

SUPREME COURT OF LOUISIANA

No. 96-KA-2667

STATE OF LOUISIANA

Versus

KEVAN BRUMFIELD

On Appeal from the Nineteenth Judicial District Court,
for the Parish of East Baton Rouge, Honorable Ralph E. Tyson, Judge

LEMMON, Justice*

This is a direct appeal to this court from a conviction of first degree murder and a sentence of death. La. Const. art. V, §5(D). The principal issues involve (1) the admission in the penalty phase of evidence of unrelated criminal conduct; (2) the prosecutor's reference to defendant's future dangerousness; (3) the prosecutor's reference in closing argument in the penalty phase to defendant's claim of a coerced confession in another case; (4) the court's discovery order requiring the defense to produce the report of a non-testifying expert; (5) the admission of the surviving victim's hypnosis-refreshed testimony; (6) the curtailment of defendant's attempts to impeach the surviving victim; (7) various claims concerning ineffective assistance of counsel; and (8) the alleged failure of the court to properly preserve the record.¹

*Marcus, J., not on panel. Rule IV, Part 2, §3.

¹Defendant's other assignments of error involve only settled principles of law and are treated in an unpublished appendix, which is attached to this opinion and is part of the official record.

Facts

On January 5, 1993, defendant, accompanied by Henri Broadway, went to a self-described psychic counselor to obtain a reading. Defendant, who was carrying a gun, told the psychic he planned to commit a robbery and wanted to know the best day to do so.

Two days later, a pair of armed robbers ambushed a grocery store manager who was being escorted to the bank by an off-duty police officer working a security detail. In the fusillade of bullets fired into the police unit, the officer was killed by five shots, but the store manager, although, suffering eleven bullet wounds, survived the attack.

The morning after the murder, defendant nervously told Eddie Paul that he had just “killed a son of a bitch.” Paul also overheard defendant tell Broadway that it had been a waste of time because they did not obtain anything during the attempted robbery. Remembering a conversation a week or two earlier in which defendant, Broadway, and his cousin, West Paul, planned the robbery of a bank, Eddie Paul informed the police on January 10 that defendant had committed the murder.

The police apprehended defendant the next day. Upon interrogation, defendant originally denied any connection with the shooting, claiming he was with his brother when the crime occurred. However, when later informed that his brother had not corroborated his alibi, defendant gave a videotaped statement in which he admitted involvement in the crime, but claimed he acted as the getaway driver while West Paul and Broadway committed the robbery.

Based on that information, the police arrested West Paul and Broadway, who both gave statements about the crime inconsistent with defendant’s claim that he acted only as the getaway driver. Confronted with that information, defendant gave a second

videotaped interview in which he admitted shooting the victims. Several hours later, defendant also confessed to an armed robbery in Clinton, Louisiana.

The jury found defendant guilty as charged. After the penalty phase of the trial, the jury unanimously recommended a sentence of death, finding as aggravating circumstances that defendant was engaged in the perpetration of an attempted armed robbery, that the victim was a peace officer engaged in her lawful duties, and that defendant knowingly created a risk of death or great bodily harm to more than one person. Defendant has appealed his conviction and sentence.

Other Crimes Evidence

Defendant raises several issues relating to evidence of unrelated criminal conduct. Defendant first argues that the prosecutor improperly introduced evidence during the penalty phase that defendant committed an unadjudicated attempted murder during the armed robbery in Clinton, Louisiana.

Prior to the trial of the present crime, defendant was charged with the Clinton crime and was convicted of armed robbery. In the penalty phase of the present trial, the prosecutor introduced a certified copy of the bill of information charging defendant with armed robbery, as well as the minutes of his conviction for the crime. The prosecutor also called the victim of the Clinton robbery, who testified that defendant, accompanied by defendant's brother and West Paul, robbed him at gunpoint in 1992, left him on the side of the road, put a gun to his head, "and the gun clicked."

La. Code Crim. Proc. art. 905.2 provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the impact that the death of the victim has had on the family members." Evidence of a prior conviction is admissible in the penalty phase of a capital case,

whether or not the defendant puts his character at issue, because the capital sentencing statute puts his character at issue. State v. Sawyer, 422 So. 2d 95 (La. 1982), Accordingly, the evidence of the armed robbery conviction in this case clearly was admissible.

