

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0500

STATE OF LOUISIANA

VERSUS

DERRICK NICHOLAS JOHNSON

Judgment Rendered: SEP 19 2008

On Appeal from the Thirty-Second Judicial District Court
In and For the Parish of Terrebonne
State of Louisiana
Docket No. 483,407

Honorable David W. Arceneaux, Judge Presiding

Joseph L. Waitz, Jr.
District Attorney
Ellen Daigle Doskey
Assistant District Attorney
Houma, Louisiana

Counsel for Appellee
State of Louisiana

Gwendolyn K. Brown
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Derrick Nicholas Johnson

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

JMC
JKW
RHO

McCLENDON, J.

Defendant, Derrick Nicholas Johnson, was charged by grand jury indictment with one count of second degree murder, a violation of LSA-R.S. 14:30.1. Defendant entered a plea of not guilty and was tried before a jury. The jury determined by a vote of eleven to one defendant was guilty as charged. The trial court sentenced defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

Defendant appeals, citing the following assignments of error:

1. Defendant was convicted by a non-unanimous verdict in violation of the United States and Louisiana Constitutions.
2. The trial court erred by allowing the state to argue and adduce evidence to support, over defense objection, that defendant's brother instructed him on how to commit a murder.

We affirm defendant's conviction and sentence.

FACTS

Shortly after 5:00 a.m. on June 16, 2006, Mitchell Hubbard (the victim) drove up to Pel's Motel (also known as "the Bricks") on Lafayette Street in Houma. The victim was observed exiting his four-door white Mitsubishi and throwing several objects toward the Bricks, just prior to being fatally shot in the head.¹

After being shot, the victim fell face-down on Lafayette Street. Because Pel's Motel was located approximately a block away from the Houma Police Department, several officers arrived within minutes of the incident and began taking statements from people in the area. During the ensuing investigation, the police initially arrested Jerome "Butter" Williams, who was seen in the vicinity at the time of the shooting. However, shortly after the arrest of Williams, Donna Robinson approached Detective Dana Coleman of the Houma Police Department and identified defendant as the person responsible for the victim's death. Robinson indicated she was in fear of her life. However, at trial, Robinson testified that she did not see the shooter.

¹ The victim had acquired a reputation for frequenting the Bricks in search of drugs. The victim was also known as the "pull off man" because of his tendency to drive away with drugs before paying for his purchase.

The investigation into Robinson's statement revealed certain actions on the part of defendant's siblings and Vanessa Walker (defendant's brother's girlfriend) that included disposing of a revolver and assisting defendant in leaving Houma and travelling to Houston, Texas. The murder weapon was never recovered, despite Nathan Johnson's (another brother of defendant) admission that he threw a black revolver, which Vanessa Walker and Elvena Johnson (defendant's sister) suspected defendant used in the shooting, into the canal under the Prospect Street Bridge.

NON-UNANIMOUS VERDICT

In his first assignment of error, defendant argues his conviction by a non-unanimous verdict was a violation of the United States and Louisiana Constitutions. Specifically, defendant argues that, in light of recent jurisprudence, LSA-C.Cr.P. art. 782 and LSA-Const. art. I, § 17 (providing for jury verdicts of ten to two in cases in which punishment is necessarily confinement at hard labor) violate the Sixth and Fourteenth Amendments of the United States Constitution. Thus, defendant argues that the eleven to one jury verdict finding him guilty of second degree murder is unconstitutional.

The punishment for second degree murder is life imprisonment at hard labor. See LSA-R.S. 14:30.1(B). Louisiana Constitution article I, § 17(A) and LSA-C.Cr.P. art. 782(A) provide that in cases where punishment is necessarily confinement at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified in the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885, pp. 15-16 (La.App. 1 Cir. 6/29/98), 715 So.2d 157, 164-65.

Defendant's reliance on **Blakely v. Washington**, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428,

153 L.Ed.2d 556 (2002), **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) is misplaced. These United States Supreme Court decisions do not address the issue of the constitutionality of a non-unanimous jury verdict; rather, they address the issue of whether the assessment of facts in determining an increased penalty for a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. These decisions, thus, stand for the proposition that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See **Apprendi v. New Jersey**, 530 U.S. at 490, 120 S.Ct. at 2362-63. Nothing in these decisions suggests that the jury's verdict must be unanimous. Accordingly, LSA-Const. art. I, § 17(A) and LSA-C.Cr.P. art. 782(A) are not unconstitutional and, hence, not violative of the defendant's Sixth Amendment right to trial by jury.

Further, we note this same argument has previously been rejected by this court. See **State v. Caples**, 05-2517, pp. 15-16 (La.App. 1 Cir. 6/9/06), 938 So.2d 147, 156-57, writ denied, 06-2466 (La. 4/27/07), 955 So.2d 684.

This assignment of error is without merit.

WALKER'S TESTIMONY

In his second assignment of error, defendant argues the trial court erred by allowing the state to argue and adduce evidence to support the allegation that defendant's brother, Quincy Johnson, instructed him on how to commit a murder.

