

Judgment rendered November 17, 2005.

No. 39,731-KA

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

ROOSEVELT S. GARNER

Appellant

* * * * *

On Rehearing

Originally Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 215,140

Honorable Leon Emanuel, Judge

* * * * *

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Appellant

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Appellee

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Before BROWN, STEWART, GASKINS, DREW and MOORE, JJ.

STEWART, J., dissents for reasons assigned in the original opinion.

MOORE, J., dissents for reasons assigned in his original concurrence.

GASKINS, J.

The defendant, Roosevelt S. Garner, appealed his conviction and sentence for manslaughter. In a written opinion, this court found that the trial court's erroneous jury instruction of self-defense in a nonhomicide substantially prejudiced the defendant's due process rights; the defendant's conviction was reversed and the matter was remanded to the trial court. The State of Louisiana applied for rehearing, contesting this court's decision. We granted rehearing to address this issue. After review, we reverse our prior opinion, affirm the defendant's conviction, amend and, as amended, affirm his sentence.

FACTS

On May 30, 2001, the defendant engaged in a fight with James Marshall. When the police and emergency personnel arrived at the scene, a vacant lot at East 70th and Henderson in Shreveport, they found Marshall unconscious from a head injury. Marshall never regained consciousness, and he died in a nursing home more than six months later.

The police quickly developed the defendant as a suspect. Aware that the authorities were looking for him, the defendant came to the police station several hours after the fight. Although he had no facial injuries, his hands were swollen and there was blood on his clothing. He was transported to the hospital to receive medical treatment; his hands were so swollen that regular handcuffs would not fit.

The defendant was originally charged with aggravated battery because it was believed that a weapon had been used to inflict the victim's injuries. After the police concluded that no weapon was used, the charge was reduced to second degree battery. Following the victim's death, the defendant was charged with manslaughter.

Trial was held in December 2003. Detective Rod Johnson of the Shreveport Police Department testified that he interviewed the defendant in the city jail the night after the incident. The defendant asserted that the victim had hit him first; he then struck the victim three times. According to his statement to the detective, after the victim fell to the ground, the defendant picked him up over his head and dropped him on his face. The defendant's recorded statement was played for the jury.

Officer Traci Mendels testified that she responded to the initial call about the battery. After the defendant was identified as a possible suspect, she went to look for him at two different addresses. Later the defendant contacted Officer Mendels and came to the police station. He was arrested, advised of his rights, and taken to the hospital for medical treatment of his badly swollen hands. While the defendant was in the officer's presence and squad car, his statements were recorded. The videotape of the statements was admitted into evidence.

The state also presented the testimony of Dr. George McCormick, the Caddo Parish coroner. He testified that the autopsy on the victim was actually performed by his former chief deputy coroner, Dr. Stephen Cogswell. At the time of trial, Dr. Cogswell was chief medical examiner for a six-county area in Florida. When Dr. McCormick attempted to testify about the cause of death based upon Dr. Cogswell's autopsy report, the defendant's counsel objected on the basis that the report was not properly authenticated. The trial court sustained the defendant's objection, but afforded the state an opportunity to lay a proper foundation.

Dr. McCormick verified that the autopsy report was a true and accurate copy of the report generated by his office. He also testified about Dr. Cogswell's qualifications as a forensic pathologist to perform autopsies. He stated that he had

spoken to Dr. Cogswell and reviewed the reports himself. Dr. McCormick, who was accepted as an expert in forensic pathology, stated that if a person had been body slammed from over someone's head and landed on his face, that would be consistent with his findings. He testified that he concurred in Dr. Cogswell's conclusion that the victim's death was caused by complications following blunt force injuries to the head and brain, the complication being a small bowel infarction due to his long hospitalization.

When the state sought to introduce into evidence Dr. Cogswell's autopsy report, the defendant reiterated his previous objection about the report's certification. The trial court found that Dr. McCormick, as the coroner, had sufficiently authenticated the autopsy report, and allowed it to be admitted into evidence.

The victim's sister testified that her brother was hospitalized for two months after the beating and was then transferred to a nursing home where he remained unresponsive until his death.

The defendant testified that he sent the victim to the store with \$20 to get him some beer. The victim returned with neither the beer nor the money. The defendant stated that he attempted to walk away from the victim, but the victim attacked him. He became angry and struck the victim back. He asserted that he acted only in self-defense and that he never intended to cause the victim serious harm. The defendant claimed that he lied to the police when he said that he picked up the victim and that he had previous experience boxing. He testified that he was angry, upset and drunk when he talked to the police.