Defendant's complaint focuses on the admission of evidence of the conduct that arguably constituted attempted murder, as well as on the prosecutor's reference in closing argument to that unadjudicated conduct.

Rules governing the admission of evidence of unrelated and unadjudicated criminal conduct in penalty phase hearings to prove the defendant's character and propensities have evolved jurisprudentially. In State v. Brooks, 541 So. 2d 801 (La. 1989), this court approved the prosecutor's introduction in the case-in-chief in the penalty phase of two unrelated and unadjudicated murders when the trial judge had determined in a separate hearing that (1) the evidence of the defendant's commission of the unrelated criminal conduct was clear and convincing; (2) the proffered evidence was otherwise competent and reliable; and (3) the unrelated conduct had relevance and substantial probative value as to the defendant's character and propensities.

In State v. Jackson, 608 So. 2d 949 (La. 1993), this court established limitations on the types of evidence of unrelated and unadjudicated criminal conduct that may be introduced by the prosecutor in the case-in-chief in the penalty phase of a capital sentencing hearing. To be admissible, the evidence of unadjudicated criminal conduct must involve violence against the person of the victim, and the period of limitation for instituting prosecution must not have run at the time of the indictment of the accused for capital murder. Id. at 955.

In State v. Comeaux, 93-2729 (La. 7/1/97), 699 So.2d 16, 22, this court declined to place significant restrictions on the amount of this type of evidence, as long as the

evidence is highly relevant to the defendant's character and propensities. Nevertheless, this court warned that:

[T]he judge, having already ruled at the pretrial hearing on the admissibility of evidence of the unadjudicated conduct, should cautiously consider the quantum of evidence necessary to convey the message to the jury that the defendant has engaged in other serious criminal conduct that the jury should consider in its determination of sentence, without shifting the jury's focus from its function of determining the appropriate sentence in the capital case to a focus on the defendant's involvement in other unrelated criminal conduct.

Id. at 23.

In the present case, the prosecutor gave defense counsel the required notice of intent to use other crimes evidence and presented evidence at the pretrial hearing that easily met the required clear and convincing standard. Moreover, the conduct involved violence against the person, and the statute of limitations had not run at the time defendant was indicted on the instant charge. Finally, the brief testimony of the victim of the Clinton robbery provided substantial probative value as to defendant's character and propensities. Accordingly, the court did not err in admitting the evidence of the unadjudicated criminal conduct that arguably constituted attempted murder.

Defendant contends, however, that the evidence of an attempted murder was improperly admitted because he was only charged with and convicted of armed robbery.

The Jackson decision prohibited introduction of evidence of the original charge when the defendant was convicted of a lesser crime. Id. at 924. Here, however, defendant was indicted for (and convicted of) armed robbery, and no evidence or prosecutor's comment suggested that defendant was ever charged with attempted murder. Moreover, as noted above, the testimony of the victim of the Clinton robbery did not violate the Jackson standards and was properly admitted into evidence. Finally, the prosecutor's comments in closing argument that defendant "put that gun to [the

victim's] head and pull[ed] the trigger" during the Clinton robbery and that defendant would have killed the robbery victim "but for a gun misfiring" was proper argument based on the record and on fair inferences drawn from the record.

Defendant also complains about the admission of evidence of a previous murder attributed to defendant in a report by a sociologist consulted by the defense.

Defendant's mitigation expert, Dr. Cecile Guin, testified on her direct examination that during her investigation of defendant's social history she used a report prepared by Dr. Bryan Jordan, an expert who was consulted by the defense but did not testify. On cross-examination, Dr. Guin conceded that in her report she characterized defendant's criminal history as not "very lengthy or complicated." The prosecutor then directed Dr. Guin to a portion of her report stating defendant declared he had witnessed a drug deal and murder in 1989 and had "turned state's evidence" against the perpetrator, and questioned Dr. Guin on defendant's participation in the 1989 event.² Referring to Dr. Jordan's report, the prosecutor pointed out the statement that defendant admitted that "he in fact . . . did shoot at a drug user who had refused to pay and drove away in his car." Dr. Guin responded, "That is one of the conflicting reports that I read."

