NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1307

STATE OF LOUISIANA

VERSUS

THOMAS CHARLES HOFFELE

Judgment Rendered: FEB 0 9 2007

Appealed from the
Thirty-Second Judicial District Court
in and for the Parish of Terrebonne, State of Louisiana

Trial Court Number 402,805

Honorable John R. Walker, Judge Presiding

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BEFORE: CARTER, C. J., WHIPPLE AND McDONALD, JJ.

Carter, C.J. Concurs (by jmm)

WHIPPLE, J.

The defendant, Thomas Charles Hoffele, was charged by grand jury indictment with one count of simple robbery, a violation of LSA-R.S. 14:65, and pled not guilty. Following a jury trial, he was found guilty as charged. He moved for a new trial, but the motion was denied. He was sentenced to five years at hard labor. He now appeals, contending in two assignments of error that the trial court erred: (1) in allowing evidence of the death of the victim after an altercation he had with two other men, and (2) in overruling the defendant's objection to the State's special jury instructions. Finding no merit to these assignments, we affirm the defendant's conviction and sentence.

FACTS

On November 1, 2002, the victim, Johnnie Dawkins, and two of his friends from Mississippi, William Bragg and Terry Doss, traveled to a fishing camp in Cocodrie, Louisiana, belonging to Bragg's in-laws. During the evening, the men decided to go to the Harbor Lights bar. At the bar, the victim began playing pool with the defendant. During one of the pool games, the victim touched the defendant's girlfriend on her buttocks. Words were exchanged between the victim and the defendant over the incident, but the men continued playing pool. At approximately 10:30 p.m., Bragg and Doss asked the victim to leave with them because Bragg was not feeling well. The victim declined to leave, indicating he wanted to continue playing pool.

An argument subsequently ensued between the victim and the defendant about the victim paying the defendant some money after losing a pool game against him. The defendant left the bar and waited outside for the victim. Thereafter, the victim was forced out of the bar by the bar owner. Calvin "T-Cal" Vergin, another patron, was also angry because of the victim's refusal to pay the defendant and because of Vergin's belief that the victim had been "starting trouble" with Vergin's wife.

According to the testimony of Joshua Jude Lyons, Vergin and the defendant confronted the victim outside of the bar. Vergin punched the victim, and then the defendant punched the victim. The victim fell to the ground and the defendant began kicking him in the ribs, stating, "Give me my effing money. Give me my effing money." The victim stood up and handed the defendant ten dollars. The defendant told the crowd of approximately twenty people, "I got my money. I got my money." Vergin put his arm around the victim and told him, "When you come down here, you pay your bets." The victim began walking away, but cursed Vergin. Vergin ran after the victim and punched him at least twice more.

Jeremy Foret, his wife Monique, and the defendant's girlfriend, Kaiann Pierron, were with the defendant at the bar on the night in question. According to the testimony of Foret, after the victim was asked to leave the bar, Vergin began shouting at him that the victim "was going to pay the money." Foret testified that Vergin punched the victim, and that the defendant then approached the victim, punched him, and demanded money. The victim fell to the ground and the defendant again demanded money. The victim handed the defendant some money, and the defendant told the crowd to leave the victim alone because the defendant had the money. The victim began walking away, and Vergin told him, "when you come down here, you're going to pay your damn money[,]" and punched the victim. The victim fell to the ground, but then stood up. Vergin tried to punch him again, but missed. Vergin then punched and hit the victim, and the victim hit his head on the cement. As the victim tried to sit up, Nicholas Pierron kicked him in the face.

Early on the morning of November 2, 2002, the defendant made a statement concerning the offense. He indicated the victim owed him $7.50 after losing a wager on a pool game, but refused to pay because he had been buying the defendant drinks. The defendant was told to leave the bar. He left the bar, but waited outside for the victim. The defendant claimed that when the victim was forced out of the bar, he

yelled and screamed at the victim that he wanted "his" money, but the victim began walking away. Vergin and some other men followed the victim. According to the defendant, he ran after the victim, telling him he wanted the defendant's money and "didn't want bullshit[.]" The victim told the defendant to "go f--- [him]self[.]" The defendant punched the victim in the mouth, knocking the victim to the ground. The victim stood up and handed the defendant $10.00. The defendant claimed he told the crowd to "leave it alone" and not to do anything stupid. He claimed he then walked away. He surrendered to the police when he heard they were looking for him.

