NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1207

STATE OF LOUISIANA

VERSUS

IRVIN JONES

Judgment Rendered: December 23, 2009

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 06-07-0036

Honorable Richard D. Anderson, Judge Presiding

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

HUGHES, J.

The defendant, Irvin Jones, was charged by grand jury indictment with one count of second degree murder (count I), a violation of LSA-R.S. 14:30.1, and one count of possession of a firearm by a convicted felon (count II), a violation of LSA-R.S. 14:95.1, and pled not guilty on both counts. He moved for severance of the offenses, but the motion was denied. Following a jury trial, he was found guilty as charged on both counts. On count I, he was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. On count II, he was sentenced to fifteen years without benefit of probation, parole, or suspension of sentence. The court ordered that the sentences on counts I and II were to be served consecutively. The defendant now appeals, challenging the denial of the motion to sever. For the following reasons, we affirm the convictions and sentences on counts I and II.

FACTS

On May 25, 2007, the victim, Roosevelt Lane, was beaten and twice shot in the head, , resulting in his death, at an apartment complex in the Mall City area of Baton Rouge. Following an anonymous telephone call, the police knocked on the defendant's door at the apartment complex to investigate claims that he had committed the offense. The defendant answered the door, wearing only a towel. There was what appeared to be blood on the towel. After obtaining a search warrant, the police recovered tennis shoes and shorts, also with suspected blood on them, from the apartment. Additionally, they discovered a revolver hidden under a dresser in the bedroom. The revolver contained three spent Winchester .357 Magnum rounds, an unfired Winchester .357 Magnum round, and had two empty chambers. The dresser contained a box for fifty Winchester .357

Magnum bullets, containing forty-five bullets. An unfired Winchester .357 Magnum bullet was located on the ground between the picnic table and the defendant's apartment.

Anderson "Bootney" Ross testified at trial. Shortly before the shooting, he had been playing cards at a picnic table at the apartment complex with "Black," "La-La," a third man, and the victim. Ross knew the defendant through a mutual friend. Prior to the card game, he had joked with the defendant, claiming a girl had said that the defendant had "licked her a[--]." After the victim left the card game, the defendant suddenly began hitting the victim before going to his own apartment. Ross went into another apartment to use the bathroom, but heard shots as he exited the apartment. When the defendant saw Ross, he stated, "Bitch, I'm going to show you who my old lady is," and came towards him, clenching his fist.

The defendant gave a recorded statement to the police on the night of the offense. He referred to the victim as "the Police" because the victim talked too much. He indicated he shot the victim and tried to shoot "Bootney" because they talked too much. He claimed that the victim and Bootney knew that he had "jacked off" on a woman in the bathroom where he worked, and thus, must have seen surveillance video of him. The defendant stated, "I go do life. Hey, f[---] it. I killed the police." While laughing, he indicated he had shot the victim in the head. He indicated he had placed the gun under the big dresser in his apartment. When asked if the victim had been armed, he stated, "Bitch ain't got a stick." In regard to Bootney, he stated, "I see that bitch, I kill him."

An expert in fingerprint comparison indicated that the defendant's fingerprints matched those of Irvin Jones, III, with the same date of birth, the same race, and the same gender as the defendant, who was arrested for

second-degree battery. The State also introduced into evidence certified copies of the bill of information filed June 6, 1995, charging "Irvin Jones" with second degree battery, and minutes indicating that he pled guilty to that offense on September 12, 1996.

SEVERANCE OF OFFENSES

In his sole assignment of error, the defendant argues that the trial court erred in denying the motion to sever the offenses because the ruling inappropriately placed before the jury evidence of a prior offense in connection with count II.

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial. LSA-C.Cr.P. art. 493. If it appears that a defendant or the State is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires. LSA-C.Cr.P. art. 495.1

Prior to trial, the defendant moved for severance of counts I and II, arguing that he would be prejudiced if the State were permitted to try the offenses together because "[s]tudies" showed that allowing joinder of LSA-R.S. 14:95.1 offenses insured the State a conviction with a lesser burden. At the hearing on the motion, the defense argued that to put before the jury that someone has a prior conviction would bias the jury and make the trial unfair. The State argued that joinder was permissible under **State v. Morris**, 99-3075

(La. App. 1 Cir. 11/3/00), 770 So.2d 908, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002). The trial court denied the motion for severance.