Prior to the commencement of trial, the trial court heard arguments on the prosecution's motion to compel the testimony of Quincy (this motion is not included in the record). According to the state's argument, Quincy, who was incarcerated at the time of this incident, allegedly told at least one witness that he had "schooled" defendant on how to commit a murder. Quincy allegedly told

defendant that if he was going to shoot someone, always use a revolver and never handle the bullets.

Defense counsel objected on the basis that such evidence was highly prejudicial and had no bearing on whether defendant was guilty of the offense. The trial court allowed the prosecutor to refer to this assertion during opening statements.²

Later, the prosecutor sought clarification from the trial court regarding a motion in limine seeking to exclude the recorded phone conversations between Vanessa Walker and Quincy, specifically wherein they discussed the fact that Quincy had previously instructed defendant on how to commit a murder. The trial court ruled that it was proper for the prosecutor to question Walker regarding her knowledge of whether a revolver was used in this crime. The trial court stated that if Walker denied knowledge of the use of the revolver, then the recorded conversation would be admissible for purposes of impeachment. The trial court further stated, "I don't know that you're going to be able to ask her about the conversation in which the brother told her how he educated the defendant on how to commit a murder."

Walker was then called to the stand. During her testimony, the prosecutor questioned her regarding how she acquired knowledge of whether a revolver was used in the crime and if she relayed such information to Quincy. Walker admitted that she spoke to Quincy while he was incarcerated and informed him that a revolver was used in the crime. Although Walker was reluctant to admit why she informed Quincy of this information, she eventually testified that Quincy had asked her to ask defendant what type of weapon was used.

At no point during the examination of Walker did the prosecutor directly ask her if Quincy had stated that he had educated defendant on how to commit

² During his opening statement, the prosecutor referred to a tape-recorded phone conversation between Quincy, who was incarcerated in the Terrebonne Parish Criminal Justice Complex, and his girlfriend, Walker, wherein Walker stated that "it was a revolver" and "he wiped it." The prosecutor went on to quote Quincy's response that he had "schooled" defendant well.

a murder. Nonetheless, the prosecutor addressed the difference between using a revolver and a semiautomatic weapon with Walker. Quincy never testified.

At the outset, we note on appeal that defendant asserts such evidence was inadmissible hearsay. Although defense counsel objected to such evidence on the basis of relevancy, at no time did defense counsel raise a hearsay objection at trial. The hearsay argument presented in appellate counsel's brief constitutes a new ground for objection and cannot be raised for the first time on appeal. The basis or ground for objection must be sufficiently brought to the attention of the trial court to allow it the opportunity to make the proper ruling and prevent or cure any error. A defendant is limited on appeal to the grounds for the objection that were articulated at trial. See LSA-C.Cr.P. art. 841; LSA-C.E. art. 103(A)(1); see also **State v. Young**, 99-1264, p. 9 (La.App. 1 Cir. 3/31/00), 764 So.2d 998, 1005. Thus, we will not address this portion of the assignment of error.

Defendant also argues that the evidence was not relevant to any issue. Relevant evidence is that tending to show the commission of the offense and the intent, or tending to negate the commission of the offense and the intent. The relevancy of evidence must be determined by the purpose for which it is offered. Any evidence, whether direct or circumstantial, is relevant if it tends to prove or disprove the existence of any material fact. In questions of relevancy, much discretion is vested in the trial court. Such rulings will not be disturbed on appeal in the absence of a showing of manifest abuse of discretion. **State v. Trosclair**, 584 So.2d 270, 275 (La.App. 1 Cir.), writ denied, 585 So.2d 575 (La. 1991).

The state elicited testimony from Walker indicating that at Quincy's request, Walker asked defendant, who had gone to Texas, if the weapon was a revolver or a semiautomatic and whether defendant wiped the weapon. The state established that Walker provided this information to Quincy prior to the

police interviewing her regarding her knowledge of the incident.³ Taken in this context, such evidence tended to establish defendant's use of the weapon to shoot the victim. Thus, it was clearly relevant.

Further, we do not find such evidence was unfairly prejudicial. Under cross-examination by defense counsel, Walker admitted that defendant had not told her he actually used the weapon. Moreover, there was no danger of confusion of the issues, misleading the jury, or undue delay in this evidence, since it clearly related to defendant's evasive actions following the shooting. Finally, defendant fails to articulate specifically how this evidence unfairly prejudiced him.⁴

Based on the context in which the evidence surrounding Walker's statement to Quincy (that defendant told her it was a revolver and he had wiped it) was presented, we cannot say the trial court erred in finding it relevant and not unfairly prejudicial. This assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.

³ At trial, Walker admitted she had been charged with accessory after the fact to second degree murder and obstruction of justice because of her actions in assisting in defendant's escape and disposing of the weapon.

⁴ Although the prosecutor referred to Quincy's statement during his opening argument, Walker never actually testified regarding Quincy's statement of "schooling" defendant in how to commit a murder.