

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 1080

STATE OF LOUISIANA

VERSUS

CHARLES BROWN

Judgment Rendered: December 23, 2008

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court Number 9-06-962


Honorable Anthony Marabella, Judge

* * * * *

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* * * * *

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

GUIDRY, J

The defendant, Charles Brown, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. The defendant pled not guilty. The defendant filed motions to suppress statements and identification. Following a hearing on these matters, the motions to suppress were denied. Following a jury trial, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating three assignments of error. For the foregoing reasons, we affirm the conviction and sentence.

FACTS

On July 31, 2006, at about 12:30 a.m., assistant manager Andrew London was alone closing the Popeye's Famous Fried Chicken & Biscuits restaurant (Popeye's) on the corner of N. 38th Street and Choctaw Drive in Baton Rouge. The seventeen-year old defendant, a former Popeye's employee who worked with Andrew, knocked on the window. Recognizing the defendant, Andrew allowed him to come inside. The defendant was concealing a .22 revolver and a kitchen knife. The defendant produced the handgun and attempted to rob Andrew by ordering him to open the safe. Andrew rushed the defendant, and the defendant shot him. The defendant then produced his knife and began stabbing Andrew.

While Andrew was being attacked, motorist Yawanna Mitchell was driving with her windows down on N. 38th Street toward Choctaw Drive. Popeye's was to her right. As she approached the traffic signal, she heard a loud noise. She looked toward Popeye's and, through the windows, saw the defendant repeatedly stab Andrew. Yawanna did not know either the defendant or Andrew. She called 911 and described the events to the dispatcher as she watched them unfold. She

described the physical appearance of both men and what they were wearing. While she was still on the phone, the police arrived.

Officers Terrell Brown and Nolton Riviere, both with the Baton Rouge City Police Department, approached Popeye's at opposite corners. Officer Riviere saw the defendant moving from behind the counter area toward the door where Officer Brown was standing. Officer Riviere alerted Officer Brown that someone was stepping out of the building. The defendant exited Popeye's with his gun in his hand. With his weapon drawn, Officer Brown ordered the defendant to get on the ground. Initially, the defendant refused and told Officer Brown to come get him. After several more commands by Officer Brown, the defendant complied and laid on the ground. The defendant's gun was subsequently retrieved and placed into evidence.

Several officers, including Officer Riviere, went inside Popeye's and followed a trail of blood to the freezer. Inside the freezer, Officer Riviere found Andrew lying on the floor. Although severely injured, Andrew was still alive. Officer Riviere spoke to Andrew. Andrew did not speak, but with head nods, identified the defendant as his attacker. A short time later, Andrew died from his injuries. Dr. Edgar Cooper testified at trial that Andrew, whose cause of death was exsanguination, had twenty stab wounds and one gunshot wound.

The defendant was taken to Earl K. Long Hospital to be treated for a puncture-type wound to his right thigh. The defendant also had small cuts on his hands. Sergeant John Norwood, with the Baton Rouge City Police Department, went to the hospital to speak to the defendant. After Mirandizing the defendant, Sergeant Norwood asked him how he had received his injuries. The defendant told Sergeant Norwood that he was at Popeye's that night talking to Andrew about getting his job back. At some point, Andrew went to the rear of the store, and the

defendant heard a loud “pop.” The defendant ran to Andrew and saw an “old dude” swinging a knife at Andrew. When the defendant tried to stop the man, the defendant was stabbed in the leg. As the defendant sat on the floor, he observed the man repeatedly stab Andrew, and then pull him inside the freezer. The man then placed the knife on the floor and left. The defendant picked up the knife and also picked up a gun he had found and walked out the door, where he was immediately apprehended by the police.

Subsequently, Lieutenant Ike Vavasseur, with the Baton Rouge City Police Department, took Yawanna to Earl K. Long Hospital to see if she could identify the defendant as the person she saw in Popeye’s. Yawanna walked past the defendant and identified him as the person she saw in Popeye’s with the knife.

Later that same morning, the defendant was taken to police headquarters for questioning. After about three hours of denying his involvement in Andrew’s death, the defendant confessed to killing Andrew. The audiotaped statement of the defendant was played for the jury and submitted into evidence. In his confession, the defendant stated that he tapped on the window at Popeye’s, and Andrew unlocked the door and let him in. With the intent to rob Andrew, the defendant pulled a gun on him and told him to open the safe and to stay down. Andrew refused and rushed the defendant. The defendant shot Andrew and then pulled a knife and began stabbing him. Andrew tried to run, but the defendant followed him and continued to stab him. The defendant also hit Andrew with a metal tray. At one point, the defendant tried to stab Andrew, but Andrew moved his arm, and the defendant stabbed himself. Finally, the defendant pulled Andrew into the “cooler” and locked it. The defendant grabbed the knife handle (because the blade was stuck in Andrew’s side), the gun, and scissors and exited the restaurant.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to suppress his statement. Specifically, the defendant contends that he was coerced into giving an incriminating statement to the police during the unrecorded approximately three hours of questioning preceding the recorded confession.

