NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 1908

STATE OF LOUISIANA

VERSUS

MARLIN JONES

Judgment Rendered: March 26, 2008

Appealed from the
Thirty-Second Judicial District Court
in and for the Parish of Terrebonne, State of Louisiana
Trial Court Number 438,700

Honorable Randall Bethancourt, Judge Presiding

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| Joseph Waitz<br>Carlos Lazarus<br>Ellen Daigle Doskey<br>Houma, LA | Attorneys for Appellee,<br>State of Louisiana |
| Bertha Hillman<br>Thibodaux, LA | Attorney for Defendant/Appellant,<br>Marlin Jones |

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

**WHIPPLE, J.**

The defendant, Marlin Jones, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The defendant now appeals, urging in a single assignment of error that the trial court erred in denying his motion for a change of venue.

## FACTS

On August 10, 2004, the victim, Veondra Patterson, was shot and killed at her place of employment, the photo studio at Wal-Mart in Houma, Louisiana. The gunman, a black male, immediately fled the scene in a white, foreign vehicle bearing the license plate number "KLE017." Later that day, a vehicle matching the description and license plate number was stopped by the Terrebonne Parish Sheriff's Office. The driver, McKinley Jones, was arrested. Based upon information obtained from McKinley Jones, the defendant (who was McKinley's cousin and the victim's boyfriend) was developed as a suspect in the shooting.[1] The defendant was subsequently located and arrested at a nearby motel. The murder weapon was discovered in the attic of the motel room where the defendant was found. In connection with the police investigation, the defendant provided a tape-recorded statement wherein he admitted that he entered Wal-Mart armed with a handgun, confronted the victim, and eventually lost his temper. He explained that he was upset with the victim because he believed she had given him a sexually-transmitted disease. In the recorded statement, the defendant did not specifically admit that he shot the victim. Instead, he claimed he "blacked out"

[1]The particular facts surrounding the offense are not relevant to the issues raised in the instant appeal and will not be further discussed herein.

after losing his temper. Detective Lieutenant Dawn Bergeron of the Terrebonne Parish Sheriff's Office testified that in an oral statement given prior to the recorded statement, the defendant specifically admitted to shooting the victim. The defendant also provided a "step-by-step account of what happened" at Wal-Mart and never claimed to have "blacked out."

## CHANGE OF VENUE

In his sole assignment of error, the defendant asserts the trial court erred in denying his motion for a change of venue. Specifically, the defendant contends that the pretrial publicity surrounding the crime in the local media was great and made it impossible for him to receive a fair trial in Terrebonne Parish.

Louisiana Code of Criminal Procedure article 622 provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

A defendant is guaranteed an impartial jury and a fair trial. La. Const. art. I, § 16. Accordingly, a defendant is entitled to a change of venue when he can establish inability to obtain an impartial jury or a fair trial in the original venue. State v. Morris, 99-3075, pp. 7-8 (La. App. 1st Cir. 11/3/00), 770 So. 2d 908, 915, 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). Absent the unusual circumstance where the trial atmosphere has been entirely corrupted by press coverage or is lacking in the solemnity and sobriety to which a defendant is entitled, see State v. David, 425 So. 2d 1241, 1246 (La. 1983), the burden is on the defendant to show actual prejudice. Morris, 99-3075 at p. 8, 770 So. 2d at 915. See also State v. Goodson, 412 So. 2d 1077, 1080 (La. 1982). A change of venue shall be granted

only when the moving party proves that, by reason of prejudice existing in the public mind, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending. LSA-C.Cr.P. art. 622. Extensive knowledge in the community of either the crimes or the defendant is not sufficient by itself to render a trial unconstitutionally unfair. State v. Hart, 96-0697, p. 6 (La. 3/7/97), 691 So. 2d 651, 655. The defendant "must prove more than mere public knowledge of facts surrounding the offense to be entitled to have his trial moved to another parish." State v. Comeaux, 514 So. 2d 84, 90 (La. 1987). A defendant is not entitled to a jury that is entirely ignorant of his case, and he cannot meet his burden of proof on a motion for change of venue by merely showing a general level of public awareness of the case. State v. Thompson, 516 So. 2d 349, 352 (La. 1987), cert. denied, 488 U.S. 871, 109 S. Ct. 180, 102 L. Ed. 2d 149 (1988).

