

AFFIRMED

On August 6, 1998, co-defendants, Demetricy Moore and Terrance Thomas (also known as “Co”), were indicted for second degree murder. Both defendants pled not guilty. On January 22, 1999, the trial court denied defendants’ motion to suppress identification. On January 19, 2000, following a two-day jury trial, defendants were found guilty as charged. On January 28, 2000, both defendants were sentenced to life in prison without benefit of parole. The trial court denied various post-trial defense motions. Both defendants appeal.

FACTS

On the night of May 12, 1998, Tara Willis; her sister, Carla Willis; and her god-sister, LaShonda Laman (collectively referred to as the “Trio”), went to Ms. Moore’s house to play cards. While they were playing cards, Mr. Thomas, a friend of Ms. Moore’s, came by to borrow some money. Shortly thereafter, a neighbor knocked on the door and announced that Charles Gladstone was outside and that he wanted to speak with Tara Willis.

At that time, Tara Willis was several months pregnant, purportedly with Mr. Gladstone's child.

According to Tara Willis, she went outside and had a five to ten minute conversation with Mr. Gladstone. The topic of their conversation was her upcoming baby shower that she was planning and that Mr. Gladstone had promised to help fund. Although Mr. Gladstone had promised her some time ago to get a house with her, he was still residing with Yvette, a woman with whom he had another child. Yvette's house, where he was residing, was located only two blocks away from Ms. Moore's house and on the same street. Tara Willis further testified that Yvette knew about Mr. Gladstone's relationship with her and knew of his plans to move out.

While Tara Willis was outside, Ms. Moore mentioned to Mr. Thomas that he should go outside and finish his business with Mr. Gladstone. Particularly, Carla Willis testified that when her sister went outside to converse with Mr. Gladstone, she heard Ms. Moore tell Mr. Thomas the following: "Charles [Gladstone] outside, come handle your business." Ms. Laman likewise testified that while they were at Ms. Moore's house playing

cards, she heard Ms. Moore repeatedly tell Mr. Thomas the following:

“When you going to handle your business.”

After completing her conversation with Mr. Gladstone, Tara Willis returned inside to complete the card game. Ms. Moore, however, declined to complete the game; instead, Ms. Moore insisted that she was going down the street to talk to Yvette. Ms. Moore stated that she planned to tell Yvette about Tara Willis’ relationship with Mr. Gladstone and about her pregnancy.

At that point, Ms. Moore and Mr. Thomas abruptly departed in Mr. Thomas’ car without locking Ms. Moore’s house. Carla Willis testified that as Ms. Moore and Mr. Thomas departed from Ms. Moore’s house, she and Ms. Laman attempted to follow them and get into Mr. Thomas’ car, but Tara Willis told them not to do so. Carla Willis still further testified that Tara Willis then locked the doors to Ms. Moore’s house, and the Trio departed in Tara Willis’ car to Yvette’s house. Tara Willis drove, Ms. Laman sat in the front passenger seat, and Carla Willis sat in the back. According to Tara Willis, the purpose for which she went to Yvette’s house was to give Ms. Moore her house keys.

According to Tara Willis, when she arrived she spotted Ms. Moore on

the porch knocking at Yvette's door. She saw Mr. Gladstone open the door, then she heard him state: "Girl don't come here with this foolishness," and then she saw him slam the door shut. Ms. Moore then knocked on the door again, and Mr. Gladstone came outside. An oral altercation ensued between Mr. Gladstone and Ms. Moore. Eventually, Ms. Moore walked from the porch to Mr. Thomas' car; Mr. Gladstone followed. Ms. Moore got back into the car. Although she and Mr. Thomas drove off a short distance, they immediately backed up apparently because Mr. Gladstone was arguing with Tara Willis.

