

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 2423

STATE OF LOUISIANA

VS.

LARRY LEWIS, JR.

JUDGMENT RENDERED: JUNE 8, 2007

ON APPEAL FROM THE
EIGHTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 70,970, DIVISION A
PARISH OF POINTE COUPEE, STATE OF LOUISIANA

HONORABLE JAMES J. BEST, JUDGE

RICHARD J. WARD
DISTRICT ATTORNEY
ELIZABETH A. ENGOLIO
PLAQUEMINE, LA

ATTORNEY FOR APPELLEE
STATE OF LOUISIANA

FRANK SLOAN
MANDEVILLE, LA

ATTORNEY FOR DEFENDANT/APPELLANT
LARRY LEWIS, JR.

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

Handwritten signature and initials in the left margin, possibly reading 'JMM' and 'AW'.

MCDONALD, J.

The defendant, Larry Lewis, Jr., was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. The defendant pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant filed a motion for new trial, which was denied. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals designating one assignment of error. We affirm the conviction and sentence.

FACTS

On August 1, 2004, at about 6:30 p.m., in New Roads, Pointe Coupee Parish, the defendant began driving his car behind the car of Darrell Victorian, the victim. The defendant had at least two passengers in his car. Victorian's passenger was Mark Webb. In what appeared to be a high-speed chase, the defendant followed Victorian to Fir Street, where Victorian lived. Victorian exited his car and tried to run to his house. Before Victorian could get to his house, the defendant shot Victorian in the back, killing him.¹

Two eyewitnesses to the shooting testified at the trial. Krystal Carter, who knew the defendant, testified that Victorian ran and fell on the ground. The defendant stood over Victorian and shot him. The defendant said, "How you feel now, N-----, how you feel now. Your life's flashing before your eyes, how you feel now?" Carter also testified that the defendant was wearing a wig, a black hooded sweatshirt, and black pants or shorts that

¹ According to Dr. Alfredo Suarez, the pathologist who autopsied Victorian's body, the cause of death was exsanguination due to a gunshot wound to the back, and the manner of death was homicide. Charles Watson, Jr., a forensic scientist with the Louisiana State Police Crime Lab, testified that the bullet retrieved from Victorian's body was a .38 caliber. Victorian's car had a bullet hole in it, and three spent bullets or bullet fragments were found inside the car. The bullet or fragments from Victorian's car matched the bullet from his body. Webb, who was also shot, was shot with a .45 caliber bullet. It is not clear from the record if Webb was also killed.

went down to the ankle. When he shot Victorian, the defendant was not wearing a cap. Anthony Jackson, the other eyewitness who also knew the defendant, testified that, as the defendant approached Victorian, Victorian said, "Please, Mooney."² The defendant asked Victorian where the money was, and Victorian said he did not have any money. Jackson then saw the defendant shoot Victorian. Jackson testified that the defendant was wearing jeans and a dark-colored shirt. He further testified that he did not notice a wig on the defendant and that the defendant was wearing a white cap.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in refusing to instruct the jury on identification as requested by defense counsel. Specifically, the defendant contends that the trial court should have included in its jury instructions a special jury charge on identification regarding the capacity of an eyewitness to make a reliable observation.

After both parties rested their cases and prior to closing arguments, the jury was excused and the trial court and the parties discussed jury charges. Defense counsel submitted an approximately two-page special jury charge on identification. The State objected on the ground that the trial court's regularly used general charge on identity was sufficient. The trial court found that most of what was in defense counsel's special jury charge was contained in the trial court's jury charge that it had been using for years. In ruling that it would adopt only a particular portion of defense counsel's special jury charge, but would not "overly elaborate" the importance of identification as suggested in defense counsel's special jury charge, the trial court stated:

² The defendant's nickname is "Mooney-Moo."

I think this is gonna be -- I'm going to read my identity on page -- I'm going to add to that what I believe to be something that is not in mine, and I'm going to go to the second to last paragraphs on the first page of the Special Jury Charge requested on behalf of the Defendant, and I'm going to pick up that second to last paragraph, and I'm going to state, and I'm going to tact (sic) this on at the end of mine. I'm going to say -- I changed the beginning of it.

Rather than asking the question, "Are you satisfied", I'm going to say, "You may consider whether the identification made by the witness subsequent to the offense was the product of his own recollection or not. You may take into account both the strength of the identification and the circumstances under which the identification was made, such as whether or not the witness may have been influenced by the circumstances under which the Defendant was presented to him for identification, period."³

I find everything else is in my General Charge, and that - - I'm not going to start off by suggesting, although it is important, but I'm not going to start off with one of the most important issues of the case is identification.⁴ You're certainly welcome to argue that identification is important. Everything else, I've looked, and it's in mine. I'm not going to do, "Finally, you must consider the credibility of each witness," because that is in my General Charge on credibility of witnesses. [Footnotes added.]

The defendant objected to the trial court's ruling.

Louisiana Code of Criminal Procedure article 807 states:

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.

³ The actual charge read to the jury was only slightly modified with no substantive change. The last sentence was changed to: "You may take into account . . . the witness or witnesses may have been influenced by the circumstances under which the witness identified the Defendant."

⁴ The trial court is referring to the first sentence of the proposed special jury instruction: "One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime."

In his brief, the defendant contends, in particular, that the following language from the special charge should have been included in the trial court's general charge: "Finally, you must consider the credibility of each identification witness the same way as any other witness, consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony."⁵ According to the defendant, the charge given by the trial court "was long on the opportunity issue but entirely lacking on the capacity issue."

We do not agree. The trial court's general charge contains three pages devoted exclusively to witness credibility and identification. During its charge on the credibility of witnesses, the trial court stated in pertinent part:

As the sole judges of the credibility of the witnesses, and of the weight their testimony deserves, you should scrutinize, carefully, the testimony given and the circumstances under which the witness or witnesses have testified. In evaluating the testimony of a witness, you may consider his or her ability and opportunity to observe, and to remember the matter about which he or she has testified.

During its charge on identification, the trial court stated in pertinent part:

In appraising identification evidence, you may consider how far or close a witness was, how good the lighting conditions were and whether the witness had occasion to see or to know the person in the past. You may also consider the length of time that elapsed between the occurrence of the crime and the next opportunity of the witness to see the Defendant. . . . You may consider whether or not the identification made by the witness subsequent to the offense was the product of his own recollection or not.

The record reflects that the trial court properly instructed the jury to consider the witness's ability and opportunity to observe in determining the

⁵ The quoted language, contained in defense counsel's special charge, is slightly different as it appears in the defendant's brief because the defendant quotes in his brief the charge language as it appeared in *State v. Williams*, 2001-1398, p. 6 (La. App. 1st Cir. 3/28/02), 815 So.2d 378, 382, writ denied, 2002-1466 (La. 5/9/03), 843 So.2d 388.

credibility of testimony relating to identification. The defendant's requested special charge was sufficiently included in the amended general charge given by the trial court. Thus, the trial court did not err in refusing to give the defendant's entire requested special jury charge. See State v. Ford, 608 So.2d 1058, 1062 (La. App. 1st Cir. 1992).

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.