

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0857

STATE OF LOUISIANA

VERSUS

DAMIEN LEVAR DYSON

Judgment rendered March 23, 2012.

Appealed from the
22nd Judicial District Court
in and for the Parish of Washington, Louisiana
Trial Court No. 08 CR3 97842
Honorable Raymond Childress, Judge

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

J.E.W. by [Signature]

PETTIGREW, J.

The defendant, Damien Levar Dyson, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1 He pled not guilty. Following a jury trial, the defendant was convicted as charged. The defendant moved for a new trial, which the trial court denied. The defendant was subsequently sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, urging one assignment of error challenging the trial court's exclusion of evidence of the character of the victim, which he contends supports his claim of self-defense. For the reasons set forth below, we affirm the defendant's conviction and sentence.

FACTS

The victim, Timothy Wilson, was a resident of Seattle, Washington, but lived most of his life in Bogalusa, Louisiana. The victim maintained close ties with his Bogalusa family and visited every few years. During the 2008 New Year holiday season, he traveled to Bogalusa to visit with family and friends. On January 4, 2008, he and some of his first cousins decided to have an informal cookout in an open lot on Redmond Street that was close to his relatives' homes. Apparently, Redmond Street residents used this lot for such informal gatherings. He and his cousin took charge of frying chicken and cooking red beans. Throughout the day, friends and family stopped by to eat and visit.

The defendant also lived in the Redmond Street area. He was a long-time friend with the victim's first cousin, Chequita Levy, and with other members of the victim's family. Ms. Levy thought of the defendant "like family." He was a daily visitor in her mother's home. The defendant was welcomed and attended many family functions and get-togethers.

The first indication of trouble occurred around 11:30 a.m. The victim was not there when the defendant first stopped by the cookout. The defendant joined in a conversation Ms. Levy was having with her brother and a friend. During the conversation, Ms. Levy said something that angered the defendant. He jumped up, grabbed a fork, and tried to stab her. Ms. Levy's brother intervened and told the

defendant to leave. Instead of leaving the area, the defendant went across the street and sat on some bricks. Thirty minutes later, he returned to the cookout site and turned over the table of food.

The trouble between the defendant and the victim occurred around 4 p.m. The record indicates that as the day progressed, the defendant continued to linger in the Redmond Street area. Around 4 p.m., Ms. Levy saw the defendant and the victim briefly exchange "a few licks." Another family member, who was standing on her front porch, also saw the altercation. After the brief exchange, the defendant and the victim went their separate ways. Not long after, the victim and Ms. Levy's brother ran inside a relative's house saying the defendant had a gun. Ms. Levy called 911 to report the incident.

Officer Chad Casard of the Bogalusa Police Department responded to the call. As he was driving up to the location, he observed a black male walking down the street wearing a black jacket that fit the description given to the 911 operator. The officer pulled up behind the defendant, identified himself, and told the defendant why he was there. The defendant explained he had an argument with the victim over his black jacket. The defendant said he got his jacket back from the victim, there was no disturbance, and there was no need for the police. Officer Casard testified that he did not find a gun on the defendant or in the area around him. Because the officer did not see signs of a disturbance and the victim was not present, the officer left.

The shooting occurred more than an hour after this incident. During that time, the victim's cousin, John Wilson, stopped by after work while it was still daylight. Earlier, Ms. Levy told him about the prior incidents involving the defendant. When he was driving up, John Wilson noticed the defendant standing down the street on the corner of Redmond and Ann. He mentioned this to the victim. The victim assured him "everything is quiet; ain't nothing happening."

As it was getting closer to dusk, Deidre Lester happened to be driving on Redmond Street with her friend, Janice Sowell, when she spotted the victim. Ms. Lester and the victim were long-time friends and she had not seen him in quite some time.

Eager to see him, she pulled her car up onto the lot at an angle close to where the victim was frying chicken. The victim invited both ladies to eat and visit with him, John Wilson, and the others who were still at the cookout.

