

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2006 KA 2422**

**STATE OF LOUISIANA**

**VERSUS**

**GEORGE HUGHES**

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**On Appeal from the 19th Judicial District Court  
Parish of East Baton Rouge, Louisiana  
Docket No. 11-04-0609, Section IV  
Honorable Bonnie F. Jackson, Judge Presiding**

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George Hughes**

**BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.**

Judgment rendered **JUN 20 2007**

**PARRO, J.**

The defendant, George Hughes, was charged by grand jury indictment with one count of second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty, and after a trial by jury, was found guilty as charged. The defendant moved for post-verdict judgment of acquittal and for a new trial. The trial court denied both motions. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, urging the following assignments of error:

1. The trial court erred in denying the motion for new trial based on newly discovered evidence.
2. The trial court erred in denying trial counsel's oral motion to continue the motion for new trial.
3. The trial court erred in denying the defendant's motion for post-verdict judgment of acquittal.

We affirm the defendant's conviction and sentence.

**FACTS**

On the night of November 19, 2004, the victim, Drew Hawkins, was fatally injured by a single gunshot wound to the chest during a physical altercation with the defendant. The defendant is the father of Hawkins's live-in girlfriend, Amy Hughes.<sup>1</sup> The defendant never denied that he shot Hawkins. At trial, the defendant testified that while he did, in fact, fire the shot that killed Hawkins, the shooting was not intentional. The defendant claimed the gun accidentally went off when Hawkins grabbed the barrel during a struggle. The gun was recovered from the defendant's vehicle after he gave the arresting officers consent to search it.

**SUFFICIENCY OF THE EVIDENCE**

The defendant argues that the evidence presented by the state failed to prove the requisite element of specific intent to support a finding of guilt of second degree

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<sup>1</sup> The record establishes that the defendant is not Amy's biological father. According to the defendant, he and his wife, Gladys Hughes, served as "therapeutic foster parents" to several children with emotional, physical, and/or mental disabilities. The couple adopted Amy.

murder. Thus, he asserts the trial court erred in denying his motion for post-verdict judgment of acquittal.

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. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, LSA-R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 159.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

Louisiana Revised Statute 14:30.1(A)(1) defines second degree murder, in pertinent part, as "the killing of a human being: [w]hen the offender has a specific intent to kill or to inflict great bodily harm[.]" Thus, to support the conviction for second degree murder the state was required to show: 1) the killing of a human being; and 2) that defendant had the specific intent to kill or inflict great bodily harm. **State v. Morris**, 99-3075 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 918, writ denied, 00-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002).

Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to

follow his act or failure to act. LSA-R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. **State v. Cummings**, 99-3000 (La. App. 1st Cir. 11/3/00), 771 So.2d 874, 876.

The facts and circumstances surrounding the shooting, as established by the testimony and evidence presented at the trial, were as follows:

Amy Hughes is the adopted daughter of the defendant and his wife, Gladys Hughes. She lived in an apartment on Central Woods Avenue in the Central area of East Baton Rouge Parish with Hawkins, her boyfriend of six years.

On the day of the shooting, Amy and her children spent the day with her parents at their residence. Later that night, after Amy made it home, Hawkins arrived at the apartment. A verbal altercation ensued when Amy refused to tell Hawkins where she had been all day. During the altercation, Amy told Hawkins that she was moving and was taking their two-year-old child with her. The altercation eventually resulted in Hawkins locking Amy out of the apartment. Amy went to a neighbor's home and called her parents. The defendant answered, and Amy told her father what was going on. The defendant testified that Amy, crying and hysterical, stated that Hawkins was beating on her again. The defendant instructed Amy to contact the police and told her he would come over. Amy explained that she did not want to call the police. She told her father she would call him back. After a while, the defendant called Amy back. No one answered the telephone. The defendant called back again. During this call, the defendant and Hawkins engaged in a verbal altercation which ended in the defendant telling Hawkins he was going to come over there and "kick his ass."