Whether the defendant has made the requisite showing of actual prejudice is a question left to the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an affirmative showing of error and abuse of discretion. Morris, 99-3075 at p. 8, 770 So. 2d at 915; State v. Hoffman, 98-3118, p. 5 (La. 4/11/00), 768 So. 2d 542, 552, cert. denied, 531 U.S. 946, 121 S. Ct. 345, 148 L. Ed. 2d 277 (2000).

Factors to consider in determining whether actual prejudice exists, warranting a change of venue, include: (1) the nature of the pretrial publicity and the particular degree to which it has circulated in the community; (2) the connection of governmental officials with the release of the publicity; (3) the length of time between the dissemination of the publicity and the trial; (4) the severity and notoriety of the offense; (5) the area from which the jury is to be drawn; (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7)

any factors likely to affect the candor and veracity of the prospective jurors on voir dire. State v. Bell, 315 So. 2d 307, 311 (La. 1975).

In the instant case, the defendant filed a timely motion for change of venue. Prior to beginning voir dire, the trial court deferred its ruling on the motion until after the venire had been questioned about its knowledge of the case. The trial court, prosecutors, and defense counsel conducted an extensive, thorough voir dire of the first panel of prospective jurors. Each juror was asked by the trial court whether he or she had heard or read anything about the case. Several of the prospective jurors indicated a vague familiarity with the case.

Upon completion of the questioning of the first panel of prospective jurors, defense counsel reurged the change-of-venue motion and argued that many of the jurors questioned had been exposed to information regarding the case. The trial court denied the motion, noting that of the eighteen prospective jurors questioned, eight had been found to be fair and impartial enough to be selected to serve as jurors in the case. The court specifically noted that the venire members who stated that they knew about the case had only a "general or vague" recollection of the case without any specific details concerning the crime. The trial court applied the jurisprudentially established factors for determining whether prejudice existed, and held that none were met. The court reasoned:

> When . . . [looking] at the factors that the Supreme Court tells the Court to look at, none of them were met. The nature of pretrial publicity and the particular degree to which it has circulated in the community. Indeed, if there was [sic] some stories it was a while back, nothing anytime within the last few months or so. I think the earliest someone said they may have heard something or read something was a few months ago.
>
> [No.] 2) The connection of government officials with the release of the publicity. Indeed, there has been no showing that the State or government officials did anything to publicize this case so as to influence prospective jurors.
>
> No. 3) The length of time between the dissemination of the publicity and the trial. Again, we're not talking about people having

> read something over the last few days, or few weeks. Indeed, if they heard anything it was several months ago. Only a few of them. Some of them actually said it was right after the incident occurred, which is longer than a year ago, as I understand.
>
> No. 4) The severity and notoriety of the offense. And that's why people know something about this case, because of, you know, luckily, there's not some type of incident such as this that happens in Terrebonne Parish every day.
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> So I didn't get the feeling that our community is so prejudiced because of pretrial publicity as to warrant a change in venue. Indeed, I guess the proof is in the pudding, so to speak. Of the eighteen individuals voir dire'd, eight were ultimately selected out of that panel.

Counsel for the defendant objected to the court's ruling and included the additional argument that venue should be changed because several of the witnesses in the case (particularly Dr. Brian Matherne and Mr. Yogi Naquin) are prominent individuals in the local community and are known by almost every person in the jury venire. The trial court denied the motion on this ground and explained that all of the prospective jurors who indicated an acquaintance or familiarity with these particular individuals, and/or any other witnesses in the case, specifically and unequivocally indicated that they would not be influenced or prejudiced by the acquaintance.[2] There was no further discussion of the change-of-venue motion.