The victim died as a result of the beating he suffered outside of the bar. Vergin and Pierron were separately prosecuted for his death. Vergin pled guilty to manslaughter and Pierron was convicted of murder.[1]

OTHER CRIMES EVIDENCE

In assignment of error number 1, the defendant argues the trial court erred in accepting the State's argument that the beating of the victim by Vergin and Pierron was res gestae and allowing the introduction of evidence concerning the victim's death from the ensuing altercation.

Relevant evidence is 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. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. LSA-C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by

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[1]The record in the instant case does not reflect the grade of homicide.

considerations of undue delay, or waste of time. LSA-C.E. art. 403.

Louisiana Code of Evidence article 404 provides, in pertinent part:

> **B. Other crimes, wrongs, or acts.** (1) Except as provided in Article 412 [inapplicable here], evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. However, LSA-C.E. art. 404(B)(1) authorizes the admission of evidence of other crimes, wrongs, or acts when the evidence "relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." In State v. Brewington, 601 So. 2d 656 (La. 1992) (per curiam), the Louisiana Supreme Court indicated its approval of the admission of other crimes evidence, under this portion of LSA-C.E. art. 404(B)(1), "when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it." 601 So. 2d at 657.

The res gestae doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances. State v. Taylor, 2001-1638, pp. 10-11 (La. 1/14/03), 838 So. 2d 729, 741, cert. denied, 540 U.S. 1103, 124 S. Ct. 1036, 157 L. Ed. 2d 886 (2004).

Further, the res gestae doctrine incorporates a rule of narrative completeness by which, "the prosecution may fairly seek to place its evidence before the jurors, as

much as to tell a story of guiltiness as to support an inference of guilt, to convince the jurors a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." Taylor, 2001-1638 at pp. 12-13, 838 So. 2d at 743 (quoting Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)).

Prior to trial, the defense moved for the exclusion at trial of any evidence pertaining to the death, or the actions which caused the death, of the victim. The defense argued the probative value of the referenced evidence would be outweighed by the prejudicial effect of the evidence. The State argued that the circumstances surrounding the victim's death formed an integral part of the act that was the subject of the charge against the defendant, and that without the evidence, the State would not be able to present a cohesive and complete picture of what happened. The State also argued that the jury was entitled to know the victim was unavailable to testify, not because of an unrelated death, but because of what happened after he left the bar. The trial court denied the motion in limine. The court felt that due to the circumstances, the charged offense and the events which followed were all "part and parcel" of one event. The court also noted that in the trial of Nicholas Pierron, a witness who did not testify at the instant trial testified that the defendant, rather than Pierron, had caused the death of the victim.

The trial court correctly denied the motion in limine. At the outset, we note that the prohibition set forth in LSA-C.E. art. 404(B) applies to "other crimes" committed by the defendant. Thus, it was inapplicable to the evidence that the victim was beaten by Vergin and Pierron. Likewise, the res gestae exception, codified in LSA-C.E. art. 404(B)(1), is inapplicable for the same reason. Thus, the issue is whether the evidence of the victim's death at the hands of others following the incident with defendant was relevant and, if so, whether its probative value outweighed the danger of unfair prejudice, confusion of the issues, being

misleading, or undue delay. See State v. Lewis, 2000-80, p. 16 (La. App. 5th Cir 5/30/00), 764 So. 2d 164, 172, writ denied, 2000-2081 (La. 9/28/01), 797 So. 2d 683. On review, we find the evidence was both probative and relevant, and was properly considered by the jury.

The evidence that the victim was beaten by Vergin and Pierron had some tendency to make the existence of whether the victim surrendered his money to the defendant as a result of intimidation more probable or less probable than it would be without the evidence, and thus, was relevant.