The defense also presented the testimony of Isaac James Putnam, a friend of the defendant who said he witnessed the fight. He corroborated the defendant's account of sending the victim to buy beer and the victim returning empty-handed.

When the defendant attempted to walk away, the victim hit him with a lug wrench. The defendant blocked the blow with his arm and hand, and then struck the victim two or three times. Putnam testified that he did not see the defendant throw the victim over his shoulder and body slam him.

The jury found the defendant guilty as charged. The defendant filed a motion for postverdict judgment of acquittal, asserting that with Dr. McCormick's testimony that a small bowel obstruction was the immediate cause of death and with the fight eyewitness' testimony about self-defense, no rational jury could have found the defendant guilty. The defendant also filed a motion for new trial, asserting the verdict was contrary to the law and evidence. Both motions were denied.

The state filed a habitual offender bill alleging the defendant to be a second felony offender, with the supporting felony being a guilty plea to DWI, Third Offense on April 15, 1994. The defendant filed an objection to the habitual offender bill of information, asserting the DWI, Third Offense is already an enhancement offense, and could not be used to multi-bill the defendant. The trial court found the defendant to be a second felony offender, and sentenced him to 20 years at hard labor, without benefit of probation, parole or suspension of sentence.

The defendant filed a motion for reconsideration of sentence, asserting that the 20-year sentence was cruel and unusual punishment; it was denied.

JURY INSTRUCTION

The defendant argues that the trial court erred in giving the wrong jury instruction on self-defense and that this error confused the jury.

During the jury instruction conference, the state requested that the jury be instructed as to self-defense when it involved a homicide, and the trial court agreed. Unfortunately, the actual self-defense instructions given to the jury pertained to a nonhomicide situation. The instructions generally tracked the language of several of the justification articles in Title 14:

In Louisiana, the law provides for self-defense. The fact that the defendant's conduct is justifiable, although otherwise criminal, shall constitute a defense to prosecution of any crime based upon that conduct. This defense of justification can be claimed when any crime, except murder, is committed through the compulsion of threats by another of death or great bodily harm, and the defendant reasonably believes the person making the threats is present and would immediately carry out the threats if the crime were not committed. [First paragraph of La. R.S. 14:18 & La. R.S. 14:18(6).]

The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person, provided that the force or violence used must be reasonable and apparently necessary to prevent such offense. [Portions of La. R.S. 14:19.]

Justification where a death does not occur is an affirmative defense that the defendant had the burden of establishing by a preponderance of the evidence.

A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should [know] that he desires to withdraw and discontinue the conflict. [La. R.S. 14:21.]

The jury instructions do not include the appropriate language from La. R.S. 14:20 pertaining to justifiable homicide. It provides, in relevant part:

A homicide is justifiable:

(1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.

When self-defense is raised as an issue by the defendant, the state has the burden of proving, beyond a reasonable doubt, that the homicide was not

perpetrated in self-defense. *State v. Cheatham*, 38,413 (La. App. 2d Cir. 6/23/04), 877 So. 2d 164, *writ denied*, 2004-2224 (La. 6/24/05), 904 So. 2d 717; *State v. Dooley*, 38,763 (La. App. 2d Cir. 9/22/04), 882 So. 2d 731, *writ denied*, 2004-2645 (La. 2/18/05), 896 So. 2d 30.

Examination of the record reveals that the defendant did not object to the trial court's delivery of the nonhomicide self-defense instructions in this homicide case or to its failure to give the homicide-related self-defense instructions. The general law is that an error may not be asserted on appeal unless a timely contemporaneous objection is made. La. C. Cr. P. arts. 801, 841(A).

Nevertheless, the jurisprudence has carved out an exception to this rule where such alleged trial errors raise overriding due process considerations. *State v. Gaddis*, 36,661 (La. App. 2d Cir. 3/14/03), 839 So. 2d 1258, *writ denied*, 2003-1275 (La. 5/14/04), 872 So. 2d 519, *cert. denied*, 125 S. Ct. 1649, 161 L. Ed. 2d 487, 73 USLW 3555 (2005); *State v. Lowery*, 33,905 (La. App. 2d Cir. 2/28/01), 781 So. 2d 713, *writ denied*, 2001-1041 (La. 2/22/02), 809 So. 2d 978; *State v. Williamson*, 389 So. 2d 1328 (La. 1980).

