

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1221

STATE OF LOUISIANA

VERSUS

MICHAEL WAYNE RICHARDSON

Judgment Rendered: December 21, 2007

On Appeal from the Twenty-Second Judicial District Court
In and For the Parish of St. Tammany
State of Louisiana
Docket No. 397655-1

Honorable Larry J. Green, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

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McCLENDON, J.

Defendant, Michael Wayne Richardson, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. Defendant entered a plea of not guilty. At the conclusion of a jury trial, defendant was convicted as charged. The trial court sentenced defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

Defendant now appeals urging the following assignments of error:

1. The trial court erred in denying the motion for mistrial after the victim's mother had contact with one of the jurors.
2. The trial court erred in allowing multiple photographs of the victim into evidence.

Finding no merit in the assigned errors, we affirm defendant's conviction and sentence.

FACTS

On March 11, 2005, two men wearing ski masks, dark clothing, and black gloves entered the Slidell, Louisiana residence of the victim, Toney Dewayne Silve. The men held the victim and his girlfriend, Kelly Callender, at gunpoint and demanded money. The victim ultimately was shot in the chest during the robbery attempt. The gunshot entered the victim's left chest, traveled through his left sixth rib and perforated his heart. The victim did not survive. Defendant subsequently was convicted as one of the participants in the victim's murder.¹

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, defendant contends that the trial court erred in failing to grant his motion for a mistrial after discovering that there had been communications between the victim's mother and a juror.

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.

Defendant asserts that any such contact was presumptively prejudicial and warranted a mistrial.

The record reflects that during a recess in the trial, Angelica Silve, who was seated on the front row of the spectator section of the courtroom (closest to the back row of the jury), was observed communicating with one of the jurors. When questioned by the trial court regarding the communication, Ms. Silve indicated that she had simply asked for a piece of gum. Ms. Silve further explained that she was not speaking directly to the juror in question. She claimed she generally posed the request to all persons in the area. The juror made eye contact and responded to Ms. Silve's request.

Based upon this communication, defense counsel moved for a mistrial. In the alternative, defense counsel requested that the court admonish the victim's family to refrain from showing emotion and/or having any further contact with the jury. The trial court denied the motion for a mistrial. To prevent any additional problems, the trial court prohibited any spectator from sitting on the front row near the jury. The court also admonished the spectators:

I admonish each and every one of you: If you are going to stay in this courtroom, you will have no contact whatsoever with any of the jurors, any of the attorneys, any of the parties or myself or my staff. What we try to do is keep [ourselves] completely removed from any outside influence. I hope you would appreciate that and understand that.

Ms. Silve indicated she understood and apologized to the court for the contact. After conferring with defendant, defense counsel indicated that he did not wish to question the juror. The trial resumed.

Louisiana Code of Criminal Procedure Article 775 provides for a mistrial when prejudicial conduct in or outside the courtroom makes it

impossible for the defendant to obtain a fair trial. A mistrial is a drastic remedy to be invoked only when the defendant suffers such substantial prejudice that he is deprived of any reasonable expectation of a fair trial. **State v. Smith**, 430 So.2d 31, 44 (La. 1983); **State v. Wilkerson**, 403 So.2d 652, 659 (La. 1981). In addition, a trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. **State v. Sanders**, 93-0001, pp. 20-21 (La. 11/30/94), 648 So.2d 1272, 1288-89, cert. denied, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996).

In a criminal case, any private communication, contact or tampering directly or indirectly with a juror during a trial *about the matter pending before the jury* is deemed presumptively prejudicial. **State v. Hawkins**, 496 So.2d 643, 647 (La.App. 1 Cir. 1986), writ denied, 500 So.2d 420 (La. 1987). However, not every contact with a juror will result in a mistrial; prejudice must also be established. See **State v. Ross**, 95-1240, p. 10 (La.App. 1 Cir. 5/10/96), 674 So.2d 489, 495.