Before a confession can be introduced into evidence, it must be affirmatively shown that it was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. La. R.S. 15:451. It must also be established that an accused who makes a confession during custodial interrogation was first advised of his Miranda rights. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Since the general admissibility of a confession is a question for the trial court, its conclusions on the credibility and weight of the testimony are accorded great weight and will not be overturned unless they are not supported by the evidence. See State v. Patterson, 572 So.2d 1144, 1150 (La. App. 1st Cir. 1990), writ denied, 577 So.2d 11 (La. 1991). The trial court must consider the totality of the circumstances in determining whether or not a confession is admissible. State v. Hernandez, 432 So.2d 350, 352 (La. App. 1st Cir. 1983). Testimony of the interviewing police officer alone can be sufficient to prove a defendant's statements were freely and voluntarily given. State v. Mackens, 35,350, p. 13 (La. App. 2d Cir. 12/28/01), 803 So.2d 454, 463, writ denied, 2002-0413 (La. 1/24/03), 836 So.2d 37.

At the motion to suppress hearing and at trial,¹ Sergeant Norwood testified that he and Sergeant Chris Johnson questioned the defendant for several hours at

¹ In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. State v. Chopin, 372 So.2d 1222, 1223 n. 2 (La. 1979).

the downtown police headquarters on Mayflower. Prior to the defendant being questioned, he was Mirandized orally from a written "Rights of an Arrestee or Suspect" form. The defendant was read each of his rights and indicated that he understood these rights. He then signed the portion of the form, which indicated he was waiving his privilege against self-incrimination and choosing to make a statement about his knowledge of the commission of the crime. Sergeant Norwood also signed the form. At the bottom of the form, Sergeant Norwood noted that the defendant did not request an attorney. The form was dated July 31, and the time on the form was 9:40 a.m.

From about 9:40 a.m. until about 12:30 p.m., the detectives questioned the defendant, but did not record him during this time because he continued to deny any involvement in the attack on Andrew. Sergeant Norwood explained at the motion to suppress hearing that they do not tape the denial of a suspect because it is not significant. He further testified at the hearing and at trial that he knew the defendant was not telling the truth because his denial did not line up with the evidence from the crime scene. Accordingly, they continued to question the defendant. Finally, the defendant "came clean," told the detectives his first story was not true, and admitted to attacking Andrew. When the defendant, without being recorded, recounted the entire incident at Popeye's, which lined up with the evidence, Sergeant Norwood had the defendant repeat his confession at about 12:30 p.m., this time while being recorded.

The defendant alleges in his brief that his taped statement was the result of coercion and/or inducements because, despite having originally denied involvement in the murder, after three hours of repeated questioning, he recanted and incriminated himself. According to the defendant, the interrogation tactics by the police were inappropriate. However, other than sustained questioning of the

defendant for about two hours and fifty minutes, the defendant fails to reference in his brief any instances of alleged inappropriate tactics. Nothing suggests that the duration of the interrogation, without more, rendered the confession involuntary. See State v. Blank, 2004-0204, pp. 12-13 (La. 4/11/07), 955 So.2d 90, 104-05, cert. denied, __U.S.__, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007).

Notably, the defendant did not testify at either the motion to suppress hearing or the trial. Accordingly, the defendant offers no evidence that indicates he was coerced or mistreated in any way during the entire interview process. On the other hand, Sergeant Norwood testified at the motion to suppress hearing that, during the approximately three hours of the interview process, the defendant was not constantly questioned. In addition, they also took bathroom breaks. He also testified that, during this period before the defendant was recorded, the defendant was not physically intimidated or threatened by anyone into making a statement, no promises were made, he did not seem impaired, and he understood the questioning and what was going on. Similarly, Sergeant Norwood testified at trial that no promises were made to the defendant before he gave his taped statement, no threats were made against him, his family, or his friends, and the taped statement he made was given voluntarily.

Moreover, we reviewed the audiotape of the defendant's statement. We find nothing in the interview process that suggests the defendant was coerced, threatened, or mistreated in any way. The defendant never asked for a lawyer and never indicated that he wanted to stop the interview.

