

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 2193

STATE OF LOUISIANA

VERSUS

DAVID POLKEY

Judgment Rendered: March 26, 2008

On Appeal from the Seventeenth Judicial District Court
In and For the Parish of Lafourche
State of Louisiana
Docket No. 428251

Honorable John E. LeBlanc, Judge Presiding

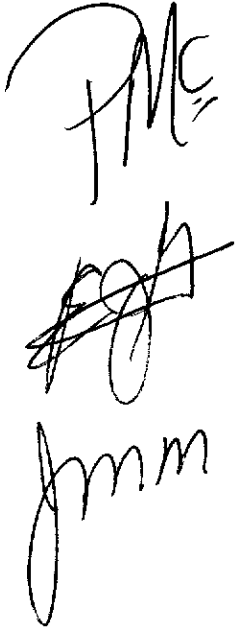
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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.



McCLENDON, J.

Defendant, David Polkey, was charged by grand jury indictment with one count of second degree murder, a violation of LSA-R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. In a joint motion, he moved for a post-verdict judgment of acquittal and for a new trial, but the motion was denied. Defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On February 13, 2006, defendant repeatedly struck the victim, Troy Lawson, with a bat while the victim was inside the home of defendant. The victim suffered a depressed skull fracture during the attack, resulting in his death. Defendant's friends, Sean Patrick Ryan, Joyce Siebers, and Rene Paul Matherne, were present at the time of the attack.

Ryan testified the victim had been at defendant's home the night before the killing. According to Ryan, on the day of the attack, Ryan and Siebers found the victim waiting outside of defendant's home when they arrived there after giving one of Ryan's friends a ride to work. The victim asked for Matherne, stating he "had called him to come over." The victim was calm and not upset or angry. Ryan used a key to let himself, Siebers, and the victim into the house. Ryan indicated he had lived at defendant's house at the end of 2005, still occasionally slept there, and had slept there the previous night. Ryan indicated he had permission from defendant to go into the house.

According to Ryan, once inside the house, he, Siebers, and the victim talked. Defendant arrived a minute or two later and went into the house. He spoke to Siebers, and they went outside briefly, but returned. Matherne then knocked on the back door. The victim and defendant both went to the back door, and then Ryan heard “a scuffle go down.” On a surveillance camera, Ryan saw Matherne “swinging” or “fighting.” Ryan also saw the victim on the floor, and saw defendant hit him with a bat in the shoulder area. Ryan then walked toward the back and as he approached the victim, he saw Matherne kicking the victim. Ryan asked Matherne what was going on, and Matherne and defendant both stated that the victim had raped a girl and stolen \$16,000 from Matherne. Ryan decided to leave and, as he was leaving defendant’s house with Siebers, he saw Matherne going through the victim’s pockets. Ryan asked Matherne what he was doing, and Matherne told Ryan to “shut up and help him.”

According to Ryan, he next saw defendant at William Bruce’s house when they “partied” there later on the date of the attack. Defendant told Ryan that the victim had come to defendant’s house “to take us out.” Defendant told Ryan not to say anything about what had occurred. Ryan and defendant left Bruce’s house together, returned to defendant’s house, and picked up a few things, including the bat defendant had used to beat the victim. At defendant’s request, Ryan threw the bat out of the truck window as defendant and Ryan drove near Allied Shipyard. Ryan never saw the victim with any weapons on the day of the attack.

Ryan indicated that on the night before the attack, he had used crack cocaine, which Matherne had obtained from the victim. Ryan conceded he was aware that the victim wanted money from Matherne for crack cocaine.

Siebers testified she was dating defendant in February of 2006. She testified similarly to Ryan concerning how the victim came to be in defendant's house and added that the victim sat in the living room with her and Ryan "having a good conversation." She indicated defendant arrived almost immediately thereafter. She saw defendant with a hammer and asked him what he was going to do. Defendant stated he was "going to beat the f-- - out of [the victim]." In response to further inquiry by Siebers, defendant claimed that the victim had raped "a chick and cheated somebody out of dope money." Defendant stated that he was looking for a ball bat. Siebers told defendant she had a bat in her car and gave him her car keys. However, because defendant could not unlock Siebers's vehicle, Siebers went outside, removed the bat from her vehicle, and placed it on the back fender of defendant's truck. Defendant put the bat in the sleeve of his jacket and took it into his house. According to Siebers, after Matherne knocked on the back door, the victim walked to the back door followed by defendant. The victim told Siebers and Ryan "good-bye" before leaving the living room and did not appear to be mad. Siebers saw the victim shake hands with Matherne on the surveillance camera, and then saw scuffling and heard a pop and a thump. She then saw Matherne pushing the victim back into the house. Siebers subsequently saw Matherne searching the victim's vehicle. She indicated defendant approached her later that day at William Bruce's house and told her not to tell anyone or the police what had happened and that "other guys" that knew the victim would be coming to "kill us."

Siebers conceded she used cocaine at a party at defendant's house on the night before the attack, and that Matherne had obtained the cocaine from the victim. She claimed she did not know that Matherne owed the victim money for the cocaine.