After she ate, Ms. Lester walked to her car to get a cigarette. This is when she saw a young man, who she later learned was the defendant, standing on Redmond Street in front of a car that was parked close to her car. Ms. Lester tried to speak to the defendant, but he did not respond.

While Ms. Lester was enjoying her cigarette, she discovered she had left her car radio on and the car would not start. Several men, including the victim, tried to get the car started. During this effort, Ms. Lester was behind the steering wheel. Ms. Sowell was in the front passenger seat. John Wilson was standing near the front driver side of her vehicle, and the victim was standing in front of the vehicle on the passenger side with his hand on the raised hood. While everyone was busy with her car, something caught Ms. Lester's attention. She noticed the defendant "pacing" back and forth on Redmond Street. Ms. Lester heard the defendant say something like "what's up" to the victim. She then saw the defendant walking to the front of her car with a gun in his hand. She was very frightened. She thought the defendant was going to shoot her because she tried to speak to him earlier.

The defendant's behavior also caught Ms. Sowell's attention. She thought the defendant said, "I'm tired of your shit, n****r, or something" and he was pacing up and down Redmond Street. John Wilson also saw the defendant approach. He believed the defendant told the victim to leave, and his cousin responded, "[W]hat you mean, I [got] to leave here." The defendant replied, "Like I said, you got to leave here." At that point, John Wilson testified, the defendant "came out with a pistol."

John Wilson ran to get out of the way but kept looking back to see what the defendant was doing. The victim began to move to the back passenger side of Ms. Lester's car. However, the defendant changed direction and moved to the back of the car. The defendant then reached over the back of Ms. Lester's car and shot the victim.

Witnesses testified the defendant ran away from the scene carrying the gun. Ms. Sowell and John Wilson testified the victim did not have a gun.

The police received the call reporting the shooting at 5:47 p.m. Officers and an ambulance arrived on the scene within minutes of the call. Officers found the victim lying on the ground. There was nothing they could do for him. Emergency responders took the victim to a hospital, where he was pronounced dead. An autopsy revealed that the victim died from exsanguination as the result of a single gunshot wound to his left arm. The bullet traveled through the left arm, through the left chest cavity, through the top part of the left lung, then through the right lung, where it came to rest just in the right chest cavity. Officers did not find any guns or weapons on or near the victim or in the area.

After the shooting, the defendant hid in an abandoned house for two days before he surrendered to the police. The defendant made a digitally recorded statement to Bogalusa Police Detective David Miller in which he confessed to shooting the victim, but claimed self-defense.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends the trial court erred in sustaining the State's objection, which precluded the defense from thoroughly questioning Detective Miller about the statements the defendant made during his recorded interview and about the information the detective received during the investigation concerning the victim's criminal past. The defendant argues the trial court's ruling prevented the defense from presenting evidence to the jury that would support his claim of self-defense. On appeal, the defendant seeks reversal of his conviction and sentence for second degree murder and remand for a new trial.

Conversely, the State argues the defense was attempting to get evidence in front of the jury of the victim's character, specifically his prior conviction for attempted manslaughter. The State argues evidence of a victim's character is inadmissible except when the defense shows evidence of a hostile demonstration or overt act by the victim immediately before the offense. The State contends the defense failed to produce any

evidence of such overt act by the victim. Moreover, even if the defense could show an overt act by the victim, the State contends evidence of the victim's character is inadmissible because the defense failed to establish the defendant knew of the victim's dangerous character prior to committing the offense.

The foundation for admissibility of character evidence is Louisiana Code of Evidence article 404. In pertinent part, Article 404(A)(2)(a) states:

A. Character evidence generally. Evidence of a person's character or a trait of his character, such as a moral quality, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

.....

(2) **Character of victim.** (a) Except as provided in Article 412, evidence of a pertinent trait of character, such as a moral quality, of the victim of the crime offered by an accused, or by the prosecution to rebut the character evidence; provided that in the absence of evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, evidence of his dangerous character is not admissible[.]