In **Morris**, the defendant was charged by a single indictment with one count of possession of a firearm by a convicted felon, four counts of armed robbery, one count of aggravated kidnapping, and one count of second degree murder. **Morris**, 99-3075 at p. 2, 770 So.2d at 912. On appeal, he argued that the trial court had erred in denying his motion for severance of the felon-in-possession-of-a-firearm charge from the other counts. **Morris**, 99-3075 at p. 3, 770 So.2d at 913. He argued the joinder had prejudiced him by allowing the jury to hear the otherwise inadmissible evidence that he was a convicted felon. **Id.**

In analyzing the defendant's claim in **Morris**, we noted a defendant in any case bears a heavy burden of proof when alleging prejudicial joinder of offenses as grounds for a motion to sever; factual, rather than conclusory, allegations are required. In ruling on a motion for severance, the trial court must weigh the possibility of prejudice to the defendant against the important considerations of economical and expedient use of judicial resources. An appellate court will not reverse the trial court's ruling denying a motion for severance absent a clear showing of prejudice. **Morris**, 99-3075 at pp. 4-5, 770 So.2d at 913-14.

In **Morris**, this court noted that all of the offenses charged were triable by the same number of jurors and required the same concurrence, and thus, joinder was not improper. **Morris**, 99-3075 at p. 5, 770 So.2d at 914. We also noted that evidence that the defendant was armed was not improper because

the use of a weapon was an essential element of the armed robbery charges.[1] **Id.**

We further noted in **Morris** that, in ruling on a motion for severance, the trial court should consider a variety of factors to determine if prejudice may result from the joinder: whether the jury would be confused by the various counts; whether the jury would be able to segregate the various charges and the evidence; whether the defendant could be confounded in presenting his various defenses; whether the crimes charged would be used by the jury to infer a criminal disposition; and whether, considering the nature of the offenses, the charging of several crimes would make the jury hostile. **Morris**, 99-3075 at pp. 5-6, 770 So.2d at 914.

Applying these factors in **Morris**, we found that the defendant had failed to establish that the evidence of the firearms charge was likely to confuse the jury and make it unable to segregate the charges and evidence because the charges and evidence pertinent to each of the crimes charged were easily distinguishable. **Morris**, 99-3075 at p. 6, 770 So.2d at 914. We also found that evidence of the defendant's prior conviction had not confounded his defenses of alibi and discrediting the testimony of the State's witnesses. **Morris**, 99-3075 at p. 6, 770 So.2d at 914. We also rejected the identical claim made here, i.e., the claim that the felon-in-possession charge was included so that the jury would learn that he had a prior conviction and infer that he had a criminal disposition, finding the claim to be only a conclusory allegation. **Morris**, 99-3075 at p. 6, 770 So.2d at 914-15.

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[1] In the instant case, evidence that the defendant was in possession of a firearm was not improper because, under the State's theory of second degree murder, specific intent to kill or inflict great bodily harm was an essential element of second degree murder, and the State contended that the defendant had used a gun to shoot the victim, thus satisfying the element.

In the instant case, the trial court did not abuse its discretion in denying the motion to sever the offenses. Joinder of counts I and II in a single indictment was proper pursuant to LSA-C.Cr.P. art. 493. The offenses were based on the same act or transaction and were triable by the same mode of trial (a jury composed of twelve jurors, ten of whom had to concur to render a verdict). See LSA-R.S. 14: 30.1(B), LSA-R.S. 14:95.1(B), LSA-C.Cr.P. art. 782(A). The record does not contain the court's charge to the jury because no objections or assignments of error were made during the charge. The State did not move to supplement the record with the court's jury charge and argues on appeal that it is unclear whether the jury was instructed that the evidence of the defendant's prior conviction was admitted only to establish an element of the felon-in-possession-of-a-firearm charge and not as evidence of the defendant's character.

