NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1905

STATE OF LOUISIANA

VERSUS

LEPREASE K. MONTANA

DATE OF JUDGMENT: May 4, 2007

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER 295736 "B"), PARISH OF ST. TAMMANY
STATE OF LOUISIANA

THE HONORABLE ELAINE W. DIMICELI, JUDGE

* * * * * *

Hon. Walter P. Reed District Attorney Covington, Louisiana	Counsel for Appellee State of Louisiana
Kathryn W. Landry Baton Rouge, Louisiana	
Mary E. Roper Baton Rouge, Louisiana	Counsel for Defendant/Appellant Leprease K. Montana
Leprease K. Montana Angola, Louisiana	In Proper Person

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

Leprease Montana, defendant, was indicted with one count of second degree murder, a violation of La. R.S. 14:30.1. Defendant entered a plea of not guilty and was tried before a jury. The jury found defendant guilty as charged. The trial court sentenced defendant to a term of life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

We affirm defendant's conviction and sentence.

FACTS

On November 4, 1998, Roger Nave, Jr., the victim, was murdered in the 1000 block of Polk Street in Covington. The victim was shot four times, with one of the bullets piercing his lung and heart, causing near instantaneous death. Diane Nave, the victim's mother, testified at trial that her son had struggled with substance abuse and that, a couple of months before his death, had relapsed into drug abuse.

Earlier in the day, Leonard Jones ("Jones")[1] was with defendant, whom Jones knew from living in the same neighborhood. Defendant had questioned Jones about what he knew about a truck being broken into, but Jones denied knowing anything.

At approximately 9:00 p.m., Jones left defendant and was on his way to his residence, located at 1105 Polk Street, which he shared with his cousin, Tina Ruffian. While he was in the yard of the residence, he noticed a red van drive by,

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[1] Jones acknowledged that at the time of trial he was serving a ten year sentence for distribution of cocaine. Jones also acknowledged convictions for felony possession of stolen property and possession of cocaine, and misdemeanor convictions for resisting an officer, simple trespassing, simple criminal damage, simple battery, simple assault, and remaining in an area after being forbidden.

and the driver of the van waved at him. The driver, who was later identified as the victim, exited the vehicle, approached Jones, and asked Jones if he knew where he could get some "weed." Although Jones told the victim that he did not have any "weed," he indicated that he could probably find someone to sell the victim what he wanted. Before Jones could do so, defendant approached the men and drew a gun on the victim. Jones testified at trial that he had no doubt defendant was the man holding the gun on the victim.

When Jones saw that defendant had a gun, he walked away, but he heard the defendant ask the victim to see his wallet because the defendant thought the victim was a police officer. As Jones was walking away, he looked back and saw two people coming from 30th Street onto Polk Street, then turn around when they got closer to defendant.

As Jones was returning to his yard, he heard several gunshots, and when he looked back, the victim was lying in the ditch. Jones testified that he kept walking because he knew defendant was aware that he had just witnessed some of the events that had just occurred.

A short time later, defendant caught up with Jones and pointed his gun in Jones's face. Defendant held the gun on Jones as he was standing near the door to Ruffian's residence. Ruffian began calling for Jones, who then went inside the residence. Jones claimed to have told Ruffian what happened.[2]

Jones left Ruffian's residence and went to a friend's house. Defendant arrived at that location a short time after Jones and called Jones outside to tell him

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[2] At the time of trial, Ruffian was deceased.

that the police wanted to talk to him. Defendant told Jones to tell the police that he had been with defendant all day. When Jones spoke with the deputies, defendant was standing next to him, so Jones told the deputies what defendant told him to say. Later that evening, both Jones and defendant were brought to the Covington Police Department. After being separated from defendant, Jones told Detective Arrowwood of the Covington Police Department that he saw defendant shoot the victim earlier that evening. Jones identified a plaid flannel shirt seized by the police following defendant's arrest as an article of clothing defendant was wearing when he shot the victim.

The State also presented testimony of Heloise Richardson,[3] who was walking with her friend, George "Sparkplug" Jones. Richardson and George Jones were returning from Gilbert's Bar, where Richardson had just purchased some cigarettes. As they reached the intersection of 30th Street and Polk Street, Richardson testified that she saw three men, one of whom was holding a gun. According to Richardson, the man holding the gun was defendant, who was a distant relative of hers.

Richardson heard the victim, who at the time she thought was a light-complexioned male she knew as "Devin," tell defendant that he had nothing. Defendant told the victim, "I the mastermind, I kill you." When Richardson and George Jones saw the gun, they both turned around and began running away. As they were running away, Richardson heard several gunshots.