Evidence of the dangerous character of the victim is admissible only if the accused first produces evidence that at the time of the incident, the victim made a hostile demonstration or committed an overt act against the accused of such character that would have created, in the mind of a reasonable person, a belief that he was in immediate danger of losing his life or suffering great bodily harm. **State v. Schexnayder**, 97-0729, p. 8 (La. App. 1 Cir. 4/8/98), 708 So.2d 851, 855, writ denied, 98-1665 (La. 10/30/98), 723 So.2d 978. The term "overt act," as used in connection with prosecutions where the plea of self-defense is involved, means any act of the victim that manifests to the mind of a reasonable person a present intention on his part to kill or do great bodily harm. **State v. Black**, 2004-1526, p. 14 (La. App. 1 Cir. 3/24/05), 907 So.2d 143, 152, writ denied, 2005-1682 (La. 2/3/06), 922 So.2d 1175. To meet the "overt act" requirement of Article 404(A)(2)(a), the defendant must introduce "appreciable evidence" in the record relevantly tending to establish the overt act. Once the defense has introduced such appreciable evidence, the trial court cannot exercise its discretion to infringe on the fact-determining function of the jury by disbelieving this

defense testimony and denying the accused a defense permitted him by law. A trial judge's determination that the defendant has not laid a sufficient evidentiary foundation upon which to introduce testimony concerning the victim's dangerous character will not be disturbed absent a finding of clear error. **State v. Felder**, 2000-2887, p. 6 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 367, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

Moreover, even where a proper foundation is laid, the admissibility of a victim's character trait depends on the purpose for which the evidence is offered. Once evidence of an overt act on the part of the victim has been presented, evidence of threats and of the victim's dangerous character is admissible for two distinct purposes: (1) to show the defendant's reasonable apprehension of danger that would justify the conduct; and (2) to help determine the aggressor in the conflict. Only evidence of general reputation, and not specific acts, is admissible in order to show who the aggressor was in the conflict. Evidence of prior specific acts of the victim against a third party is inadmissible for this purpose. When evidence of a victim's dangerous character is offered to explain defendant's reasonable apprehension of danger, such evidence may be introduced to show the accused's state of mind **only if** it is shown that the accused knew of the victim's reputation at the time of the offense. When such a showing is made, some courts have held that evidence is not limited to general reputation, but may also include evidence of specific acts. Other courts have held that, even when offered for this purpose, only specific acts committed against the defendant are admissible. **Black**, 2004-1526 at 14-15, 907 So.2d at 152-153.

Thus, in the instant matter, the threshold question as to the admissibility of evidence of the victim's character is whether the defendant introduced "appreciable evidence" into the record to establish an overt act by the victim at the time the defendant shot him. Notably, the defense did not call any witnesses to support the self-defense claim, and the defendant did not testify at trial. Nonetheless, the defense asserts that the statements the defendant made in his interview with Detective Miller are sufficient to establish appreciable evidence of an overt act, which would allow him to offer evidence

before the jury of the victim's dangerous character. Specifically, the defense points out the defendant told Detective Miller that he believed the victim had a gun and that he believed the victim was reaching for the gun when he shot him.

The defendant's recorded interview was introduced into evidence during the State's direct examination of Detective Miller. The State played the interview for the jury, which lasted about thirteen minutes. The defendant admitted to shooting the victim. However, he claimed he did not mean to kill the victim. The defendant stated that he shot him because he believed that the victim had a gun and that the victim was going to shoot him. The defendant gave Detective Miller his version of the events of the day, the moments before the shooting, and his professed reasons for shooting the victim.

The defendant knew the victim's family members. The victim lived in Seattle, Washington, and the defendant only saw him when he was in town visiting relatives. The defendant claimed the victim would "mess" with him. However, he did not give any examples or explain how the victim allegedly "messed" with him on prior occasions.

The defendant admitted that earlier on the day of the cookout, he and Ms. Levy had an argument that got "drastic" and that he turned over the table of food. After family members told the victim about the incident, the defendant said the victim drove over to his house. The defendant claims he was standing on the street corner by his house, when the victim pulled up in front of his house, got out of his truck, and asked him "what's the problem." The defendant told the victim about his argument with Ms. Levy and that he turned over the food table. The defendant indicated that this was the extent of the conversation between them, stating, "so that was that." The defendant did not say the victim physically or verbally threatened him during this encounter.