In **State v. Gaines**, 633 So.2d 293, 297 (La. App. 1 Cir. 1993), writ denied, 93-3164 (La. 3/11/94), 634 So.2d 839, a case involving the denial of a motion to sever charges of armed robbery and first degree robbery, we noted that the Louisiana Supreme Court has held that a severance is not mandated simply because the offenses would not be admissible at separate trials, if the defendant is not prejudiced by the joinder. We also noted that under the jurisprudence, there is no prejudice from the joinder when the evidence of each offense is relatively simple and distinct, although such evidence might not have been admissible in separate trials of the offenses because, with a proper charge, the jury easily can keep the evidence of each offense separate in its deliberations. **Id.** In **Gaines**, we found that there was no doubt that the jury was aware that the defendant was charged with two separate offenses, each requiring a separate verdict, because the jury was given a separate list of responsive verdicts and a separate verdict form for each count. **Id.** We further

noted that even though the court had not specifically instructed the jury that evidence of one count could not be used in determining the defendant's guilt of the other count, the defendant had not objected to the court's failure to include the instruction, and he was not prejudiced by the absence of such an instruction because the facts of the two offenses were relatively simple. **Gaines**, 633 So.2d at 297-98.

In the instant case, the defendant failed to establish that the evidence of the felon-in-possession-of-a-firearm charge was likely to confuse the jury and make it unable to segregate the charges and evidence because the charges and evidence pertinent to each of the crimes charged were easily distinguishable. Nor did evidence of the defendant's prior conviction confound his defense of discrediting the testimony of the State's witnesses and distancing himself from the gun hidden in his apartment. Even assuming that the trial court did not give a limiting instruction, the defendant was not prejudiced by the absence of such an instruction. The jury was given a separate list of responsive verdicts and a separate verdict form for each count and the facts of the two offenses were relatively simple.

Moreover, even if we were to find that the trial court erred in refusing to sever the felon-in-possession-of-a-firearm charge, the erroneous admission of other-crimes evidence is a trial error subject to harmless-error analysis on appeal. **Morris**, 99-3075 at p. 6, 770 So.2d at 915. The test for determining whether an error is harmless is whether the verdict actually rendered in this case was surely unattributable to the error. **Morris**, 99-3075 at pp. 6-7, 770 So.2d at 915.

In the instant case, any possibility that the jury was prejudiced against the defendant because of his prior conviction is so remote as to render the verdicts surely unattributable to the evidence of the prior conviction. The

evidence at trial established that the defendant beat and repeatedly shot the victim because he believed the victim had been talking about him and then arrogantly confessed to the killing and to hiding the murder weapon in his apartment.

The defendant relies upon **State v. Griffin**, 2007-0974 (La. App. 1 Cir. 2/8/08), 984 So.2d 97. In that case, the defendant was charged by two separate bills of information with distribution of cocaine and possession with intent to distribute cocaine. **Griffin**, 2007-0974 at p. 2, 984 So.2d at 103. On the day of trial, the State moved to consolidate for trial both bills of information. **Griffin**, 2007-0974 at p. 18, 984 So.2d at 112. The trial court allowed consolidation over the objection of the defendant. **Id.** We noted LSA-C.Cr.P. art. 706 did not provide for consolidation of separate indictments without the consent of the affected defendant. **Id**. We also found that the error was not harmless because the consolidation error resulted in the jury being exposed to inadmissible other crimes evidence, prejudicing his credibility, and the drug distribution case rested on the jury making a credibility determination between the police officer and the defendant. See **Griffin**, 2007-0974 at p. 20, 984 So.2d at 113.

Griffin is distinguishable from the instant case. This case does not involve a consolidation (or misjoinder) error. Further, the defense at trial in this case did not rely on the credibility of the defendant.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable

by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2).

On count II, the trial court failed to impose the mandatory fine of not less than one thousand dollars nor more than five thousand dollars. See LSA-R.S. 14:95.1(B). Although the failure to impose the fine is error under LSA-C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTIONS AND SENTENCES ON COUNTS I AND II AFFIRMED.