NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

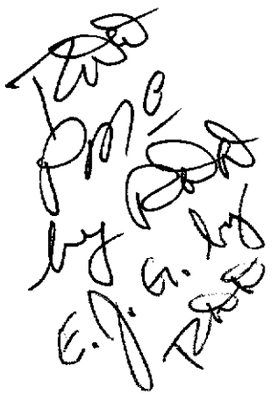
FIRST CIRCUIT

2009 KA 2186

STATE OF LOUISIANA

VERSUS

DEREK NATHANIEL MOORE



Judgment rendered: MAY - 7 2010

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On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Case Number: 05-07-0341; Section 8
The Honorable Wilson E. Fields, Judge Presiding

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BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

The defendant, Derek Moore, 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. On count one the defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. On count two the defendant was sentenced to fifteen years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The sentences are to be served concurrently. The defendant now appeals, assigning error to the exclusion of an alibi witness, to the sufficiency of the evidence, and to the imposition of sentence immediately after the denial of post-trial motions without a waiver of the time delay. Subsequent to the State's response by brief, the defendant also filed a reply brief that has been reviewed and considered by this Court. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On or about March 16, 2007, at about 10:30 p.m., a gunman knocked on the door of a residence located at 864 North 38th Street in Baton Rouge, Louisiana and held the victim, Cathy Brumfield, at gunpoint as he entered the home. The gunman asked about money and for a person named Gilbert. The gunman then began firing his weapon. Officers of the Baton Rouge City Police Department were dispatched to the residence. Upon their arrival, the officers learned that it was the scene of the shooting of victims Kevin Lee and Ms. Brumfield. Ms. Brumfield died as a result of injuries suffered from the shooting. The defendant was identified as the shooter of both victims.

FIRST COUNSELED ASSIGNMENT OF ERROR AND FIRST, SECOND AND THIRD *PRO SE* ASSIGNMENTS OF ERROR

In the first assignment of error, the defendant argues that the trial court erred in excluding alibi witness testimony. The defendant contends that the defense counsel was not informed of the name of an alibi witness until the day of the trial. The defendant notes that the trial court excluded the witness pursuant to La. C.Cr.P. art 727. The defendant contends that notice was given in accordance with subsection C of the statute.[1] Arguing that even if this court finds that notice was not timely, the defendant maintains exclusion of the witness was not mandatory. The defendant notes that the trial court reasoned that the defense did not show good cause for the late notice, and argues that the trial court failed to conduct a balancing test to determine if the State would suffer prejudice as a result of the alibi witness testimony. The defendant further contends that the trial court did not consider alternatives to the exclusion of the testimony and argues that the trial court violated his Sixth Amendment constitutional right to present a defense. Finally, the defendant argues that the trial court's error was not harmless, noting that the verdicts were not unanimous.

The defendant has filed a *pro se* brief with three assignments of error wherein he reiterates the arguments in support of counseled assignment of error number one. The defendant submits that he was denied due process and equal protection of the laws in that he was particularly deprived of his Sixth Amendment constitutional right to present a defense. The defendant contends that the proposed testimony of an alibi witness was relevant and notes that the evidence of his guilt was not overwhelming. The defendant contends that the trial court should have granted the prosecution additional discovery or inspection regarding the alibi

[1] The defendant's answer to reciprocal motion for discovery in pertinent part states that on March 16, 2008, he was in the company of a Mr. David Johnson at a gentlemen's lounge.

witness testimony, and modified its previous order pursuant to La. C.Cr.P. art. 729.3 and La. C.E. art. 402.

In the course of the voir dire, the defense attorney informed the court that an answer to reciprocal motion for discovery was filed. The State informed the court that despite the State's previous request for notice of an alibi witness in reciprocal discovery months before trial, the defendant only gave such notice in the middle of the jury selection. Contending that it had not had an opportunity to investigate any information regarding the witness, the State asked the court to exclude the testimony. The defense attorney stated that the defendant had just provided the information. The trial court noted that the defendant had been arrested for the charges herein more than a year before the trial and found that if the defendant really knew of an alibi witness, he would have provided that information to his attorney long before the jury selection. The court concluded that good cause had not been shown for the delay. The defendant filed writ applications in this court and the Louisiana Supreme Court for review of the trial court's ruling and the applications were denied. **State v. Moore**, 08-2287 (La. 9/19/08), 992 So.2d 971; **State v. Moore**, 08-1925 (La. App. 1st Cir. 9/18/08) (unpublished).

