NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 1891

STATE OF LOUISIANA

VERSUS

BRANDON LARKIN TWILLIE

Judgment Rendered: March 26, 2010

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 419059
Honorable Richard A. Swartz, Judge Presiding

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Walter P. Reed **Covington, LA**	**Counsel for Appellee,** **State of Louisiana**
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BEFORE: WHIPPLE, HUGHES AND WELCH, JJ.

Hughes, J., concurs.
Welch, J. concurs

WHIPPLE, J.

The defendant, Brandon Larkin Twillie, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty of the responsive offense of manslaughter, a violation of LSA-R.S. 14:31. The defendant was adjudicated a third-felony habitual offender and sentenced to fifty years imprisonment at hard labor without the benefit of probation or suspension of sentence. The defendant now appeals, challenging: (1) the trial court's denial of his peremptory challenge of prospective juror Sarah Easterly; (2) the sufficiency of the evidence; and (3) the validity of the habitual offender adjudication. For the following reasons, we affirm the conviction, the habitual offender adjudication, and the sentence.

STATEMENT OF FACTS

On or about June 24, 2006, sometime before daylight, at 37461 Hill Crest Drive, Slidell, Louisiana, a gun (a Smith and Wesson revolver) possessed by the defendant was discharged, resulting in the death of the victim, Thomas Cousin. At the time of the shooting, the victim was holding crack cocaine in his hand. After the shooting, the defendant ran from the scene, discarded the weapon, and ultimately fled to Houston, Texas, where he was apprehended days later.

During a recorded interview conducted in Houston after the defendant was apprehended, the defendant admitted to shooting the victim, but stated that the shooting was accidental. When the defendant was transported back to Louisiana, he led the police to the location where he had discarded the weapon, a wooded area a couple of blocks from the scene of the shooting.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant contends that the trial court should have granted his challenge for cause of prospective juror Sarah Easterly, arguing that her responses as a whole revealed that if the defendant did not testify, she could not be fair and impartial. The defendant notes that another prospective juror, Christian Schade, was excused on the same basis with less support. The defendant contends that the trial court did not address Easterly's lingering doubt regarding a defendant's decision not to testify and concludes that Easterly was not successfully rehabilitated.

The State or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality, or on the ground that the juror will not accept the law as given to him by the court. LSA-C.Cr.P. art. 797(2) & (4). For a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.[1] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. State v. Taylor, 2003-1834, pp. 5-6 (La. 5/25/04), 875 So. 2d 58, 62.

A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment

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[1]The rule is now different at the federal level. See U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

according to the law reasonably may be inferred. However, the trial court is vested with broad discretion in ruling on a challenge for cause; its ruling will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Henderson, 99-1945, p. 9 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 754, writ denied, 2000-2223 (La. 6/15/01), 793 So. 2d 1235. A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, the juror has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. State v. Taylor, 2003-1834 at p. 6, 875 So. 2d at 63.

In accordance with LSA-C.Cr.P. art. 799, the defendant was entitled to twelve peremptory challenges. In this case, the defendant exhausted his peremptory challenges. Thus, an erroneous denial of a peremptory challenge in this case is presumptively prejudicial.

Several prospective jurors responded, including Easterly and Schade, when the trial court asked if they, a relative, or a close friend had been a victim of a crime. As noted by the defendant, prospective juror Easterly stated that she had been robbed a couple of months before the trial and that her brother had been attacked the weekend before the trial. Prospective juror Schade stated that his car had been vandalized on two separate occasions and that the younger brother of his college friend was murdered in a robbery. Schade noted that the perpetrator of the murder was sentenced to life imprisonment and was shot by guards during a prison riot and that no one was arrested in the other two incidents. Schade also noted that one of his friends is a reserve deputy in St. Tammany Parish. The prospective jurors did not give any indications regarding the trial court's inquiries as to whether any of them had any questions regarding the defendant's constitutional

rights, would suffer undue hardship if chosen to serve as jurors, or could not give the State and the defendant a fair trial.

Several prospective jurors again responded when the State asked how many of them had a family member or someone close to them who had suffered a drug-related injury. Easterly stated that her family struggled with drug addiction and that her closest friend had died a year before the trial. Easterly stated that if drugs came up in this case it would not affect her.