In its reasons for denying the motion to suppress, the trial court stated in pertinent part:

While there was a period of time, three hours, from the time the defendant was initially advised of his rights until the tape was actually turned on the Court after hearing the testimony of the witnesses and other evidence concludes that the taped statement was made after full

Miranda warning was given, was given knowingly, intelligently and voluntarily without any coercion, threats or promises.

We agree. The trial court's determination on credibility was supported by the record. Accordingly, the trial court did not err in denying the defendant's motion to suppress his statement.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in denying his motion to suppress identification. Specifically, the defendant contends that the one-on-one identification procedure used by the police was suggestive, and there was a likelihood of misidentification.

In reviewing an identification procedure, the court must determine whether the procedure was so unnecessarily suggestive and so conducive to an irreparable mistaken identification that the defendant was denied due process of law. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). A trial judge's determination on the admissibility of an identification should be accorded great weight and will not be disturbed on appeal unless the evidence reveals an abuse of discretion. State v. Bickham, 404 So.2d 929, 934 (La. 1981).

One-on-one confrontations between a suspect and a victim, while not favored by the law, are permissible when justified by the overall circumstances. Such identification procedures are generally permitted when the accused is apprehended within a short time after the offense and is returned to the scene of the crime for on-the-spot identification. A prompt in-the-field identification, under appropriate circumstances, promotes accuracy, as well as expedites the release of innocent suspects. State v. Bickham, 404 So.2d at 934. Even when suggestiveness of the identification process is proved by the defendant or presumed by the court, the defendant must also show that there was a substantial likelihood of

misidentification as a result of the identification procedure. State v. Broadway, 96-2659, p. 14 (La. 10/19/99), 753 So.2d 801, 812, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000).

In the instant matter, the one-on-one in-field identification was closely associated in time with the commission of the crime, since the defendant was immediately apprehended at Popeye's and brought to Earl K. Long Hospital for a leg injury. While the identification did not take place at the scene of the crime, the same reasoning could be applied to the hospital identification, which took place shortly after the attack. See State v. Chapman, 410 So.2d 689, 709 (La. 1981). Between 12:40 a.m. and 1:00 a.m., Yawanna witnessed Andrew being attacked inside of Popeye's. Yawanna was brought to Earl K. Long Hospital and, at about 4:05 a.m., she identified the defendant as the person she saw at Popeye's attacking Andrew.

At the motion to suppress hearing, Lieutenant Vavasseur testified that Yawanna called 911 as she was watching what appeared to be two men fighting. She described the defendant as the taller of the two men. She also noted that the defendant had a knife and was striking Andrew in the head. She described the defendant as tall, thin, in his early twenties, and wearing a shirt with horizontal stripes on it, and a tan baseball-type cap. Lieutenant Vavasseur further testified at the hearing that he made it a point to not suggest to Yawanna that she was being brought to the hospital to identify the suspect. Prior to Yawanna seeing the defendant in the hospital, Lieutenant Vavasseur covered the defendant's legs and arm with a blanket because his legs were shackled and his arm was handcuffed to the bar on the bed. Also, according to Lieutenant Vavasseur, the defendant did not have his clothes on, but was wearing only his boxer shorts. Lieutenant Vavasseur then had another police officer casually walk Yawanna past the defendant. When

Lieutenant Vavasseur asked Yawanna if there was anyone she recognized, she was visibly shaken. She informed Lieutenant Vavasseur that the defendant was the person she had seen fighting at Popeye's. Lieutenant Vavasseur also testified at the hearing that the defendant's personal effects were placed in a bag at the hospital, and that he observed in the bag a tan "fancy ball cap."

Yawanna testified at trial that she identified the defendant at the hospital as the person she had seen at Popeye's. She testified that the defendant had on the same shirt and pants as when she had earlier seen him. She further identified the defendant in court. On cross-examination, Yawanna testified that at Popeye's she saw the defendant's face, but could not identify any features. While she recognized his face and his skin tone, she could not tell, for instance, what color his eyes were.

Yawanna positively identified the defendant by his physical appearance and his clothes within only a few hours of the attack. See Bickham, 404 So.2d at 934. Despite the discrepancy in testimony in whether or not the defendant was wearing his clothes at the hospital when Yawanna identified him, we do not find the identification procedure was suggestive. Even assuming arguendo, that the identification was suggestive, the defendant has failed to prove a likelihood of misidentification. In Manson, 432 U.S. at 114, 97 S.Ct. at 2253, the U.S. Supreme Court considered these five factors in determining whether or not a photographic identification was reliable: (1) the witness's opportunity to view the defendant at the time the crime was committed; (2) the degree of attention paid by the witness during the commission of the crime; (3) the accuracy of any prior description; (4) the level of the witness's certainty displayed at the time of identification; and (5) the length of time elapsed between the crime and the identification. These factors also have been applied in determining the reliability of other types of

identifications. See State v. Davis, 409 So.2d 268 (La. 1982). See State v. Thomas, 589 So.2d 555, 563-64 (La. App. 1st Cir. 1991).