The state contends that the jury instructions, read as a whole, reflect that the burden of proof was on the state to prove all of the case. However, if the trial court failed to properly define justifiable homicide, or to specifically denote the state's burden of proof in a case involving a justifiable homicide defense, errors in jury instructions are subject to the harmless error analysis. Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State v. Tate*, 2001-1658 (La. 5/20/03),

851 So. 2d 921, *cert. denied*, 541 U.S. 905, 124 S. Ct. 1604, 158 L. Ed. 2d 248 (2004); *State v. Marse*, 365 So. 2d 1319 (La. 1978).

The record contains little or no evidence to support a justifiable homicide defense. In his statements to the police, the defendant stated that the victim failed to return his money, and, when confronted, hit the defendant in the mouth. The defendant said that he was mad and that the victim “hit the wrong person.” The defendant never mentioned to the police that the victim was armed with a weapon. Even if one accepted that the victim hit the defendant with a tire tool, causing no or minimal injuries, the state proved that the defendant did not reasonably believe he was in imminent danger of losing his life or receiving great bodily harm. The state further established that the defendant’s response – pummeling the victim to the ground, then picking him up, and dropping him on his head – was not necessary to prevent death or great bodily harm to the defendant by the victim. The failure to include the justifiable homicide instruction, while giving the nonhomicide instruction, was harmless error.

This assignment lacks merit.

AUTOPSY REPORT

In his next assignment of error, the defendant argues that he was denied his constitutional right to confrontation when the state presented the testimony of the coroner, instead of the deputy coroner who actually performed the victim’s autopsy, on the issue of cause of death. In support of this position, the defendant cites the recent U.S. Supreme Court case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).¹

¹In *Crawford, supra*, the criminal defendant’s wife had made a taped statement to the police indicating that the crime was not committed in self-defense. The wife did not testify at trial because of the marital privilege. The state introduced her statement after the trial court ruled that it bore “particularized guarantees of trustworthiness.” The U.S. Supreme Court found the state’s use of this statement violated the Confrontation Clause, noting that where testimonial statements are at issue, the only indication of reliability sufficient to satisfy constitutional

A review of the record shows the defendant never raised this issue when Dr. McCormick was testifying. Accordingly, he is not entitled to argue this basis for his objection on appeal. La. C.E. art. 103(A)(1); La. C. Cr. P. art. 841; *State v. Bosley*, 29,253 (La. App. 2d Cir. 4/2/97), 691 So. 2d 347, *writ denied*, 97-1203 (La. 10/17/97), 701 So. 3d 1333. However, even if the defendant were entitled to argue the issue, we find that it would still have no merit.

The Sixth Amendment of the United States Constitution and Article I, § 16, of the Louisiana Constitution guarantee an accused in a criminal prosecution the right to be confronted with the witnesses against him. The primary purpose behind this right is to secure for the defendant the opportunity for cross-examination. *State v. Hotoph*, 99-243 (La. App. 5th Cir. 11/10/99), 750 So. 2d 1036, *writs denied*, 1999-3477 & 2000-0150 (La. 6/30/00), 765 So. 2d 1062, 1066. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *State v. Hotoph, supra*; *State v. Hillard*, 398 So. 2d 1057 (La. 1981).

The defendant's argument overlooks the fact that Dr. McCormick's testimony was not merely repeating Dr. Cogswell's autopsy report, but was his own expert medical opinion as to the fact that the victim was dead and the cause of his death. The defendant fully cross-examined Dr. McCormick as to his own expert opinion about the cause of the victim's death. The defendant has cited no authority to support his argument that the *Crawford* case bars a medical expert from rendering his own opinion, based on a review of medical records done by other doctors and health care providers.

A medical expert's opinion is almost always based on some degree of hearsay, given the fact that numerous other medical personnel and records may be

demands is confrontation.

involved in the treatment of a patient. The issue is not admissibility, but the weight a fact finder gives to this expert testimony, dependent upon the professional's qualifications and experience, and the facts upon which his opinion is based. *Warlick v. Warlick*, 27,389 (La. App. 2d Cir. 9/29/95), 661 So. 2d. 706. A defendant is protected because La. C.E. art. 704 bars an expert from expressing, ". . . an opinion as to the guilt or innocence of the accused." Likewise, La. C. Cr. P. art. 105 provides, "A coroner's report and a procès verbal of an autopsy shall be competent evidence of death and the cause thereof, but not of any other fact." The record does not reflect Dr. McCormick going beyond these restrictions in his testimony about the cause of death.