The State also asked the prospective jurors if they or anyone close to them had been prosecuted by the district attorney's office. Schade stated that he was accused of "harassment or something like that" regarding incidents with his ex-wife and claimed that he was "railroaded" the second time around. Schade further recalled an incident in St. Tammany Parish where someone was accused and convicted of contributing to the delinquency of a minor and "there was no evidence against him." Schade stated, "So maybe I'm a little suspicious." When asked if he would hold that against the State in this case, Schade stated that he would "try not to" adding that he "may have some difficulty" and that it "happened in this courtroom." Schade added that in that case the accuser was a chronic liar, but the jury was never given that information, and he stated that was one of his concerns regarding the instant case. The prosecutor informed Schade that he had to judge the case based on the facts before him and asked Schade if that addressed his concern. Schade stated, "Well, yes. I may not agree entirely."

When the defense attorney asked the prospective jurors if they would hold it against the defendant if he did not testify, Easterly responded, "I would have some doubts. I feel personally, if I weren't guilty for something, I would want to sit before people and be questioned and be able to explain myself." Easterly stated that she did not know if it would affect her finding of guilt or innocence, and after

further questioning, added that it might be a factor in her deliberation. In response, Schade stated:

> I agree with 90 percent with (sic) the lady, except the last part. I think it would affect my decision. Like she said, if I was accused, and I knew I was innocent, I would demand that I get on the witness stand. I need to get on the witness stand and tell my side. I wouldn't be nervous at all. Because I knew I was innocent.

Schade stated, "I think it would" when asked if it would affect his decision. Schade later added that if child victims have to take the witness stand then the accused should have to do so as well.

When the defense attorney asked the prospective jurors if they would let past violent crimes influence them on this case, Schade stated, "I would try my best not to. I can't say." He added, "It was very, a experience I will never forget (sic). Again, you have to be fair."

Before the challenges took place, the trial court noted that three prospective jurors indicated that they would have reservations about the defendant's right not to testify, Easterly, Schade, and Henry G. Harper.[2] The trial court individually questioned those jurors as to whether they would be able to put aside their beliefs or opinion and make a fair and impartial decision. Easterly responded, "yes." The trial court then asked Mr. Schade whether he could comply with the court's instructions. Schade responded as follows,

> I think it would put some doubt in my mind as to the nature of the defendant. So I would have difficulty if the defendant did not take the witness stand. And I understand that the defense has to raise the doubt, not the prosecution.

Schade stated that he understood that the defendant had a right not to testify.

Based on our thorough review of Easterly's responses, we find that the trial court did not abuse its broad discretion in denying the challenge for cause against Easterly. Despite the concern raised by her initial response, she subsequently

[2]Harper was excused after the jury selection was complete.

demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. The trial court's granting of the defense challenge for cause against prospective juror Schade, based on a comparison of their responses as a whole, does not strengthen the defendant's argument against the trial court's denial of his challenge for cause of prospective juror Easterly. We find that Easterly's responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that there is insufficient evidence in support of the manslaughter conviction. The defendant contends that the evidence only supports a finding of guilty of negligent homicide. The defendant contends that the record and evidence is unclear as to what underlying crime the State relied on in proving manslaughter. The defendant contends that no rational trier of fact could have found him guilty of manslaughter.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting LSA-C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. State v. Brown, 2003-0897, p. 22 (La. 4/12/05), 907 So. 2d 1, 18, cert. denied, 547 U.S. 1022, 126 S. Ct. 1569, 164 L. Ed. 2d 305 (2006). When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. State v. Graham, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.

2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987).

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. State v. Azema, 633 So. 2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So. 2d 460. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. State v. Richardson, 459 So. 2d 31, 38 (La. App. 1st Cir. 1984). Moreover, 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. Richardson, 459 So. 2d at 38. Thus, the fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985).

Louisiana Revised Statute 14:30.1 defines second degree murder as follows:

> A. Second degree murder is the killing of a human being:
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> (1) When the offender has a specific intent to kill or to inflict great bodily harm....

Specific 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. LSA-R.S. 14:10(1). Such state of mind can be formed in an instant. State v. Cousan, 94-2503, p. 13 (La. 11/25/96), 684 So. 2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the

circumstances of the transaction and the actions of defendant. State v. Graham, 420 So. 2d 1126, 1127 (La. 1982).

The defendant was charged with second degree murder, but was convicted of manslaughter, a violation of LSA-R.S. 14:31, which provides, in pertinent part:

> A. Manslaughter is:
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> (1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or
>
> (2) A homicide committed, without any intent to cause death or great bodily harm.
>
> (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person....