Applying the Manson factors, we find the identification of the defendant by Yawanna was reliable. Yawanna observed through the glass door and through the windows from only several yards away the defendant attack Andrew in Popeye's. As she observed the attack, she called 911 and described what she saw. She accurately described the physical features of the defendant, a weapon he used, and the clothes and hat he was wearing. When she identified the defendant in the hospital within only about three hours of the commission of the crime, she was visibly shaken, having recognized the defendant as the person she had seen at Popeye's. At trial, Yawanna testified that she was absolutely positive that the person she saw at the hospital was the same person she had seen at Popeye's. Further, after identifying the defendant in court, she testified that she was absolutely positive that the defendant was the man that had the knife at Popeye's. See Thomas, 589 So.2d at 564.

Based on the foregoing, we conclude there was no substantial risk of misidentification. Accordingly, the motion to suppress identification was properly denied. See Bickham, 404 So.2d at 934.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court erred in ruling that Andrew's nonverbal communications shortly before he died fell under the dying declaration exception to hearsay. Specifically, the defendant contends that testimony referring to Andrew's head nods, which identified the defendant as his attacker, should not have been allowed into evidence.

Officer Riviere arrived at Popeye's shortly after Andrew had been attacked.

Officer Riviere found Andrew lying on the freezer floor badly injured, but still conscious. Officer Riviere knew Andrew from frequenting Popeye's. Officer Riviere testified at trial that Andrew's eyes were still open, so he made eye contact with Andrew and spoke to him in an effort to keep him conscious. Andrew did not speak. Officer Riviere described the defendant and what he was wearing, and asked Andrew if that was the person who inflicted the injuries on him that kept him from speaking. Andrew nodded his head in the affirmative. Officer Riviere then asked Andrew if anyone else had helped the defendant to inflict his injuries. Andrew shook his head "no." Finally, Officer Riviere asked Andrew if this was an attempt to rob him or the store, and Andrew nodded his head, "yes."

The defendant objected at trial that Andrew's head movements did not constitute a dying declaration and were, therefore, impermissible hearsay. Overruling the objection, the trial court ruled that Andrew's statements qualified as dying declarations and were, therefore, admissible. In his brief, the defendant contends the trial court erred in finding that Andrew's non-verbal responses to Officer Riviere's leading questions were dying declarations.

Louisiana Code of Evidence article 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Louisiana Code of Evidence article 801(A)(2) provides that a "statement" includes "[n]onverbal conduct of a person, if it is intended by him as an assertion." Louisiana Code of Evidence article 802 provides that "[h]earsay is not admissible except as otherwise provided by this Code or other legislation." Under La. C.E. art. 804(B)(2), a statement which falls under the dying declaration exception to the hearsay rule is one "made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death."

A statement is admissible as a dying declaration if made when the declarant is conscious of his condition and aware of his approaching demise. However, the necessary state of mind may be inferred from the facts and circumstances surrounding the making of the declaration and the victim need not express this belief in direct terms. State v. Verrett, 419 So.2d 455, 457 (La. 1982). While no absolute rule can be laid down by which to decide with certainty whether the declarant, at the time of making his statement, really expected to die, yet when the wound is from its nature mortal, and when, as a matter of fact, the deceased shortly after making his statement died, the courts have uniformly held that the declarant really believed that death was impending, and his statement has been admitted as a dying declaration. Verrett, 419 So.2d at 456.

Andrew was gravely injured when he communicated to Officer Riviere and, shortly thereafter, died from his injuries. Though it appeared he was unable to speak because of his injuries, Andrew communicated with two nods and a shake of his head. Such nonverbal conduct constituted statements. See La. C.E. art. 801(A)(2). A victim's statement may be admissible as a dying declaration even if the statement is elicited by questions. Verrett, 419 So.2d at 456; see also State v. Foote, 379 So.2d 1058, 1060 (La. 1980). Accordingly, despite Andrew's statements having been elicited as a result of Officer Riviere's questioning, rather than having spontaneously occurred, such statements constituted dying declarations.

We find no error in the trial court's ruling that Andrew's statements were admissible as dying declarations. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.