Matherne testified that on February 13, 2006, he walked back to defendant's house and sat in defendant's truck after defendant had dropped him off at a store. Matherne stated that at that time the victim had been his roommate for two or three weeks. Matherne decided to go into defendant's house, but claimed as he approached the door he saw the victim inside the house, holding the back of his head. Defendant was beating the victim with a baseball bat. The victim had his back turned to defendant during the attack. Matherne did not see the victim with a weapon. Matherne conceded that he kicked the victim, but claimed he only kicked the victim between his ankles and his knees to see if he was still alive. Defendant told Matherne to "get the mother f----- out of my house," and Matherne and defendant put the victim in his own car. Matherne then drove the car to a garage approximately three blocks away where he abandoned the victim and his car. Matherne testified that he began walking toward the store when defendant picked him up and told him, "I beat the f----- ni--er" Matherne denied being in fear of the victim and denied telling defendant that the victim was "out to get [Matherne]." He also denied going through the victim's pockets.

When initially questioned concerning the victim's death, defendant denied any involvement, stating, "I did not kill no f----- ni--er. I didn't even hit one." Thereafter, he conceded the victim was at his house, but denied any involvement in his death. Subsequently, he conceded he hit the victim in the head with a bat, but claimed he did so only to protect Matherne. Defendant claimed the victim came to the house to collect a debt owed by Matherne, and Matherne hid in defendant's truck because he was afraid of the victim. Defendant stated the first thing he said to the victim in defendant's house was, "[W]hat is going on, man? What is happening?"

Defendant claimed he struck the victim with the bat after the victim began fighting with Matherne.

JURY INSTRUCTION

In his sole assignment of error, defendant argues the trial court erred in refusing to charge the jury on justifiable homicide as provided by LSA-R.S. 14:20(4)(a).

Louisiana Code of Criminal Procedure art. 807 provides:

The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.

A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

Prior to closing argument, the defense submitted a special jury charge to the trial court, and requested that the jury be instructed, “that a homicide is justifiable when committed by a person lawfully inside a dwelling against a person who has made an unlawful entry into the dwelling and the person committing the homicide reasonably believes that the use of deadly force is necessary to compel the intruder to leave the premises,” and that “the homicide shall be justifiable even though the person committing the homicide does not retreat from the encounter.” See LSA-R.S. 14:20(4)(a) (prior to amendment by 2006 La. Acts No. 141, § 1).

The state objected to the proposed special jury charge as misleading. The state argued that only defendant claimed that the victim was uninvited into defendant’s house; the victim had been present in the house the night before with the same people present when he was killed; defendant never

told the victim “you don’t belong here, get out”; defendant never asked the victim to leave; and it was implicit in defendant’s actions that the victim had authority to be in the house.

The trial court refused the proposed special jury charge, holding:

In reviewing the evidence and the testimony of the witnesses, including that of the defendant, and the circumstances, the Court really has no evidence for which to base this charge or proposed charge on. There is no indication from any witness, including the defendant, that the victim was unlawfully inside the dwelling, which is the first prong of the charge. Because he was certainly invited in by, as testified to by everyone, the persons who entered the home first, which are Ms. Siebers, ... Mr. Ryan. Approximately at the same time the defendant arrived and entered the house and in his own words said, what’s up? That is not exactly an indication to anyone that they are unlawfully present in the home or that he expected them to leave or that he reasonably could be considered to have believed that the use of deadly force was necessary to prevent [the victim] from entering the home or compelling [the victim] to leave. I just don’t think that I can charge the jury with an absence of factual basis, and therefore, I deny the use of that charge.

The trial court correctly refused the proposed special jury charge. The proposed jury charge was not pertinent because the testimony and other evidence at trial did not indicate that the victim had made an unlawful entry into defendant’s home.

Moreover, even assuming *arguendo*, that the trial court erred in refusing to give the proposed jury charge, any such error was harmless. The refusal to give a requested special charge does not warrant the reversal of a conviction unless it prejudices substantial rights of the accused. See LSA-Cr.P. art. 921; **State v. Domino**, 97-0261, p. 7 (La.App. 1 Cir. 2/20/98), 708 So.2d 1143, 1147. In its closing argument, the defense repeatedly argued that defendant was protecting his home when he killed the victim. Further, the defense stated:

Ladies and gentlemen, the other part of R.S. 14:30 [sic] that [the state] didn’t read to you says that a homicide is

justifiable when it's committed by a person lawfully inside his dwelling against a person who made an unlawful entry, and [the victim] did not get [defendant's] permission to come in the house. That was clear from everybody. He came in on his own. He wasn't let in by the owner of that house. And the person committing the homicide reasonably believes that the use of deadly force is necessary to prevent the entry or to compel the intruder to leave. And that homicide is justified even though the person committing it doesn't retreat.

Under these circumstances, the substance of the proposed special jury charge was clearly placed before the jury by the defense closing argument and, even if the charge was erroneously refused, defendant was not prejudiced thereby. See Domino, 97-0261 at p. 7, 708 So.2d at 1147. Accordingly, this assignment of error is without merit.

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

CONVICTION AND SENTENCE AFFIRMED.