NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1079

STATE OF LOUISIANA

VERSUS

CHAD CAMERON

EJG BHC

DATE OF JUDGMENT: FEB 13 2009

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 12-01-0244, SEC. 1), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

THE HONORABLE DONALD R. JOHNSON, JUDGE

* * * * * *

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BEFORE: KUHN, GUDIRY, GAIDRY, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

Gaidry, J. concurs in the result.

KUHN, J.

The defendant, Chad Cameron, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. The defendant entered a plea of not guilty. After a bench trial, the defendant was found guilty as charged. The trial court denied the defendant's motion for new trial. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, raising the following assignments of error:

1. The trial court erred in finding a knowing and intelligent waiver of the right to trial by jury in this case, as the only evidence of the waiver by the defendant is an acknowledgement of advice to waive the right, rather than an actual knowing and intelligent waiver.

2. The trial court erred in finding an effective waiver of the right to trial by jury, as the waiver was induced by representations from the prosecution that were not correct.

3. The trial court erred in finding the evidence sufficient to sustain a conviction for second degree murder.

4. The trial court erred by failing to grant the defendant's motion to quash the second indictment following the State's strategic dismissal of the first indictment in order to secure a continuance.

For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about July 9, 1998, the defendant and several other male acquaintances went to a bar, Traditions, on Highland Road in Baton Rouge. A physical altercation took place on the dance floor. Chris Thorne, the victim, began brandishing a knife as he stood on the dance floor. The victim continued to brandish the knife as he walked through the crowd and exited the bar. Several

individuals, including the defendant, began chasing the victim after he exited the bar. As the group gave chase, the victim ran out of the parking lot and down Highland Road to a police station. The group surrounded the victim. At some point, the victim lost possession of the knife and was physically attacked. According to the autopsy report, the victim sustained four stab wounds, including a fatal one that severed the abdominal aorta.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In his first assignment of error, the defendant contends that he never made a knowing and intelligent waiver of his right to a trial by jury. The defendant specifically argues that the record shows that the trial judge, at best, merely established that the defendant's trial counsel advised him to waive the jury trial. The defendant notes that while the trial judge asked the defendant if he had been advised by counsel to waive a jury trial, the trial judge did not ask the defendant if it was his desire to do so. The defendant argues that, therefore, there is no evidence that he, independently of his counsel's advice, elected a bench trial.

In the second assignment of error, the defendant contends that his trial counsel's advice to waive his right to a jury trial was based on misinformation. The defendant specifically contends that his trial counsel was led to believe that there would be no eyewitness at the trial who could positively identify the defendant as the person who stabbed the victim. The defendant notes that his trial counsel confirmed that he would not have advised the defendant to waive his right to a jury trial if he had known about the eyewitness. The defendant contends that the misleading discovery response amounted to a material misrepresentation of the strength of the State's case. Thus, the defendant contends that his waiver was not

knowing and intelligent, as it was based on the belief and erroneous advice of his counsel that there would be no witness who could make a positive identification of defendant.

In its brief, the State concludes the record is clear that the defendant understood he was waiving his right to a jury. In a reply brief, the defendant reiterates his argument that there was no express waiver.

Both the United States Constitution and the Louisiana Constitution expressly guarantee a criminal defendant the right to a jury trial. U.S. Const. amend. VI; La. Const. art. I, §§ 16, 17. However, some criminal defendants may, pursuant to statute, waive this constitutionally guaranteed right, provided the waiver of the right is knowingly and intelligently made. La. Code Crim. P. art. 780A; **State v. Brooks**, 2001-1138, p. 5 (La. App. 1st Cir. 3/28/02), 814 So.2d 72, 76, writ denied, 2002-1215 (La. 11/22/02), 829 So.2d 1037.

A valid waiver of the right to a jury trial must be established by a contemporaneous record setting forth an appraisal of that right, followed by a knowing and intelligent waiver by the accused. Waiver of this right is never presumed. **Brooks**, 2001-1138, p. 5, 814 So.2d at 76. However, prior to accepting a jury trial waiver, the trial court is not obligated to conduct a personal colloquy inquiring into the defendant's educational background, literacy, and work history. See **Brooks**, 2001-1138 at p. 7, 814 So.2d at 77.

The rules of discovery are intended to eliminate unwarranted prejudice arising from surprise testimony to permit the defense to meet the State's case, and to allow proper assessment of the strength of its evidence in preparing a defense. When the defendant is lulled into misapprehension of the strength of the State's

case through the failure of the prosecution to timely or fully disclose and the defendant suffers prejudice, basic unfairness results that constitutes reversible error. **State v. Harris**, 2000-3459, p. 8 (La. 2/26/02), 812 So.2d 612, 617.

