

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0709

STATE OF LOUISIANA

VS.

JOSEPH THOMAS

JUDGMENT RENDERED: NOV - 7 2007

ON APPEAL FROM THE
TWENTY-THIRD JUDICIAL DISTRICT COURT
DOCKET NUMBER 18,082, DIVISION D
PARISH OF ASCENSION, STATE OF LOUISIANA

HONORABLE PEGRAM J. MIRE, JR., JUDGE

ANTHONY G. FALTERMAN
DISTRICT ATTORNEY
DONALD D. CANDELL
ASSISTANT DISTRICT ATTORNEY
DONALDSONVILLE, LA

STATE OF LOUISIANA

BENN HAMILTON
BATON ROUGE, LA

ATTORNEY FOR DEFENDANT/APPELLANT
JOSEPH THOMAS

JOSEPH THOMAS
ANGOLA, LA

DEFENDANT/APPELLANT IN
PROPER PERSON

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ.

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MCDONALD, J.

Defendant, Joseph Thomas, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1. This same indictment also charged Montreal Veal, Joshua Weatherspoon, and Emanuel Howard with second degree murder. Defendant entered a plea of not guilty. Prior to trial, Veal and Weatherspoon each pled guilty to a lesser charge of conspiracy to commit second degree murder, a violation of La. R.S. 14:26 and 30.1. As part of their plea agreement, Veal and Weatherspoon agreed to testify against defendant and Howard.¹

Defendant and Howard were tried before a jury in the same proceeding. The jury determined both were guilty as charged.² The trial court subsequently sentenced defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

Defendant's conviction and sentence are affirmed.

FACTS

On the morning of November 29, 2004, Christopher Granier was traveling eastbound on Interstate Highway 10, when he noticed something odd in the ditch alongside the highway in the vicinity of the rest area near Sorrento. Granier stopped in Sorrento and called 911.

Deputy Jeff LeGrange of the Ascension Parish Sheriff's Office responded to the dispatch regarding the sighting alongside the highway. When Deputy LeGrange arrived, he observed a man lying in the grass close to the road, face down. Unable to rouse the victim by verbal questioning, Deputy LeGrange nudged the body and could tell the victim had been

¹ Weatherspoon was sentenced to thirty years imprisonment at hard labor. His conviction and sentence were affirmed by this Court in an unpublished opinion, **State v. Weatherspoon**, 2007-0723 (La. App. 1 Cir. 9/14/07).

² Howard's appeal is addressed in an unpublished opinion, **State v. Howard**, 2007-0879 (La. App. 1 Cir. 11/2/07).

deceased for a period of time sufficient to allow rigor mortis to develop. Deputy LeGrange also observed a bullet hole in the middle of the victim's back. Following notification of the situation to the Criminal Investigations Division, officers from the Ascension Parish Sheriff's Office secured the rest area and surrounding area as a crime scene.

Detective Barry Tullier, of the Ascension Parish Sheriff's Office, responded to the scene and took initial photographs of the victim's body and surrounding area. Detective Tullier noted that the victim was found holding a prescription-pill bottle in his hand. The prescription bottle bore the name of Lloyd Offrey. The police were able to locate Offrey, who lived in a halfway house in New Orleans. Offrey told the police that he had attended the Bayou Classic football game the previous night and had lost his pill bottle containing several different prescriptions in the vicinity of Bourbon Street. Offrey did not know the victim.

The victim was identified using the AFIS (Automated Fingerprint Identification System). The victim was identified as Jerron Glasper of New Orleans. Detective Tullier notified Glasper's family of his death. While speaking with Glasper's family, Detective Tullier learned that Glasper had attended the Bayou Classic the previous evening and had met a female known only as "Slim" or "Red" and had returned to Baton Rouge with her. According to his relative, Glasper found the pill bottle belonging to Offrey on the street and kept it with him.

Detective Tullier contacted Antreka Comager, who was the woman Glasper accompanied to Baton Rouge. Comager confirmed that she had met Glasper in New Orleans and that he had returned to Baton Rouge with her. According to Comager, the following day, Glasper received a phone call from a friend in New Orleans informing him that Glasper's house had been

burglarized and that he should return to New Orleans to assist in locating the burglars. Comager told Detective Tullier that she intended to arrange for transportation for Glasper to return to New Orleans, but went to lie down for a short time. When Comager awoke, Glasper was gone. Although she phoned Glasper's residence in New Orleans a number of times to determine if he had made it home, Comager never spoke to him.

