error, wherein he contended that "[t]here was insufficient evidence to convict [Defendant] of these crimes, because the State's evidence did not establish 'lewd or lascivious' conduct." We concluded that this assignment of error lacked merit because the State presented sufficient evidence to convict Defendant. *Robinson*, 21-0254, pp. 23-30, 336 So.3d at 581-85.

**Additional material
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State v. Robinson

Supreme Court of Louisiana. March 12, 2024 --- So.3d --- 2024 WL 1067509 (Mem) 2023-00661 (La. 3/12/24) (Approx. 1 page)

2024 WL 1067509
Supreme Court of Louisiana.

STATE of Louisiana

v.

Nathaniel O. ROBINSON

No. 2023-K-00661
March 12, 2024

Applying for Reconsideration, Parish of Orleans Criminal, Criminal District Court Number(s) 537-889, Court of Appeal, Fourth Circuit, Number(s) 2021-KA-0254.

Opinion

*1 Application for reconsideration not considered. See Louisiana Supreme Court Rule IX, § 6.

Griffin, J., would grant.

All Citations

--- So.3d ----, 2024 WL 1067509 (Mem), 2023-00661 (La. 3/12/24)

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