The defendant's trial counsel argued below that the State did not provide sufficient notice of a possible in-court identification. During the trial, Reggie Thompson positively identified the defendant as the perpetrator. The defense counsel did not contemporaneously object to the in-court identification by Thompson or to any portion of Thompson's testimony. The State's discovery response dated July 11, 2000 notes that during questioning by the police, Thompson was shown a photographic line-up consisting of the defendant and five other individuals. As stated in the discovery response, Thompson pointed to the picture of the defendant and stated, "[T]his looks like him." As further stated in the discovery response, Thompson was unable to make a positive identification at that time. As correctly emphasized by the State in its response brief, this discovery response should have put the defense on notice of a possible in-court identification of the defendant at trial. Thus, the defendant has failed to show that he was lulled into a misapprehension of the strength of the State's case.

The minute entry for the defendant's January 3, 2002 arraignment indicates that the trial court advised the defendant of his right to have or waive a trial by jury. The minute entry for the February 26, 2002 hearing on the defendant's motion to quash the indictment indicates that the defendant, "through counsel, informed the court that he waived his right to trial by jury and wished a trial by judge." As verified by the transcript of February 26, 2002, the defense counsel advised the State and the trial court that the defendant would be waiving his right

to a jury trial. The trial court asked the defendant if his defense counsel advised him to give up his right to a trial by a jury of his peers. The defendant answered affirmatively. The trial court added, "And trust one juror, I?" The defendant again responded affirmatively. The trial court further added, "If that is what you desire, then that is what we will have?" Once again, the defendant responded affirmatively, and the trial court replied, "Very well."

It is evident that the defendant independently waived his right to a jury trial and expressed his desire to do so. We find that the right to a jury trial was validly waived in this case. Based on the foregoing, assignments of error numbers one and two are without merit.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, the defendant contends that the evidence in support of the second degree murder conviction is insufficient. The defendant contends that the record, at best, gives rise to mere speculation that he was in proximity to the victim. The defendant notes that the sole eyewitness was not seen by anyone else and contends that his testimony was discredited. The defendant contends that there is no direct evidence of his guilt. The defendant concludes that the evidence is not sufficient to prove each element of the crime beyond a reasonable doubt, and that it does not exclude every reasonable hypothesis of innocence.

The constitutional standard for testing the sufficiency of evidence, enunciated in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find

the essential elements of the crime charged and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. This standard is codified in La. Code Crim. P. art. 821. **State v. Jones**, 596 So.2d 1360, 1369 (La. App. 1st Cir.), writ denied, 598 So.2d 373 (La. 1992). The **Jackson** standard of review 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. **State v. Graham**, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420.

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. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984).

Additionally, where the key issue is defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v.**

Hayes, 94-2021, p. 4 (La. App. 1st Cir. 11/9/95), 665 So.2d 92, 94, writ denied, 95-3112 (La. 4/18/97), 692 So.2d 440.

As he traveled en route to the police station on Highland Road, Lieutenant Lomax of the Baton Rouge City Police Department, observed approximately five white male subjects running from the police station northbound towards a nearby bar, Traditions. Lieutenant Lomax discovered the victim's body in the gated parking lot behind the police station, about six feet from the building. Officer Duke Staples, also of the Baton Rouge City Police Department, went to the bar for crowd control. While there, Officer Staples received information from a female patron, Daysha Taylor, concerning the whereabouts of the knife used to murder the victim. Specifically, Taylor informed the officer that the knife was in a city bus stop garbage can located between the bar and the police station (north of the police station), and that was where the knife was found.

Frank Vendt, Jr., Joel Kinabrew, Brandon Landry, Joshua Tourere, and Wesley Braud all testified regarding their participation in and observations during the incident in question. Vendt, Kinabrew, Landry, and Tourere admitted to chasing the victim from the bar to the police station. Vendt, who described himself as a friend of the defendant, testified that the defendant pushed the victim through the gate and to the ground after the group surrounded him. Vendt admitted to hitting the victim about four times. Kinabrew and Landry testified that the group chased the victim from the bar because they wanted to beat him up. Kinabrew, who had received an injury to his head as a result of being hit by a beer bottle, was unsure as to whether the defendant or Vendt pushed the victim to the ground. Kinabrew admitted to kicking the victim in the legs. In his probable

cause affidavit, Kinabrew stated that after the attack he heard the defendant say, "[W]e cut that dude up." However at trial, Kinabrew did not recall stating that the defendant made said statement. Landry testified that the victim appeared to lose consciousness when he was tackled to the ground. Landry stated that he never actually hit the victim. The witnesses consistently testified that the victim appeared to lose consciousness early in the attack and did not fight back.