As previously noted, a coroner's report is competent evidence of death and the cause of death. La. C. Cr. P. art. 105. It is excepted from the hearsay rule and is admitted in evidence as proof of death and the cause thereof. *State v. Kelly*, 375 So. 2d 1344 (La. 1979); *State v. Rhodes*, 29,207 (La. App. 2d Cir. 1/22/97), 688 So. 2d 628, *writ denied*, 97-0753 (La. 9/26/97), 701 So. 2d 980. The coroner or one of the coroner's deputies may testify as to the victim's death or the cause thereof, even where the testifying witness did not perform the autopsy or prepare the report. *State v. Rhodes, supra*. The trial court properly admitted the coroner's report pursuant to La. C. Cr. P. art. 105 to prove death and the cause of death, after the coroner was questioned and cross-examined about the results. The defendant articulates no basis for his argument that he was unable to exercise his constitutional right to cross-examine the medical expert testifying about how and why the victim died.

See also *State v. Leonard*, 2004-1609 (La. App. 1st Cir. 4/27/05), 2005 WL 1039635, in which the defendant claimed a *Crawford* violation because the coroner testified about an autopsy performed by another. Finding that the

coroner's report was admissible to prove the cause of death as nontestimonial hearsay and that the coroner's testimony was limited to the contents of the autopsy report, the court found it unnecessary to consider whether the coroner was properly qualified as an expert in his field. The defendant's *Crawford* claim was dismissed.²

This assignment is without merit.

RESPONSIVE VERDICT

The defendant contends that the trial court erred in failing to include the offense of negligent homicide as a responsive verdict.

During the jury instruction conference, the defendant and the state discussed whether attempted manslaughter or negligent homicide should be

²A handful of courts in other states have considered *Crawford* claims as to autopsy reports.

In *People v. Durio*, 794 N.Y.S. 2d 863 (N.Y.Sup. 2005), the autopsy report was admitted at trial as a business record. The testifying pathologist had not conducted the autopsy. He was qualified as an expert witness and testified about the report findings and, using the report as a reference, rendered an opinion as to the cause of death. The court found that the admission of the routine findings recited in the autopsy report were not testimonial and the accompanying testimony of the assistant medical examiner who had not authored the report was proper.

In *Moreno Denoso v. State*, 156 S.W. 3d 166 (Tex. App. 2005), the pathologist who had performed the autopsy report had died and a certified copy of the autopsy report was admitted into evidence. Because the autopsy report was nontestimonial in nature, the new *Crawford* rule was deemed inapplicable. Additionally, the court concluded that even if the introduction of the report was error, it was harmless error.

In *Smith v. State*, 898 So. 2d 907 (Ala. Crim. App. 2004), the defendant objected to admission of the autopsy evidence because the pathologist, who had left the medical examiner's office and entered private practice, was available. The trial court permitted the State to present the evidence without the testimony of the medical examiner who performed the autopsy. The interim medical examiner testified that the records had not been tampered with, that he had discussed the case with the pathologist who conducted the autopsy, and that he agreed with the autopsy report findings. Another forensic pathologist who had reviewed the autopsy materials testified that he likewise agreed with the autopsy report's conclusion. The appellate court found that while admission of the evidence violated the Confrontation Clause under the particular facts of this case, the error was harmless because the evidence overwhelmingly supported the manslaughter conviction even without the autopsy report.

In *Perkins v. State*, 897 So. 2d 457 (Ala. Crim. App. 2004), rendered the same day as *Smith v. State*, *supra*, the defendant complained that the trial court erred in admitting into evidence an autopsy report prepared by a now retired pathologist and by allowing the forensic technician who assisted in the autopsy to testify as to conclusions and opinions based on the autopsy report. Another pathologist testified that the autopsy report was a business record and that after reviewing the materials he agreed with the report's conclusions. The appellate court found that the autopsy report was nontestimonial evidence. However, even if its admission was error, such error was harmless because the evidence presented by the state was sufficient to convict even without the autopsy report.

included as a responsive verdict. Counsel discussed the fact that after the offense, La. C. Cr. P. art. 814(5) was amended to include negligent homicide as a responsive verdict to manslaughter. The state suggested that the amendment was only prospective. The record does not contain any further discussion on the matter or any written jury instructions or objections about it. The jury verdict form did not include negligent homicide as a responsive verdict. The record does not show the defendant objected to this.