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Louisiana, the Louisiana Code of Evidence, or other legislation. La. C.E. art. 402. Louisiana Code of Criminal Procedure article 727 provides, in pertinent part:

> A. Upon written demand of the district attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the district attorney a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.
>
> B. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the district attorney shall serve

> upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.
>
> C. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under Subsection A or B, the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.
>
> D. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.
>
> E. For good cause shown, the court may grant an exception to any of the requirements of Subsections A through D of this Section.

In evaluating whether a party has established good cause for failing to comply with notice requirements for alibi witnesses, a district court should consider (1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors rising out of the circumstances of the case. **State v. Rogers**, 95-1485, p. 5 (La. App. 1st Cir. 9/27/96), 681 So.2d 994, 997, writs denied, 96-2609 & 96-2626 (La. 5/1/97), 693 So.2d 749.

The Compulsory Process Clause of the Sixth Amendment may, in certain cases, be violated by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness. However, the Sixth Amendment does not create an absolute bar to the preclusion of the testimony of a surprise defense witness. **Taylor v. Illinois**, 484 U.S. 400, 409-10, 108 S.Ct. 646, 653, 98 L.Ed.2d 798 (1988). Several years after **Taylor**, the Supreme Court reiterated that there is no per se bar against the exclusion of testimony for failure to comply with

discovery rules, in the context of the notice provisions of Michigan's rape-shield law. **Michigan v. Lucas**, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991). However, the Supreme Court further explained its prior holding: "We did not hold in **Taylor** that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be 'adequate and appropriate in most cases.'" **Michigan v. Lucas**, 500 U.S. at 152, 111 S.Ct. at 1748 (quoting **Taylor**, 484 U.S. at 413, 108 S.Ct. at 655).

In **Toney v. Miller**, 564 F. Supp.2d 577 (E.D. La. 2008), the petitioner claimed that the trial court erred in refusing to allow the testimony of two alibi witnesses, his sister and his girlfriend. The Court noted that the police had been told during the initial investigation by both petitioner's sister and his girlfriend that he could not have committed the robbery based on their knowledge of his whereabouts at the time of the crime. In addition, the petitioner's former counsel had apparently made an oral representation to the prosecutor that the petitioner had told him of the existence of an alibi witness. Under those circumstances, the Court found that there was no indication that the petitioner himself was attempting to gain any tactical advantage by contributing to the failure to give notice of alibi in a timely fashion. **Toney**, 564 F. Supp.2d at 589. In **Taylor**, where defense counsel did not apprise the court or the prosecution of the two additional witnesses until the second day of trial, after the State's two principal witnesses had completed their testimony, the Supreme Court found that the "inference that he was deliberately seeking a tactical advantage is inescapable." **Taylor**, 484 U.S. at 417, 108 S.Ct. at 657.

Reviewing the decision of the trial court in light of the factors enumerated above, this court is unable to conclude that the trial court abused its discretion in excluding the testimony in question. Unlike the circumstances in **Toney**, here, there is no indication that the police or the prosecution, were informed of the alibi

witness before the trial. The trial court found that the defendant failed to give good cause warranting an exception to the notice requirement. We agree. There is a reasonable inference that the defendant was deliberately seeking a tactical advantage in failing to give notice herein. Thus, first counseled assignment of error and the three assignments of error argued in the *pro se* brief lack merit.

SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR

In a combined argument for assignments of error numbers two, three, and four, the defendant argues that the evidence is insufficient to support the verdicts. The defendant does not contest the fact that the two victims were shot, only his identity as the perpetrator. The defendant contends that the only evidence linking him to the shooting is the testimony of Kevin Lee, an admitted drug dealer. The defendant contends that Lee withheld incriminating information from the police and was initially unable to identify anyone in a photographic lineup. The defendant notes that Lee stated that he knew the defendant but he did not know the defendant's real name. The defendant argues that considering Lee's lack of credibility and the lack of scientific evidence, the State failed to carry its burden and the trial court should have granted the defendant's motion for new trial or his motion for "judgment notwithstanding the verdict" on the basis that the evidence was insufficient to support the verdicts.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of the crime beyond a reasonable doubt. **State v. Pittman**, 93-0892, p. 5 (La. App. 1st Cir. 4/8/94), 636 So.2d 299, 302. Where the key issue is a defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. 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**, 02-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a 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).

