

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1164

STATE OF LOUISIANA

VERSUS

BRENT J. LEWIS

Judgment Rendered: December 21, 2007

On Appeal from the Twenty-Second Judicial District Court
In and For the Parish of St. Tammany
State of Louisiana
Docket No. 403,021

Honorable Reginald T. Badeaux, III, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

Handwritten signatures and initials in black ink on the left margin. The top signature appears to be 'JMc', followed by a signature that looks like 'RJB', and another signature below it that is less legible.

McCLENDON, J.

Defendant, Brent J. Lewis, was charged by grand jury indictment with one count of second degree murder, a violation of LSA-R.S. 14:30.1. Defendant entered a plea of not guilty. After waiving his right to a jury, he was tried before a judge. The trial judge determined defendant was guilty of the responsive offense of manslaughter, a violation of LSA-R.S. 14:31. The trial court sentenced defendant to a term of ten years imprisonment at hard labor.

Defendant appeals. After reviewing the record and applicable law, we affirm his conviction and sentence.

FACTS

Johnnie Batten, the victim, and Sonya Nores were acquainted with each other through their association with the “party crowd” in the Bay St. Louis area of Mississippi. On the evening of June 24, 2005, Nores and Batten had been “barhopping” between two establishments in the Waveland-Bay St. Louis area. According to Nores, at various times throughout the evening, both she and Batten used crack cocaine and marijuana.

Nores and Batten stayed out all night. During the early morning of June 25th, Nores suggested to Batten that they drive to a location in St. Tammany Parish, where she knew she could acquire more drugs. Batten agreed to go with her and they obtained a black pickup truck from one of their acquaintances, identified at trial only as “Ricky.”

It was near daylight when Nores and Batten began driving towards the home of Ernest Casnave, also known as “Black,” who lived on Emma Street in Lacombe, Louisiana. Shortly before they arrived at Casnave’s residence, Nores telephoned to let Casnave know that they were coming. Nores and Batten arrived at Casnave’s residence with \$180.00 that they planned on

using to purchase crack cocaine. They got out of the truck and entered the residence, where they completed their drug transaction. Nores testified that Batten appeared “a little nervous” because he was unfamiliar with Casnave and the people at the residence. Nores stated that she, Batten, and Stephanie Mills (Casnave’s girlfriend) smoked some of the crack cocaine for awhile, and then she and Batten prepared to leave.

Nores and Batten left Casnave’s residence and got back into the truck, with Batten getting into the passenger’s side and Nores getting into the driver’s side. By that time, two other vehicles had pulled into Casnave’s driveway, and another was parked on the road, all of which blocked the exit from the residence. As Nores got out to speak with Casnave, who was standing at the end of the driveway, she told Batten to stay in the truck. According to Nores, Batten was “agitated” as she left the truck. Nores asked Casnave to help get the vehicles moved so that Nores and Batten could leave.

Just after Nores spoke to Casnave, she heard gunshots. Nores turned around to see Batten standing by the truck, holding a gun. Just before a shot was fired, Kevin Keys, who was sitting in one of the vehicles in the driveway, heard Batten yell, “Y’all mother f----r’s are going to let me out.” Keys testified that once the shot was fired, everyone, including himself, immediately began to flee the area. Keys stated he heard more gunshots as he drove away.

Nores testified that she thought Batten fired the weapon at least two times into the air, and then got into the truck, put it in reverse, and began to quickly back out of the driveway. Two of the vehicles that were behind the truck left after Batten fired the weapon. Defendant was sitting in a green Nissan Sentra that was behind the truck, but off to the left. While backing

out, Batten struck defendant's vehicle. Batten then pulled forward and struck the Sentra again as he was trying to leave.

After Batten hit defendant's vehicle the second time, Nores heard more shots and saw defendant standing in front of the truck. Defendant fired into the truck as it was moving backwards causing the back window of the truck to shatter. Defendant then walked to the driver's side of the truck, which had rolled to a stop, and fired another shot into the driver's door. Defendant opened the driver's door while one of defendant's friends, Renaldo O'Neal, opened the passenger door. They both began beating Batten.

Shortly thereafter, after Nores intervened, O'Neal and defendant stopped beating Batten. Nores moved the weapon, which was on the seat beside Batten, and placed it in the back of the truck. Batten told Nores that he thought he had been shot. Nores and Mills pulled Batten out of the truck and laid him on the ground. Soon thereafter, the police and an ambulance arrived. Batten was transported to Slidell Memorial Hospital.

