

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 2273

STATE OF LOUISIANA

VERSUS

ANDREW JAMES FRANK

JAW
BJ
RJ

Judgment Rendered: September 10, 2010

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 505,710

Honorable George J. Larke, Jr., Judge

* * * * *

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, Andrew James Frank, was charged by bill of information with one count of unauthorized entry of an inhabited dwelling, a violation of La. R.S. 14:62.3. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The trial court sentenced the defendant to six years imprisonment at hard labor. The defendant now appeals, urging the following assignments of error:

1. The trial court erred in denying the defendant's objection to a jury instruction on flight of the defendant.
2. The trial court erred in denying the defendant's motion to include a jury instruction on justification and the burden of proof in justification.

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

FACTS

On April 7, 2008, Gregory Gobert, of the Terrebonne Parish Sheriff's Office, was dispatched to the home of Neal and Jennifer Goulas in Schriever, Louisiana, to investigate a burglary in progress. As he arrived in the area near the residence, Gobert observed an individual who matched the description of the perpetrator walking towards him. As Gobert approached him, the defendant waived his arms to flag Gobert down. Gobert stopped and the defendant advised him that he had just entered a residence without authorization. The defendant asked Gobert to escort him back to the residence in question so that he could apologize to the occupants. Gobert then transported the defendant to the Goulases' residence. Neal and Jennifer both identified the defendant as the individual who entered their residence without permission, before being forced back out.

At the trial of this matter, Jennifer Goulas testified she was outside washing her vehicle on the date in question when she observed the defendant "peeking" at

her from around the vehicle. The defendant, who initially was in a stationary position, asked Jennifer, "[w]hat's the matter, girl. What's the matter." Frightened, Jennifer ran, screaming, towards the door of her home. The defendant ran behind Jennifer and eventually grabbed her arm and attempted to pull her back towards him. Jennifer ran into her home and the defendant followed closely behind. Inside the residence, the defendant was met by Jennifer's husband, Neal. Neal pushed the defendant back out of the residence, locked the door, and the couple contacted the police.

Jennifer further testified that as she was on the phone with the police dispatcher, she looked out the window and observed the defendant making hand gestures (which appeared to suggest he wanted to fight) toward the residence. The defendant eventually left the area.

Neal testified and corroborated Jennifer's account of the events. Neal testified he was inside watching television on the date in question when Jennifer came running inside screaming. The defendant was running behind Jennifer and followed her into the residence. Neal forcefully ejected the defendant from the residence and locked the door. According to Neal, the defendant did not immediately leave the area. Instead, he remained outside and made aggressive gestures towards the Goulases' residence. Neal testified the defendant eventually walked away.

Jamie Louque, the Goulases' neighbor, testified that she personally observed Jennifer outside washing her vehicle on the date in question. Jamie also observed the defendant approach Jennifer and pushed her into her house. The defendant exited the residence shortly thereafter, but he did not immediately leave the area. The defendant approached Jamie's residence and asked for some water. When Jamie refused to provide the water, the defendant paced back and forth on the side of the road before he walked away from the area.

Jennifer, Neal, and Jamie all denied seeing or hearing a dog in the area during or immediately after the incident. Jennifer and Jamie both testified that, while outside, they were conscious of their surroundings and would have noticed if there had been a dog in the area.

The defendant, in his trial testimony, provided a different account of the events. The defendant did not deny entering the Goulases' residence, however, he claimed he did so only because he was being chased by a "Pit Bull" dog. The defendant claimed he had been driving in the area on the day in question when he observed a vehicle for sale on the side of the road. He exited his vehicle and went over to inspect the vehicle for sale. Shortly thereafter, a black dog approached and began to chase him. The defendant claimed he ran toward the nearby Goulases' residence because he noticed that the door was opened. According to the defendant, Jennifer was standing in the doorway of the residence holding a baby; she was not outside washing a vehicle. The defendant testified he desperately entered the residence, accidentally bumping into Jennifer as he entered, to avoid the impending attack.

While on the stand, the defendant was also questioned regarding his criminal history. The defendant admitted that he had prior felony convictions for simple rape, battery of a corrections officer, and forgery, as well as a few misdemeanor convictions.

As corroboration for the defendant's version of the events, the defense presented testimony from Larry Randolph, Sr. Randolph, an acquaintance of the defendant, testified that he was driving in the area on the date in question when he saw the defendant being chased by a black Pit Bull. Randolph claimed that by the time he turned around and went back, he no longer saw the defendant or the dog in the area. Randolph further testified that he saw the defendant's vehicle parked on the side of the road.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant contends the trial court erred in including, over his objection, an instruction on flight in its final charge to the jury. The defendant argues that the instruction on flight should not have been included because it was not supported by the evidence.