During the investigation, Detective Tullier learned that a 1971 blue Cutlass registered to Montreal Veal, a senior at McKinley High School in Baton Rouge, had been towed from alongside the interstate near the Sorrento rest area. The vehicle had been reported stolen earlier that night. The police located Montreal Veal in Baton Rouge. During their first interview with Veal, Veal confirmed that his vehicle had been stolen from a Fina station on Highland Road that previous evening. Veal walked to the Second District Police Station, across the street from the Fina station, and attempted to report his car stolen. The report could not be completed because Veal did not know the license-plate number so that the report could be entered into the NCIC as stolen.

Veal told Detective Tullier that after leaving the police station, he and a friend, Genero Allen, rode around a short time looking for his vehicle. Veal stated that Allen dropped him off around 7:30 p.m. at the home of his cousin, Chauncy Smith, who allowed Veal to live with him. Genero Allen confirmed this version of events. At this point in time, Detective Tullier felt that Veal had no connection to Glasper's murder. However, while attempting to verify Veal's initial statement, Detective Tullier discovered that there was a significant discrepancy between the time Veal claimed to have arrived at his cousin's house and the time when his cousin, Smith, and his cousin's girlfriend, Chiquita Williams, reported Veal arrived.

The ensuing investigation revealed that Veal was not driven around by Allen, but rather by Emanuel Howard. As Howard drove Veal around, they contacted defendant and Weatherspoon to help in searching for Veal's vehicle. Veal had previously called his grandmother to have her contact the police with the necessary license information. During this search, Howard received a phone call from Cornell Cummins, a relative of Veal's, reporting that he had seen Veal's vehicle at the Shell station located at the intersection of Plank Road and 22nd Street. Howard contacted defendant and Weatherspoon and told them to meet him and Veal at the Shell station.

According to the employees working at the Shell station, a black male driving a blue Cutlass had come in and asked for directions to New Orleans. After receiving directions, he left. Shortly thereafter, Veal, Howard, Weatherspoon and defendant arrived in two separate vehicles. While defendant and Howard purchased gasoline, Veal asked the employees if they had seen his vehicle. The clerks had recognized the blue Cutlass as Veal's because it was one of only two in the area and the only one with a white interior. The clerks informed Veal that they had seen his vehicle and that the driver asked for directions to New Orleans. While at the Shell station, Veal was seen giving a gun to Howard.

After learning that Veal's vehicle was last seen heading towards Interstate Highway 10, defendant, Howard, Weatherspoon and Veal left in the same vehicles they arrived in and headed towards New Orleans. Because Howard thought his vehicle was about to break down, the men exited the highway in their two vehicles at the Louisiana Highway 30 exit near Tanger Outlet Mall in Gonzales. Howard parked his vehicle at a Jet 24 convenience store and he and Veal got into defendant's vehicle. Defendant then drove all of the men toward New Orleans.

As they proceeded further along the highway, Veal observed his vehicle parked on the shoulder. Veal recognized Glasper from their brief encounter at the Fina station.³ Glasper was walking away from Veal's vehicle. Defendant pulled over some distance in front of Veal's vehicle, backed his vehicle a little toward Veal's vehicle, got out and asked Glasper if he needed assistance. Glasper told defendant that he was trying to get to New Orleans. Defendant stated he could not bring him to New Orleans, but could bring him to the next exit to get some gasoline. As Glasper approached defendant's vehicle, Weatherspoon, Veal, and Howard jumped out of defendant's vehicle and rushed towards Glasper. As Glasper fled, defendant and Howard shot at him. Glasper was hit twice in the back, and fell face forward.

Veal went to his vehicle, but it was locked and no one wanted to check Glasper's body for the key. Defendant threw his weapon into the wooded area across the highway. The men got back into defendant's vehicle and left. Howard asked defendant why he began shooting. Defendant responded, "It was the urge, Bro." Howard stated, "I start shooting because you start shooting." They stopped in Gonzales to retrieve Howard's vehicle and returned to Baton Rouge.