Under cross-examination, Nores admitted that Batten had a reputation for getting angry and frustrated. However, she had never observed him behave in such a manner.

Deputy Amore Neck of the St. Tammany Parish Sheriff's Office had arrived on the scene at 12:07 p.m. and asked the people present not to leave, so that the detectives might interview them. At the scene, defendant did not come forward to claim that he had shot Batten in self-defense.

Dr. Michael Karam, who was accepted by the trial court as an expert in general surgery, treated Batten upon his arrival at the hospital. Dr. Karam testified that in assessing Batten, it became obvious that he had massive life threatening intra-abdominal and intra-pelvic bleeding caused by a gunshot

wound in the area of the pelvis against the sacrum. Batten died during surgery because the injury to his iliac vein was in an area that could not be clamped to stop the bleeding.

Dr. Michael Difatta¹, the chief deputy coroner for St. Tammany Parish, was accepted by the trial court as an expert in forensic pathology. Dr. Difatta conducted the autopsy on Batten. According to Dr. Difatta, Batten sustained a gunshot entrance wound to his left buttock that caused a significant amount of trauma inside his body. In the doctor's opinion, the victim was leaning over when he was shot. Batten also sustained four non-life-threatening contusions on his head. The toxicology reports on Batten's blood indicated he had ingested cocaine, probably within three to four hours prior to his death, and methamphetamine, about one to two hours prior to death.

On cross-examination by defense counsel, Dr. Difatta testified that Batten could have been experiencing a drug-induced psychosis brought about by his ingestion of cocaine and methamphetamine. Such a psychosis may produce paranoia, agitation, and violence, including rage-like behavior. A classic example of such a drug-induced psychosis would be when a person who is using drugs suddenly becomes paranoid and perceives everyone around him to be a threat. Such a reaction could lead to the person acting out violently under the impression he was protecting himself.

By the time detectives arrived, defendant was no longer present at the crime scene. Casnave identified himself as a resident of the address, but did not claim to have witnessed the shooting. During the ensuing investigation, a weapon identified as an Arminius ARM .44 magnum single-action revolver was recovered approximately 157 feet from the roadway,

¹ We are relying on the spelling of the name as it appears in the record.

underneath a garbage bag, wrapped in a T-shirt. Casnave admitted that he moved the weapon from the back of the truck.

Carl Fullilove of the St. Tammany Parish Sheriff's Office Crime Laboratory was qualified as an expert witness in firearm and tool marking examinations, and in ballistic trajectory. Fullilove testified that any time the weapon recovered in this case is fired, it must be cocked manually before the trigger can be pulled.

Fullilove also performed trajectory analysis on the truck found at the crime scene to determine the path that the bullets fired by defendant traveled. According to his findings, the bullet that entered through the front windshield went through the cab of the truck, into the seat, ricocheted off the metal frame of the back window, went over the back rail of the truck bed, and lodged in the back tailgate. Fullilove determined that the bullet that went through the driver's-side door was fired at a ninety-degree angle to the door, penetrated the door, and entered "the opposite side of the seat"

Otto Stubbs of the St. Tammany Parish Sheriff's Office, who was accepted by the trial court as an expert in firearms examination, testified that it took three and one-half pounds of pressure to pull the trigger on this weapon. According to Stubbs, this was a normal amount of pressure needed and he stated that his testing indicated this weapon did not have a "hair" trigger.

The defense called Zarrick Landor to testify. Landor was sitting in a chair in Casnave's yard during the incident. Landor testified that there was no indication of any problem until Batten began shooting. Landor observed Batten get into the truck after the initial shots were fired and then ram defendant's vehicle while defendant was still in it. Landor testified that Batten struck defendant's vehicle as defendant was trying to get out of it.

According to Landor, once defendant obtained the weapon, he appeared to be trying to scare Batten away. Landor further testified that defendant was considered a good person and had no reputation for violence.

The defense also called Frances Atkinson, who was present at Casnave's house between 9:00 and 10:00 a.m. on the day of the incident. Atkinson observed defendant and described him as jittery and scared and noted that his eyes were dilated. In her experience, defendant appeared to be under the influence of "crystal meth."² Atkinson watched defendant retrieve a knife from his truck, put it in his belt, and keep his hand on it.