In 2003, the legislature amended La. C. Cr. P. art. 814(5) to include negligent homicide as a responsive verdict to manslaughter. Amendments to responsive verdicts are procedural, and the list of responsive verdicts in effect at the time of trial, not the time of the offense, should be used. *State v. Martin*, 351 So. 2d 92 (La. 1977). While the record shows that the state and the defendant's counsel discussed whether or not the amendment was retroactive, it then goes silent on the issue, with no further requests or objections on the matter. La. R.S. 14:32 defines negligent homicide as ". . . the killing of a human being by criminal negligence." Criminal negligence exists when, although neither specific nor general criminal intent

is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances. La. R.S. 14:12.

If the evidence does not reasonably support a verdict, a trial court may exclude an otherwise proper responsive verdict. *State v. Wright*, 36,635 (La. App. 2d Cir. 3/7/03), 840 So. 2d 1271; *State v. Taylor*, 34,096 (La. App. 2d Cir. 12/15/00), 774 So. 2d 379, *writ denied*, 2001-0312 (La. 12/14/01), 803 So. 2d 984. A defendant may not be entitled to a negligent homicide jury instruction where there is no evidence that the defendant hit the victim by accident or merely by disregard for the interest of others, and that the actions in beating the victim were deliberate and repeated, continuing after the victim was incapacitated. *State v. Patterson*, 99-994 (La. App. 5th Cir. 1/25/00), 752 So. 2d 280, *writ denied*, 2000-0753 (La. 2/9/01), 785 So. 2d 26. Accordingly, we find that the trial court did not err in failing to give negligent homicide as a responsive verdict.

This assignment of error is without merit.

ENHANCED SENTENCE

The defendant argues the trial court could not use his 1994 conviction for DWI, Third Offense to enhance his sentence in the present conviction. He argues that once the state elected to charge him under the enhanced penalty provision of the DWI law, it could not then “double enhance” by

filing a multiple offender bill of information against him in the present conviction, since the DWI law already provides for an enhancement.

La. R.S. 15:529.1 refers generally to “a felony.” It contains no restriction as to the type of felony. *State v. Murray*, 357 So. 2d 1121 (La. 1978), *overruled on other grounds*, *State v. Skipper*, 2004-2137 (La. 6/29/05), 906 So. 2d 399. The defendant’s argument that the state is trying to improperly enhance the penalty as a second felony offender because the first felony conviction had already been enhanced is without merit. The 1994 conviction for DWI, Third Offense is “a felony” under the Habitual Offender Act. It can be used to support the defendant’s status as a second felony offender. See *State v. Iverson*, 37,369 (La. App. 2d Cir. 9/24/03), 855 So. 2d 835, *writ denied*, 2003-2950 (La. 5/14/04), 872 So. 2d 510. The defendant has shown no reason why the state cannot use the felony DWI conviction to enhance the penalty for manslaughter, since it is not being used twice to enhance the DWI penalty. It would only have, if the defendant, for example, had instead been convicted of a DWI, Fourth Offense, and the state had wanted to use the Habitual Offender Act to further enhance the DWI, Fourth Offense penalties.

This assignment of error is meritless.

ERROR PATENT

The trial court imposed the defendant’s sentence without benefit of “parole, probation or suspension of sentence.” However, the defendant was sentenced as a second felony offender under La. R.S. 15:529.1. Under La. R.S. 15:529.1(G), such a sentence is to be imposed “without benefit of probation or suspension of sentence.” La. R.S. 14:31 does not require the imposition of a manslaughter sentence without benefit of parole. Accordingly, we amend the defendant's sentence to delete the restriction on parole eligibility.

CONCLUSION

The defendant's conviction is affirmed. His sentence is amended to delete the restriction on parole eligibility.

REHEARING GRANTED; CONVICTION AFFIRMED; SENTENCE AMENDED AND, AS AMENDED, AFFIRMED.