

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1280

STATE OF LOUISIANA

VERSUS

SUMMER S. McSHANE



Judgment Rendered: **MAR 25 2011**

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On Appeal from the  
19th Judicial District Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 06-08-0366

Honorable Donald R. Johnson, Judge Presiding

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Hillar C. Moore, III, D.A.  
Stacy L. Wright, Asst. D.A.  
Baton Rouge, LA

Attorneys for Plaintiff-Appellee,  
State of Louisiana

Jane L. Beebe  
New Orleans, LA

Attorney for Defendant-Appellant,  
Summer S. McShane

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

## HIGGINBOTHAM, J

The defendant, Summer S. McShane, was charged by bill of information with two counts of assault by drive-by shooting (counts I and II), violations of LSA-R.S. 14:37.1(A), and one count of illegal use of weapons or dangerous instrumentalities (count III), a violation of LSA-R.S. 14:94(A). She pled not guilty on all counts. She waived her right to a jury trial and, following a bench trial, was found guilty as charged on all counts. On counts I, II, and III, she was sentenced to two years at hard labor without benefit of suspension of sentence, with the sentences to run concurrently with each other and concurrently with any other sentences she was serving.<sup>1</sup> She now appeals, contending her conviction for all three counts resulted in a double jeopardy violation. For the following reasons, we affirm the convictions and sentences on counts I and II, but conditionally affirm the conviction and sentence on count III, and remand the case to the trial court for a ruling on the issue of double jeopardy.

### FACTS

On October 25, 2007, Latrina Johnson Green traveled to the Acadian Food Mart in Baton Rouge, Louisiana with her friend Charlene Alex and Alex's three children. In the parking lot of the business, an argument ensued between Alex and the defendant. During the argument, the defendant threw a pot at Alex, but struck Green, who was pregnant. Green asked the defendant, "What the hell I have to do with it?" The defendant replied, "You in the car with [Alex]. Take your lick." Green then struck the defendant with the pot, and a fight ensued between them.

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<sup>1</sup>The sentencing minutes are inconsistent with the sentencing transcript concerning the number of sentences imposed. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983).

Bystanders pulled Green and the defendant apart, and they both left the Acadian Food Mart.

Thereafter, Green, Alex, and Alex's children traveled to Green's mother's home on Acadian. Green told her mother about the altercation, and discovered that her leg was bruised where she had been struck by the pot. Approximately fifteen minutes later, a car containing the defendant and some other women stopped in front of Green's mother's home, and the defendant began "hooping and hollering out the window." The defendant stated, "Bitch, come fight now. Where somebody at?" Green's sisters ran out of the door, and her sister, Oiasia Carter, threw a brick at the car. The defendant and the other women drove away.

Approximately thirty to forty-five minutes later, as Green was standing by the road in front of her mother's home, and Carter was standing under a tree in front of the house, the defendant and the other women pulled up to the corner, the defendant leaned out of an open window on the rear of the car, and the defendant twice fired a gun. A bullet entered Green's mother's home, narrowly missing a baby on the couch, and hit a can of food in the pantry. Subsequently, Green and Carter both selected the defendant's photograph from photographic lineups as depicting the person who fired the gun.

### **DOUBLE JEOPARDY**

In her sole assignment of error, the defendant argues that the assault by drive-by shooting offenses and the illegal use of a weapon by discharge of a firearm offense required the same evidence, and thus, her conviction on all three charges resulted in a double jeopardy violation. In his closing argument, counsel for defendant raised for the first time the issue of double jeopardy. He stated "count three, with either count of one and two is duplicitis[sic]. It's one act ... [i]t would be

subjecting someone to double jeopardy for one shot to get convicted of two different crimes that share the same elements.” The attorney for the State objected to the defense raising double jeopardy in closing argument on procedural and substantive grounds. Louisiana Code of Criminal Procedure article 594 states “Double jeopardy may be raised at any time, but only once, and shall be tried by the court alone. If raised during the trial, a hearing thereon may be deferred until the end of the trial.” Double jeopardy was clearly raised before the trial court and the trial court made no ruling. Therefore, we find it necessary to remand this case for a ruling on the double jeopardy issue as it is not ripe for our consideration until resolved at the trial court.

The procedure for remedying a violation of double jeopardy is to vacate the conviction and sentence of the less severely punishable offense, and to affirm the conviction and sentence of the more severely punishable. **State v. Dudley**, 06-1087 (La. App. 1st Cir. 9/19/07), 984 So.2d 11, 22, writ not considered, 08-1285 (La. 11/20/09), 25 So.3d 783. Therefore, the defendant’s convictions and sentences for two counts of assault by drive-by shooting are affirmed and the conviction and sentence for count III, for illegal use of a weapon, is conditionally affirmed based on the evidence in the record on appeal. However, a final determination of the double jeopardy issue on appeal is pretermitted and the case is remanded to the trial court for the limited purpose of determining whether the defendant’s convictions on the two counts of assault by drive-by shooting and one count of illegal use of a weapon constituted double jeopardy. We instruct the trial court to conduct a hearing solely on that issue. The defendant’s right to appeal from an adverse decision on the double jeopardy issue is reserved.

## REVIEW FOR ERROR

The defendant also requested that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 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, other than the double jeopardy issue, we have found no reversible errors. See State v. Price, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

**CONVICTIONS AND SENTENCES ON COUNTS I AND II  
AFFIRMED; CONVICTION AND SENTENCE ON COUNT III  
CONDITIONALLY AFFIRMED; AND REMANDED WITH  
INSTRUCTIONS FOR DOUBLE JEOPARDY DETERMINATION.**