Defendant testified at trial. Defendant admitted that he shot Batten, but claimed that he was only trying to scare defendant away from the area. According to defendant, after he heard the first gunshot, he was trying to exit his vehicle to make sure no one was hurt. As defendant was getting out, he placed his left leg on the ground and Batten rammed the door of his vehicle with the truck. Defendant claimed that he held the door so his leg would not be injured. Defendant also testified that he was very fearful at this point.

According to defendant, Batten pulled the truck forward, then put it in reverse again. Defendant closed his vehicle door and the truck skimmed the side of his vehicle. Defendant got out of his vehicle and went to the front of the truck where Mills was standing. Mills had picked up the weapon Batten threw down after he fired the shots.

Defendant testified that he grabbed the weapon from Mills and in the process the weapon fired, almost hitting him in the foot. As the truck again moved toward defendant's vehicle, he remembered the gun going off again, this time with the bullet going through the windshield of the truck. Defendant claimed that he was trying to stop the truck when he went around

² Atkinson admitted to convictions for distribution of crack cocaine and distribution of crystal methamphetamine. Atkinson also admitted that she used both drugs.

to the driver's side of the truck and fired again. In his statement to the police, defendant claimed that he was trying to shoot the truck's tires when he fired while standing near the driver's-side door. According to defendant, he got out of his vehicle to make sure none of his nieces or nephews, who were in the vicinity when Batten fired the weapon, were hurt.

Defendant denied that he fired at Batten in retaliation for Batten ramming his vehicle, and denied he intended to kill Batten. Defendant claimed that the damage caused to the vehicle was not really important to him because the vehicle did not belong to him.³ Defendant admitted he left the scene before the police arrived, but testified that he went home to put on his shoes. In his statement to the police and at trial, defendant claimed that he shot Batten in self-defense and to protect the other people, including children, who were in the vicinity.

As a rebuttal witness, the state called Renaldo O'Neal. O'Neal testified that he was a good friend of defendant's. According to O'Neal, defendant fired the weapon three or four times, with the first shot going into the ground, the second shot through the windshield of the truck, and the third and possibly fourth shots going into the driver's-side door of the truck. O'Neal testified that, when defendant fired the shots, the truck was in the process of backing up.

SUFFICIENCY OF THE EVIDENCE

In his first three assignments of error, defendant argues that the trial court erred in denying his motions for new trial and post-verdict judgment of acquittal. He argues the evidence was insufficient to negate his defense that the homicide was justified as being committed in self-defense or in defense of others.

³ The vehicle defendant was using that day was registered to Nia Greene of Springfield.

More specifically, defendant argues that the state failed to prove beyond a reasonable doubt that he did not act in self-defense or in the defense of others when he shot Batten. Defendant asserts the evidence clearly established that Batten fired the first shot without provocation and while numerous people were in the immediate vicinity. Additionally, Batten rammed his truck into defendant's vehicle twice, while defendant was in the vehicle. Defendant further argues that Batten presented a threat to those in the immediate vicinity, such that Mills picked up Batten's discarded weapon to arm herself. Similarly, defendant points out that O'Neal testified that he would have armed himself and shot Batten as the only means to stop his threatening behavior.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend XIV; LSA-Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also LSA-Cr.P. art. 821(B). The **Jackson** standard of review, incorporated in article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that in order to convict, the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statute 14:31 provides, in pertinent part:

A. Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed [.]

Louisiana Revised Statutes 14:20 provides, in pertinent part:

A. A homicide is justifiable:

(1) When 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.

Louisiana Revised Statute 14:22 provides:

It is justifiable to use force or violence or to kill in the defense of another person when it is reasonably apparent that the person attacked could have justifiably used such means himself, and when it is reasonably believed that such intervention is necessary to protect the other person.

When the defendant in a homicide prosecution claims self-defense or defense of another, the state must prove beyond a reasonable doubt that the homicide was not committed in self-defense. On appeal, the relevant inquiry is whether or not, after viewing the evidence in the light most favorable to the prosecution, a rational fact finder could have found beyond a reasonable doubt that the defendant did not act in self-defense or in defense of another. **State v. Williams**, 2001-0944, pp. 5-6 (La.App. 1 Cir. 12/28/01), 804 So.2d 932, 939, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135; see also **State v. Fenner**, 94-1498, pp. 7-8 (La.App. 4 Cir. 11/16/95), 664 So.2d 1315, 1320, writ denied, 95-3001 (La. 4/26/96), 672 So.2d 679.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, 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. The trier of fact's determination of the weight to be given is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Williams**, 2001-0944 at p. 6, 804 So.2d at 939.