In her closing penalty phase argument, the prosecutor referred to the "1989 incident involving the killing of the drug dealer" and "the conflicting versions that [defendant] apparently gave Dr. Guin, and the other version in which he admitted his involvement in this case to Bryan Jordan, the person whose report was repeatedly referred to during the course of this case."

Because the defense admitted use of the Jordan report on direct, the prosecutor on cross-examination was entitled to inquire into defendant's role in the drug-related

²The incident had not been mentioned by Dr. Guin on direct examination.

homicide referred to in the report. The Jackson limitations on admissibility of unrelated criminal conduct in the penalty phase apply only to the state's case-in-chief, not to relevant rebuttal evidence. State v. Sepulvado, 93-2692 (La. 4/8/96); 672 So. 2d 158, 165, cert. denied, ____ U.S. ____, 117 S.Ct. 310 (1996). Moreover, the prosecutor properly used the report to challenge Dr. Guin's conclusion that defendant's criminal history was not very lengthy. Under these circumstances, the prosecutor's questions about the Jordan report constituted proper cross-examination to impeach Dr. Guin's evaluation of defendant's prior criminal behavior.

Reference to Future Dangerousness

Defendant complains about a portion of the prosecutor's closing argument in the penalty phase referring to defendant's future dangerousness. In the complained-of portion of the argument, the prosecutor stated:

As long as [defendant] lives, others are in jeopardy and in danger and you saw the records [T]his man, as long as he lives and breathes, is a danger at the very least to other inmates and whatever jail he's housed in, he's a danger to whatever people in law enforcement he will be connected with. He has already shown this as he waits for a trial on this charge, that he has not regard for anyone else, he has no regard for authority, he has no problem with brutalizing and killing police officers or battering them.

This court has stated that the "prosecutor's remarks about the societal costs of a life sentence, misspent tax dollars, future escapes, more killings by defendant, were improper." State v. Busby, 464 So. 2d 262, 267, (La. 1985), sentence vacated on other grounds, 538 so. 2d 164 (La. 1988). Without deciding whether a single statement in closing argument that the defendant, if released, may kill again would require reversal of the sentence in other cases, we note in this case that defendant's mitigation expert admitted a number of incidents in which disciplinary action against defendant had been taken since his incarceration. Therefore, the prosecutor had a factual basis for the

remarks in this case, and this portion of the closing argument did not inject an arbitrary factor into the proceedings.

Reference to Defendant's Claim of Coerced Confession in Unrelated Case.

Defendant argues that the prosecutor's comments in closing argument about defendant's attempts to suppress a confession in an unrelated case warrants a reversal of the penalty in this case.

In the closing argument in the penalty phase, the prosecutor emphasized that this murder involved the highest degree of aggravation, since it was premeditated as opposed to a spontaneous killing in the course of a robbery. The prosecutor noted that the planning of the crime was revealed in defendant's confession. While conceding that defendant asserted the confession was coerced, the prosecutor made the following argument against the claim of coercion:

[T]he taped statements that you heard by the defendant which, . . . he alleged to have been coerced, just as [the arresting officer in the Clinton robbery] told you that when he gave a taped statement concerning his crime against [the victim of the Clinton robbery] that he readily confessed to the same day, later on, again you hear the allegations. It's his M.O. He's street smart, he's savvy, and after he's confessed, what is he going to do but go back and attack the officers who've gone about doing their job, giving him his rights and taking a proper statement?³

Later, the prosecutor referred to counsel's cross-examination of the state witnesses, stating, "during the course of this trial those very police officers who go about and try to protect us every day have been assailed, have been defamed through the allegations of this defendant when he is the person who is on trial."

Closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of evidence, to conclusions of fact that may be drawn therefrom,

³In the trial of the armed robbery committed by defendant in Clinton, the officer testified that defendant freely admitted the crime the day of the event, but later claimed involuntariness based on coercion.

and to the law applicable to the case. La. Code Crim. Proc. art. 774. While the trial judge has broad discretion in controlling the scope of closing arguments, Louisiana jurisprudence on prosecutorial misconduct has allowed prosecutors wide latitude in choosing closing argument tactics. See State v. Prestridge, 399 So. 2d 564, 580 (La. 1982). Nonetheless, the prosecutor should refrain from making personal attacks on defense strategy and counsel. See State v. Duplessis, 457 So. 2d 604, 609 (La. 1984).

In the present case, the prosecutor did not suggest that defendant or his attorney did anything improper in attempting to suppress the confession in the earlier case. Rather, the prosecutor pointed to record evidence that this case was not the first one in which defendant had unsuccessfully claimed a confession was coerced. Because the jury had already rejected defendant's claim of a coerced confession in the guilt phase of this case, we conclude that the comments about defendant's claim of a coerced confession in a different case did not inject an arbitrary factor into the jury's deliberations during the penalty phase. Furthermore, the prosecutor's statement about defense counsel's cross-examination of police officers was a fair comment pointing out the frequently used strategy of attempting to shift the focus from the accused to the accuser.

Production of Report of Non-Testifying Expert

Defendant contends that the court erred when it granted a discovery motion and ordered his counsel to provide the prosecutor with the report prepared by Dr. Bryan Jordan whom defense counsel did not intend to, and in fact did not, call to testify at trial.

This court summarized an accused's discovery obligations regarding such reports in State v. Touchet, 642 So. 2d 1213, 1218-19 (La. 1994), stating:

In Louisiana, the Code of Criminal Procedure recognizes that the onus of any criminal prosecution is upon the state, and that the state is not to receive any unfair advantages in the pretrial discovery process. La.C.Cr.P. arts. 724 and 725 provide for state discovery only of defense scientific or medical reports, and only after the defense has “opened the door” by its request for similar information in the possession of the state. La.C.Cr.P. art. 728 specifically forbids discovery of elements of anything but scientific and medical reports that were, in turn, first requested by the defense, and protects “statements made by . . . witnesses or prospective witnesses [and] the names of defense witnesses or prospective defense witnesses” from discovery by the state. These provisions of the Code reflect a legislative recognition that the state should “shoulder the entire load” in a criminal prosecution and should not be allowed to circumvent the “burdens of independent investigation by compelling self-incriminating disclosures.” Murphy v. Waterfront Commission of New York, 378 U.S. 52, 55, 84 S.Ct. 1594, 1597, 12 L.Ed.2d 678 (1964).

Because defense counsel did not seek medical or scientific reports from the prosecutor, the trial court arguably erred when it ordered the defense to provide Dr. Jordan's report. The prosecutor's right to discovery is very limited. Under La. Code Crim. Proc. art. 725, “[t]he state is not entitled to discover the defendant's reports of physical and mental examinations unless the defendant has first been granted relief under Article 719,” and then may discover only reports “of a similar nature” to those previously requested by the defense from the prosecutor. State v. Rachal, 362 So. 2d 737, 739 n. 5 (La. 1978).

However, when Dr. Cecile Guin, the social worker-mitigation expert, testified in the penalty phase that she relied on, among other things, Dr. Jordan's report when

she made her psychological evaluation of defendant, the prosecutor then became entitled to examine the report for possible impeachment material. See State v. Williams, 445 So. 2d 1171, 1181 (La. 1984). Because the prosecutor eventually would have obtained possession of the report, the defense fails to show any prejudice resulting from the court's order to produce Dr. Jordan's report. Cf. State v. Bourque, 92-0968 (La. 7/1/93); 622 So. 2d 198, 239 (holding that the defendant, before being entitled to relief, must show prejudice resulting from the state's failure to comply with discovery procedure).

Hypnosis-Refreshed Testimony of the Surviving Victim

Defendant first contends that the court should not have admitted the testimony of the store manager who survived the shooting, because her recollection of the crime and her identification of Henri Broadway as one of the assailants occurred only after she had been hypnotized by the police.