The witnesses' testimony varied as to whether the victim lost possession of the knife as he was tackled to the ground or when one or more beer bottles were thrown at him. According to Vendt, the defendant told him to grab the dropped knife, but the defendant retrieved the knife before Vendt could grab it. Someone shouted to the group to leave, and they ran back toward the bar. According to Vendt, the defendant remained with the victim while the rest of the group ran toward the bar. As they were running Vendt heard a loud noise. Some of the individuals stopped at a tree behind the bar. According to Vendt, the defendant approached the tree about ten seconds after they had stopped. The defendant stated, "I jugged him," and clarified, "I stabbed him." Vendt further testified that the defendant had blood on his shirt at the time. During cross-examination, Vendt explained the absence of his account of the defendant's statements from the police report by admitting that he did not give the police all of the details because the defendant was his friend. The defendant later told Vendt that he wanted to claim self defense.

Tourere also testified that he heard the defendant admit that he "jugged" the victim. Landry testified that he heard the defendant tell Vendt that he stabbed the victim four times and threw the knife in a dumpster. Braud testified that he did

not join the chase but remained in the bar. According to Braud, the defendant telephoned him the following day and went to his residence. The defendant told Braud that he and others chased the victim and beat him up. The defendant added that he thought he stabbed the victim and did not know if the police would believe it was self-defense.

State witness Reginald Thompson was at the bar on the night in question, despite his violation of bail conditions that prohibited his presence. Thompson did not enter the bar, but was in the parking lot when he saw a man run out of the bar and a group of men chase the man down Highland Road toward the police station. Thompson followed, intending to assist the victim. He observed the group of six or seven people kicking and punching the victim. Thompson yelled, and all except one individual fled the scene. Thompson described the remaining male as chubby, having dark hair, wearing a hat, and weighing about 180 to 200 pounds. Thompson made an in-court identification of the defendant as the individual who remained. According to Thompson, the defendant kicked and beat the victim some more and then stabbed him at least four times. Thompson stated that the victim was not moving, and he believed that the victim was unconscious before the stabbing. After the stabbing, the defendant ran back toward the bar. Thompson further observed the defendant throw the knife in a trash can on the side of Highland Road. Thompson went back to the bar and described his observations to Daysha Taylor.

Thompson did not talk to the police that night but went to the police to report his observations about a week after the incident. Thompson was shown several photographic lineups and identified individuals involved in the attack.

Viewing Line-up F, Thompson selected photograph number five (a photograph of the defendant) as the person who committed the stabbing, but he also stated that he was unsure if it was the correct person. During his trial testimony, Thompson stated that the defendant was depicted in the fifth photograph. Thompson testified that he was "pretty positive" that the defendant was the man who stabbed the victim. During cross-examination, the defense elicited testimony regarding discrepancies in Thompson's description of the person who committed the stabbing when he gave a statement to the police. Thompson stated that he told the police that the perpetrator had highlights in his hair, because his hair was glistening. Thompson explained that he considered the perpetrator to be overweight, fat, or "chubby," describing him as "fatter than me." Thompson agreed that the defendant looked the same in court as he did in the photographs except that he had gained a few more pounds, describing him as "fatter." Thompson's trial testimony of the facts was largely consistent with his taped statement to the police.

Defense witness Greg George testified that he went to Traditions on the night in question with the defendant. George did not witness the attack outside of the police station. George testified that he left the bar in a vehicle with Frank Vendt, Wesley Braud, and Lyle James, and he did not recall anyone in the vehicle having said anything about the defendant saying that he "jugged" anyone. Defense witness Aaron Seal was also present on the night in question. While Seal was in the parking lot of Traditions, an individual abruptly approached him from behind and knocked him down. Seal and the individual both fell to the ground. The individual got up and ran toward the police station with a group of guys

chasing him. A few minutes after the guys ran down the road, Kinabrew walked up to Seal in the parking lot. Seal noted that Kinabrew had a cut near his eye, and Kinabrew said that it was inflicted by a man in the bar. According to Seal, Kinabrew then stated, "[W]e cut him up." Seal did not see Thompson at the bar that night.

Defense witness Deputy Jason Broussard, a three-year reserve deputy at the East Baton Rouge Parish Sheriff's Office, testified that 'jugged' means to punch someone. During cross-examination, Deputy Broussard testified that he had not worked any murderous stabbings but had been around victims who had been cut during domestic disputes.

The taped statement of Tiffany O'Neal, who was deceased at the time of the trial, was admitted. O'Neal had gone to the bar with the victim on the night in question. O'Neal stated that the victim asked for her knife when they arrived at the bar and she gave it to him, noting that the victim feared that gang members were in the bar. O'Neal observed the confrontation in the bar. O'Neal stated that several of the individuals who crowded around the victim had knives. After that statement, O'Neal was asked, "You saw several of them with knives?" She responded, "Yes sir, I saw one thrown for sure." O'Neal stated that the victim was stabbed while he was in the bar, "as far as I knew." When asked whether she saw someone stab the victim in the bar, O'Neal responded negatively and stated that she saw a knife that was thrown at the victim hit him. O'Neal did not know the details of what happened after the victim fled from the bar. She noted that individuals were returning to the bar before she could catch up with the victim.