Once Mr. Thomas' car stopped, Mr. Gladstone resumed arguing with Ms. Moore. According to Tara Willis, she then returned to her car, which was parked ahead of Mr. Thomas' car. Tara Willis testified that she could see from her rear view mirror that Mr. Gladstone was leaning into the passenger side of Mr. Thomas' car. She further testified that she heard Mr. Gladstone loudly state: "Now you going to pull a gun on me." Tara Willis then heard a single shot and saw Mr. Gladstone fall straight down on his face in the street. Immediately after, she saw Mr. Thomas's car, in which Mr. Thomas was driving and Ms. Moore was a passenger, depart. Tara Willis

then jumped out of her car and came to Mr. Gladstone's aid. Although she attempted to revive him, he failed to respond. Tara Willis testified that she was sure that the shot came from Mr. Thomas' car since no one else was outside.

Throughout the entire event, Carla Willis stated that she and Ms. Laman stayed in Tara Willis' car. Carla Willis also stated that when Mr. Thomas' car backed up, the Trio were all in Tara Willis' car, and they were about to depart. Finally, Carla Willis testified that when she looked out the back car window she saw Mr. Gladstone leaning into the passenger side of Mr. Thomas' car where Ms. Moore was seated and heard Mr. Gladstone state: "oh, you going to pull a gun on me now" or "you're going to shoot me."

Ms. Laman testified consistently with Tara and Carla Willis. Ms. Laman testified that they were in Tara Willis' car moments before Mr. Gladstone was shot, that she saw him leaning into the passenger side of Mr. Thomas' car, and that she heard him loud and clearly state: "You going to pull a gun on me." Ms. Laman further testified that she was looking at him when he made that statement. She, however, indicated that she could not see

into the vehicle as it was dark and the car windows were tinted.

Dr. Paul McGarry, a forensic pathologist with the Orleans Parish Coroner's office, performed the autopsy. Dr. McGarry testified that Mr. Gladstone died from a single gunshot wound that entered the front of his neck above his collarbone. The bullet traveled almost in a straight line down his body into his chest and hit the aorta, which caused a large amount of blood to enter the left lung. Mr. Gladstone died due to a massive internal hemorrhage caused by the hole in his aorta. Dr. McGarry also testified that strippling was found around the entry wound. Explaining the meaning and significance of this finding, Dr. McGarry testified that strippling refers to tiny particles of gunpowder that hit the skin and can be found around an entry wound and that this generally occurs when a gun is fired from a close distance ranging from twelve to eighteen inches.

As noted, immediately after the shot was fired, both Ms. Moore and Mr. Thomas fled the scene in Mr. Thomas' car. The Trio remained on the scene and positively identified Ms. Moore (based on their long-term personal acquaintance with her) and Mr. Thomas (based on photographic line-ups). About a month after the shooting, the police received an

anonymous call reporting the whereabouts of Ms. Moore and Mr. Thomas at a local motel. Based on that call, the police located and arrested them. The police never found the murder weapon or any other gun.

At the joint trial, the state's case was based on the testimony of the Trio and the pathologist who performed the autopsy. In defense, both Ms. Moore and Mr. Thomas testified on their own behalf.

Ms. Moore testified that after Tara Willis' initial conversation with Mr. Gladstone outside her house, she and Tara Willis jointly decided to go talk to Yvette. According to Ms. Moore, they decided to tell Yvette about Mr. Gladstone's relationship with Tara Willis and her pregnancy with his child. Ms. Moore further testified that since she was unsure of the exact location of Yvette's house, she had Tara Willis identify the correct door and then wait on the porch steps. Ms. Moore testified that, after Mr. Gladstone opened the door, she told him that she wanted to talk to Yvette and that he responded by starting an argument with her. She further testified that they continued arguing even as she was returning to Mr. Thomas' car and even as she and Mr. Thomas were driving away.

As they were driving away, Ms. Moore testified that she observed that

Mr. Gladstone had started an argument with Tara Willis. Concerned about Tara Willis' safety, Ms. Moore instructed Mr. Thomas to back the car up. Ms. Moore testified that at that point Mr. Gladstone resumed arguing with her and that he was standing by Mr. Thomas' car about the halfway point. Ms. Moore testified that she became frustrated with the argument, lowered her head, and then heard a gunshot. She further testified that she did not know where the gunshot came from. She still further testified that Mr. Gladstone was not leaning on Mr. Thomas' car at that time and that she saw him grab himself, fall back, and then she and Mr. Thomas departed.

