

**SUPREME COURT OF LOUISIANA**

**No. 00-KO-1629**

**STATE OF LOUISIANA**

**VERSUS**

**STEVE M. MARCANTEL**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL  
THIRD CIRCUIT, PARISH OF EVANGELINE**

**CALOGERO, Chief Justice dissenting**

I dissent from the majority for two reasons. First, I disagree that there was sufficient evidence produced at trial to convict defendant, Steve Marcantel, of theft. Second, I find merit in defendant's argument that "the trial court improperly restricted the cross-examination of key prosecution witness Mark McCauley." In my view, defendant did not received a fair trial when his constitutional right to cross examination was restricted. For the reasons further set forth below, I respectfully dissent from the majority.

Insufficiency of Evidence of Theft

The majority states that the evidence presented at trial was sufficient to allow the jury to find that defendant committed theft. Yet, there is no direct nor circumstantial proof to support that finding. As to direct proof, no one testified that they witnessed Marcantel take the weapons; the firearms themselves did not contain the defendant's prints; and the guns were never found in defendant's possession but in the possession of others including Todd Deshotel, Rebecca Dupre and Mark McCauly (none of whom were charged by the State) who merely gave testimony that they had seen Marcantel in possession of firearms belonging to the Prejeans.

Similarly, there was no circumstantial evidence to support an inference of theft

by Marcantel. First, the fact that Marcantel was a cousin of the Prejeans and was familiar with the house does not make him a thief. Second, just because defendant's father knew the Prejeans were to go camping on May 11, 1997 does not mean that the defendant himself knew of that trip. There was no testimony that defendant was told of the vacation plan. Finally, the fact that a visibly inoperative .25 caliber gun, a gift to Cecil Prejean from defendant's father was not taken, does not necessarily prove that Marcantel was the thief or the burglar. Cecil Prejean admitted that the gun did not have a clip. Furthermore, other weapons besides the .25 caliber gun were left behind as well. Cecil Prejean testified that none of his shotguns were taken. The State provided no explanation as to why the defendant would not have taken the other operable weapons if he was, in fact, familiar with the Prejean home.

Finally, the jury did not find the defendant guilty of burglary yet found him guilty of theft when there was no direct proof that the defendant had committed the burglary, nor that he stole the Prejeans' weapons.

What the majority has done, in actuality, is determined that the defendant was guilty of theft based upon the presumption of La. Rev. Stat. 15:432, a presumption that the majority stated "was unnecessary to discuss." The presumption in La. Rev. Stat. 15:432 is that "the person in the unexplained possession of property recently stolen is the thief." That presumption, however, has dubious constitutional validity, *see State v. Searle*, 339 So.2d 1194 (La. 1976)(on reh'g), but may provide a rational, permissive inference for a factfinder under the particular circumstances of the offense. *State v. Johnson*, 406 So.2d 153, 155-56 (La. 1981).

Here, the majority has, in effect, found that Steve Marcantel is guilty based upon the presumption of La. Rev. Stat. 15:432 alone without supporting direct or circumstantial evidence. Such a holding, in my view, is a violation of basic principles

of criminal law that a defendant must be proven guilty beyond a reasonable doubt. La. Const. art. 1, § 2.

### The Trial Court Improperly Restricted Cross-Examination of a Key Witness

Defendant plainly asserted as an assignment of error that:

The trial court improperly restricted the cross-examination of key prosecution witness Mark McCauley as to prior arrests, deals or promises, which may have unduly influenced the witness' testimony and established bias and interests on the part of the witness in violation of defendant's Sixth Amendment right to confront and cross-examine his accusers.

The majority, however, does not discuss this assignment, finding that the court of appeal satisfactorily addressed the issue. In my view, the defendant has demonstrated that his right to cross examine was restricted and that such action constitutes reversible error.

The record reveals that during the cross-examination of Mark McCauley the defense counsel made a motion, outside of the presence of the jury, that he be permitted to question McCauley concerning his prior arrests and pending charges, in order to show bias. After hearing the arguments, the court denied the defendant's motion, finding that any questioning pertaining to Mark McCauley's prior arrests was irrelevant and inadmissible. The court of appeal agreed, finding that La. C.E. art. 609.1 limits impeachment of witnesses to convictions and not arrests or pending charges.