At the charge conference, prior to the delivery of the jury charge, the defendant objected to the inclusion of an instruction on flight. The trial court overruled the defendant's objection and the jury instructions included the following:

If you find that the defendant fled immediately after a crime was committed or after he was accused of a crime, flight alone is not sufficient to prove that he is guilty. However, flight may be considered in light of all of the other evidence. You must decide whether such flight was due to consciousness of guilt or to other reasons unrelated to guilt.

The ruling of the trial court on an objection to a portion of its charge to the jury will not be disturbed unless the disputed portion, when considered in connection with the remainder of the charge, is shown to be both erroneous and prejudicial. **State v. Butler**, 563 So.2d 976, 988 (La. App. 1st Cir.), writ denied, 567 So.2d 609 (La. 1990). If there is testimony of flight after the crime was committed and the jury charge regarding flight is brief when considered in connection with the remainder of the charge, the instruction is neither erroneous nor prejudicial. **State v. Bell**, 97-896 (La. App. 5th Cir. 10/14/98), 721 So.2d 38, 41, writs denied, 98-2875 & 98-2890 (La. 3/12/99), 738 So.2d 1085.

In the instant case, there was no evidence of flight by the defendant after the offense was committed. In fact, the evidence was to the contrary. Each of the witnesses called by the State testified that the defendant did not immediately leave the area. He stayed around, gesturing, pacing, and asking for water, before eventually walking away from the area. The defendant likewise testified that he

did not flee. The testimony of Gobert, the investigating officer, further established that the defendant was still present in the area when he arrived in response to the dispatch. The defendant did not run or otherwise attempt to flee when he saw Gobert. Instead, he flagged Gobert down and asked to be returned to the Goulases' residence. Because there was absolutely no evidence of flight in this case, the inclusion of the instruction at issue was clearly in error.

Nevertheless, some erroneous jury instructions are subject to harmless error review. See State v. Jynes, 94-745, pp. 14-15 (La. App. 5th Cir. 3/1/95), 652 So.2d 91, 98. The appropriate standard for determining harmless error is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in the instant trial was surely unattributable to the error. State v. James, 95-566, pp. 6-7 (La. App. 5th Cir. 11/28/95), 665 So.2d 581, 584 (citing Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)). As previously noted, the testimony presented at the trial in this case clearly established that the defendant remained in the area after the commission of the offense. Thus, flight by the defendant was not an issue at the trial. Since it was clear that the defendant did not flee, we find the instruction on the inferences allowed to be drawn from evidence of flight could not possibly have led to any confusion by the jury and did not, in any way, prejudice the defense. The guilty verdict rendered in this case reflects that the jury rejected the defendant's claim that he never ran behind Jennifer and that a dog chased him into the Goulases' residence. The jury accepted the account of the events presented by the State's witnesses. Based on the record before us, we find that the guilty verdict in this case was amply supported by the testimony of the State's witnesses and was surely unattributable to the disputed portion of the jury charge. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant contends the trial court erred in failing to include a jury instruction on the law of justification in the court's final charges to the jury. At trial, the defendant claimed his conduct in entering the Goulases' home was justifiable because he was being chased by a dog. Thus, he argued the jury should have been instructed on the law of justification regarding the circumstances of his entry. In support of his argument for inclusion of the instruction, the defendant relied on La. R.S. 14:18(6), which provides as follows:

The fact that an offender's conduct is justifiable, although otherwise criminal, shall constitute a defense to prosecution for any crime based on that conduct. This defense of justification can be claimed under the following circumstances:

. . . .

(6) When any crime, except murder, is committed through the compulsion of threats by another of death or great bodily harm, and the offender reasonably believes the person making the threats is present and would immediately carry out the threats if the crime were not committed; ...

It is the duty of the trial judge to give a requested charge, which does not require qualification, limitation, or explanation and is not included in the general charge or another special charge, if it is wholly correct and pertinent to the case. La. C.Cr.P. art. 807. This is a corollary of the trial judge's basic obligation to charge the jury as to the law applicable to the case, under which he is required to cover every phase of the case supported by the evidence whether accepted by him as true. La. C.Cr.P. art. 802. It follows from these rules that the trial judge is required to charge the jury, in response to an otherwise proper request, as to the law applicable to any theory of defense which a jury could reasonably infer from the evidence. **State v. Marse**, 365 So.2d 1319, 1323 (La. 1978).

In the instant case, the theory of defense was that the defendant only entered the Goulases' residence without authorization because he was being chased by a

vicious dog and he feared for his life. In denying the defendant's request to include a justification instruction, the trial court ruled that the justification statute (La. R.S. 14:18) applied to compulsion by another individual, not an animal. We find no error in the trial court's refusal to give an instruction on justification. As the trial court noted, and the clear and unambiguous language of the statute provides, the justification defense provided in La. R.S. 14:18(6) is available only when there are threats by "another" and the "person" making the threats is present and would carry out the threats. See La. R.S. 14:18(6). The defense does not extend to impending danger by animals. The trial court did not err in excluding this instruction. This assignment of error lacks merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.