Mr. Thomas testified that when he drove Ms. Moore to Yvette' house, he pulled up at the same time as Tara Willis did, and Ms. Moore and Tara Willis then went to the door. Originally, the argument was only between Ms. Moore and Mr. Gladstone. After Mr. Gladstone came out, Tara Willis walked back to the car, and she handed Mr. Thomas the keys to Ms. Moore's house. Although Ms. Moore and Mr. Gladstone were arguing loudly, Mr. Thomas stated that he was not paying attention to what they were arguing about; instead, he was playing CDs on his car stereo. However, Mr. Thomas testified that when Mr. Gladstone came close to his car, he heard him state

that he was going to get Yvette to “whip both you all [Tara Willis and Ms. Moore].” Mr. Thomas further testified that as they initially pulled off, Ms. Moore said “hold up, she [Tara Willis] ain’t in her car yet” and that he then backed up the car. He indicated that he backed up slowly because he was too close to Tara Willis’ car and that Tara Willis and Mr. Gladstone were behind him. He still further stated that Mr. Gladstone and Ms. Moore resumed arguing, and he lowered his radio.

At that time, Mr. Thomas described Mr. Gladstone’s position as standing by “where his little window was.” Mr. Thomas further explained that a little later he heard a shot and drove off. At the time he heard the shot, Mr. Thomas stated he was looking in a CD case that he had on his lap. Mr. Thomas further stated that as he drove off he saw Tara Willis standing behind his car by the hood. He further stated that when he looked in his rear view mirror he saw Mr. Gladstone standing in the street and that he never saw him on the ground. Mr. Thomas indicated that he was unaware of whether Mr. Gladstone had been shot and that the reason he drove off was because he believed someone was shooting.

After the shooting, Mr. Thomas testified that he and Ms. Moore drove

around for a while and then stopped at Schwegmann's to get something to eat. Since Ms. Moore did not want to go home because she was scared, he testified that they went to a motel instead. Mr. Thomas also testified that he had a prior altercation with Mr. Gladstone regarding him engaging in horseplay with Tara Willis while unbeknownst to him she was pregnant. Apparently, Mr. Gladstone came to Ms. Moore's house on a prior occasion to discuss this matter with Mr. Thomas. On that occasion, Mr. Gladstone told Mr. Thomas that he carried a gun and that he "ain't afraid to use it." Mr. Thomas testified that he told Mr. Gladstone that: "You didn't bring a gun into this, house" and that he was upset about this incident. Mr. Thomas, however, indicated that the incident ended amicably.

At trial, Mr. Thomas acknowledged he had a history of several prior convictions; namely, three felonies--possession of cocaine, distribution of drugs, and possession of a stolen automobile--and two misdemeanors--unauthorized use and battery on a police officer.

As noted, the jury found both Mr. Thomas and Ms. Moore guilty as charged of second degree murder. The trial judge then sentenced them both to life without benefit of parole. Both defendants appealed.

ERRORS PATENT

A review of the record for errors patent reveals a potential error patent. Particularly, the trial court sentenced both Ms. Moore and Mr. Thomas within twenty-four hours of denying their motions for new trial or post judgment verdict of acquittal. Absent a waiver by the defendant, La. C.Cr.P. art. 873 requires a twenty-four delay between the denial of a motion for new trial or in arrest of judgment and sentencing. In this case, there is no indication that either Ms. Moore or Mr. Thomas waived this delay.

In *State v. Augustine*, 555 So. 2d 1331, 1334 (La. 1990), the Supreme Court vacated the defendant's sentence and remanded for resentencing when the defendant did not expressly waive the delay as required by Article 873 and challenged his sentence on appeal. In this case, however, neither Ms. Moore nor Mr. Thomas challenged their sentence on appeal. Thus, there is no error. *State v. Collins*, 584 So. 2d 356 (La. App. 4th Cir. 1991).