However, the possibility that the State may have "leverage over a witness due to the witness's pending criminal charges..." is a valid and permissible area of cross-examination. State v. Rankin, 465 So.2d 679, 681 (La. 1985). It is also well-settled that "a witness[']s hope or knowledge that he will receive leniency from the state is highly relevant to establish bias or interest" (State v. Brady, 381 So.2d 819, 821-22

(La. 1990)), and that “a witness’s bias or interest may arise from arrests or pending criminal charges, or the prospect of prosecution, even when he has made no agreements with the state regarding his conduct.” State v. Vale, 95-1230 p. 4 (La. 1/26/96), 666 So.2d 1070, 1072.

During the defendant’s motion for permission to question McCauley about prior arrests and pending charges, the assistant district attorney stated that Mark McCauley had been arrested just ten months prior to defendant’s trial. That arrest was in connection with McCauley’s allegedly having issued a worthless check. Furthermore, the district attorney conceded that McCauley had not been charged with that crime and that it was “pending.”

Therefore, the defendant had a right to cross-examine McCauley regarding the worthless check charge and the consequential possibility of prosecution of this witness by the State to show bias. Because the defendant was precluded from asking such questions, his right to cross-examination pursuant to U.S. Const. Amend. 6, La. Const. art. I, § 16, and La. Rev. Stat. 15:273 was impermissibly restricted. In addition, that constitutional violation was not harmless error.

### *Harmless Error Analysis*

The United States Supreme Court set forth a harmless error analysis in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). Under Chapman, an appellate court must decide “whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,” and “the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt.” Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Furthermore, if the error is the kind that may be deemed harmless, the burden is on someone other than the person prejudiced

by it to show that it was harmless. Chapman, *supra*.

The Chapman standard was later refined in Sullivan v. Louisiana, 508 U.S. 275, 279; 113 S.Ct. 2078, 2081 (1993), as follows:

Consistent with the jury-trial guarantee, the question [Chapman] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand... . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

Here, it cannot be said that the guilty verdicts rendered on the seven counts of convicted felon in possession of a firearm were surely unattributable to the trial court's restricting defendant's right to cross-examine Mark McCauley. The evidence presented at trial to prove that defendant was in the possession of the stolen firearms was marginal. The State presented no physical evidence such as fingerprints, but relied solely on the testimony of three witnesses: Todd Deshotel, Rebecca Dupre and Mark McCauley. The testimony of these three witnesses, however, is suspect.

First, it was these three witnesses, not Steve Marcantel, who admitted having been in possession of some of the stolen property of the Prejeans. Second, all three admitted lying to the police during the Prejean investigation. Finally, the testimony of Rebecca Dupre and Todd Deshotel raises questions as to their ability to recall events. Rebecca Dupre stated that during May/June of 1997 when Steve Marcantel was allegedly in the possession of the stolen firearms, she mixed pain medication with alcohol, and on that day in particular, she had been drinking. She further testified that her boyfriend, Todd Deshotel, was a drug addict during May and June of 1997, had a "bad memory problem" and was drugged "very heavily" on the day Steve was seen in possession of the firearms. Todd Deshotel also admitted taking drugs in May/June of 1997 and further stated that in 1998, prior to trial, he was involved in an automobile

accident which caused damage to his brain and created some memory problems.

Considering the testimony of Todd Deshotel, Rebecca Dupre and Mark McCauley, the fact that all three witnesses lied to the police during the Prejean investigation, and the rule in Chapman, *supra*, that “the burden of proving harmless error is on someone other than the person prejudiced by it to show that it was harmless,” it cannot be said that the trial court’s failure to allow the defendant to cross-examine Mark McCauley on the then viable charge for passing a worthless check was harmless. That is, it cannot be said that the guilty verdicts on the seven counts of convicted felon in possession of a firearm were surely unattributable to the trial court’s restricting the defendant’s right to cross-examine one of the State’s key witnesses. Hence, I would reverse these convictions and remand the matter for a new trial on these seven counts.

In sum, I disagree with the majority that the evidence presented at trial was sufficient to convict Steve Marcantel of theft. In my view, the majority impermissibly relied on the presumption of La. Rev. Stat. 15:432 alone without supporting evidence, either direct or circumstantial. Second, I find merit in defendant’s argument that he was restricted from cross examining a key witness. In my view, the trial court’s refusal to allow defendant to cross examine Mark McCauley on the pending worthless check charge is reversible error, and not harmless.

For the foregoing reasons, I respectfully dissent.