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. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Thus, 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**, 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).

Louisiana Revised Statutes 14:30.1A(1) defines second degree murder as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. Louisiana Revised Statutes 14:27A defines "attempt" as any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. Specific intent is a state of mind and need not be proved as a fact; it may be inferred from the circumstances of the transaction and the actions of the defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). Specific intent to kill may be

inferred from a defendant's act of pointing a gun and firing at a person. **State v. Delco**, 06-0504, p. 4 (La. App. 1st Cir. 9/15/06), 943 So.2d 1143, 1146, writ denied, 06-2636 (La. 8/15/07), 961 So.2d 1160.

Officer John Dauthier of the Baton Rouge City Police Department testified that he was notified two persons had been shot, and he reported to the scene. Upon his arrival, Officer Dauthier interviewed the son of the deceased victim, Darius Brumfield. Brumfield informed the officer that he knew the gunman as "Dot." Brumfield was unable to identify the gunman from a photographic lineup. Brumfield stated that the gunman had "twists" in his hair at the time of the offenses, unlike anyone in the lineup.

Officer Dauthier also interviewed the other victim, Lee. Lee stated that on the day of the shooting, he, and the defendant, whom he referred to as "Dot," and Gilbert Schuler had been involved in the purchase of narcotics that the defendant having given a sum of money, approximately $4,500.00, to Schuler for the purchase of narcotics. When the deal was not consummated because Schuler did not return with the promised product, the defendant became upset. The defendant came to Lee's house, and began accusing him of being part of a conspiracy to take money from him. The defendant inquired as to the whereabouts of his money and Schuler. Lee further informed Officer Dauthier that this was when the defendant began firing his weapon at Lee's girlfriend, the deceased victim. Lee identified the defendant as the shooter from a photographic lineup. Officer Dauthier was unsure as to why an interoffice written communication between him and Detective Gann indicated that Lee was unable to identify anyone in a lineup and did not remember typing or reading such a communication.

Brumfield testified that shortly after he heard a knock at the door he heard screaming and walked to the front of the house to investigate. His sister and his mother, the deceased victim, were screaming. The gunman held the gun to his

mother's head. Brumfield stated that the gunman was a man known as "Dot." Brumfield ran to his bedroom to hide. After the gunshots ended, Brumfield walked back to the front of the house and saw his mother on the floor bleeding and also observed Lee bleeding. Brumfield further testified that he heard Dot hollering and asking for someone named Schuler before he heard the gunshots. Brumfield stated that he could not identify anyone in the photographic lineup because the gunman had twists or dreadlocks in his hair. During cross- examination, Brumfield stated that Lee told him that the gunman was Dot.

Lee testified that on the morning of the offenses, his long-time friend Schuler and Dot called him. Lee had known the defendant for about five to seven years. Lee identified the defendant as Dot in court. Lee testified the defendant had previous deals with Schuler before the date in question wherein the defendant would pay for drugs before receiving them. This time, however, Schuler did not come back with the drugs. Lee suffered gunshot wounds to his neck, back, and side. Lee confirmed his identification of the defendant from a photographic lineup.

Based on our review of the evidence, we conclude that the State negated any reasonable probability of misidentification. Positive identification by only one witness may be sufficient to support a conviction. **State v. Andrews**, 94-0842, p. 7 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453. Herein, the trier of fact accepted the testimony of Lee. Lee knew the defendant very well and his factual account was consistent with the statements that Brumfield heard the gunman make before the shooting. An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **Richardson**, 459 So.2d at 38. A rational juror could have concluded that all of this evidence together, viewed most favorably to the State, proved beyond a

reasonable doubt that the defendant committed the instant offenses. This assignment of error lacks merit.

FIFTH ASSIGNMENT OF ERROR

In the final assignment of error, the defendant contends the trial court erred in sentencing him immediately after denying his motion for new trial and motion for post-verdict judgment of acquittal without obtaining a waiver of the sentencing delays.[2] The defendant argues that the case should be remanded for resentencing. In his reply brief, the defendant further argues that the Official Revision Comment to La. C.Cr.P. art. 873 and **State v. Martin**, 199 La. 39, 5 So.2d 377 (1941), required that the defendant be apprised of the right to a sentencing delay prior to an express waiver of said right.