DISCUSSION

Sufficiency of the Evidence

Ms. Moore and Mr. Thomas contend that the evidence was constitutionally insufficient to support their convictions. The convictions at

issue are for second degree murder, which is defined as the killing of a human being with the specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1. The specific intent to kill is an ultimate legal conclusion that a fact-finder can infer from the pointing of a gun at close range and pulling of the trigger. *State v. Williams*, 383 So. 2d 369, 373 (La. 1980). That fact is present, but only can be attributed to one of the two alleged offenders. The dispositive question is whether both Mr. Thomas and Ms. Moore were properly convicted of second degree murder as principals pursuant to La. R.S. 14:24, which defines as a principal all persons “concerned in the commission of the crime.”

Given the state’s inability to establish that either of them fired the shot, Ms. Moore and Mr. Thomas argue that the state cannot establish either of them were principals. They further argue that to establish their status as principals the state was required to prove that each of them had the specific intent to kill or to inflict great bodily harm and that the evidence was insufficient to satisfy that burden of proof. In this regard, they cite *State v. Holmes*, 388 So. 2d 722 (La. 1980), for the proposition that “an individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state” and that “[m]ere presence at the scene” is insufficient to “concern” an individual in the crime.

In reviewing sufficiency of the evidence to support a conviction, this court applies the due process standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). Under the *Jackson* standard, an appellate court must determine that the evidence, viewed in the light most favorable to the state, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proved beyond a reasonable doubt. The *Jackson* standard “preserves the role of the jury as the fact finder in the case but it does not allow jurors ‘to speculate if the evidence is such that reasonable jurors must have a reasonable doubt.’” *State v. Pierre*, 93-0893, p. 5 (La. 2/3/94), 631 So. 2d 427, 429.

Under the *Jackson* standard, all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *State v. Jacobs*, 504 So. 2d 817, 820 (La. 1987). When circumstantial evidence forms the basis for the conviction, the totality of such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. However, the circumstantial evidence rule is not a separate test from the *Jackson* standard; La. R.S. 15:438 is simply “an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found defendant guilty beyond a reasonable doubt.” *State*

v. Wright, 445 So. 2d 1198, 1201 (La. 1984).

Applying the above guidelines to this case in which the state's proof hinged almost entirely upon circumstantial evidence and viewing the evidence in the light most favorable to the state, we now address Ms. Moore's and Mr. Thomas' argument that the state failed to exclude a reasonable hypothesis of innocence; namely, that one of them was the sole shooter and the other was merely present and neither aided or abetted the other in the commission of the crime. Stated otherwise, they argue that the evidence viewed most favorable to the state is that "the shot that killed the victim was fired from the appellants' [Mr. Thomas'] vehicle," and that "one of the appellants was merely present when the other unexpectedly shot a weapon that ultimately killed the victim."

The general rule is that "liability [as a principal] will not flow merely from a failure to intervene; however, silence in the face of a friend's crime will sometimes suffice when *immediate proximity* of the bystander is such that he could be expected to voice some opposition or surprise if he were not a party to the crime.'" *State v. Bridgewater*, 2000-1529 at pp. 11-12 (La. 1/15/02), ___ So. 2d ___, ___ (quoting 2 Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law*, § 6.7(a) (1986) (Emphasis supplied)). Such is the case here.

In this case, the circumstantial evidence that the state relied on to establish joint liability as principals in this case included the following: (1) the Trio's testimony that the shot had to come from Mr. Thomas' car because no one else was in the area; (2) the Trio's testimony that Mr. Gladstone was leaning up against the passenger side of Mr. Thomas' car and loudly stated just moments before the firing of the shot that a gun was being pointed at him; (3) the pathologist's testimony based on the autopsy that the shot was fired at close range from directly in front and at an angle consistent with Mr. Gladstone leaning up against a vehicle; and (4) the departure from the scene of both Mr. Thomas and Ms. Moore in Mr. Thomas' car immediately following the firing of the shot.

The evidence, albeit circumstantial, does not support the characterization of either of the appellants, Ms. Moore or Mr. Thomas, as "merely present" as the jurisprudence has construed that phrase in this content. Significantly, they were sitting next to each other in the front seat of the same car from which the shot emanated; hence, this case is distinguishable from cases in which the alleged principal was in another room of the house when the crime was committed. *See Bridgewater, supra*. Given their "*immediate proximity*" to each other, the one that allegedly was not involved would "be expected to voice some opposition or surprise if he

were not a party to the crime.” *Bridgewater, supra*.