Immediately after the assailants fired the barrage of shots into the police car, Broadway reached into the car to get the bag of money and was face-to-face with the store manager. Although she had received eleven bullet wounds, the manager drove off. When the manager immediately reported the crime to the 911 operator, she could not describe either of the assailants. Later, she gave a detailed description of the assailant who reached into the car, and at trial she gave the jury a detailed description of one of the perpetrators. There was no objection to the testimony or the identification.⁴ Consequently, defendant waived any claim based on the erroneous admission of this guilt phase evidence. La. Code Crim. Proc. art. 841; State v. Taylor,

⁴Because the store manager did not identify defendant, but only identified a co-assailant, defense counsel may have made a strategic choice not to object to the hypnosis-refreshed identification. This issue perhaps would be more appropriately addressed in post-conviction proceedings.

93-3301, p. 7, (La. 2/28/96); 669 So. 2d 364, 369, cert. denied, ____ U.S. ____, 117 S.Ct. 162 (1998).

The Curtailment of Defendant's Attempt to Impeach the Surviving Witness

Defendant also contends that the court erred by limiting impeachment of the store manager as to anti-psychotic medication she allegedly was taking.

Defense counsel questioned the manager in detail about medications prescribed for her after the incident. The manager listed "antianxiety" medication, "sleeping pills," and antidepressant medication taken for about a year after the murder. She stopped using the sleeping medication, but she began taking Prozac for depression about six months prior to trial. When defense counsel asked if she took some medications in doses larger than prescribed, the prosecutor objected. The court held a bench conference during which the prosecutor asserted that this line of questioning was irrelevant. Defense counsel responded that the witness first gave a description that did not describe Broadway and one year later identified Broadway as one of the robbers.

The court ultimately sustained the objection, explaining:

The jury has had the benefit of her description prior to her treatment. They've also had the benefit of her description subsequent to that treatment. They've had the benefit of the testimony regarding the medication that she's taking, and that's enough for the jury to make whatever decisions they're going to make about it. And again, that's all viewed against the backdrop that the description that you're talking about doesn't apply to your client.

As a general rule, a party may attack the credibility of a witness by examining him or her concerning any matter having a reasonable tendency to disprove the truthfulness of his or her testimony. La. Code Evid. art. 607C. The subject matter of the attack, however, is limited by the relevancy standard of La. Code Evid. art. 403.

Moreover, while La. Code Evid. art. 607D provides that “extrinsic evidence to show a witness’ bias, interests, corruption, or defect of capacity is admissible to attack the credibility of the witness,” a witness cannot be cross-examined as to a fact which is collateral or irrelevant to the issue at hand merely for the purpose of contradiction or impeachment. State v. Vessell, 450 So. 2d 938 (La. 1984) (decided under former La. Rev. Stat. 15:494).⁵ Finally, a trial court’s ruling on the scope and extent of cross-examination should not be disturbed absent an abuse of discretion. State v. Coleman, 406 So. 2d 563 (La. 1981).

In the instant case, defense counsel cross-examined the store manager extensively about the medications prescribed for her after the murder. The judge’s ruling also correctly noted the manager identification did not directly implicate defendant in the crime, and defense counsel did not object to the identification at trial. Under these circumstances, defendant fails to show any prejudice resulting from the court’s ruling which prevented him from questioning the manager further regarding the prescribed medications.

Ineffective Assistance of Counsel

Defendant contends that his trial attorneys rendered constitutionally deficient assistance in a number of areas.

A claim of ineffective assistance of counsel generally is more properly raised in an application for post-conviction relief than on appeal. State v. Hamilton, 92-2639 (La. 7/1/97); 699 So. 2d 29, ____, cert. denied, ____ U.S. ____, 118 S.Ct. `070 (1998). In post-conviction proceedings, the district judge can conduct a full evidentiary

⁵Article 607C was not intended to change Louisiana law, and reference to a prior decision is therefore warranted. La. Code Evid. art. 607, Official Comment.

hearing on the matter. However, when the record contains evidence sufficient to decide the issue, the appellate court may consider the issue in the interests of judicial economy. See, e.g., State v. Radcliff, 416 So. 2d 528 (La. 1982). Moreover, this court on several occasions in death penalty cases, when the issue is sufficiently troubling, has not deferred the issue to post-conviction proceedings, but has conditionally affirmed the conviction and sentence, and remanded the case to the district court for a hearing on the issue of ineffective assistance. See, e.g., State v. Wille, 559 So. 2d 1321 (La. 1990).