Negligent homicide is the killing of a human being by criminal negligence. LSA-R.S. 14:32A(1). Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under the circumstances. See LSA-R.S. 14:12.

Detective John Morse of the St. Tammany Parish Sheriff's Office subpoenaed the defendant's cellular telephone records to trace his whereabouts to Houston, Texas. Five unfired bullets remained in the weapon at the time it was recovered. Detective Morse testified that the firearm used in the shooting had a "very strong trigger pull" on it, thus requiring a certain degree of pressure to discharge. During cross-examination, Detective Morse noted that the trial took place three years after the gun was secured as evidence and that it had not been

handled. During re-direct examination, Detective Morse testified that the gun was stored in a clean area.

In his recorded statement, the defendant stated that he had been "chillin" with the victim just before the shooting. The defendant was sitting on a bucket just in front of the residence. The defendant was using cocaine and was "high" at the time. According to the defendant, the victim planned to distribute some drugs to an unnamed individual before the shooting took place. The defendant was playing with his pistol when it discharged. The defendant admitted to squeezing the trigger, but said that he was not thinking or paying attention to his actions. According to the defendant, the victim was about ten feet away from the defendant at the time he was shot. The defendant saw the victim's reaction and immediately realized he had been shot. He ran to and grabbed the victim before he fell to the ground. The defendant was nervous and then fled the scene. The defendant further stated that only he, the victim, and "Tony" were present at the time of the shooting.

Dr. Michael DeFatta of the St. Tammany Parish Coroner's Office, an expert in forensic pathology, performed the autopsy in this case. Dr. DeFatta testified that the victim suffered a close-range gunshot wound to his right back with injuries to his right lung and heart. The entrance wound was approximately eleven inches from the top of the victim's shoulders and two inches right of the midline of his body. The exit wound was on his center chest about nine inches from the top of his shoulders and about one inch from the right midline. Based on the soot deposition and unburned gunpowder flakes forming stippling marks around the wound, Dr. DeFatta concluded that the range of fire was twelve inches or closer. During cross-examination, Dr. DeFatta confirmed that the bullet travelled in an upward trajectory for a deviation of two inches, and that the gun was in a lower position at the time of the shooting than the point of entry. Dr. DeFatta further

confirmed there was a plus or minus variation of several inches in the gunshot range estimation, based on the make and model of the weapon and type of ammunition. During re-direct examination, Dr. DeFatta clarified that the stippling and soot deposition around the wound negated the possibility that the victim was up to fifteen, ten, or even five feet away from the defendant at the time of the shooting and that there could only be a few-inch plus or minus variation from the estimated range.

Tony Kirsch was with the defendant and the victim at the time of the shooting. Kirsch grew up with the defendant and referred to the victim as his friend. Kirsch testified that he was sitting on the windowsill next to the defendant at the time of the shooting. The victim was sitting in a chair, and they were all "[g]etting high" "[s]moking" "[w]eed." He later admitted that he also had used three grams of cocaine. The victim was walking away when he was shot, and the defendant was walking behind him. The defendant's back was partially turned to Kirsch at the time of the shooting. Kirsch saw the defendant's hand move as the gun was fired. Kirsch stated, "He didn't come up like that. It just went off." He confirmed that he did see the defendant's arm elevate before the shot was fired. According to Kirsch, after the shooting the defendant stated, "My bad. I'm sorry," adding that the defendant said he didn't mean to do it and was in shock. The defendant asked him not to tell anyone what happened. One of the occupants of the residence called the police after Kirsch summoned them for assistance. Kirsch stated that he could not remember what he did or did not tell the police after the shooting, but that he did remember what happened.

During cross-examination, Kirsch was asked if the defendant and the victim were having an argument before the shooting. Kirsch stated, "We all came up with each other from kids." When asked if the defendant and the victim were friends, Kirsch stated, "Yeah. We come up together. We all friends. Me and Thomas was

more closer than me and him. The way it happened, I wouldn't, you know, I don't know what was on his mind." As testified during re-direct examination, Kirsch did not see the defendant playing with or holding the gun before the shooting.

Jeanette Cooper, the sole defense witness and distant cousin of the defendant, was not present at the time of the shooting, but saw the defendant and the victim together on the afternoon before the shooting, between 4:30 and 5:00 p.m. Cooper had known the defendant all of his life and had known the victim since he was a child, and she assumed they were friends. The defendant and the victim came to the snowball stand that she operated. She stated that they arrived separately, greeted each other with a handshake as normal, and departed together. She was unaware of any conflicts between the two of them, but had no personal knowledge as to what happened after they left the stand.