In *State v. Meyers*, 95-750 (La. App. 5 Cir. 11/26/96), 683 So. 2d 1378, which involved a drive-by shooting, both the driver and a passenger were convicted as principals of second degree murder. On appeal, the defendants argued that they lacked the specific intent to kill. Affirming their convictions, the court of appeal reasoned that “neither [the driver] nor [the passenger] tried to assist the victim. . . after the shooting. They did not call the police to report the shooting or give any statement regarding the murder to anyone. [The driver] drove the Cutlass to the scene and [the passenger] watched the incident thru the car window.” *Meyers*, 95-750, p. 11, 683 So. 2d at 1384. The court of appeal acknowledged the lack of direct evidence that either the driver or the passenger knew the perpetrator was armed, yet reasoned that they “were definitely not an innocent driver and passenger in the car.” *Id.*; *see also State v. Hayes*, 2001-736, pp. 13-14 (La. App. 5 Cir. 12/26/01), 806 So. 2d 816, 824 (following *Meyers*).

Reliance on a defendant’s failure to act is supported by the Legislature’s express inclusion of such inaction within the definition of specific intent in La. R.S. 14:10(a). Particularly, La. R.S. 14:10(a) defines specific intent as “that state of mind which exists when . . . the offender actively desired the prescribed criminal consequences to follow his act or

failure to act.” La. R.S. 14:10(a)(Emphasis supplied). In this case neither Ms. Moore nor Mr. Thomas attempted to assist Mr. Gladstone or attempted to report the shooting to the police. Instead, they fled together in Mr. Thomas’ vehicle and were arrested together about a month after the crime at a local motel. Taken together with the circumstantial evidence enumerated earlier in this opinion, we conclude that although this is an extremely close case, the evidence was sufficient for a rational juror to have found both Ms. Moore and Mr. Thomas guilty as principals.

Evidentiary Errors

Both Ms. Moore and Mr. Thomas raise one other evidentiary assignment of error. They assign as error the trial court’s limiting certain cross-examination of the state’s witnesses, Tara and Carla Willis, and certain direct examination of the defendant, Ms. Moore.

As to Tara Willis, they argue that the trial court erred in refusing to allow them to question her regarding what Mr. Gladstone and Ms. Moore were talking about when they were arguing on the porch. They argue that the trial court erred in limiting their questioning about the argument based on the hearsay doctrine. They contend that under La. C.E. art. 801D(4), Tara Willis’ testimony regarding the topic of the argument was admissible as part of the *res gestae*--an integral part of the chain of events that preceded

the shooting--and thus not hearsay. They argue that this question was important in that it was intended to solicit a response that would establish Tara Willis' knowledge that the argument was about the "love triangle" involving herself, Yvette, and Mr. Gladstone. This question was thus intended to show Tara Willis' "emotional involvement" in the argument and thereby support a defense theory that Tara Willis was the perpetrator.

The state counters that the trial court properly sustained the objection to the initial question, which elicited a hearsay answer, and allowed defense counsel to reframe the question to elicit a *res gestae* response. Defense counsel was then allowed to conclude this line of questioning without limitation. The state submits that the trial court thus did not improperly limit defense questioning of this witness. The colloquy at issue supports the state's position; particularly, the colloquy was as follows:

Defense Counsel: What were [Ms. Moore and Mr. Gladstone] talking about during this ten minutes, screaming back and forth?

Prosecutor: Objection

Court: Sustained

Defense Counsel: Did you hear any statements that she made?

Witness: Yes. All she said was that, "Yvette, Tara was pregnant."

Defense Counsel: Okay. So, you could not hear this—you could hear what Demetricy [Moore] was saying?

Witness: That's when I was getting out the car bringing Ko [Mr. Thomas] her house keys.

Defense Counsel: You heard some things but you didn't hear some other things, is that correct?

Witness: That's when I was standing outside of the vehicle.