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[3] Richardson acknowledged she had five previous convictions for misdemeanor theft, a felony theft conviction, and an unauthorized entry conviction. At the time of trial, there was a pending drug charge against Richardson.

Richardson admitted that she initially did not want to become involved, so she did not come forward with any information regarding what she had witnessed that evening. Several nights later while at a Wal-Mart store, Richardson saw Chris Viccari, with whom she had previous dealings with as a parole officer, and told him that she had information about the murder. Viccari arranged a meeting with Detective Arrowwood. When she met with Detective Arrowwood and Viccari, she provided a statement indicating defendant as the gunman.

SUFFICIENCY OF THE EVIDENCE

Through counseled and pro se assignments of error, defendant argues the evidence is insufficient to support his conviction for second degree murder. Defendant specifically asserts there is no physical evidence linking him to the crime and the only witnesses to the incident gave inconclusive and speculative testimony.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, after 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. La. Code Crim. P. art. 821; ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The ***Jackson*** standard of review, incorporated in La. Code Crim. P. art. 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. 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. See ***State v.***

Montecino, 04-0892, pp. 5-6 (La. App. 1st Cir. 2/11/05), 906 So.2d 450, 453, ***writ denied***, 05-0717 (La. 6/3/05), 903 So.2d 456.

Louisiana Revised Statutes 14:30.1(A) defines second degree murder in pertinent part as: "(1) When the offender has a specific intent to kill or to inflict great bodily harm ...." Specific intent is that state of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or his failure to act. La. R.S. 14:10(1). Specific intent may be proven by direct evidence, such as statements by a defendant; or by inference from circumstantial evidence, such as defendant's actions or facts depicting the circumstances. ***State v. Montecino***, 04-0892 at p. 6, 906 So.2d at 453. Specific intent is an ultimate legal conclusion to be resolved by the trier of fact. ***State v. LeBoeuf***, 06-0153, pp. 4-5 (La. App. 1st Cir. 9/15/06), 934 So.2d 1143, 1138.

This court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. ***State v. Montecino***, 04-0892 at p.6, 906 So.2d at 453.

In the present case, no one actually witnessed defendant shoot the victim. However, Jones testified that defendant approached the victim with a weapon drawn. As Jones was leaving the area, he heard shots fired and turned and saw the victim lying in a ditch. According to Jones, no one else was in the area. Moreover, only minutes later, defendant pointed the weapon at Jones, and later that evening, told Jones to lie to the police to provide him with an alibi. Jones also

identified the flannel shirt seized from defendant as what defendant was wearing when he shot the victim.

The State also introduced Richardson's testimony that indicated she, too, saw defendant pointing a gun at the victim. Richardson heard defendant tell the victim, "I the mastermind, I kill you," shortly before she heard several gunshots. Richardson also testified that defendant was wearing a plaid shirt when he was pointing the gun at the victim.

The State presented evidence to explain why there was no physical evidence of the victim's blood found on defendant. Dr. Michael DiFatta, who was accepted by the trial court as an expert in forensic pathology, testified that there are different types of contact wounds, including intermediate contact and distant contact wounds. According to Dr. DiFatta, distant contact occurs when a weapon is beyond 36 to 43 inches from a victim. Dr. DiFatta also explained that the further a shooter is from a victim the less likely there is to be "blowback," or blood from the victim on the shooter's clothing, especially if there is no head injury.

Further, defendant also raises issue with the fact Richardson and Jones differed on their descriptions of the shirt the gunman was wearing at the time he pointed the weapon at the victim. While we recognize there were certain color discrepancies in each witness's description, both Richardson and Jones testified that defendant was wearing a plaid shirt. Richardson identified the photograph of the defendant's shirt seized at his arrest as what the gunman was wearing.

Defendant also points to Jones's testimony at trial that the gunman was wearing a ski mask. We note that Richardson described the gunman as wearing a skull cap. However, at no point did Jones testify that he could not tell the identity

of the gunman because of something he was wearing. Moreover, we note that Jones testified that after the shooting, defendant followed him to more than one location and spoke with him about what to tell the police. Melvin Crockett, who was with the Covington Police Department, testified that he saw defendant and Jones walking together and in conversation approximately two blocks from the murder scene, as he responded to the call.

The gun used in the homicide was never found, nor was the victim's wallet.

Viewing the evidence in the light most favorable to the State, we find that it was reasonable for the jury to have concluded that defendant shot and killed the victim. Accordingly, we find the evidence sufficiently supports defendant's conviction for second degree murder.

This assignment is without merit.

