

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1068

STATE OF LOUISIANA

VERSUS

JOSEPH BROWN

Judgment Rendered: November 2, 2007

On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 04-04-0373

Honorable Richard D. Anderson, Judge Presiding

Hon. Doug Moreau
District Attorney
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

By: Dylan C. Alge
Assistant District Attorney

Frederick Kroenke
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Joseph Brown

BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

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McCLENDON, J.

Defendant, Joseph Brown, was charged by bill of information with attempted first degree murder (Count 1), a violation of LSA-R.S. 14:27 and 30; aggravated burglary (Count 2), a violation of LSA-R.S. 14:60; attempted armed robbery (Count 3), a violation of LSA-R.S. 14:27 and 64; and possession of a firearm after having been convicted of a felony (Count 4), a violation of LSA-R.S. 14:95.1. Defendant entered a plea of not guilty to all charges.

The state subsequently dismissed the charge of attempted first degree murder (Count 1) and defendant proceeded to trial before a jury. The jury determined defendant was guilty as charged. The state instituted habitual offender proceedings against defendant. Following a hearing, the trial court adjudicated defendant a second felony habitual offender on Count 3. The trial court sentenced defendant to serve thirty years at hard labor for his aggravated burglary conviction (Count 2); fifteen years at hard labor without benefit of probation, parole, or suspension of sentence and a \$1,000.00 fine for the felon in possession of a firearm conviction (Count 4); and seventy years at hard labor without benefit of probation, parole, or suspension of sentence on the attempted armed robbery conviction (Count 3). The sentences are to be served concurrently with each other.

The trial court denied defendant's motion to reconsider sentence. Defendant has appealed, urging three assignments of error. We affirm the convictions, habitual offender adjudication and the sentences.

FACTS

A few days before October 22, 2003, Torry Brown (no relation to defendant) moved into a residence located on Topeka Street in Baton Rouge. Prior to this time, Brown had been hospitalized at Touro Medical Center in

New Orleans after being paralyzed as the result of an accident. When Brown arrived in Baton Rouge, Joseph Franklin, a long-time friend, was living with him in order to provide him with assistance.

On October 22, 2003, Eric Hughes, a cousin of Brown's, arrived from Georgia to stay with Brown in order to assist him. That night, Hughes went to sleep in the rear bedroom of the residence, while Brown and Franklin each went to sleep on separate sofas in the living room in the front of the house.

After everyone had gone to bed, Brown heard a "couple little pecks" at the door, but did not attempt to answer the door because it would have taken him more than fifteen minutes to get off the sofa and into his wheelchair. Franklin got up, turned on the light in the living room and answered the door. At that time, four to five men rushed through the door of the residence. According to Brown, all of the men were black males dressed in dark clothing with bandanas covering their faces, and each had some type of weapon.

Brown testified that two of the men threw him to the floor. While Brown and Franklin were held at gunpoint by two of the men, at least two others proceeded through the house. The men were demanding drugs and money.

Hughes was awakened when two of the men entered the bedroom, and at least one had a gun drawn. According to Hughes, he was pulled out of bed and held at gunpoint as the men demanded drugs and money. According to Hughes and Brown, there were no drugs or money in the

residence.¹ One of the men shot Hughes in the neck and all of the men began to leave.

As the men were leaving, Franklin called out “Joe Joe” to one of the men who had been holding him and Brown at gunpoint in the front of the residence. After hearing this, the gunman pulled his bandana off his face, which allowed Brown to observe his face clearly, and said a few words to Franklin. Brown could not hear what the gunman told Franklin.

After the men left, Franklin contacted 911. Hughes was transported to a hospital and Sergeant Tillmon Cox of the Baton Rouge City Police Department interviewed Brown and Franklin. Brown and Franklin were able to provide descriptions of the men. According to Brown, he was able to observe and describe some of the weapons carried by the gunmen, which included a chrome weapon, a shotgun, and an assault rifle.

By January 2004, the police had developed defendant as a suspect. On January 16, 2004, Sergeant Cox contacted Brown in order to show him two photographic lineups that included two persons of interest. Accompanied by Detective George Caldwell, Sergeant Cox met with Brown.

Brown could not identify anyone he recognized in the first photographic lineup, but when shown the second lineup, identified defendant as being one of the men who invaded his home when his cousin was shot. Brown also identified defendant in court as one of the men who entered his residence and held him at gunpoint. According to Brown, defendant was the man who pulled his bandana down after Franklin addressed him as “Joe Joe.”

On January 17, 2004, in an unrelated investigation, Officer Brian Higginbotham of the Baton Rouge City Police pulled over an older-model

¹ Franklin was murdered several weeks following this incident.

Cadillac that had left from a residence under surveillance on Nicholson Drive. Officer Higginbotham had been contacted by his supervisor that the Cadillac was moving toward his position. After following the Cadillac, Officer Higginbotham observed that the passenger was not wearing a seatbelt. As the Cadillac proceeded north on Nicholson Drive, it began to enter the entrance of the Mississippi River Bridge. Officer Higginbotham activated the lights on his unit and directed the Cadillac to stop at the first exit in Port Allen on the west bank of the river.

Once the Cadillac was stopped, Officer Higginbotham approached the driver and requested his driver's license, vehicle registration, and proof of insurance. The driver, who was defendant, informed Officer Higginbotham that he had none of the requested information. The other man in the car was later identified as Michael Allen. Officer Higginbotham then asked defendant if there were any weapons or contraband in the vehicle and defendant responded there were not. Officer Higginbotham asked defendant if he could check the vehicle to make sure and defendant agreed.

While searching the vehicle, Officer Higginbotham recovered a handgun, later identified as a Smith & Wesson .40 cal., under the liner of the trunk of the vehicle.² The weapon, which was loaded, was seized.

Subsequent testing by the State Police Crime Lab identified the two cartridges and one bullet recovered from the October 22, 2003 incident at Brown's Topeka Street residence as being fired from this weapon.

Michelle Pate, defendant's mother, testified at trial. Pate acknowledged that in 2004 she owned a 1992 Fleetwood made by Cadillac. At that time, as many as ten relatives had access and use of her vehicle,

² Following his arrest, defendant executed an affidavit stating that Allen was in the vehicle with him and had no knowledge of the weapon.

including defendant. Pate denied she put the weapon in the trunk of her vehicle. Pate further admitted that defendant was called “Joe Joe.”

Defendant did not testify at trial.

ADMISSION OF PHOTOGRAPH OF DEFENDANT

In his first assignment of error, defendant argues the trial court erred in denying his Motion in Limine to Exclude Photograph and his subsequent objection to the introduction of the photograph.

The photograph at issue is a picture of defendant holding a gun. Defendant filed a motion in limine seeking to prevent the state from introducing this photograph because the prejudicial effect of the photograph outweighed any probative value. Defense counsel argued the photograph depicted defendant holding a firearm in a manner that could be described as “gang related.” Defendant acknowledged that the state was not going to describe his client’s hand gestures or his posture as being gang related, but that jury members could still recognize this posture for what it may be. Defense counsel contended that this photograph would unfairly prejudice his client because he would be portrayed as “menacing” and a threat to the average citizen, which could lead the jury to conclude defendant was guilty because he was a bad person. Defense counsel also contended that the absence of identifying information about the gun in the photograph or any information describing when the photograph was taken would further create unfair prejudice.

The state argued that the photograph of defendant was probative because it reinforced defendant’s connection to the crimes. Specifically, the photograph showed defendant holding a gun consistent in all respects with the gun found in the vehicle he was driving, and that same gun had been matched by ballistics as the weapon fired at the Topeka Street crime scene.

The state argued defendant's concerns were issues affecting how much weight a jury would give the evidence, rather than a question of admissibility of the evidence. Noting that it had seen the photograph in chambers, the trial court denied the motion in limine.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or waste of time. LSA-C.E. art. 403.

Photographs which illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place or thing depicted, are generally admissible, provided the probative value outweighs any prejudicial effect. **State v. Hebert**, 96-1884, p. 16 (La.App. 1 Cir. 6/20/97), 697 So.2d 1040, 1049, writ denied, 97-1892 (La. 12/19/97), 706 So.2d 450. The trial court's admission of photographs will be overturned on appeal only if the prejudicial effect of the photographs clearly outweighs their probative value. No error will be found unless some aspect of the photographic evidence overwhelms the jurors' sense of reason and leads them to convict defendant without sufficient other evidence. See State v. Hebert, 96-1884 at p. 16, 697 So.2d at 1049.