Defense Counsel: It wasn't when you were looking in the rear-view mirror?

Witness: No.

Defense Counsel: No further questions.

On this question, we further note, as the state points out, Tara Willis' testimony at trial revealed that she knew the topic of the argument involved Ms. Moore's attempt to confront Yvette regarding Tara Willis' identity and pregnancy. Thus, even assuming it was error to limit defense counsel's questioning, any error was harmless given the cumulative nature of the evidence sought to be elicited.

The second limitation on defense counsel's questioning that defendants assert as error was the trial court's refusal to allow defense counsel during cross-examination to question Carla Willis regarding whether she knew if Mr. Gladstone had ever told Tara Willis he was going to move in with her. Specifically, the question defense counsel posed to Carla Willis was "[d]id you know if your sister—do you know if Mr. Gladstone ever told

your sister he was going to move in with her?” The trial court sustained the prosecutor’s objection to that question. Defense counsel then stated: “I’m not asking what she said, ‘did she know it.’” Apparently, defense counsel was attempting to persuade the trial court that the question was not intended to elicit hearsay. As defendants urge before this court, the question was not asked to establish the truthfulness of the statement. Rather, the question was intended to determine if Carla Willis knew that the victim had led Tara Willis to believe that he was going to move in with her.

The defendants further argue that it was error for the trial court to limit this question that was intended to establish a defense theory that Carla Willis assisted her sister, Tara Willis, in killing Mr. Gladstone. More particularly, they contend that “[i]f Carla knew that Gladstone was jilting Tara, it would support the argument that Tara and Carla, who were sisters, would have a reason to kill Gladstone and then testify falsely.”

The state, on the other hand, argues that defense counsel’s question was not intended to elicit relevant evidence. The state submits that the defense theory sought to be established by this questioning—that the two sisters teamed together to be the perpetrator—lacks factual support. Other than Carla Willis’ presence in Tara Willis’ car, the defense offered no evidence that she was involved in the shooting. Indeed, no one testified or

alleged at trial that she was involved in the shooting. Given that this theory was not presented at trial, the state contends defendants' attempt to raise such a theory on appeal is improper. Alternatively, the State contends that even if the trial court's ruling was improper, any error was harmless given the defendants' failure to show any prejudice resulting from the trial court's ruling.

Given the wide discretion accorded the trial court in evidentiary matters coupled with the principle that errors generally must be raised at the trial level, we find defendants' argument unpersuasive.

Finally, Mr. Thomas and Ms. Moore argue that the trial court erred in limiting defense counsel's questioning on direct examination of Ms. Moore regarding past altercations between Mr. Gladstone and Tara Willis. The colloquy at issue was as follows:

Defense Counsel: Why were you concerned?

Witness: Because before in the past, they had an altercation.

Defense Counsel: They had altercations previous?

Prosecutor: Objection, your Honor.

Court: Sustained.

Defense Counsel: Did you know Mr. Gladstone to be violent?

Witness: Not while --

Prosecutor: Objection.

Witness: we was in school.

Court: Sustained.

Defendants argue that this line of questioning was intended to establish a motive for Tara Willis committing the offense and that it did not solicit a hearsay answer. Anticipating the state's response, defendants contend this questioning was not seeking inadmissible character evidence prohibited by La. C.E. art. 404. We disagree.

As a general rule, La. C.E. art. 404 A(2) prohibits admission of evidence of a victim's character unless it is admitted for a purpose other than proving that the victim acted in conformity with the evidence on the occasion in question. The evidence elicited by this questioning of the past arguments between the victim, Mr. Gladstone, and Tara Willis was intended to show that the victim acted in conformity therewith on the night he was killed. Under Article 404 A(2), the trial court properly limited this line of questioning.

As to defendants' alternative argument that this questioning was intended to establish that Ms. Moore's concern for Tara Willis was the reason they backed up the car, Ms. Moore testified to that effect at trial. The trial court's exclusion of this evidence, even if incorrect, was harmless error.

CONCLUSION

For the foregoing reasons, we affirm the convictions and sentences of both Terrance Thomas and Demetricy Moore.

AFFIRMED.