The defendant left home and headed to Amy's apartment. Before leaving, the defendant armed himself with a .22 caliber handgun. Upon arriving at the apartment complex, the defendant claimed he observed Hawkins forcibly grab his grandchild from Amy. The defendant testified that this really upset him, so he exited the vehicle and headed towards Hawkins. The gun was in his back pocket. The defendant again told Hawkins he was going to "kick his ass." According to the defendant, Hawkins then threw the ten-month-old baby in the back seat of Hawkins's vehicle. The defendant

"flew at him" and a struggle ensued. The defendant testified that he struck Hawkins three times and then "threw an elbow." He explained that he wanted to hurt Hawkins "like he hurt Amy and the baby." He was tired of Hawkins beating on Amy.

The defendant further testified that once he hit Hawkins with his elbow, Hawkins staggered back and stated, "no more, no more." The gun was still in the defendant's right, back pocket. The defendant claimed that when he turned and instructed Amy to go get her children, Hawkins observed the gun in his pocket. Hawkins then yelled, "He's got a gun; God, He's got a gun." According to the defendant, Hawkins began screaming for help and moving towards him. The defendant thought Hawkins was under the influence of drugs based upon his actions. The defendant claimed he calmly reached back and pulled the gun out of his pocket with his right hand. He then told Hawkins that he did not need the gun to beat him. He told Hawkins he was going to lay the gun on the truck. The defendant claimed he then turned to go put the weapon aside and Hawkins grabbed for the gun. Hawkins's hand landed partially on the barrel of the gun and he began jerking it, trying to take it away from the defendant. He then told the defendant, "go head and shoot me," and he pulled the gun real hard. Hawkins's right hand slipped off of the gun and hit his chest. The defendant testified he stumbled forward and Hawkins fell forward towards the defendant, at which point the gun hit Hawkins's chest and the gun went off.

The state presented eyewitness testimony, including that of the defendant's own daughter, Amy, to contradict the defendant's claim of an accidental shooting. In her testimony, Amy admitted that she telephoned her father on the night in question. She stated that she told him that she and Hawkins were arguing and she was locked outside and did not know what to do. Amy further testified that the defendant and Hawkins later were involved in a verbal altercation over the telephone. Amy denied telling the defendant that she and Hawkins were involved in a physical altercation or that Hawkins was beating her.

Later, when Amy called back to her parents' house, her mother told her that the defendant was on his way to Amy's apartment and he had his gun with him. Shortly thereafter, the defendant arrived in the area. Hawkins, who Amy claimed had just left

to take the baby for a ride to calm her, turned around and returned to the apartment once he saw the defendant's vehicle. According to Amy, Hawkins was attempting to remove the baby from her car seat when the defendant approached. He and Hawkins began exchanging words. They both continued to threaten to fight one another. Hawkins was still holding the baby. When Amy asked Hawkins to give the baby to her, he refused. Amy grabbed the baby and Hawkins "kind of nudged [her] back a little." At this point, the verbal encounter between the defendant and Hawkins began to escalate and eventually turned physical. According to Amy, the defendant began slapping Hawkins in the face. Amy denied seeing Hawkins swing at or strike the defendant. At some point during the altercation, the defendant stopped and lifted his shirt up exposing the gun he had stored on the left side of his pants. The defendant then pulled the gun out with his right hand and Hawkins yelled for help. With his hands raised up, Hawkins began backing away as the defendant continued to hit him. The defendant then pointed the gun at Hawkins and fired. Amy testified that she personally observed the defendant point the gun directly at Hawkins and fire the fatal shot. Hawkins fell to the ground and the defendant stood there with a strange look on his face. After the shooting, the defendant then stated, "I told you you were going to die tonight, boy." Amy denied ever turning her back on the men during the fight. Amy admitted that she told the police that her back was turned when the gun went off, but she explained she was hysterical and upset at the time. She stated that her account of the events as presented in her trial testimony was accurate.

