

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 2107

STATE OF LOUISIANA

VERSUS

AUBREY BROWN

**Judgment rendered May 6, 2011.**

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Appealed from the  
21st Judicial District Court  
in and for the Parish of Tangipahoa, Louisiana  
Trial Court No. 110284  
Honorable Ernest G. Drake, Jr., Judge

\* \* \* \* \*

HON. SCOTT M. PERRILLOUX  
DISTRICT ATTORNEY  
PATRICIA PARTKER  
ASSISTANT DISTRICT ATTORNEY  
AMITE, LA

ATTORNEYS FOR  
STATE OF LOUISIANA

MARY E. ROPER  
BATON ROUGE, LA

ATTORNEY FOR  
DEFENDANT-APPELLANT  
AUBREY BROWN

\* \* \* \* \*

*KUHN, J DISSENTS & ASSIGNS REASONS*  
**BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.**

## **PETTIGREW, J.**

The defendant, Aubrey Brown, was charged by bill of information with simple burglary of a religious building, a violation of La. R.S. 14:62.6.<sup>1</sup> He pled not guilty. The defendant was tried by a jury of twelve and found guilty as charged. The defendant was sentenced to imprisonment at hard labor for twelve years without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, urging the following assignments of error:

1. The trial court abused its discretion in refusing to grant a mistrial after the State presented testimony which alluded to [the defendant's] criminal history.
2. [The defendant] was convicted by a non-unanimous verdict in violation of the United States and Louisiana Constitutions.

For the following reasons, we pretermitt discussion of the assignments of error, reverse the defendant's conviction, vacate the sentence, and remand the matter to the trial court for a new trial.

### **FACTS**

On April 25, 2004, at approximately 7:26 p.m., Lieutenant Richard Lindsey, of the Tangipahoa Parish Sheriff's Office, was on uniform patrol when he was dispatched to Starney Baptist Church on Old Baton Rouge Highway in Hammond, Louisiana, to investigate a burglary. When Lieutenant Lindsey arrived at the church, he observed damage to the west side of the building. There was a broken window, and the rear door was damaged. Shortly thereafter, Pastor Michael Jackson, the head of the church, arrived at the scene. Upon inspection of the premises, Pastor Jackson advised that a keyboard was missing. Lieutenant Lindsey was later advised, by a "concerned citizen" that the defendant was observed traveling toward Anderson Enterprise, an area known for drug activity, with a keyboard in hand.

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<sup>1</sup> The defendant was also charged with simple burglary of a property belonging to Annie Mae Brown, in violation of La. R.S. 14:62. The offenses were tried separately.

On May 3, 2004, after he was apprehended on an outstanding warrant, the defendant was questioned by the police regarding the instant offense. Detective Roy Albritton, of the Tangipahoa Parish Sheriff's Office, testified that the defendant waived his right to remain silent and verbally confessed to burglarizing the church and stealing the keyboard. The defendant advised Detective Albritton of the location of the keyboard. The defendant stated he sold the keyboard to Bradley Peters. The keyboard eventually was recovered from Mr. Peters and returned to the church.

### **REVIEW FOR ERROR**

In accordance with our review for error pursuant to La. Code Crim. P. art. 920(2), we note as follows.

The number of persons required for a jury in a criminal case is dictated by La. Const. art. I, § 17(A), which provides, in pertinent part, as follows:

A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. **A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons,** all of whom must concur to render a verdict. [Emphasis added.]

Also, La. Code Crim. P. art. 782(A) provides, in pertinent part, that "[c]ases in which the punishment may be confinement at hard labor shall be tried by a jury composed of **six jurors**, all of whom must concur to render a verdict." (Emphasis added).

In this case, the defendant was charged with simple burglary of a religious building, a crime punishable by imprisonment with or without hard labor. La. R.S. 14:62.6(B).<sup>2</sup> Thus, a six-person jury was required for this offense. The record reflects that the defendant was tried by a jury of twelve. Ten of the twelve jurors concurred in the verdict.

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<sup>2</sup> Louisiana Revised Statutes 14:62.6(B) provides, "[w]hoever commits the crime of simple burglary of a religious building shall be fined not more than two thousand dollars and imprisoned with or without hard labor for not less than two years nor more than twelve years. At least two years of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence."

Unanimous conviction by a twelve-person jury where La. Const. art. I, § 17(A) and Article 782(A) require a six-person jury has been held to constitute a trial error subject to harmless error analysis. **State v. Jones**, 2005-0226, p.43 (La. 2/22/06), 922 So.2d 508, 511. However, because the jury's verdict in this case was not unanimous, we find that the error in the jury composition was not harmless error. See **State v. Jones**, 2005-0226 at 7 n.9, 922 So.2d at 513 n.9. The absence in this case of a unanimous verdict was fatally prejudicial to the defendant's jury trial right. Therefore, we must reverse the conviction and vacate the sentence.

### **CONCLUSION**

For the foregoing reasons, the defendant's conviction is reversed, and the sentence is vacated. This case is remanded to the trial court for a new trial.

**CONVICTION REVERSED; SENTENCE VACATED; REMANDED FOR A NEW TRIAL.**

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KUHN, J., dissenting.

I disagree with the majority's reversal of defendant's conviction and the remand for a new trial. I believe the majority erroneously holds that because a jury is not unanimous, the error of empaneling a twelve-person jury rather than a six-person jury is not a harmless one.

The empaneling of a jury composed of a greater number of persons than constitutionally required is not a non-waivable jurisdictional defect subject to automatic nullity. *State v. Jones*, 2005-0226, p.6, 922 So.2d 508, 513. Unanimous conviction by a twelve-person jury where La. Const. art. I, § 17(A) and Article 782(A) require a six-person jury is subject to a harmless error analysis. *See State v. Jones*, 2005-0226 at p. 3, 922 So.2d at 511.

In this case, law enforcement was advised by a concerned citizen that defendant was in an area known for drug activity with a keyboard in hand after the church's pastor had advised that a keyboard was missing. Having been apprehended a few days later on an outstanding warrant, defendant waived his right to remain silent, confessed to having burglarized the church, and admitted to having taken the keyboard. He even advised law enforcement of the location of the keyboard, which was eventually recovered from the person to whom he stated he had sold it. Defendant's only defense

was that his fingerprints were not found at the church and that there was no video or photographs showing him perpetrating the burglary.

In light of his confession and that law enforcement recovered the stolen item where he had advised them it was located, any error in the size of the jury was harmless beyond a reasonable doubt. As such, I would uphold the conviction and sentence. Accordingly, I dissent.