Neither defendant nor Howard testified at trial.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues that the evidence is insufficient to support his conviction for second degree murder. Specifically, defendant argues that no rational trier of fact could conclude

³ When Veal arrived at the Fina station, he left his car running in the parking lot. As he walked toward the door, Glasper approached him and asked for directions to New Orleans. Veal gave Glasper directions and proceeded into the store. When Veal exited the store, his vehicle was gone.

that the State presented evidence of his guilt beyond a reasonable doubt on the basis of the testimony of Montreal Veal and Joshua Weatherspoon.

The standard of review for the 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 that the State proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also La. C.Cr.P. art. 821(B).

To support a conviction for second degree murder, the State is required to show: 1) the killing of a human being; and 2) that defendant had the specific intent to kill or inflict great bodily harm. La. R.S. 14:30.1(A)(1); **State v. Morris**, 99-3075, p. 13 (La. App. 1 Cir. 11/3/00), 770 So.2d 908, 918, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002).

Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting the circumstances. **State v. Cummings**, 99-3000, p. 3 (La. App. 1 Cir. 11/3/00), 771 So.2d 874, 876.

The State presented eyewitness testimony from Veal and Weatherspoon that defendant began firing at Glasper as Glasper began to run away from them as they rushed from defendant's vehicle. Both Veal and Weatherspoon also testified that defendant indicated he had thrown his weapon into the woods across the highway and explained his actions by indicating he had just had an "urge" to shoot Glasper.

The jury was aware that both Veal and Weatherspoon had previously pled guilty to conspiracy to commit second degree murder in exchange for testifying against defendant and Howard. Although Veal admitted he had Howard's gun in his possession while at the Shell station, Veal explained that Howard had asked him to retrieve the weapon from beneath the seat of his vehicle. Both Veal and Weatherspoon denied they had a weapon during the encounter where Glasper was killed.

Veal admitted that he lied to the police in his initial statement, but explained that he was afraid. Veal acknowledged that he and Weatherspoon were cousins, but denied that he could speak with Weatherspoon at any time while they both awaited trial. Veal specifically denied that he "rehearsed" his testimony with Weatherspoon. Moreover, when Weatherspoon made his April 12, 2005 statement implicating defendant, he testified that he was unaware that Veal had previously made a statement implicating defendant. Moreover, Howard's statement that was played for the jury also identified defendant as being the first person to fire at Glasper.

As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. 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. On appeal, this Court will not assess the credibility of the witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Pooler**, 96-1794, p. 56 (La. App. 1 Cir. 5/9/97), 696 So.2d 22, 58, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288.

The jury was aware of the circumstances affecting Veal's and Weatherspoon's credibility and still chose to accept their testimony.

Defendant had ample opportunity to cross-examine both Veal and Weatherspoon on issues affecting their credibility. After review of this record, we find the evidence, when viewed in the light most favorable to the prosecution, supports the defendant's conviction for second degree murder.

This assignment of error is without merit.

SEVERANCE

Prior to trial, defendant made a motion to sever his case from that of the remaining defendant, Howard. In support of his motion, defense counsel argued that it "appears that from all of the papers that we've seen that his defense is certainly going to be antagonistic to all of the others." Defense counsel continued his argument by commenting that "it appears that my client has been singled out to get piled on, and any evidence that will be presented against Mr. Howard will certainly be ... construed against him as well." Following argument, the trial court denied defendant's motion to sever on the basis there was no evidence that there was an antagonistic defense.

Defendants who are jointly indicted are to be tried together unless the court finds that justice requires a severance. La. C.Cr.P. art. 704(2). The courts have permitted a severance to codefendants whose defenses are antagonistic to each other. Defenses are antagonistic when each defendant intends to exculpate himself by putting the blame for the offense on a codefendant. However, a mere allegation that the defenses are antagonistic is insufficient because convincing evidence of actual antagonism must be present to justify a severance. **State v. Price**, 93-0625 (La. App. 1 Cir. 3/11/94), 636 So.2d 933, 936, writs denied, 94-0742 (La. 6/17/94), 638 So.2d 1091, & 94-1566 (La. 10/19/94), 643 So.2d 159.