Sandra Allen testified that she witnessed the altercation, albeit from a distance, from her apartment across the street. Allen stated she observed the two men (the defendant and Hawkins) arguing and pushing each other. Shortly thereafter, she observed Hawkins backing away with his hands up. Then, a gunshot was fired. Hawkins fell to the ground and the defendant got into his truck and left. Allen admitted that in her written statement to the police after the incident she indicated that she was inside her residence when she heard the gunshot. Allen explained that this was inaccurate. She testified that she was, in fact, outside when the men were arguing and the shot was fired. She stated that there was no argument after the shot was fired.

Allen stated that she must have transposed the events when providing her written statement.

Dr. Gilbert Corrigan testified that an autopsy revealed that the victim died as a result of a contact gunshot wound to the chest. Corrigan explained that the trajectory of the bullet was consistent with either a struggle or with the victim being bent over. There was no trauma noted to the victim's hands. Toxicology examination revealed the presence of Oxycodone and Diazepam in Hawkins's blood.

Julie Bergen, a fingerprint analyst, testified that she analyzed two latent prints collected from the barrel of the gun. The prints were unable to be matched. Bergen explained that one of the prints did not have ridge detail and the other was of insufficient quality or clarity to include or exclude anyone.

The jury in this case heard different accounts of the events leading up to the shooting from Amy, Allen, and the defendant, himself. While Amy and Allen's testimony suggest that the defendant intentionally shot the victim, the defendant denied that the shooting was intentional. The jury obviously chose to accept the facts as presented by the state's witnesses. As a trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. On appeal, this court will not assess the credibility of the witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Pooler**, 96-1794 (La. App. 1st Cir. 5/9/97), 696 So.2d 22, 58, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288.

In denying the motion for post-verdict judgment of acquittal, the trial court found that there was sufficient indication of an intentional shooting in this case. The court specifically noted the fact that the defendant pulled out a gun during the confrontation, he fired the gun at close range, and the shot was fired after he and Hawkins broke apart after the struggle. The court further noted that the downward trajectory of the bullet does not necessarily mean that there was an accidental shooting during a struggle. The court noted it was conceivable that the path of the bullet was

possibly explained by the fact that the victim may not have yet assumed the fully upright position.

Regarding the inconsistencies in Amy's trial testimony (she saw the defendant fire the fatal shot) and her recorded statement at the time of the offense (her back was turned when she heard the shot), the court noted that Amy never wavered in the fact that her father shot the victim. The court explained that based upon the fact that Amy's statement was more complete at the time of trial, the jury was allowed to infer that this was because she was initially interested in protecting her father to some extent. Considering the evidence as a whole, the trial court concluded the jury was justified in inferring from the circumstances that the defendant possessed specific intent to kill Hawkins.

After a careful review of the record, we find that the evidence supports the trial court's ruling. Having viewed all of the evidence in a light most favorable to the prosecution, any rational fact finder could have concluded that the state proved second degree murder beyond a reasonable doubt, to the exclusion of every reasonable hypothesis of innocence, including a claim of accidental shooting. Thus, the trial court did not err in denying the defendant's motion for post-verdict judgment of acquittal.

This assignment of error lacks merit.

**DENIAL OF MOTION FOR A NEW TRIAL /**  
**DENIAL OF MOTION TO CONTINUE**

The defendant contends the trial court erred in declining to consider his motion for a new trial based upon newly discovered evidence.<sup>2</sup> The defendant further contends the trial court abused its discretion in failing to grant his oral motion for a recess during the hearing on the motion for a new trial.

In reviewing the defendant's motion for new trial, we note the motion was based on four grounds: 1) the verdict was contrary to the law and evidence, 2) a ruling during the proceedings showed prejudicial error, 3) the defendant discovered new and

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<sup>2</sup> In his brief, the defendant argues the trial court erred in denying his motion for new trial based upon newly discovered evidence. However, the record reflects the trial court did not deny the motion on this ground. Instead, the trial court declined to consider this ground because it did not comply with the statute. The trial court considered and denied the motion for a new trial on the other three grounds urged. The defendant does not challenge the trial court's ruling denying the motion on these grounds.



material evidence that would have changed the outcome of the trial, and 4) the ends of justice would be served by granting a new trial.