After their brief conversation, the defendant went "back around" to the cookout area. He told Detective Miller he knew "they was [sic] all plotting up against [him]." However, he did not explain what lead him to this conclusion.

Detective Miller asked the defendant to tell him exactly what happened that brought him to shoot the victim. The defendant began by saying, "previous to [the

shooting] we had a fist fight." He said "the street saying this man is HIV positive." The defendant did not know if that was true, but he expressed a concern about their blood "all mashed up and everything because he hit me." Nevertheless, the defendant was quick to say this was not the reason he shot the victim.

After the fight, the defendant claimed the victim "had his people come over there in a blue truck." He claimed the victim's brother passed something out of the window of his truck to the victim's. Although he did not see a gun, he believed a gun was passed to the victim. Based on this presumption, the defendant said he took "precautions." He went around the corner and got his gun. Armed with his gun, he came back to the spot where everyone was "all still hanging." When Detective Miller asked if the victim or his family went out looking for him, the defendant said no. He said the victim never left the cookout area.

As to the moments immediately before the shooting, the defendant denied saying anything to the victim. He explained that he was "fed up by trying to apologize to the man." He was "just leaving it alone." Without any explanation, the defendant claimed the victim was "steady going off." The defendant thought the victim had a gun because he said, "Click, you come over here with a gun I'm going to kill you." The defendant stated, "Now he playing." The defendant did not know if the victim had a gun or not. So, he "just shot him and ran." Later in the interview, the defendant said he shot the victim because he believed he had a gun and he "reached."

When the defendant finished telling his account of the shooting, Detective Miller asked the defendant if there was anything else he needed to know. The defendant took this opportunity to ask the detective if they found the victim's gun. Detective Miller told him they had not found any guns. The defendant said he was sure the victim had a gun. In an attempt to explain why the gun was not found, he told Detective Miller that the victim and his "people are together" and suggested "it could be a throw."

After the defendant's interview was played for the jury, the defense cross-examined Detective Miller. The objection at issue in this assignment of error occurred when the defense asked Detective Miller if he checked "to see if [the victim] had a

background for violence?" The State objected, arguing this was the defense's attempt to get evidence of the victim's character before the jury without first producing evidence of an overt act by the victim toward the defendant.

The trial court sustained the State's objection, finding there was no evidence admitted at this point in the trial of an overt act by the victim toward the defendant. In further explaining its ruling, the trial court stated it considered the defendant's statements that he thought someone had passed a gun to the victim and that he believed the victim was reaching for a gun when he shot the victim. However, the trial court also noted the defendant told the detective he did not actually see a gun. Moreover, the trial court found the witness testimony of the people present at the time of the shooting did not corroborate or verify the defendant's self-serving statements that he believed the victim had a gun and was attempting to pull a gun on him. The trial court also found the witness testimony concerning the statements the victim made during the moments before he was shot did not in any way sound like a threat to the defendant. Lastly, although the trial court found the defendant did not meet the threshold issue of producing appreciable evidence of an overt act by the victim, the trial court further noted there was no evidence that the defendant was aware of the victim's alleged dangerous character prior to the shooting.¹

In general, "appreciable evidence" of an overt act by the victim requires more than the defendant's self-serving statement. See Felder, 2000-2887 at 6-7, 809 So.2d at 367. For example, this court found "appreciable evidence" of a victim's overt act where the defendant and another eyewitness testified that a group of men, including the victim, menacingly followed them through a parking lot after a heated argument. Although their testimony conflicted with prosecution witness testimony, this court stated that deciding the weight to be accorded the testimony was for the jury. **State v. Brooks**, 98-1151, pp. 10-11 (La. App. 1 Cir. 4/15/99), 734 So.2d 1232, 1237-1238, writ denied, 99-1462

¹ After sustaining the State's objection, the trial court allowed the defendant to proffer documents from the Department of Public Safety and Corrections showing the victim was convicted of attempted manslaughter for a 1994 offense and was sentenced to three years imprisonment.