TRIAL COURT'S FAILURE TO HOLD A HEARING

Through counseled and pro se assignments of error, defendant argues the trial court abused its discretion in failing to hold a hearing on his motion to remove the Indigent Defender Board as his counsel of record. Defendant made this motion because his case had been pending for nearly six years and felt that his counsel had repeatedly delayed the process by requesting continuances. Defendant also urged that his counsel was ineffective because of these delays.

It is well settled that the trial court cannot be called upon to appoint counsel other than the one originally appointed merely to please the desires of the indigent accused, in the absence of an adequate showing that the court-appointed attorney is inept or incompetent to represent the accused. See ***State v O'Neal***, 501 So.2d 920, 928 (La. App. 2nd Cir.), ***writ denied***, 505 So.2d 1139 (La. 1987).

In defendant's motion to remove counsel, which was filed on March 17, 2005, he alleges that John McGuckin, Jr., had been appointed to represent him on March 1, 1999. Defendant claimed he and his family members had made several unsuccessful attempts to contact McGuckin. Defendant requested new counsel because he claimed the nearly twenty continuances obtained by McGuckin were interfering with his right to a fast and speedy trial and that McGuckin had not assisted him since he was indicted.

The record indicates that on May 2, 2005, the trial court conducted a proceeding in open court in which the court addressed defendant's motion by stating the following:

> Mr. Montana, you've filed a motion for me to appoint other counsel for you. I've looked at the record and the delays in trying your case are not all attributable to Ms. McGuckin. Quite a few times we've issued a writ to the state to bring you here. A couple times they brought you here but then we asked that you stay in the jail so Mr. McGuckin could meet with you, but you got taken back.
>
> He hasn't had an opportunity to sit down and discuss the case with you. So what I'm going to do is next time when pretrial comes, I'm going to request that the state leave you here for the whole week so that we can prepare your case and get it tried.
>
> So I'm denying your motion to appoint other counsel.

Defendant's motion to remove counsel required a determination of whether defense counsel was inept or incompetent in light of the multitude of continuances granted in this case. However, a simple inspection of the record revealed that of the forty-six continuances granted in defendant's case, defendant was absent for more than thirty of those hearing dates.[4]

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[4] There are several references to defendant being in the custody of the Department of Corrections, and the trial court noted that many of defendant's absences were because the State failed to produce him.

A claim of ineffective assistance of counsel is evaluated under a two-prong test developed by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must prove that the attorney's performance was deficient. This requires a showing that counsel made errors so serious that they were not effectively functioning as the "counsel" that is guaranteed by the Sixth Amendment. Secondly, the defendant must show that the counsel's deficient performance prejudiced the defense and thus deprived the defendant of a fair trial. An error by counsel does not warrant setting aside a criminal conviction if the error had no effect on the judgment. Rather, the defendant must prove that but for the counsel's errors, a reasonable probability exists that the trial outcome would have been different.

Although no testimony was taken at the May 2, 2005 proceeding, we find that the trial court did, in fact, conduct a "hearing" on defendant's motion and considered the issue raised by defendant. At this hearing, the defendant failed to present evidence to show that his attorney's performance was deficient. The defendant also failed to prove that the alleged deficiencies caused him actual prejudice that had any effect on the outcome of his proceeding. In addition, though defendant claimed his ineffective counsel interfered with his right to a speedy trial, once a defendant has been convicted, any allegations of a speedy trial violation are moot. ***State v. Gordon***, 2004-0633, p. 12 (La. App. 1st Cir. 10/29/04), 896 So. 2d 1053, 1062-63, ***writ denied***, 2004-3144 (La. 4/1/01), 897 So. 2d 600. Therefore, the trial court did not abuse its discretion in denying defendant's

Motion to Remove the Indigent Defender Board as counsel after a hearing was held in which the defendant failed to carry his burden of proof.

Accordingly, this assignment of error is without merit.

PRO SE ASSIGNMENTS OF ERROR

In his pro se brief, defendant argues that the indictment was not brought in open court by the grand jury. Defendant contends that the failure to do so is a violation of constitutional and statutory law.

Our review of the record and minute entries indicates that the grand jury indictment charging defendant with second degree murder was, in fact, brought in open court. Accordingly, this assignment of error has no factual basis.

Defendant also argues that his appellate counsel was ineffective because she failed to argue on appeal that the defendant's trial counsel was ineffective. Such a vague assertion fails to allege any specific prejudice defendant has sustained and thus fails to meet the burden of proof established by ***Strickland v. Washington***, *supra*.

This assignment of error is without merit.

DECREE

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

CONVICTION AND SENTENCE AFFIRMED.