The record in this case reflects that the defendant was convicted on June 9, 2006. Thereafter, the matter was set for sentencing on August 9, 2006. On the morning of the scheduled sentencing date, counsel for the defendant filed motions for a new trial and for post-verdict judgment of acquittal. On motion of the defense, hearings on these motions were continued until September 15, 2006. When the motions came for hearing on September 15, 2006, the state objected to the motion for new trial insofar as it was based upon newly discovered evidence. The state argued that the evidence the defense sought to introduce was not evidence that could not have been discovered before or during the trial. The state also argued that the newly discovered evidence portion of the motion did not comply with the requirements of LSA-Cr.P. art. 854, because it did not contain a concise statement of the facts to be established by the testimony of the named witnesses. Finding that the newly discovered evidence portion of the motion contained only a conclusory statement, the trial court declined to consider the motion for new trial on this ground. Counsel for the defendant asked for permission to amend the affidavit to cure the defect. The trial court denied the request. The trial court advised defense counsel to seek review of the ruling in this court. The court stated: "If the First Circuit says you can cure it, then you'll cure it, but I'm going to deny you the opportunity to present this evidence because you have not followed the requirements of law." Thereafter, counsel asked for a continuance of the hearing to allow for the motion to be amended. The trial court denied the motion, reasoning that the hearing had already been continued by the defense on a previous occasion. The trial court also denied defense counsel's request to proffer the evidence. Following the trial court's ruling on the motion for post-verdict judgment of acquittal and the remaining grounds for a new trial, defense counsel requested that he be allowed to seek a writ of review as to the trial court's denial of the motion to continue, so as to cure defects in the newly discovered evidence ground for the motion. The trial court allowed the defense until Monday, September 18, 2006, to

perfect a writ application with this court. Sentencing was continued to September 18, 2006.

On September 18, 2006, instead of perfecting a writ application to this court, defense counsel filed a second motion for a new trial, based upon newly discovered evidence, in the trial court. This motion contained a more concise statement of the facts. In a footnote in this motion, counsel explained that, despite his previous request for permission to file a writ, he chose to file a second motion for new trial since a motion for new trial based on newly discovered evidence can be made up to one year after conviction. Prior to proceeding with the sentencing, the trial court entertained the defense's argument on the second motion. The court maintained its ruling declining to consider the motion for new trial based upon newly discovered evidence and reasoned as follows:

Well, Mr. Collier, on Friday we entertained your motion for new trial to the extent that the court would not allow you to call witnesses when your allegations – when your pleading did not conform to 853.<sup>3</sup> You gave no statement of what the witnesses would testify about. You did not file the affidavit as required in 853. There was (sic) some other grounds that I allowed you to argue that did not necessitate the calling of witnesses, and I denied the motion for new trial. I gave you until this morning at ten o'clock to perfect your writ application. You elected not to do that. You elected instead to file an additional motion for a new trial. 856 says a motion for new trial shall urge all grounds known and available to the defendant at the time of the filing of the motion. It says that the court may permit the defendant to supplement his original motion by urging additional grounds, or may permit the defendant to file an additional motion for new trial prior to the court's ruling on the motion. I have already ruled on the motion. I ruled on it last Friday. I did not allow you to go forward to call any witnesses because your motion did not conform with 853, so I'm not going to entertain an additional motion for new trial. However, if the First Circuit's interpretation of 856 will allow you to urge a motion for new trial then this court will obviously follow the dictates of the First Circuit and I will hear your motion for new trial if the First Circuit tells me that I was in error not to allow you to either file the motion this morning under the standards of 853 or allow you to amend it on Friday before we took it up. But at this juncture I'm not inclined to allow you to file an additional motion for new trial... .

Louisiana Code of Criminal Procedure article 851 provides, in pertinent part:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

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<sup>3</sup> Although the reference is to LSA-C.Cr.P. art. 853, we believe LSA-C.Cr.P. art. 854 is the applicable provision that the court was discussing.