The defendant is correct in that the trial court did not wait the required twenty-four hours after denial of the defendant's motion for new trial, motion in arrest of judgment, and motion for post-verdict judgment of acquittal, before imposing sentence. See La. C.Cr.P. art. 873.[3] However, in response to the trial court's inquiry as to whether or not the parties were ready for sentencing, the defendant's counsel stated, "We are ready judge." Based on our statutory and jurisprudential review, we do not find that the validity of the defendant's express waiver hinges upon the trial court's express appraisal of the right to a sentencing delay. Article 873 concludes: "If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately." The defendant relies on the Official Revision Comment to Article 873 and the Louisiana Supreme Court's ruling in **Martin**. In **Martin,** the defendant argued in

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[2] Although the minutes imply that the defendant filed the motion for new trial and motion for post-verdict judgment of acquittal after the sentencing, the motions were filed and ruled on before the sentences were imposed. (R. 124-27; 717-18).

[3] La. C.Cr.P. art. 873 requires a 24-hour delay in sentencing after denial of a motion for new trial or in arrest of judgment, unless the defendant waives said delays. The article does not explicitly require a 24-hour delay in sentencing after a motion for a post verdict judgment of acquittal has been denied. However, this Court has applied the 24-hour delay in La. Code Crim. P. art. 873 to motions for post verdict judgment of acquittal. See **State v. Coates**, 00-1013, p. 5 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1226, and **State v. Jones**, 97-2521, p. 2 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53.

part that her sentence was illegal because it was imposed on the same day on which she was tried and found guilty. The Louisiana Supreme Court found a sufficient waiver of the delay and noted, as an important factor, that the trial court in that case explained to the defendant that she was entitled to the delay of twenty-four hours before being sentenced. However, the Court did not mandate such an explanation as a prerequisite to a sufficient waiver, nor does the Official Revision Comment to Article 873.

In **State v. Flowers**, 337 So.2d 469, 474 (La. 9/13/76), the defendant was present in court with his counsel at which time his motion for a new trial was denied and he was sentenced. The court asked defendant if he wished to be sentenced on that date, and his counsel replied in the affirmative. The Louisiana Supreme Court found that this constituted an express waiver of the delay. Indeed the jurisprudence is replete with findings of sufficient waivers, without mention as to whether an explanation of the delay preceded the waiver. See **State v. Steward**, 95-1693, p. 23 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1019; **State v. Lindsey**, 583 So.2d 1200, 1206 (La. App. 1st Cir. 1991), writ denied, 590 So.2d 588 (La. 1992). See also **State v. Ferrell**, 94-702, p. 11 (La. App. 5th Cir. 5/30/95), 656 So.2d 739, 745, writ denied, 95-2360 (La. 4/18/97), 692 So.2d 433.

In **State v. Diaz**, 93-1309, p. 16 (La. App. 3d Cir. 4/6/94), 635 So.2d 499, 508-09, writ denied, 94-1189 (La. 9/16/94), 642 So.2d 191, neither the defendant nor his attorney objected to sentencing being held immediately after denial of their motion for new trial and they did not assign the Article 873 violation on appeal. The court found that the defendant and his attorney impliedly waived the delay by their active participation in the sentencing hearing. Noting that the defendant received the minimum sentence under the statute, the court found the error harmless.

In the instant case, by announcing his readiness for sentencing, the defendant waived the waiting period. Moreover, on count one the defendant was subject to a mandatory sentence of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. In **State v. Seals**, 95-0305 (La. 11/25/96), 684 So.2d 368, cert. denied, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997), the Louisiana Supreme Court considered the mandatory nature of the death sentence in a first degree murder case and the fact that no prejudice could be shown for the failure to wait twenty-four hours before sentencing. Distinguishing **State v. Augustine**, 555 So.2d 1331 (La. 1990), the Court held: "Absent a showing that prejudice resulted from the failure to afford the statutory delay, reversal of the prematurely imposed sentence is not required." **Seals**, 95-0305 at p. 17, 684 So.2d at 380; see also **State v. White**, 404 So.2d 1202, 1204 (La. 1981); La. C.Cr.P. art. 921. The defendant did not raise any objections regarding the sentences imposed or cite any prejudice resulting from the trial court's failure to delay sentencing, nor have we found any indication that he was prejudiced. Based on the foregoing, this assignment of error lacks merit.

DECREE

For the above reasons, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED