

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0863

STATE OF LOUISIANA

VERSUS

VERNON L. KENNEDY

Judgment rendered December 21, 2011.

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 11-09-0714
Honorable Anthony J. Marabella, Judge

HON. HILLAR C. MOORE, III
DISTRICT ATTORNEY
JEANNE ROUGEAU
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MANDEVILLE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
VERNON L. KENNEDY

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Welch Jr. Dismissed with reasons

PETTIGREW, J.

Defendant, Vernon Kennedy, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1. Following a jury trial, defendant was found guilty as charged. He was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. Defendant now appeals, alleging three assignments of error. For the following reasons, we affirm the conviction and sentence.

FACTS

On September 18, 1985, Tina Kristynik's nude body was discovered in a bedroom inside Kristynik's home. An autopsy revealed that Kristynik died from a loss of oxygen to her brain caused by multiple contusions and head injuries, and by a swelling of her brain likely caused by strangulation, as evidenced by ligature marks on her neck.

Jon McConnell testified at trial that in the late night hours of September 17, 1985, or the early morning hours of September 18, 1985, he met Kristynik for the first time at a local bar in Livingston, Louisiana. McConnell stated that Kristynik later invited McConnell, his brother, and coworkers to follow her and her friend, Nancy Percle, to another local bar. According to McConnell, he left the second bar with Kristynik and Percle to purchase cocaine, which the three then snorted at Kristynik's home shortly thereafter. Kristynik then brought McConnell back to the second bar to meet his brother and coworkers. At Kristynik's request, McConnell chose not to leave with his brother and coworkers but rather, to stay out with her and to visit another local bar. Kristynik and McConnell stayed at this bar only briefly, and they left the bar to return to Kristynik's house, where the two had sex. McConnell testified that he was unable to ejaculate during sex, so he and Kristynik went to sleep.

McConnell stated that he awoke to Kristynik's alarm clock shortly after 5:30 a.m. to find that Kristynik was no longer in bed with him. McConnell spoke briefly with Percle, who was sleeping on a couch in Kristynik's living room, about whether she would be able to give him a ride to work, but she was unable to drive a vehicle with a standard shift. McConnell was able to contact his employer through his father, and he

arranged to be picked up from Kristynik's house. McConnell testified that he left Kristynik's home without seeing Kristynik anywhere in it, but he stated that he had not searched throughout the house before leaving.

Later in September, McConnell was informed by his father that Baton Rouge detectives wanted to speak to him regarding their investigation of Kristynik's murder. McConnell gave a voluntary statement to detectives, and he was subsequently ruled out as a suspect.

Jerry Callahan, a retired detective of the Baton Rouge Police Department, testified at trial that he investigated Kristynik's murder. During his investigation, Callahan interviewed numerous witnesses, including McConnell. Callahan testified that Kristynik's body was recovered from a bedroom other than the one in which McConnell testified he had slept. Callahan stated that the evidence at the crime scene indicated to him that an attack on Kristynik originated in a bathroom adjacent to the bedroom in which her body was found. Further, it was Callahan's opinion that Kristynik was dragged from an area near her initial attack to the point where her body was discovered in the middle of the bedroom. Finally, Callahan testified that the detectives recovered a steam iron from the kitchen area of Kristynik's home that was, at the time, identified as a possible murder weapon. Callahan stated that this steam iron was ultimately not connected to Kristynik's murder as a part of his investigation.

Michael Vaughn, a current employee of the Louisiana Department Public Safety and Corrections, testified at trial that on September 18, 1985 he became involved in the investigation of Kristynik's murder as a detective in the homicide division of the Baton Rouge Police Department. During the course of his investigation, Vaughn obtained Kristynik's address book from her mother. Defendant's name appeared in the address book, so Vaughn contacted defendant and arranged to interview him on September 30, 1985. At this interview, defendant signed a waiver of rights form. Vaughn testified that defendant stated during this interview that he had known Kristynik for about three months, that he had only been to her house one time, and that the last time he saw her was on September 8, 1985 at a bar in Prairieville.

Dr. Deborah Cavalier testified at defendant's trial as an expert in anatomical and clinical pathology. On September 19, 1985, Dr. Cavalier performed the autopsy on Kristynik. She testified that she observed lesions on Kristynik's scalp as well as some injuries to Kristynik's hands that appeared to be defensive in nature. Dr. Cavalier concluded that Kristynik's death was caused by a loss of oxygen to her brain caused by multiple contusions and head injuries, and by a swelling of her brain likely caused by strangulation, as evidenced by ligature marks on her neck. Dr. Cavalier also observed dried semen on the inside of Kristynik's legs, so she took swabs of Kristynik's vagina and anus, which revealed the presence of sperm. Dr. Cavalier was then shown a close-up photograph of Kristynik's vagina taken by crime scene technician David Floyd as part of his documentation of the scene. Dr. Cavalier testified that the photo depicted a white, thick substance, appearing to be semen, which was partially exuding or coming out of the entrance to Kristynik's vagina. Dr. Cavalier offered her opinion that Kristynik's body had not moved after the semen was left in her vagina. This opinion was based upon the appearance of lividity in Kristynik's buttocks and Dr. Cavalier's conclusion that the semen would have run down Kristynik's legs had she been in a different position and then died lying down on the carpet. Dr. Cavalier also stated that the fresh and moist appearance of the semen at the time of the picture would indicate to her that the semen could not have been deposited on September 8, 1985.

Jackie Hohensee, a latent fingerprint examiner for the Louisiana State Police Crime Lab, testified at trial as an expert in latent fingerprint identification. Hohensee testified that she tested the evidence collected from Kristynik's home and matched several fingerprints to Kristynik, Maureen Harrington (Kristynik's roommate), McConnell, and Percle. McConnell's fingerprints were found on a glass coffee table in the living room and on a beer bottle in the southwest bedroom, which was where he testified he slept. Hohensee was unable to identify palm prints left on the steam iron and a piece of broken mirror. Hohensee did not testify that she matched defendant's fingerprints to any evidence collected from the scene.

Julia Naylor Kirk of the Louisiana State Police Crime Lab testified at trial as an expert in the area of forensic DNA analysis. Kirk testified that in 2006, DNA taken from the sperm fraction of Kristynik's vaginal swab was found to be consistent with DNA taken from a buccal swab of defendant for eleven of thirteen core loci tested. Kirk stated that the two unmatched loci were attributable to the fact that the DNA from the sperm fraction of Kristynik's vaginal swab had produced results below her lab's threshold for reporting, causing her to record "no result" for these loci. Kirk testified that in the event the results from one of these loci came back below her lab's threshold, but with data that excluded defendant as a contributor, that information would have been included in her report. Kirk testified that, based on the results of the comparison of defendant's DNA to the sperm fraction taken from Kristynik's vaginal swab, the FBI's database placed the probability of the DNA evidence matching someone else in the population at 1 in 464 billion. Defendant's DNA was also compared to DNA taken from sperm cells found on a shirt that had been collected near Kristynik's body. Statistical analysis on the results of this test placed the probability of the DNA evidence matching someone else in the population at 1 in 1.4 million. Kirk matched McConnell's DNA to a profile obtained from a cigarette butt found in Kristynik's kitchen. Kirk also tested the steam iron that was collected from the scene for blood and hair evidence, but she was unable to detect any blood, and the hair she found on the iron was not able to be genetically tested.

Dr. Ronald Acton, a retired director of the Immunogenetics DNA Diagnostics Laboratory and current adjunct professor at the University of Alabama-Birmingham, testified on behalf of the defense as an expert in the field of DNA analysis. Dr. Acton testified that it would be possible for the two alleles reported as "no result" to exclude defendant as the source of the semen found in Kristynik's vagina if they were able to be detected. Dr. Acton also testified that, in his opinion, the results from the anal swab taken from Kristynik indicated a mixture of DNA that would make the test inconclusive about whether defendant could have been a source. On cross-examination, Dr. Acton stated that he did not perform any retesting of any DNA material as part of his

participation in this case, but he did state that he would have ordered retesting in the event he had been in charge of the lab.

After deliberating, the jury found defendant guilty of second degree murder by an 11 to 1 vote.

ASSIGNMENTS OF ERROR NOS. 1 AND 2

In his first and second assignments of error, defendant alleges that there was insufficient evidence to support his second degree murder conviction and that the trial court erred in denying his motion for post verdict judgment of acquittal for the same reason. Specifically, defendant argues that the State only definitively proved that defendant had sex with Kristynik, but that it failed to prove beyond a reasonable doubt that defendant killed her.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The **Jackson** standard of review, incorporated in La. Code Crim. P. art. 821(B), 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. See **State v. Montecino**, 2004-0892, pp. 5-6 (La. App. 1 Cir. 2/11/05), 906 So.2d 450, 453, writ denied, 2005-0717 (La. 6/3/05), 903 So.2d 456. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **State v. Montecino**, 2004-0892 at 6, 906 So.2d at 453.

In 1985, second degree murder was defined as follows:

Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

La. R.S. 14:30.1, as amended by 1979 La. Acts No. 74, § 1.

In 1985, aggravated rape was defined, in pertinent part, as follows:

A. Aggravated rape is a rape committed where the anal or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) Where the victim resists the act to the utmost, but whose resistance is overcome by force.

(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) Where the victim is prevented from resisting the act because the offender is armed with a dangerous weapon. . . .

La. R.S. 14:42(A), as amended by 1984 La. Acts. No. 579, § 1.

In the present case, defendant's conviction is based solely on circumstantial evidence. Viewing the evidence in the light most favorable to the prosecution, the record reflects the State established the following:

Defendant had been acquainted with Kristynik for at least three months, and his name appeared in her address book. Additionally, defendant had been to Kristynik's house at least one time prior to the night of her death.

In the early morning hours of September 18, 1985, McConnell and Kristynik engaged in sexual intercourse, but McConnell was unable to ejaculate. McConnell went to sleep in Kristynik's bedroom and woke up around 5:30 a.m. to find that Kristynik was no longer in her bed and not present in the living area of the house.

Later in the day on September 18, 1985, Kristynik's body was found in a bedroom other than her own. Blood evidence indicates that Kristynik was first attacked

in a bathroom adjacent to the bedroom in which she was found and then dragged to her final position in the middle of the floor. Kristynik died from a combination of wounds to her head and strangulation. Dr. Cavalier testified that, based on the appearance of the semen in Kristynik's vagina, the semen had been freshly deposited, and it could not have been deposited on September 8, 1985, the day defendant told detectives he had last seen Kristynik. Dr. Cavalier further stated that Kristynik's body had not moved since the semen was deposited, as evidenced by the location of the semen in the vagina combined with the lividity that had set in on Kristynik's body.

Finally, Kirk testified that the probability of someone else's DNA other than defendant matching the DNA extracted from the sperm fraction of Kristynik's vaginal swab was 1 in 464 billion. Further, the probability of someone else's DNA other than defendant matching the DNA extracted from sperm found on a shirt near Kristynik's body was 1 in 1.4 million.

Defendant did not testify at trial. Defendant's counsel argued in closing that the steam iron was the murder weapon and that it was used to kill Kristynik by someone who had left the unidentified palm print on it. In circumstantial evidence cases, this court does not determine whether another possible hypothesis suggested by defendant could afford an exculpatory explanation of events. Rather, the issue before this court is whether, evaluating the evidence in the light most favorable to the prosecution, the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. **State v. Davis**, 92-1623, p. 11 (La. 5/23/94), 637 So.2d 1012, 1020, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d. 359 (1994).

In reviewing this case, we note that the jury obviously concluded that defendant attacked Kristynik near a bathroom in her home, dragged her into the middle of an adjacent bedroom, raped her by overcoming her resistance with force, and then killed her, leaving her body in the location where the rape occurred. We further note that the facts in this case established a material misrepresentation by defendant to police. In his statement to detectives, defendant claimed that he had not seen Kristynik since

September 8, 1985, but a fresh sample of his semen was found in Kristynik's vagina following her death on September 18, 1985. A finding of purposeful misrepresentation reasonably raises the inference of a "guilty mind," as in the case of flight following an offense or the case of material misrepresentation of facts following an offense. Lying has been recognized as indicative of an awareness of wrongdoing. **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984). Here, the jury clearly rejected defendant's theory of non-participation in Kristynik's murder. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Viewing the evidence in the light most favorable to the prosecution, we find the State established defendant killed Kristynik while he was engaged in the perpetration of an aggravated rape upon her. In carrying its burden of proof, the State also negated any hypothesis of innocence urged by defendant, including the claim that Kristynik was killed by someone else who wielded the steam iron as the murder weapon.

Thus, we find the evidence sufficiently supports defendant's conviction of second degree murder.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 3

In assignment of error number three, defendant argues that in light of recent jurisprudence, La. Code Crim. P. art. 782(A) (providing for jury verdicts of 10 to 2 in cases in which punishment is necessarily confinement at hard labor) violates the Sixth and Fourteenth Amendments of the United States Constitution. Thus, the defendant contends that the 11 to 1 jury verdict in his case was unconstitutional.

The State, citing Louisiana and federal jurisprudence, contends that this issue is well-settled and that the Louisiana and United States Supreme Courts have held that a non-unanimous jury verdict does not violate the Constitution.

Under the statute in effect at the time of this offense, the punishment for second degree murder is confinement for life at hard labor without the possibility of parole, probation, or suspension of sentence. See La. R.S. 14:30.1, as amended by 1979 La. Acts No. 74, § 1. Louisiana Constitution Article I, § 17(A) and La. Code Crim. P art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885, pp. 15-16 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 164-165.

The defendant suggests that **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and **Jones v. U.S.**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), which emphasize the necessity of a unanimous verdict, "implicitly overrule the prior anomalous holding in **Apodaca**, and must be taken account of by this Court." This argument has been repeatedly rejected by this court. See **State v. Smith**, 2006-0820, pp. 23-24 (La. App. 1 Cir. 12/28/06), 952 So.2d 1, 15-16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352; **State v. Caples**, 2005-2517, pp. 15-16 (La. App. 1 Cir. 6/9/06), 938 So.2d 147, 156-157, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684. Moreover, our supreme court has affirmed the constitutionality of Article 782. See **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738. The **Bertrand** court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. **Bertrand**, 2008-2215 at 8, 6 So.3d at 743.

This assignment of error is without merit.

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

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

NUMBER 2011 KA 0863

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STATE OF LOUISIANA

WELCH, J., dissenting.

Jew

I respectfully disagree with the majority's decision this matter. Reviewing all evidence in the record before us, in the light most favorable to the prosecution, I do not believe that the circumstantial evidence excludes every reasonable hypothesis of innocence. Therefore, I would reverse the defendant's conviction and sentence. See **State v. Montecino**, 2004-0892 (La. App. 1st Cir. 2/11/05), 906 So.2d 450, 453, writ denied, 2005-0717 (La. 6/3/05), 903 So.2d 456.

Thus, I respectfully dissent.