In the present case, this court, after considering each of defendant's contentions regarding ineffective assistance of trial counsel, concludes that defendant failed to establish a sufficient basis to deviate from the normal practice of relegating such issues to post-conviction proceedings.

Incomplete Record

Defendant contends that the trial court's failure to have each bench conference and ruling properly transcribed denied him the right to full appellate review of his conviction and sentence.

Defendant complains primarily about bench conferences which took place during the cross-examination of Eddie Paul, the cousin of co-perpetrator West Paul, who alerted the authorities about defendant's involvement in the murder. The first omission occurred when defense counsel suggested that the witness may have been previously incarcerated on charges other than those dealing with his failure to pay child support. After the untranscribed bench conference, defense counsel abandoned the issue.

The second untranscribed bench conference during Paul's testimony occurred when the prosecutor objected to defense counsel's reading into the record a statement

that Paul had given to the police. The prosecutor requested that she be allowed to review, before the statement was read to the jury, any allegedly prior inconsistent statement that was to be used to impeach the witness. The court then held an off-the-record discussion with the attorneys and ordered a recess.

The third unrecorded bench conference took place during cross-examination of Paul after defense counsel asked him if he remembered telling the police that nobody planned the crime at his residence. Paul responded, “I couldn't have told him that,” and defense counsel began to read from his recorded statement. The prosecutor objected, claiming the portion of the transcript which defense counsel was reading was not responsive and thus did not impeach Paul's testimony. After the conference, defense counsel did not pursue the alleged discrepancy between Paul's statement to the police about the planning of the robbery and his trial testimony.

The fourth unrecorded conference took place after defense counsel asked Paul if the police threatened to whip him when they arrested him in connection with the offense. Again the prosecutor requested a bench conference, and defense counsel did not pursue the issue after the sidebar.

The final two unrecorded bench conferences during Paul's testimony occurred when the prosecutor objected to defense counsel's questions about events following Paul's arrest, claiming they were irrelevant and lacked impeachment value.

This court has ordered a new trial when material portions of the trial record were unavailable or incomplete; however, a “slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal” does not require reversal of a conviction. State v. Parker, 361 So. 2d 226 (La. 1978); State v. Ford, 338 So. 2d 107, 110 (La. 1976).

In this case, the bench conferences primarily concerned the relevancy of defense

counsel's questions which did little to impeach Paul's testimony. Because defendant failed to show that he was prevented from presenting any relevant evidence, he has not established that prejudice resulted from the absence in the record of the substance of the conferences.

Defendant also complains about an unrecorded bench conference which took place during his examination of an employee of the Louisiana State Police Crime Lab.

The sidebar conference occurred after defense counsel asked the witness if he had an opinion about whether any .25-caliber bullets struck either of the victims. The prosecutor objected, arguing that the expert was not qualified to respond to the question, and the court sustained the objection after an unrecorded bench conference. Later, after defense counsel rephrased the question, the expert responded.

Finally, defendant complains about an unrecorded bench conference which took place after the prosecutor objected to the witness' reading from a list of exhibits in order to testify which pieces he had examined. After the sidebar conference, the witness stated that several items seized by the police had turned out to be irrelevant to the investigation.

In both instances, the witness ultimately answered defense counsel's questions. Consequently, defendant has failed to demonstrate that any prejudice resulted.

Capital Sentence Review

Under La. Code Crim. Proc. art. 905.9 and La.S.Ct.R. 28, this court reviews every sentence of death to determine if it is constitutionally excessive. In making this determination, the court considers whether the jury imposed the sentence under the influence of passion, prejudice or other arbitrary factors; whether the evidence supports

the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

Defendant was twenty years old on the date of the crime, and his IQ was seventy-five. He had a lengthy criminal record, including an arrest as a juvenile for first degree murder and distribution of cocaine in 1989. The police report of that incident indicated that defendant and a friend, under instructions by a drug dealer whose customer could not pay, shot at a car being driven by the customer, who later died from the gunshot wounds. Charges against defendant and his accomplice, also a juvenile, were dropped in exchange for their testimony against the seller of the narcotics.