The defendant testified that he did not stab the victim or admit that he did so. He also denied hitting the victim. The defendant confirmed that he did chase the victim with the other individuals, noting that he mistakenly believed that the victim stabbed Vendt while in the bar. The defendant testified that he observed the victim lunge toward Vendt, and that Vendt bent over as if he had been stabbed by the victim. After the group chased the victim to the police station and surrounded him, the defendant observed Vendt and realized that he had not been injured. Someone threw a bottle, and it shattered behind the victim's head. The defendant further testified that as the victim dropped the knife, he, the defendant, pushed the victim through the fence and they both fell to the ground. The defendant stated that he then fled from the scene. He confirmed that he and Vendt had been friends, and added that Vendt may have testified against him because he had a female friend who alleged that Vendt had raped her. The defendant also stated that Braud and Vendt were friends, and that Braud probably testified under Vendt's instructions. The defendant did not have an explanation for the testimony of the other witnesses.

Thompson's testimony provided a near-certain identification of the defendant as the person who stabbed the victim and threw the knife in a trash can. Several witnesses provided detailed and largely consistent factual accounts that corroborated the defendant's guilt. By his own admission and several witnesses' testimony, the defendant was present when the victim was fatally attacked. The defendant also admitted to pushing the victim to the ground. Several witnesses heard the defendant state that he "jugged" or stabbed the victim. We are convinced that the evidence presented herein negated any reasonable probability

of misidentification. Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and the defendant's identity as the perpetrator of the offense. For the above reasons, this assignment of error is without merit.

FOURTH ASSIGNMENT OF ERROR

In the fourth and final assignment of error, the defendant contends that the trial court erred in failing to grant the defendant's motion to quash the second indictment following the State's strategic dismissal of the first indictment in order to secure a continuance of the trial. The defendant notes that the trial court properly denied the State's oral motion for continuance, as the State failed to file a written motion for continuance at least seven days prior to the commencement of trial in accordance with La. Code Crim. P. arts. 707 and 709. The defendant contends that the State granted itself a continuance by entering a *nolle prosequi* and subsequently seeking re-indictment. The defendant also contends that the State flaunted its authority by favoring itself at his expense. The defendant specifically notes that a key exculpatory witness, Tiffany O'Neal, was unavailable as a live witness because she was deceased at the time of the trial. The defendant argues that the State prejudiced his ability to defend himself. The defendant concludes that the State abused its authority, and the trial court abused its discretion in denying his motion to quash the second indictment. The defendant does not argue that his speedy trial rights were asserted and violated, or that the trial was untimely.

Citing La. Code Crim. P. art. 693, the State notes that a dismissal is not a bar to subsequent prosecution. The State further notes that an eyewitness, Reginald Thompson, was not present and could not be located on the prior trial date. The State also contends that the defendant misrepresented the record in claiming that he was prejudiced by the delay because Tiffany O'Neal died, omitting the fact that O'Neal died on April 7, 2000, and the defendant's prior trial date was in December of 2001. Furthermore, the State notes that O'Neal's taped statement was played against the State's objection during the trial. In his reply brief, the defendant in part states that he is not suggesting that O'Neal was available to testify on the prior trial date, and that her untimely death is noted merely to highlight why the State should not be allowed to obtain continuances at its whim.

Louisiana Code of Criminal Procedure article 691 confers on the district attorney the power to dismiss a formal charge, in whole or in part, and provides that leave of court is not needed. La. Code Crim. P. art. 693 expressly provides, subject to narrowly delineated exceptions, that dismissal of a prosecution "is not a bar to a subsequent prosecution ...." A court's resolution of motions to quash in cases where the district attorney entered a *nolle prosequi* and later reinstituted charges should be decided on a case-by-case basis. **State v. Love**, 2000-3347, p. 14 (La. 5/23/03), 847 So.2d 1198, 1209. In those cases "where it is evident that the district attorney is flaunting his authority for reasons that show that he wants to favor the State at the expense of the defendant, such as putting the defendant at risk of losing witnesses, the trial court should grant a motion to quash and an

appellate court can appropriately reverse a ruling denying a motion to quash in such a situation." **Love**, 2000-3347 at p. 14, 847 So.2d at 1209.

In this case, however, there is no indication that the district attorney was flaunting his authority at the expense of the defendant. Rather, the record indicates a *nolle prosequi* was entered because a witness was not present for trial. We find nothing in the record to support a finding that the State dismissed the charge and reinstituted prosecution to obtain a tactical advantage over the defendant. This assignment of error lacks merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.