A thorough review of the record reveals that the evidence presented by the State established the elements of manslaughter under LSA-R.S. 14:31A(2)(a). The victim was also in possession of cocaine at the time of the shooting. In accordance with the defendant's statements during the recorded interview with the police and Kirsch's trial testimony, the defendant, Kirsch, and the victim were "[g]etting high" and "snorting coke" at the time of the shooting. The evidence supports a finding that the defendant was engaged in a felony not enumerated in LSA-R.S. 14:30 or 14:30.1, possession of cocaine, a violation of LSA-R.S. 40:967C, when the instant homicide was committed. Moreover, the jury may return any legislatively provided responsive verdict whether or not the evidence supports that verdict, as long as the evidence was sufficient to support a conviction of the charged offense. State ex rel. Elaire v. Blackburn, 424 So. 2d 246, 249 (La. 1982), cert. denied, 461 U.S. 959, 103 S. Ct. 2432, 77 L. Ed. 2d 1318 (1983). The evidence presented in this case, showing the defendant fired one shot at close range to the victim's back, was sufficient to support a conviction of second degree

murder. Thus, the verdict of manslaughter herein seemingly reflects the jury's decision to compromise between the verdicts of guilty of second degree murder and not guilty. Viewing all of the evidence in the light most favorable to the prosecution, we conclude there was sufficient evidence for the trier of fact to find that the State proved the instant offense beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence. Thus, we reject this assignment of error as meritless.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, the defendant argues that the State failed to carry its burden at the multiple offender adjudication. Specifically, the defendant contends that the trial court erred in adjudicating him a multiple offender when the State failed to fully comply with requirements set forth in LSA-R.S. 15:529.1. In support, the defendant argues that the State failed to prove that his prior guilty pleas were informed, free, and voluntary and made with an articulated waiver of his constitutional rights. The defendant contends that the prior convictions cannot be used for enhancement purposes as a defendant must understand the consequences of his plea and the plea must be knowing and voluntary. The defendant concludes that the enhanced sentence is illegal because it is based upon pleas that were constitutionally suspect.

If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that the defendant was represented by counsel when the pleas were taken. State v. Shelton, 621 So. 2d 769, 779 (La. 1993). If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript

of the taking of the guilty plea, one that reflects a colloquy between the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. Shelton, 621 So. 2d at 779-80. If the State introduces anything less than a perfect transcript, such as, a guilty plea form, a minute entry, an imperfect transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights.[3] Shelton, 621 So. 2d at 780; State v. Bickham, 98-1839, p. 4 (La. App. 1st Cir. 6/25/99), 739 So. 2d 887, 889-90. The purpose of the rule of Shelton is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity attaches to promote the interests of finality. See State v. Deville, 2004-1401, p. 4 (La. 7/2/04), 879 So. 2d 689, 691 (per curiam).

Herein, the State sought to establish two predicate guilty plea convictions consisting of simple burglary (St. Tammany Parish docket number 308264) and possession of a Schedule II controlled dangerous substance (St. Tammany Parish docket number 391712). A careful review of the documentation introduced by the State to support the use of the predicates to establish the defendant's habitual offender status convinces us that the State met its initial burden under Shelton.

[3]Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), requires that a trial court ascertain, before accepting a guilty plea, that the defendant has voluntarily and intelligently waived: (1) his right against compulsory self-incrimination; (2) his right to trial by jury; and (3) his right to confront his accusers. Boykin only requires a defendant be informed of these three rights. State v. Bickham, 98-1839, p. 4 (La. App. 1st Cir. 6/25/99), 739 So. 2d 887, 890.

Specifically, the State introduced fingerprint evidence to show that the defendant was the same person convicted in the cases at issue. The State proved the existence of the convictions at issue and that the defendant was represented by counsel by admitting the bills of information and minutes for the guilty plea convictions, and the transcript of the guilty plea conviction in docket number 391712. Thereafter, the defendant raised several arguments. However, the defendant did not produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. Accordingly, the State had no burden to prove the constitutionality of the predicates at issue by "perfect" transcript or otherwise. Moreover, the State presented evidence that showed that the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers before entering both predicate guilty pleas. Thus, this assignment of error also lacks merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.