

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0655

STATE OF LOUISIANA

VS.

D'ANTHONY NORMAN FORD

JUDGMENT RENDERED: NOV 14 2008

ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 06-06-0180, SECTION 6
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

THE HONORABLE RICHARD "CHIP" MOORE, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ

Hughes, J., concurs.

McDONALD, J.

The defendant, D'Anthony Norman Ford, was charged by grand jury indictment with second degree murder (count one) and attempted second degree murder (count two), violations of La. R.S. 14:30.1 and La. R.S. 14:27. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged as to count one, and guilty of aggravated battery (a violation of La. R.S. 14:34) as to count two. The trial court denied the defendant's motion for new trial. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence as to count one, and to ten years imprisonment at hard labor as to count two. The trial court ordered that the sentence on count two be served consecutively to the sentence imposed on count one. The defendant now appeals, raising the following assignments of error:

1. The testimony of Officer Kevin Adcock was improperly admitted since the witness was not qualified to offer expert testimony concerning gunshot-residue analysis.
2. The trial court's denial of expert opinion violated the defendant's constitutional consideration of due process and/or fundamental fairness.
3. The trial court violated the defendant's due process rights by failing to grant a limited continuance to present his rebuttal expert.
4. The evidence produced at trial was insufficient to find the defendant guilty of second degree murder beyond a reasonable doubt.

For the following reasons, we affirm the convictions and the sentences.

STATEMENT OF FACTS

On or about May 11, 2006, at a Chase Bank on Plank Road in Baton Rouge, Louisiana, Marcus Washington (the victim as to count two), was involved in a verbal and physical altercation with Jeffrey Young, someone Washington knew from school. Young and others later appeared at Washington's residence to

continue the encounter. A physical altercation ensued and gunshots were fired, though no one was struck, before Young and others entered their vehicle and drove away. Moments later, an individual described as having a “bright skin complexion” and “dreds” fired a large handgun as he ran toward and entered a gray Montero Sport. More gunshots were fired before the Montero Sport was driven away from the area. As before, no one was struck during this round of gunfire.

On or about May 13, 2006, at approximately 2:50 a.m., while traveling in the right lane on Winbourne Avenue, a 2006 Chevrolet Impala being driven by Darrell Wilson and occupied by Michael Brown, Ryan Francis (the victim as to count one), and Marcus Washington approached a gray Montero Sport positioned in the left lane at the Acadian Thruway intersection. A passenger of the Montero Sport passed a gun to the driver, identified as the defendant. The defendant proceeded through the red traffic light, made a left turn, stopped the vehicle in the middle of the intersection and opened the driver’s door. As Wilson made a right turn on Acadian Thruway, the defendant stepped out of his vehicle. At this point, bullets began striking the Chevrolet Impala. Ryan Francis was struck by two of the bullets and died from massive internal hemorrhage due to multiple gunshot wounds. After several witnesses were questioned, the defendant was developed as a suspect in both shootings. The defendant was later arrested. He had dreadlocks in his hair at the time of his arrest.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth assignment of error, the defendant contends that the evidence in support of the second degree murder conviction is insufficient. The defendant denies shooting Ryan Francis. The defendant contends that there were several inconsistencies between the testimony and pretrial statements presented by the occupants of the vehicle in which the victim was riding at the time of his death.

The defendant specifically contends that Wilson initially stated that a passenger of the Montero Sport, not the driver, had the firearm that was used to kill the victim. The defendant further notes that while Washington identified the defendant in court as the shooter, in his recorded statement to the police, he indicated that the shooter exited the Montero Sport from the back door, not the driver's door. The defendant further notes that Brown did not tell the police that the driver touched the firearm. The defendant concludes that multiple inconsistencies rendered the State witnesses' testimony incredible. The defendant does not contest the aggravated battery conviction based on the events that occurred on May 11, 2006. Thus, we will focus on the evidence presented in support of the second degree murder conviction. Although this is the fourth assignment of error raised by the defendant, this court will examine the evidence of this conviction for sufficiency before addressing the other assignments of error.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting La. C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. **State v. Brown**, 2003-0897, p. 22 (La. 4/12/05), 907 So.2d 1, 18. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984).

Moreover, where 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.

Richardson, 459 So.2d at 38. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

Darrell Wilson, the driver of the Chevrolet Impala, specifically testified that after they pulled up to the side of the Montero Sport, its passengers were looking into the Impala. The front passenger was leaning back. Wilson further testified that the front passenger “raised up” a firearm and passed it to the driver. Wilson was able to clearly view the driver and immediately recognized him, as they had grown up in the same neighborhood. Wilson specified that the driver, whom he identified as the defendant, lived across the street from him and went to elementary school with him. Wilson described the firearm as a “saw rifle with a long skinny barrel.” According to Wilson, the defendant made a left turn, stopped the vehicle, opened the driver's door and stepped out with the firearm. As Wilson made a right turn on Acadian Thruway, the shots were fired. Wilson observed the defendant in his rearview mirror firing gunshots toward the Impala. As Wilson continued to travel on Acadian Thruway, the victim stated that he had been shot. Wilson called 911 and reported the incident. The 911 telephone call took place at 2:56 a.m. Wilson transported the victim to Baton Rouge General Hospital, where he was pronounced dead. At the hospital, Wilson told Officer Michael Elsbury of the Baton Rouge Police Department where the shooting occurred, stated that the defendant was the shooter, and described the vehicle being driven by the defendant. Hours after the incident, on the same date, Wilson identified the