The court, on motion of the defendant, shall grant a new trial whenever:

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(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

The granting or denial of a motion for continuance rests within the sound discretion of the trial court, and its ruling shall not be disturbed on appeal absent a showing of a clear abuse of discretion. **State v. Castleberry**, 98-1388 (La. 4/13/99), 758 So.2d 749, 755, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999); **State v. Simon**, 607 So.2d 793, 798 (La. App. 1st Cir. 1992), writ denied, 612 So.2d 77 (La. 1993). Whether refusal of a motion for continuance is justified depends on the circumstances of the case. Generally, the denial of a motion for continuance is not reversible absent a showing of specific prejudice. **State v. Strickland**, 94-0025 (La. 11/1/96), 683 So.2d 218, 229.

We find no error or abuse of discretion in the trial court's refusal to consider the defendant's motion for a new trial, based upon newly discovered evidence, that did not comply with LSA-C.Cr.P. art. 854. The trial court was not required to allow the defendant to amend the pleading nor was it required to grant the defendant a recess in order to amend the affidavit. In this connection, we note LSA-C.Cr.P. art. 856 provides:

A motion for a new trial shall urge all grounds known and available to the defendant at the time of the filing of the motion. However, the court **may** permit the defendant to supplement his original motion by urging an additional ground, or may permit the defendant to file an additional motion for a new trial, prior to the court's ruling on the motion. (Emphasis added).

From this language, it is clear that while the trial court has discretion to allow the defendant to supplement his original motion or file an additional motion, the trial court was not required to do so. This is especially so in this case because the defendant was not urging an additional ground, but was merely attempting to comply with the requirements of LSA-C.Cr.P. art. 854 in an untimely manner.

In the instant case, where counsel for the defendant filed the motion for a new trial alleging newly discovered evidence on the date originally set for sentencing and

had the matter continued for over a month, the trial court reasoned that defense counsel had ample opportunity to amend his pleading to conform to LSA-C.Cr.P. art. 854 prior to the continued hearing on the motion. Because the matter was continued by the defense when the motion was initially filed, we find no abuse of discretion in the trial court's refusal to recess the hearing already in progress.

Moreover, after a careful review of the record, including the second motion for a new trial and its accompanying affidavit, we cannot say that the defendant has met all the requisites for the granting of his motion for new trial based upon newly discovered evidence. In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing (1) the new evidence was discovered after trial, (2) the failure to discover the evidence at the time of trial was not caused by lack of diligence, (3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it probably would have produced a different verdict. **State v. Smith**, 96-0961 (La. App. 1st Cir. 6/20/97), 697 So.2d 39, 43. In evaluating whether or not the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another trier of fact might render a different verdict, but whether the new evidence is so material that it should produce a verdict different from that rendered at trial. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 758, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235; **State v. Maize**, 94-0736 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

In the instant case, we do not find that the evidence alleged by the defendant could not have been discovered with the exercise of reasonable diligence before or during the trial. The witnesses listed in the defendant's motion for a new trial were all subpoenaed to testify and/or did testify at the trial. Thus, the exercise of reasonable diligence, which includes questioning each witness regarding every aspect of the case, would have led to the discovery of the "new" evidence alleged by the defendant. A motion for new trial is properly rejected when it is based on evidence which should have, with reasonable diligence, been discovered before or during trial. **State v.**

**Henderson**, 762 So.2d at 759 n. 3. Furthermore, even if the evidence was considered as newly discovered, the defendant failed to establish that the evidence was of such a nature that it would probably have produced a different verdict at a retrial. At trial, the jury was made aware of the fact that Allen's statement at the time of the offense and her trial testimony differed. Allen was examined and cross-examined regarding her statement, which suggested that she might not have been outside when the shot was fired. Also, given Amy's testimony regarding the defendant's actions of pointing the gun directly at the victim and shooting, and his verbal statement clearly evincing his intent to kill, it is unlikely that any additional testimony regarding the discrepancy between Allen's statement to the police and her trial testimony would have produced a different verdict in this case.

These assignments of error lack merit.

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

**CONVICTION AND SENTENCE AFFIRMED.**