As previously noted, a defendant cannot meet his burden on a motion for change of venue by merely showing a general level of public awareness of the case. Indeed, the jurisprudence is replete with instances in which repeated and more extensive exposure of jurors to pre-trial publicity did not result in reversible error for the failure to change venue. In State v. Frank, 99-0553, pp. 16-17 (La. 1/17/01), 803 So. 2d 1, 16-17, 110 out of 113 venire members (97%) had been exposed to some publicity surrounding the case, and 89% of the prospective jurors indicated that they had been exposed to information about the case on more than

[2]On appeal, the defendant does not challenge the trial court's denial of the venue motion on this ground. His assignment of error deals only with the trial court's ruling as it relates to the issue of alleged prejudice arising from pretrial publicity concerning the case.

one occasion or from multiple sources. See also State v. Hoffman, 93-3118 at p. 9, 768 So. 2d at 555, where 72 out of 90 prospective jurors (80%) had an awareness of the case before trial; and State v. Connolly, 96-1680, p. 5 (La. 7/1/97), 700 So. 2d 810, 815 where 120 out of 139 potential jurors (86.33%) possessed some knowledge about the crime, with most admittedly having only a vague recollection of the surrounding facts.

Moreover, consider State v. Lee, 2005-2098, pp. 16-20 (La. 1/16/08), ___ So. 2d ___, where the Supreme Court recently held, after review of the Bell factors:

> [C]onsidering that less than one-third of the prospective jurors were excused because of their inability to put aside their pre-trial exposure, defendant fails to demonstrate in the context of the other Bell factors that the undoubtedly high press coverage of the investigation was sufficient to alter the 'candor and veracity' of the juror's answers during *voir dire* examination. In fact, several jurors expressed their lack of enthusiasm for serving on the jury, despite their willingness to do so if called upon. The ever-changing profile of the serial killer, and the public perception of rampant mistakes in the investigation during the search for the serial killer would work as much in favor of defendant as the publicity would work against him. As we have previously observed, 'the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is insufficient to rebut the presumption of the juror's impartiality.' (Citations omitted.)

State v. Lee, 2005-2098 at p. 20, ___ So. 2d at ___.

The Court concluded that Lee had failed to show that the existence of pre-trial publicity was such that it would color the jurors *voir dire* responses to the point of making them unreliable, thereby depriving him of his right to a fair and impartial jury trial. Accordingly, the Court found no abuse of the trial court's discretion in denying Lee's motion for a change of venue. See State v. Lee, 2005-2098 at p. 20, ___ So. 2d ___.

According to the information gathered during *voir dire* in the instant case, approximately 54 prospective jurors were questioned. Of those questioned, approximately 39 (or about 72%) had some knowledge about the case. A close

examination of the individual juror's responses, however, reveals that these 39 jurors knew only basic facts surrounding the case. The prospective jurors stated that their main sources of information concerning the case were television, newspaper accounts, and/or word of mouth. Most of these prospective jurors had seen or heard about the incident when it occurred, over a year and a half before, but as of the time of trial, had only a vague recollection about the case or about any specific details concerning the crime.

As the trial court pointed out, in many instances the jurors had little or no recollection of the case until the attorneys disclosed information regarding the location of the crime. Some also recalled that the circumstances of the murder were suspected to have involved domestic violence. With the exception of a few, each of these prospective jurors with minimal knowledge of the case (including those who had heard it was allegedly a domestic situation) stated that they had not formed any opinions about the case and that they could disregard anything they had heard or read and make a fair decision based only upon the evidence presented at trial. These jurors denied that any pretrial publicity and/or media accounts of the case would affect their ability to apply the law in a fair and impartial manner. Of the 54, only four jurors expressed any concern about their ability to be fair based on information about the case.

Considering the foregoing, we find that the defendant failed to prove that a change of venue was necessary in this case. While the record reveals that several of the prospective jurors possessed general knowledge of the case, the defendant failed to present sufficient evidence of any overriding prejudice within the community's collective mind that prevented him from receiving a fair trial. As previously noted, although many of the prospective jurors eventually indicated that they were aware of the case, and some even indicated awareness of a purported "domestic" nature of the offense, each individual juror ultimately assured the court

that he or she would be able to set aside any such information and decide the case based solely upon the law and the evidence presented at trial. Furthermore, jury selection in this case began over a year after the date of the offense. As the trial court correctly reasoned, this delay obviously mitigated any potential prejudice to the defendant's trial rights allegedly caused by pretrial publicity and/or notoriety of the offense. Accordingly, we find no abuse of discretion by the trial court in denying the defendant's motion for change of venue.

This argument is without merit.

**CONCLUSION**

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

**CONVICTION AND SENTENCE AFFIRMED.**