defendant as the shooter in a photographic lineup. As noted during cross-examination, during his recorded statement to the police on the date of the offense, Wilson did not state that a passenger passed the gun to the driver. During the recorded statement, Wilson consistently stated that he knew the defendant since elementary school, that the defendant was the driver of the Montero Sport, and that the defendant was the shooter. Officer Elsbury collected eleven 7.62 x 39 shell casings (assault rifle type) from the scene. All of the casings were collected within a four-foot-diameter area.

Marcus Washington described the shooter as having “dreds, hair sticking straight up.” He stated that he couldn’t see the gun but noted that the shooter was holding it with both hands. Washington was unable to identify the shooter, as he only observed him during a quick look. He retracted his previous statement to the police that the shooter exited the vehicle from the back. Washington was, however, certain that the shooter had dreadlocks in his hair.

Michael Brown, the other Impala passenger, testified that a passenger of the Montero Sport brandished a firearm before passing it to the driver, whom he described as chubby, with dreadlocks in his hair. The driver exited the vehicle and opened fire. Brown identified the defendant in court as the shooter. Brown also chose the defendant in a photographic lineup conducted after the shooting incident.

Corporal Kevin Adcock used a shooter’s identification kit to test the hands of the defendant, and others taken into custody with the defendant, for gunshot residue. The defendant was the only individual to test positive. During cross-examination, Corporal Adcock confirmed that the test was not conclusive.

Charles Watson, Jr., an expert in firearms examination, determined that a spent-bullet projectile, collected by Corporal Adcock from the rear-driver’s-side floorboard of the Montero Sport, was fired from the same weapon as a bullet jacket that was removed from the victim’s body. Watson determined that the

eleven 7.62 x 39 shell casings (assault rifle type) collected from the scene were all fired from the same AK-47 type firearm.¹ A fifty-caliber Desert Eagle firearm recovered from the vehicle driven by the defendant was registered in the defendant's mother's name, Brendia Ford.

Timothy Piper, a radio-frequency engineer for Sprint Nextel Corporation, examined the defendant's cellular-telephone records. There was an inbound telephone call to the defendant's cellular telephone at 2:56 a.m., May 13, 2006. The intersection of Winbourne Avenue and North Acadian Thruway location corresponded with the cell tower used for the reception of that telephone call.

Defense witness Detective Darrell Michelli of the East Baton Parish Sheriff's Office testified that on March 25, 2006, Brendia Ford, the defendant's mother, reported her AK-47 Romanian assault rifle stolen. At the time of the report, Detective Michelli asked Ford if she thought one of her relatives had the firearm since she stated that she had left it in her unlocked vehicle, described by Detective Michelli as a "silver utility vehicle." As the detective was attempting to ask more questions, Ford abruptly walked away and entered her home. Michelli filed the report and did not have any knowledge of the weapon ever being recovered. The defendant did not testify at the trial.

A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Azema**,

¹ Watson also determined that a 7.62 x 39 shell casing collected from the scene of the May 11, 2006 shooting was fired from the same firearm as the eleven shell casings collected from the scene of the May 13, 2006 shooting. Further, a fifty-caliber-cartridge case regarding the May 11, 2006 shooting incident was fired from the fifty-caliber Desert Eagle firearm recovered from the vehicle driven by the defendant.

633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460; **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

The defendant's cellular-telephone records show that he could have been at the location of the shooting at the time the shooting occurred. At the time of his arrest, the defendant was driving a vehicle that matched the description of the vehicle that the witnesses described as being driven by the shooter at the time of the offense. Wilson knew the defendant very well, as they grew up together. Further, Wilson had a clear view, and positively identified the defendant as the driver and shooter during the incident in question. Although Washington could not identify the shooter, he was certain that the shooter had dreadlocked hair. Brown identified the defendant as the shooter during a photographic lineup and in court. Positive identification by only one witness may be sufficient to support a conviction. **State v. Davis**, 2001-3033, p. 3 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163. In this case, two of the three passengers present when the victim was shot to death positively identified the defendant as the shooter, and the distinct description of the shooter's hair provided by the third passenger was consistent with the defendant's hair at the time of his arrest. Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the defendant was the shooter and, therefore, guilty of second degree murder. For the above reasons, this assignment of error is without merit.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In the first and second assignments of error, the defendant argues that evidence regarding the gunshot-residue testing performed in this case was improper. First, the defendant contends that State witness Corporal Kevin Adcock of the Baton Rouge City Police Department was unqualified to offer expert testimony on gunshot residue. The defendant further contends that the State failed to prove that the test results were reliable, noting that the trial court did not make a

preliminary determination as to whether Corporal Adcock was qualified to testify as to the results of the test. The defendant argues that the State failed to satisfy the reliability requirements of **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 2795-2796, 125 L.Ed.2d 469 (1993) and **State v. Foret**, 628 So.2d 1116, 1122 (La. 1993). The defendant concludes that the admission of Corporal Adcock's testimony and the test results constituted prejudicial error.