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. The evidence of the victim's ultimate death at the hands of Vergin and Pierron was highly probative under the State's theory of the case. The State's theory at trial was that the defendant used force and intimidation to take $10.00 from the victim. Evidence at trial indicated the victim refused to give the defendant any money inside the bar and only surrendered his money to the defendant after being physically assaulted by Vergin and the defendant, outside the bar. The State argued the defendant used force and intimidation, specifically the victim's fear of what Vergin and the other members of the hostile group would do to him if he refused to surrender his money to the defendant, to complete the robbery of the defendant. The defense claimed the incident was "just two drunk guys fighting in a bar over a pool game." The taking of money from the victim by the defendant was part of a pattern of assault and intimidation against the victim that began when he refused to pay the money the defendant claimed the victim owed him and ended with the victim's ultimate death at the hands of Vergin and Pierron.

Further, any purported prejudice to the defendant from the evidence was mitigated by evidence: that Vergin and/or Pierron, but not the defendant, struck the

fatal blow to the victim; that the defendant tried to calm the crowd hostile to the victim after the victim surrendered his money; and that the defendant had withdrawn from the crowd at the time of the victim's death.

This assignment of error is without merit.

JURY CHARGES

In assignment of error number 2, the defendant argues the State failed to produce any legal authority for the proposition stated in the first special jury instruction, and thus, it was error for the trial court to read the instruction to the jury. The defendant also argues it was error for the trial court to read the second special jury instruction to the jury because the burden of proof is different in civil and criminal matters.

Prior to the beginning of trial, the State submitted two special written charges for the jury. The first special jury charge was as follows:

> The presence of a debt actually owed or a defendant's subjective belief that a debt is owed is not a defense to the act of robbery.
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> See State v. Sockwell, 337 So.2d 451([La.] 1976); See also State v. Gibson, 550 So.2d 263 (La.App. 4[th] Cir.[] 1989)[, writ denied, 586 So.2d 529 (La. 1991).]

The second special jury charge was as follows:

> Under Louisiana law a gambling debt is not a legally enforceable debt.
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> [LSA-C.C. Art.] 2983
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> The law grants no action for the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing.
>
> And as to such games, the judge may reject the demand, when the sum appears to him excessive.

Following a hearing, the trial court overruled the defense objections to the special jury charges and subsequently read them to the jury. The court's general charge included the law on the burden of proof in criminal trials.

The Sockwell case, 337 So. 2d at 452, involved a conviction for armed robbery. The defendant robbed the victim of $29.00 at gunpoint. Sockwell, 337 So. 2d at 453. After the victim identified the defendant as the robber, the defendant stated, "Why don't you tell them that you owed me money. You owed me $20.00[.]" Id. Although the court did not directly address whether a debt was actually owed or whether the defendant's subjective belief that a debt was owed was a legally permissible defense to the charge, the court did affirm the conviction and sentence of 150 years, while noting the defense to the charge was that the victim owed the defendant $20.00. Sockwell, 337 So. 2d at 454-55.

The Gibson case, 550 So. 2d at 263, involved a conviction for simple robbery. The defendant and the victim worked for the same employer, and the victim was the defendant's supervisor. Id. The victim testified the defendant demanded money, hit him, kicked him to the ground, stomped on him, and took $25.00 from his shirt pocket and a silver ring from his finger. Id. The defense was that the victim was responsible for distributing the defendant's pay to him and had cheated the defendant. Gibson, 550 So. 2d at 264. The court addressed the sufficiency of the evidence and affirmed the conviction and sentence. Gibson, 550 So. 2d at 264-65.

Here, we find no abuse of discretion in the reading of the special jury charges to the jury. They required no qualification, limitation, or explanation and were wholly correct and pertinent. Therefore, the district court was obligated to give the jury instructions. See LSA-C.Cr.P. art. 807.

This assignment of error is without merit.

NOTICE OF PRESCRIPTIVE PERIOD FOR POST-CONVICTION RELIEF

The defendant also complains the trial court failed to advise him of the prescriptive period for filing for post-conviction relief.

As the issue has been raised herein, the defendant apparently has notice of the limitation period and/or has an attorney who is in the position to provide him with such notice. Although we have done so in the past, we decline to remand for the trial court to provide such notice. Instead, out of an abundance of caution and in the interest of judicial economy, we note that LSA-C.Cr.P. art. 930.8(A) generally provides that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of LSA-C.Cr.P. arts. 914 or 922. See State v. Godbolt, 2006-0609, pp. 7-8 (La. App. 1st Cir. 11/3/06), ___ So. 2d ___.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.