

Judgment rendered September 8, 2005.
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 39,731-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA

Appellee

versus

ROOSEVELT S. GARNER

Appellant

* * * * *

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

Honorable Leon L. Emanuel III, Judge

* * * * *

STEPHEN A. GLASSELL

Counsel for
Appellant

PAUL J. CARMOUCHE
District Attorney

Counsel for
Appellee

DALE G. COX
EDDIE BROSSETTE
Assistant District Attorneys

* * * * *

Before STEWART, GASKINS and MOORE, JJ.

MOORE, J., concurs with reasons.

GASKINS, J., dissents with written reasons.

STEWART, J.

Roosevelt S. Garner, the defendant, was convicted of manslaughter. He was sentenced to 20 years at hard labor without benefit of probation, parole or suspension of sentence. Because of the improper jury instruction on the burden of proof for self defense, we reverse and remand the defendant's conviction and sentence.

FACTS

The defendant and the victim, James Marshall, engaged in a fight on May 30, 2001. It is undisputed that the defendant inflicted injuries upon Marshall that placed him in a coma. 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 ultimately died in a nursing home on December 15, 2001.

When the police arrived they found that the defendant had fled the scene; however, he later turned himself in to the police and received treatment for injuries to his hands. The defendant was then charged with aggravated battery and advised of his Miranda rights. He subsequently gave a statement to Detective Rod Johnson. In his statement the defendant said that he confronted Marshall about the change from a \$20.00 bill owed to him. When the defendant turned his back, Marshall grabbed him from behind, turned him around and hit Garner in the mouth. As a result a fight ensued between the two of them.

Once the police determined that there were no weapons involved in the fight, the charge was reduced from aggravated battery to second degree

battery. However, after the victim's death, the charge was raised to manslaughter.

The defendant was charged with manslaughter and tried by jury 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. During this interview, the defendant stated that the victim hit him first, and it was only after the defendant was struck that he in turn struck Marshall three times.

The defendant called Isaac James Putnam, who testified that he was present during the incident. Putnam testified that the defendant had given Marshall \$20.00 to purchase some beer. When Marshall returned without change, an argument ensued between the defendant and the victim. Putnam further testified that the defendant turned to walk away, and Marshall picked up a lug wrench and swung at the defendant's head. After Marshall struck the defendant on his arm, he turned and hit Marshall two or three times. Putnam denied ever seeing the defendant pick Marshall up and throw him back down to the ground.

The defendant testified on his own behalf stating that the argument started as a result of Marshall's failure to return the defendant's change from a \$20 bill he had given Marshall. He also testified that after he proceeded to walk away, someone shouted "watch out," and Marshall hit him two or three times. He then turned around and hit Marshall. The defendant stated that he did not remember how many times he struck

Marshall, but he acknowledged that Marshall was unconscious when he left the scene.

On cross, the defendant denied ever picking Marshall up and throwing him on the ground. This statement is corroborated by Putnam who was an eyewitness to the event. Although the defendant admitted that he made the statement to the police that he had thrown Marshall to the ground, he explained that he was angry, upset, and drunk when he made the statement. After the defendant's testimony, the defense rested.

In the jury instruction conference, the state proposed the inclusion of the homicidal self-defense instructions and modification of the manslaughter definition to include aggravated battery, second degree battery, and simple battery in lieu of "any felony" or "intentional misdemeanor." The defendant did not object to the language.

The jury found the defendant guilty as charged. The defendant's motion for postverdict judgment of acquittal and a new trial were both 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 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 appealed.

DISCUSSION

The defendant cited several assignments of error in his brief. We find that the assignment asserting error with the trial court's jury instructions

eliminates the need to discuss the other assignments of error. The defendant argues that the trial court erred by instructing the jury on non-homicidal self-defense instead of homicidal self-defense. The trial court failed to inform the jury that the prosecution has the burden of proof in self-defense cases. It is not incumbent upon the defendant to prove that he acted in self defense; the prosecution must prove beyond a reasonable doubt that he did not act in self defense. *State v. Lynch*, 436 So.2d 567 (La. 1983). We believe that the improper jury instruction constitutes reversible error.

Article 882 of the Louisiana Code of Criminal Procedure provides that an appellate court has the authority to review cases on the issues that are raised by the defendant and correct any error patent unfavorable to the defendant. *State v. Arrington*, 556 So.2d 263, 266 (La. App. 2nd Cir. 1990). We find that there is an error patent present in this case. Garrison should have received a jury instruction pertaining to the burden of proof in a homicidal self-defense case. Therefore, the trial court's judgment of conviction is reversed.

Our justice system provides a defendant with a presumption of innocence until he is proven otherwise. This presumption is fundamental to the fairness that a defendant is entitled to receive. LSA-Const. Art. 1 § 16. The trial court's failure to properly instruct the jury as to homicidal self-defense is detrimental to the fairness afforded to the defendant by the due process clause of our Constitution.