In **State v. Foret**, the Louisiana Supreme Court held that where a trial court is considering the admissibility of proposed expert testimony, the trial court must first make “ ‘a preliminary assessment’ ... ‘of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue.’ ” **Foret**, 628 So.2d at 1122 (quoting **Daubert**, 509 U.S. at 592-93, 113 S.Ct. at 2796). Gunshot residue detection testing is not a new science. Louisiana courts have historically recognized experts in this field. See **State v. Boyer**, 406 So.2d 143, 146-47 (La. 1981). Following **Boyer**, trial courts have accepted gunshot-residue testing as a technique for determining if a person has recently discharged a firearm.

As noted by the trial court in denying the defendant's motion for new trial on the ground asserted in this assignment of error, the State did not offer Adcock as an expert witness. The jury was not led to believe that Adcock was an expert in the field of gunshot-residue analysis. Adcock testified that he had conducted such tests approximately over one hundred times. However, he also testified during cross-examination that he was not an expert as he did not have any specialized training in gunshot residue, that the test had not been examined by an expert, and that the test was not conclusive. Adcock testified that he simply followed the kit instructions in conducting the test. Adcock confirmed that the kit had not been sent to a lab for further testing. The defense attorney suggested that the presence

of gunshot residue could simply mean that the person was in the presence of a gun that was fired or touched a gun that was recently fired, and Adcock could not refute such suggestions. As concluded by the trial court, the jury could properly assess the weight of the evidence at issue. Even if we were to find a clear abuse of discretion, any error in this regard is not structural, but rather a trial error that may or may not have prejudiced the defendant and thus is subject to harmless-error analysis. See State v. Hongo, 96-2060, p. 5 (La. 12/2/97), 706 So.2d 419, 422. If the evidence is otherwise sufficient to support the jury's verdict and the jury would have reached the same result if it had observed the excluded evidence, any error is harmless. The determination is based upon "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). We agree with the trial court's conclusion that there was overwhelming evidence of the defendant's guilt, such that any error in the admission of the testimony regarding, and results of, the gunshot-residue test was harmless beyond a reasonable doubt. Assignments of error numbers one and two lack merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, the defendant argues that the trial court violated his due process rights by failing to grant a limited continuance to present an expert witness. Noting that the State rested its case-in-chief on August 17, 2007, the trial court rejected the motion after being informed that the potential defense witness would be available August 19, 2007. The defendant contends that the potential expert testimony would have been unique and not cumulative.

Since the motion was made after the trial commenced, it was more properly a motion for a recess, a temporary adjournment of a trial or hearing after it has commenced. La. C.Cr.P. art. 708. Regardless of how the motion was styled, the court may consider the motion as though it had been properly

denominated. A motion for recess is evaluated by the same standards as a motion for a continuance. **State v. Warren**, 437 So.2d 836, 838 (La. 1983).

Louisiana Code of Criminal Procedure article 709 sets forth the requirements for a motion for a continuance to locate witnesses. These requirements are:

(1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;

(2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and

(3) Facts showing due diligence used in an effort to procure attendance of the witness.

Louisiana Code of Criminal Procedure article 712 commits a motion for continuance to the sound discretion of the trial judge, and his ruling will not be disturbed on appeal absent a showing of abuse and specific prejudice. **State v. Gaskin**, 412 So.2d 1007, 1011-12 (La. 1982); See also State v. Simon, 607 So.2d 793, 798 (La. App. 1st Cir. 1992), writ denied, 612 So.2d 77 (La. 1993), overruled on other grounds by State v. Celestine, 95-1393 (La. 1/26/96), 671 So.2d 896. While La. C.Cr.P. art. 707 provides for a motion for continuance to be in writing, where the occurrences that allegedly made the continuance necessary arose unexpectedly, and the defendant had no opportunity to prepare a written motion, the trial judge's denial of the defendant's motion for a continuance is properly before this court for review. **State v. Parsley**, 369 So.2d 1292, 1294 n.1 (La. 1979).

In the instant case, we find no abuse of discretion in the trial court's denial of the defendant's motion. There is no specific showing that the defendant was prejudiced. As noted by the State, the defendant was aware of the gunshot-residue evidence for over a year prior to the trial. In moving for a recess, the defense counsel simply stated that the defense's gunshot-residue expert would

not be available until the weekend. The defense counsel added that the expert would rebut State witness testimony “about the other gun.” The defense counsel did not state for the record facts to which the absent witness was expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial as required by Article 709(1). We further reiterate that Corporal Adcock was subjected to intense cross-examination regarding the gunshot-residue testing. This assignment of error lacks merit.

CONVICTIONS AND SENTENCES AFFIRMED.