The defendant did not give a statement to the investigating officers nor did he testify in his own defense. However, the codefendant, Howard, did give a taped statement that was played for the jury. In his statement, Howard denied shooting the victim and implicates defendant and Veal as the shooters. Ordinarily this would present an issue of inability to cross-examine Howard on this statement. See **Bruton v. United States**, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).⁴

However, Veal and Weatherspoon each testified at the trial and each indicated that the shooting was done by defendant and Howard. Defendant's attorney was able to cross examine both. There is nothing in Howard's statement implicating defendant, that was not testified to by Veal and Weatherspoon.

Confrontation errors are subject to a harmless error analysis.⁵ Even if there is a potential **Bruton** problem, the question becomes whether the error in not granting the severance is harmless.

The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Jackson, 03-883 (La. App. 5 Cir. 4/27/04), 880 So.2d 841, 853, writ denied, 04-1399 (La. 11/8/04), 885 So.2d 1118.

⁴ The Sixth Amendment to the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee an accused in a criminal prosecution the right to confront the witnesses against him.

⁵ **State v. Williams**, 02-1406 (La. 4/9/03), 844 So.2d 832, 836; **State v. Robinson**, 01-0273 (La. 5/17/02), 817 So.2d 1131, 1137.

Without Howard's statement there was ample evidence for the jury to convict defendant. Both Veal and Weatherspoon testified that the defendant was one of the shooters; thus, the statement is cumulative and corroborated by their testimony. Both Veal and Weatherspoon were cross-examined by defendant's attorney. Since defendant did not testify it is difficult to determine what defense he raised and how it might be antagonistic.

An accused is not entitled to a severance as a matter of right; the decision is one resting within the sound discretion of the trial judge. A denial of a motion to sever will not be overturned on appeal absent a clear abuse of discretion. Reversal of a conviction for failure to sever where antagonism is shown is not always mandated unless prejudice can be shown. **State v. Price**, 636 So.2d at 936-37.

In the present case, we agree with the trial court that there was no evidence of antagonistic defenses. Even if there were, defendant has failed to show any prejudice from the failure to grant a severance and any such failure is harmless error. The trial court properly denied defendant's motion to sever. This assignment of error is without merit.

ACCOMPLICE INSTRUCTION

Defendant also raises in his second counseled assignment of error and through his pro se brief that the trial court erred in failing to give his requested "accomplice instruction." Defendant maintains that the trial court should have given his requested jury charge that if an accomplice or codefendant provides testimony that tends to shift the blame from himself or another codefendant, then the instruction should state that the testimony is inherently unreliable and presumptively untrustworthy.

Under La. C.Cr.P. art. 807, a requested special jury charge shall be given by the court if it does not require qualification, limitation, or

explanation, and if it is wholly correct and pertinent. The special charge need not be given if it is adequately covered in the general charge or in another special charge to be given. Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. It has been held that the “great caution” language, which defendant requested in his jury charge is necessary only when the State’s case rests on accomplice testimony alone. When other evidence corroborates the accomplice testimony, such language is not required. **State v. Tate**, 01-1658 pp. 20-21 (La. 5/20/03), 851 So.2d 921, 937, cert. denied, 541 U.S. 905, 124 S.Ct. 1604, 158 L.Ed.2d 248 (2004). Material corroboration is defined as evidence that confirms material points in an accomplice’s tale and confirms the defendant’s identity and some relationship to the situation. **State v. Swartz**, 444 So.2d 660, 662-63 (La. App. 1 Cir. 1983).

In the present case, the State’s case did not rest on the uncorroborated testimony of one accomplice. Rather, the testimony of Veal and Weatherspoon was consistent regarding defendant’s involvement in this crime. Howard’s statement to the police further corroborated defendant’s involvement. Finally, the video surveillance tapes the police obtained from the Shell station and the Jet 24 station confirmed defendant’s presence with the other men.

Thus, the trial court’s instructions on general witness credibility that contained a caution of bias or interest of witnesses were adequate in this case. This assignment of error is without merit.

PRE-TRIAL DISCOVERY ISSUES

In his third assignment of error, defendant argues that on June 19, 2006, the day before his trial was scheduled to begin, the State informed him that it had a transcribed and recorded statement of codefendant Howard that it intended to introduce into evidence at trial. Defendant complains that this tape was sent on a defective compact disc (CD) and this late disclosure of the statement was deliberate and intended to surprise defendant. Defendant asserts that no previously disclosed police report identified this statement, and Detective Tullier's report indicates Howard made no statement.