As an adult, defendant was convicted of the armed robbery in Clinton, discussed above. Defendant also had adult convictions for felony theft, attempted possession of cocaine, and simple battery of a police officer.

1. Passion, Prejudice, or Other Arbitrary Factors

Defendant, the victim and the jury foreman were all African-Americans. Nothing in the record suggests race was an issue in the trial.

Defendant's case received extensive news media coverage. However, as discussed in the appendix about defendant's change of venue argument, more than one hundred prospective jurors were questioned during fourteen days of voir dire, and the court excused less than twenty because of their inability to render a verdict based on the evidence presented at trial. Moreover, defendant's trial took place two and one-half years after the offense occurred.

2. Aggravating Circumstances

The prosecutor presented more than sufficient evidence to demonstrate the aggravating circumstances that defendant was engaged in the perpetration of an attempted armed robbery and that defendant knowingly created a risk of death or great bodily harm to more than one person. Jackson v. Virginia, 443 U.S. 307, 99 (1979). Even if there was merit in defendant's contention that the jury erred when it found sufficient evidence that defendant intended to kill a peace officer engaged in her lawful duties,⁶ the jury's sentencing determination would not be vacated because there was sufficient evidence to support at least one other aggravating circumstance and the evidence relating to the arguably unsupported aggravating circumstance did not interject an arbitrary factor into the proceedings. State v. Sawyer, 422 So. 2d 95 (La. 1982); Zant v. Stephens, 462 U.S. 862 (1983).

3. Proportionality

The federal Constitution does not require a proportionality review. Pulley v. Harris, 465 U.S. 37 (1984). However, comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. State v. Thompson, 516 So. 2d 349 (La. 1987). Nevertheless, this court has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, concluding that there was a sufficiently “large number of persuasive mitigating factors.” State v. Sonnier, 380 So.2d 1, 9 (La. 1979).

Jurors in the 19th Judicial District Court have recommended imposition of the death penalty in approximately thirteen cases. In the case of Henri Broadway, the other shooter involved in the crime, the jury also returned a death verdict.

⁶That contention is rejected in the appendix. See La. Rev. Stat. 14:30B; La. Rev. Stat. 40:2402; State v. Berry, 391 So. 2d at 406 (La. 1980).

Several other cases in which the death penalty was imposed involved facts similar to this case. See State v. Williams, 96-1023 (La. 1/28/98); 708 So. 2d 703 (an eighteen-year-old defendant murdered the victim while attempting to rob him in his truck; earlier that day, the defendant had shot and wounded another victim during the attempted perpetration of an armed robbery); State v. Craig, 95-2499 (La. 5/20/97); 699 So. 2d 865, cert. denied, __U.S.__, 118 S.Ct. 343 (1997) (the seventeen-year-old defendant kidnaped the victim while stealing his truck, drove him to a secluded area, and shot him three times in the head); State v. Scales, 93-2003 (La. 5/22/95); 655 So. 2d 1326, cert. denied, 516 U.S. 1050 (1996) (the nineteen-year-old defendant, while engaged in the armed robbery of a fast-food restaurant, shot and killed one of the employees); State v. Taylor, 93-2201 (La. 2/28/96); 669 So. 2d 364, cert. denied, __U.S.__, 117 S.Ct. 162 (1996) (during the armed robbery of a fast-food restaurant where defendant had previously been a employee, he shot and killed one employee, and shot and permanently paralyzed another); State v. Williams, 383 So. 2d 369 (La. 1980) (defendant shot and killed the victim during an armed robbery of a grocery store).

Decree

For the reasons assigned, defendant's conviction and sentence are affirmed for all purposes, except that this judgment shall not serve as a condition precedent to execution, as provided by La. Rev. Stat. 15:567, until either (a) defendant fails to petition the United States Supreme Court timely for certiorari; or (b) that Court denies his petition for certiorari and either (i) defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari, or (ii) that Court denies his petition for rehearing.