The concept of procedural due process is broadly defined as fundamental fairness, that requires that the state may not deprive a person of

his basic fundamental rights of life, liberty, or property without establishing minimal procedural safeguards. *State in Interest of A.E.*, 448 So.2d 183 (La. App. 4th Cir. 1984). In this case the minimal procedural safeguards were not provided, because the jury was not instructed concerning the burden of proof in homicidal self-defense cases. When a defendant asserts that he acted in self-defense the state has the burden of establishing that he did not act in self defense. *State v. Jackson*, 419 So.2d 425 (La. 1982). 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). *Cert. Denied*, 541 U.S. 905, 124 S.Ct. 1604 (2004). We believe that the court's failure to give the jury the proper instruction constitutes reversible error as it meets all the criteria of *Tate*, *supra*.

The instruction given by the court on the issue of self-defense was as follows:

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 for any crime based on that conduct. The 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.

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.

Justification where a death does not occur is an affirmative defense that the defendant has 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 she withdraws from the conflict in good faith and in such a manner that her adversary knows or should know that she desires to withdraw and discontinue the conflict.

The trial court instructed the jury that the defendant has to prove justification in a case where a death does not occur. However, this is not a case where the victim did not die. Marshall ultimately died from the injuries that he received. Therefore, the trial court erred in instructing the jury on non-homicidal self defense.

The state argues in its brief that the defendant's failure to object to the language of the jury instructions renders the issue moot on appeal.¹

However, when there is an issue substantially affecting the fairness of the proceeding, then review can be granted. *State v. Thomas*, 27,507(La. App. 2 Cir. 12/6/95),665 So.2d 629. We believe that the issue of improper jury instruction is one substantially affecting the fairness of the proceeding below.

The failure to properly instruct the jury does not present an issue that can be considered harmless error. Garner's fundamental rights have been stripped from him without the proper process being observed. Because minimal procedural safeguards were not provided, reversal is warranted.

CONCLUSION

For the reasons presented, the defendant's conviction is reversed and the sentence is set aside.

REVERSED AND REMANDED.

¹Although the state makes this argument, it requested that the trial court instruct the jury on homicidal self-defense. Despite this request, the trial court instructed the jury in a manner that we consider to be confusing on the issue of burden of proof. The state failed to object to this improper jury instruction at the time of trial.

MOORE, J., concurs.

I concur in Judge Stewart's cogent opinion reversing the defendant's conviction and remanding for a new trial. The important but erroneous jury instruction given by the court on the burden of proof likely caused confusion among the jurors. The defendant made out a colorable claim of self-defense through his own trial testimony and that of an eyewitness to the fracas. The trial judge incorrectly instructed the jury that "[j]ustification *where a death does not occur* is an affirmative defense that *the defendant has the burden of establishing* by a preponderance of the evidence." (Emphasis supplied).

Here, a death did occur, albeit months after the incident, and the defendant was tried for manslaughter, a grade of homicide. The trial court's inexcusably wrong instruction that the defendant bore the burden of proving self-defense could have contributed to an unreliable verdict, the integrity of which is undermined.

While the lack of a contemporaneous objection to the patently incorrect instruction is troubling, I find it excusable, in that the state requested that the court give a self-defense instruction for a homicide. The trial judge agreed, but, for whatever reason, failed to do so properly. The court bears the ultimate responsibility to adequately and accurately instruct the jurors on the law applicable to the case. La. C. Cr. P. art 802.

I cannot subscribe to the notion that the failure to object contemporaneously to the incorrect instruction requires this court to affirm the defendant's conviction under a harmless error analysis. Rather, it is my view that the peculiar circumstances of this case require that it be analyzed

under the thoughtful analysis posed by Judge Brown in the case of *State v. Thomas*, 27,507 (La. App. 2 Cir. 12/6/95), 665 So. 2d 629, *writ denied*, 96-0119, 671 So. 2d 333, wherein he announced the following rule pertaining to the “plain error” doctrine:

Louisiana has not adopted a general plain error rule. Those circumstances where review has been granted in the absence of a contemporaneous objection were fact-specific situations where the relevant errors substantially affected the fairness of the proceeding and the reliability of the fact-finding process.

Thomas at 633.

The contrast between the case *sub judice* and *Thomas* is marked.

Defense counsel offered testimony suggesting a plausible self-defense theory and vigorously argued self-defense in closing argument. The trial judge’s incorrect instruction substantially prejudiced the defendant.

GASKINS, J., dissenting,

I respectfully dissent from the majority opinion to reverse this criminal conviction. 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). Under the majority's reasoning, failure to give a justifiable homicide instruction, even if not requested, is reversible error in a case where that defense is sparsely supported, but nonetheless argued.

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 it is 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 non-homicide instruction, was harmless error. I would, therefore, affirm the conviction.