The record reflects that defendant had requested any statements of coconspirators in discovery motions filed on February 10, 2005, and again on March 6, 2006. Defendant acknowledged that the State had provided open-file discovery.

The day prior to trial, there was some discussion between defense counsel, the prosecutor and the judge. It is evident from this exchange that the State provided defense counsel with a copy of Howard's statement on CD at some previous point, but that the CD was unreadable. The prosecutor claimed that a new CD was provided to defense counsel. At that point, the trial court ended discussion of the issue.

The following day of trial, the trial court was presented with this issue during the testimony of Detective John Hebert of the Ascension Parish Sheriff's Office. In a break from questioning and outside the presence of the jury, the trial court anticipated that the State was going to attempt to introduce the taped conversation between Howard and Detectives Tullier and Hebert. At this point, defendant made an argument reurging his motion to sever. Although defendant claimed that he was not provided with a readable copy of the CD or a transcript of Howard's statement, the trial court

noted that defendant had not filed or made a motion to suppress this evidence. Further, the trial court noted that there was no evidence presented to him, but that defendant's previous lawyer had indicated the State had satisfied open-file discovery, and there was no evidence of "who got what, when, where and how."

We agree with the trial court. Although not required to do so by Louisiana law, if a prosecutor adopts an open-file policy by which he or she makes the prosecution file available to the defense to satisfy the State's discovery obligations as a matter of La. C.Cr.P. arts. 716-728, and its duty to disclose material exculpatory evidence as a matter of the Due Process Clause, defense counsel "may reasonably rely on that file to contain all materials" the State is obligated to disclose. **State v. Garrick**, 03-0137, p. 1 (La. 4/14/04), 870 So.2d 990, 991 (per curiam).

In the present case, defendant's original counsel confirmed to the trial court that open-file discovery had been satisfied. As the trial court noted, there is no evidence of "who got what, when, where and how." At best, we can surmise that on the date prior to trial, June 19, there was a disagreement between the prosecutor and defense counsel regarding the readability of the CD of Howard's statement, which leads us to conclude that defendant was aware of the existence of such a statement at some point prior to this discussion.

However, this Court's role is not to surmise defendant's argument or facts in support of it. In spite of defendant's contention that there was a pre-trial discovery violation by the State's late disclosure of the Howard statement, defendant failed to make a motion to suppress the statement or move for mistrial. Nor did defendant offer evidentiary proof of when he was aware of the existence of the statement. Moreover, even assuming defense

counsel did not receive the statement until the day before trial, immediately prior to the introduction of the statement, defense counsel failed to specifically allege how the late disclosure prejudiced his client.

In light of these circumstances, we cannot say defendant has sufficiently asserted a pre-trial discovery violation warranting remedy by this Court.

This assignment of error is without merit.

PROFERRED STATEMENT OF ERICA BURRIS

In his pro se brief, defendant argues that the trial court erred in refusing to allow him to present relevant, admissible evidence that another person committed the crime. Specifically, defendant argues the trial court erred in ruling the statement of Erica Burris was inadmissible.

Erica Burris was one of the two clerks working at the Shell station where the victim obtained directions to New Orleans after he stole Veal's vehicle. Burris also provided the police with descriptions of the four men, who were all subsequently identified as the four men charged in this indictment. At the time of trial, Burris could not be located.

Following the trial court's ruling that Burris's statement was inadmissible, defense counsel proffered the statement. However, we note that Detective Hebert testified as to the substance of Burris's statement, specifically, that she saw a man, later identified as Veal, at the Shell station looking for his vehicle, and that Veal was armed with a weapon. Thus, the substance of Burris's statement was reported to the jury. We note that Veal's testimony regarding whether he possessed a gun while at the Shell station was also consistent with the content of Burris's statement. Accordingly, we cannot say defendant was prevented from presenting evidence on his behalf. Clearly, the jury was aware that Veal was seen

holding a weapon while at the Shell station some time before the victim was murdered. Further, we note that Burris's statement was not an eyewitness account of the actual crime.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.