In support of the conviction for manslaughter, the trial court provided extensive findings of fact. After reviewing the evidence in the light most favorable to the prosecution, we agree with the trial court's judgment. The evidence presented at trial indicates that once Batten fired the weapon, everyone in the area began to flee. At that point, Batten got into the truck and appeared to be trying to leave. Although he struck the vehicle in which defendant was sitting, Batten had given every indication that his intent was to leave, rather than harm defendant. Even if Batten was in the process of moving towards defendant, once defendant was standing in front of the truck with the weapon, defendant could have easily gotten out of harm's way before he fired the shot through the front windshield of the truck. By the time defendant moved to the driver's side of the truck, defendant was no longer in any danger from Batten. Witnesses testified that the truck had rolled to a stop at this point and Batten was no longer armed. Defendant's claim that he was trying to shoot the tires on the truck was rejected by the trial court based on the trajectory of the bullet that went right through the driver's door and struck Batten. Moreover, the testing of the weapon revealed that it had to be cocked before it was fired and it did not have a "hair" trigger. Thus, as the trial court concluded, defendant had to be aware of what he was doing in firing the weapon. Although defendant claimed he was trying to scare Batten away, his account of attempting to shoot the tires

on the truck would not be consistent with this intention. Even after Batten was shot, defendant and O'Neal opened the truck's doors and began beating Batten, which is clearly contrary to trying to make Batten leave the area. Finally, despite defendant's claim of justification, at no time did defendant come forward and explain to the officers on the scene that he fired at Batten in self-defense. Rather, defendant chose to leave the scene and only turned himself in to the police after a relative, who was a law enforcement officer, contacted him several hours after this incident.

After reviewing the evidence presented, we find that the state established beyond a reasonable doubt that the defendant did not act in self-defense or in the defense of others. Thus, we find no error in the trial court's rejection of defendant's claims that the homicide was justified. These assignments of error are without merit.

EXCESSIVE SENTENCE

In his fourth and fifth assignments of error, defendant argues the trial court erred in imposing an excessive sentence and by denying the motion to reconsider sentence.

Defendant preserved this issue for review by filing a motion to reconsider the sentence, citing LSA-C.Cr.P. art. 882.⁴ The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. See LSA-C.Cr.P. art. 894.1. The trial court need not recite the entire checklist of article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La.App. 1 Cir.), writ denied, 565 So.2d 942 (La.1990). In light of the criteria expressed by article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial

⁴ It is apparent from the motion that defendant was attempting to file in accordance with LSA-C.Cr.P. art. 881.1.

court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La.App. 1 Cir. 1988).

Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La.1979). However, the trial court has great discretion in imposing a sentence within the statutory limits; and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Latiolais**, 563 So.2d 469, 473 (La.App. 1 Cir. 1990).

The applicable penalty provision for manslaughter provides for imprisonment at hard labor for not more than forty years. LSA-R.S. 14:31(B). In the present case, the trial court sentenced defendant to a term of ten years at hard labor.

Defendant argues that when the trial court imposed the sentence, it indicated that it felt the minimum term of incarceration allowed by law was appropriate. However, at the time the trial court made this comment, it was operating under the mistaken impression that the crime of manslaughter carried a ten-year minimum term for this defendant. The record reflects that once the mistake was brought to the trial court's attention, the trial court stated, "I've thought about it for a long time. A 10-year sentence is the minimum I can sentence you to under 894.1 without deprecating the seriousness of the crime."

We do not find defendant's sentence to ten years at hard labor to be excessive under the circumstances of this case. In sentencing defendant, the trial court emphasized such mitigating circumstances as defendant's youthful age, the fact he had been a productive citizen, and that defendant had avoided getting into serious trouble despite being subjected to peer pressure. However, the circumstances of this crime indicated that although

defendant was originally charged with second degree murder, the trial court found him guilty of the responsive offense of manslaughter. The trial court's sentence of ten years is one quarter of the maximum sentence to which defendant was exposed. Moreover, although defendant claimed to have committed the offense in self-defense and in defense of others, his actions of continually firing the weapon at Batten's vehicle, after Batten was trying to leave the area and was no longer armed, had the effect of actually endangering others who were still in the immediate vicinity. Finally, even after shooting Batten, defendant approached him and began beating him, which is inconsistent with his testimony that he fired the weapon in an effort to merely scare Batten away.

Under these circumstances, we find defendant's sentence of ten years imprisonment at hard labor is not excessive. These assignments of error are without merit.

CONVICTION AND SENTENCE AFFIRMED.