(La. 11/12/99), 749 So.2d 651. Similarly, in **State v. Jackson**, 419 So.2d 425, 427 (La. 1981), the Louisiana Supreme Court found the evidentiary prerequisite of an overt act by the victim was met by testimony from a defendant and her brother that the victim continued to advance on the defendant in a hostile and frightening manner even after the defendant fired two warning shots.

Unlike the defenses presented in **Brooks** and **Jackson**, the instant defense did not produce any evidence or testimony at trial to corroborate or verify the self-serving statements the defendant made to Detective Miller that he acted in self-defense. Moreover, the uncontroverted trial testimony established that in the moments immediately before the shooting, the victim and some other men were standing around Ms. Lester's car with their attention focused on helping her get the car started. Prior to that, the victim and his cousin, John Wilson, were simply frying chicken and visiting with relatives and friends. The victim had assured his cousin that everything was quiet and nothing was happening.

It is against this factual background that the defendant moved toward the car with a gun in his hand. He approached in such a threatening manner that Ms. Lester was frightened he was going to shoot her for speaking to him earlier, and John Wilson ran out of fear of being shot. The defendant's contention that the victim moved in such a way that it looked like he was reaching for a gun is not substantiated by the witnesses' accounts of the victim's movements immediately prior to being shot. Ms. Lester testified the victim was under the hood of her car with his hand on the raised hood when the defendant approached. Ms. Sowell and John Wilson testified that the victim attempted to move away from the defendant, but the defendant essentially pursued him. Moreover, Ms. Sowell and John Wilson testified the victim did not have a gun, and Detective Miller testified the police did not find a gun on or near the victim.

After a through review of the record, we find the trial court did not abuse its discretion in excluding the defense from introducing evidence of the victim's character, as the record does not contain any "appreciable evidence" of the prerequisite requirement of a hostile demonstration or overt act by the victim, which manifests to the mind of a

reasonable person a present intention on the victim's part to kill or do great bodily harm to the accused. The defense failed to offer any evidence at trial to verify or corroborate the defendant's self-serving statements.

Even assuming the defendant's recorded statements were sufficient "appreciable evidence" of an overt act by the victim, evidence of the victim's dangerous character would not be admissible to show the state of mind of the defendant at the time of the offense, without the defendant first showing he knew of the victim's dangerous reputation prior to the offense. See Black, 2004-1526 at 15, 907 So.2d at 152-153. As the trial court found, and the record shows, there was no evidence that the defendant was aware of the victim's dangerous reputation prior to the shooting. Lastly, we are mindful that a person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict. La. R.S. 14:21. The uncontroverted testimony from the witnesses who were present when the defendant shot the victim clearly established the defendant was the aggressor in this matter. The defendant continued to pursue the victim even as he hopelessly attempted to keep Ms. Lester's car as a barrier between himself and the armed defendant. For the reasons stated above, we find the trial court did not abuse its discretion in sustaining the State's objection, which precluded the defense from presenting evidence of the victim's dangerous character to the jury.

POST CONVICTION RELIEF

Although not raised as an assignment of error, in his brief, defense counsel notes that the trial court did not inform the defendant of the time limitation for seeking post conviction relief. However, as the issue of filing for post conviction relief has been raised, it is apparent that the defendant has notice of the limitation period and/or has an attorney who is in the position to provide him with such notice. Even though we have done so in the past, we decline to remand for the trial court to provide such notice. Instead, out of an abundance of caution and in the interest of judicial economy, we refer the defendant to La. Code Crim. art. 930.8(A), which generally provides that no application for post

conviction relief, including applications that seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence have become final under the provisions of La. Code Crim. arts. 914 or 922. **State v. Godblolt**, 2006-0609, p. 8 (La. App. 1 Cir. 11/3/06), 950 So.2d 727, 732.

CONCLUSION

For all of the reasons set forth above, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.