When executing a search warrant for an unrelated crime at 1812 Nicholson Drive, the police seized the photograph in question. Said photograph depicted defendant holding a gun similar to the gun used during the Topeka Street incident and to the weapon previously recovered from the trunk of the vehicle he was driving. Subsequent ballistics testing revealed

this weapon was the same weapon used to fire the cartridges recovered from the scene of the instant offenses. Clearly, the photograph is relevant in that it reinforces defendant's connection to the instant crimes.

Moreover, the weapon in the photograph resembles the weapon seized from the trunk of the vehicle defendant was driving, which was used in the Topeka Street incident. Defense counsel pointed out through cross-examination of witnesses that there was no way to tell when the photograph was taken. The possibility that the weapon in the photograph may not have been the weapon used in the instant crimes was certainly argued before the jury; however, the fact that the weapon in the photograph is clearly consistent with the weapon seized from defendant makes the probative value of the photograph outweigh any unfair prejudice to defendant.

Out of an abundance of caution, we note that even if the admission of the photograph was unfairly prejudicial, it is subject to harmless-error analysis. See State v. Leonard, 05-1382, pp. 12-13 (La. 6/16/06), 932 So.2d 660, 668-69. An error is harmless if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error. State v. Leger, 05-0011, p. 40 (La. 7/10/06), 936 So.2d 108, 140, cert. denied, ___ U.S. ___, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007); see also LSA-C.Cr.P. art. 921.

Defendant was identified by one of the victims of the home invasion, Torry Brown. Brown identified defendant as one of the men who entered his home and held him at gunpoint demanding drugs and money. Brown was able to observe defendant's entire face after Franklin addressed defendant as "Joe Joe" and defendant removed his bandana. Defendant's own mother admitted that her son was referred to as "Joe Joe." Further, Brown also identified defendant in court, despite defendant's change in

appearance at the time of trial. Brown acknowledged that at the time of the incident, defendant had longer, braided hair, was thinner and not wearing glasses, but stated that he would “never forget” defendant’s face. Finally, the gun seized from the vehicle defendant was driving matched the weapon used in the Topeka Street incident.

Considering the foregoing, we find the guilty verdicts in this case were surely unattributable to any erroneous admission of the photograph in question. This assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, defendant contends that his seventy-year sentence on Count 3 is excessive. In support of his assignment of error, defendant argues that the only evidence against him was his identification by a witness charged with serious weapons and drug offenses, whose trial testimony was inconsistent with what he told the police at the crime scene, and that the vehicle he was driving when the weapon was seized was used by numerous other people. Defendant does not contest his sentences on Counts 2 and 4.

Article 1, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant’s constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one’s sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the

sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Albarado**, 03-2504, p. 3 (La.App. 1 Cir. 6/25/04), 878 So.2d 849, 850-51, writ denied, 04-2231 (La. 1/28/05), 893 So.2d 70.

Defendant was adjudicated as a second felony habitual offender on the basis of his conviction for attempted armed robbery arising out of the Topeka Street incident and a previous conviction for simple robbery. As a second felony offender, defendant was eligible to receive a sentence of slightly longer than twenty-four and a half years to ninety-nine years imprisonment for his enhanced conviction, and was so notified by the trial court. LSA-R.S. 15:529.1(A)(1)(a); 14:64(B); and 14:27(D)(3).

The trial court subsequently sentenced defendant to a term of seventy years imprisonment for his enhanced conviction of attempted armed robbery. In his reasons for sentence, the trial court noted that defendant had expressed no remorse for his conduct. The trial court also noted that defendant's family had frequently gone to Torry Brown's mother's residence in order to influence Torry Brown not to testify. The trial court also considered defendant's extensive juvenile and adult criminal history and noted defendant's history involved many crimes against the person. Finally, the trial court noted the pre-sentence investigation report characterized defendant as an "extreme threat" to society and recommended maximum sentences.

The facts of this case provide no support for defendant's argument. Defendant, accompanied by at least three other armed individuals, invaded the home of Torry Brown, a paraplegic, in search of drugs and money. In the course of this invasion, the occupants were held at gunpoint and one was even shot in the neck. Finally, we note that despite the heinous nature of

these crimes, defendant did not receive the maximum sentence for which he was eligible. Accordingly, we do not find the sentence imposed to be excessive.

This assignment of error is without merit.

**CONVICTIONS, HABITUAL OFFENDER ADJUDICATION,
AND SENTENCES AFFIRMED.**