In the instant case, the trial court's questioning of Ms. Silve in connection with the communication established that there was absolutely no discussion regarding the facts or any other aspect of the case. The contact, which was limited to a request for gum, was completely innocuous and did not result in any prejudice to the defendant. Thus, we find no error or abuse of discretion in the trial court's refusal to grant a mistrial on this ground. The trial court was correct in concluding that a mistrial was not warranted. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In this assignment of error, defendant contends that the trial court erred in allowing the state to admit, over his objection, photographs of the victim's

body at the crime scene and at the coroner's office. He asserts that the photographs were gruesome, cumulative and highly prejudicial. Defendant further argues that the photographs had no probative value or relevance because the cause of death was a gunshot wound to the chest fatally injuring the victim's heart. Defendant asserts that the photographs, particularly the one depicting a close-up of the deceased victim's face, were introduced "to incite the jury and not to prove the case." Defendant argues that the prejudicial effect of the photographs substantially outweighed any probative value thereof. Thus, he contends the trial court committed reversible error in allowing these items to be introduced into evidence.

Louisiana Code of Evidence Article 403 provides that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. Photographs which illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted, are generally admissible, provided their probative value outweighs any prejudicial effect. **State v. Steward**, 95-1693, p. 5 (La.App. 1 Cir. 9/27/96), 681 So.2d 1007, 1011. The state is certainly entitled to the moral force of its evidence and postmortem photographs of murder victims are admissible to prove *corpus delicti*, to corroborate other evidence establishing cause of death, location, and placement of wounds, as well as to provide positive identification of the victim. **State v. Koon**, 96-1208, p. 34 (La. 5/20/97), 704 So.2d 756, 776, cert. denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997). The trial court's admission of photographs will not be overturned on appeal unless the reviewing court finds that the photographs are so inflammatory as to overwhelm the jurors' reason and lead them to convict the

defendant without sufficient other evidence. See State v. Berry, 95-1610, p. 16 (La.App. 1 Cir. 11/8/96), 684 So.2d 439, 454, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

During the testimony of Kelly Callender, the state and the defense held a bench conference to confer on certain photographs the state wished to introduce. The defense objected to the crime scene photograph depicting the victim, from a distance, lying on the floor of his residence after having been shot. The defense also objected to the photograph of the victim taken at the coroner's office. This particular photograph, apparently taken prior to the autopsy, shows the defendant (from the waist up) lying on his back on a table.

Defendant argues that these photographs were gruesome, cumulative, and highly inflammatory. The state argued that the photographs were necessary to prove the victim's identity. They were all to be considered collectively to show that the victim was the same person in each photograph.² After viewing the photographs in question, the trial court overruled defendant's objections and allowed them to be admitted into evidence. The court found the crime scene photograph admissible to show the location and position of the victim's body after the shooting. The court apparently found the other photographs relevant to the issue of identity.

Initially we note that, although defendant complains in his brief about the photograph of the deceased victim's face, the transcript reflects that defense counsel specifically indicated that he had no objection to the introduction of this particular photograph. Nonetheless, upon reviewing all of the contested photographs, we find that the probative value of this evidence far outweighs any potentially prejudicial effect. All three photos were relevant to prove *corpus delicti*. As the trial court correctly reasoned, the

² The contested photograph of the crime scene does not clearly show the victim's face.

crime scene photograph is relevant to illustrate the positioning of the victim's body after the shooting. The coroner's office photograph, which depicts a side view of the victim's face, and the face-only photograph were both relevant to prove the victim's identity and to show that he was the same individual depicted in the crime scene photograph. Moreover, the coroner's office photograph also served the more important purpose of showing the gunshot wound to the victim's left chest. Dr. Michael DeFatta, Chief Deputy Coroner of St. Tammany Parish, testified that the cause of the victim's death was a gunshot wound to the left chest that lacerated the heart before exiting out of the right chest. So, even if this particular photograph had not been admitted to show identity during Kelly Callender's testimony, it certainly was probative in corroborating the testimony of Dr. DeFatta. Photographic evidence is admissible to corroborate the testimony of witnesses on essential matters. See State v. Pooler, 96-1794, pp. 42-43 (La.App. 1 Cir. 5/9/97), 696 So.2d 22, 50-51, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288.

Therefore, because the evidentiary value of each of the photographs in question outweighs the potential for prejudice, we find no error in the trial court allowing them to be admitted into evidence. This assignment of error lacks merit.

REVIEW FOR ERROR

In his brief, defendant also asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we

find no reversible errors. See **State v. Price**, 05-2514, pp. 18-22 (La.App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc).

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

CONVICTION AND SENTENCE AFFIRMED.