NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0722

STATE OF LOUISIANA

VERSUS

PRESTON NELSON

DATE OF JUDGMENT: DEC 27 2013

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 10-11-0505, SEC. 7, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE DONALD R. JOHNSON, JUDGE

* * * * * *

Hillar Moore
District Attorney
Allison Miller Rutzen
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Frederick Kroenke
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Preston Nelson

* * * * * *

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.

Defendant, Preston Nelson, was charged by grand jury indictment with three counts of second degree murder, violations of La. R.S. 14:30.1 (counts 1, 3, and 4); attempted second degree murder, a violation of La. R.S. 14:27 and La. R.S. 14:30.1 (count 2); and possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1 (count 5). Defendant pled not guilty to the counts and, following a jury trial, was found guilty as charged on all counts. For each of the second degree murder convictions, defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence; for the attempted second degree murder conviction, he was sentenced to ten years imprisonment at hard labor without the benefit of parole, probation or suspension of sentence; for the possession of a firearm by a convicted felon conviction, he was sentenced to ten years imprisonment at hard labor without the benefit of parole, probation or suspension of sentence. The trial court ordered counts 2, 3, 4, and 5 to run concurrently with each other, and count 1 to run consecutively to counts 3 and 4. The trial court also imposed a $1,000 fine for count 5. Defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

FACTS

On the night of June 29, 2011, Angela Jarvis was driving home in her Honda Accord to the Elmgrove Garden Apartments in Baton Rouge. Her friend, Ashley London, was in the front passenger seat. At the stop sign where Fairchild Street becomes Brady Road, an SUV or white truck, as described by Angela, was passing her Accord travelling the opposite way and stopped. Angela and the other driver looked at each other before Angela continued her drive home. As she turned off of Fairchild Street, Angela noticed that the white vehicle had turned around and began following her. When Angela pulled into a parking spot at her apartment,

someone from the white vehicle fired a gunshot through the Accord's back window. As Ashley tried to get out of the car, the passenger of the white vehicle approached her and shot her. Angela saw the shooter's face. Angela then heard the driver of the white vehicle tell the shooter to make sure that both of them were dead. Ashley died from a bullet that perforated her lung and heart. When Angela pretended to be dead, the shooter left without firing another shot. Angela was not hit. Weeks later, as the police developed more leads, Angela was shown separate photographic lineups with defendant and G'Quan Baker, whom defendant identified as his brother. Angela identified defendant as the driver and Baker as the shooter.

On the early morning of July 29, 2011, detectives with the Baton Rouge Police Department responded to a crime scene on Kingfisher Avenue, which is within a few miles of Elmgrove Garden Apartments. Detectives found a Ford Explorer near the railroad tracks. Inside the vehicle, which was still running, was dead shooting victims Jessica Parker, in the driver seat, and Kevin Bowie, in the front passenger seat. They were both shot multiple times in the head. Kevin was also shot in the neck, and Jessica was also shot in the neck, back, and shoulder. At least nine spent casings were found in the Explorer, eight of them 9mm caliber and one a .25 auto caliber. The police soon developed defendant and Baker as suspects. In his two recorded interviews with detectives, defendant admitted that on the night Kevin and Jessica were shot, he and Baker were in the Explorer with them. However, it was earlier that night that he and Baker were with them, and it was only to go get gas, since defendant had run out of gas in his white, older model Ford Explorer. Defendant denied that he shot anyone. Robin Johnson testified that she had been with defendant and Baker (who was staying with Robin) the night of July 29, 2011, but that they had dropped her off at her apartment about 9:00 p.m. Several hours later, at about 4:00 a.m., defendant and Baker came back to her

apartment. Robin testified they both had guns: Baker, a Ruger 9mm semi-automatic and defendant, a smaller caliber handgun. When asked on direct examination what they did with the guns, Robin stated, "They took them and they was (sic) cleaning them off." Darion Burkes testified he bought a Ruger 9mm handgun from the defendant. The 9mm casings found in the Explorer and two bullets, one removed from Kevin's body and one from Jessica's clothing before the autopsy, were tested and it was determined that they were all fired from the Ruger handgun defendant had sold to Darion.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant asserts the trial court erred in denying his motion to sever offenses. Specifically, defendant contends the charges were based on separate acts and did not constitute a common scheme.

Defendant filed a motion to sever. The parties submitted the motions with arguments, and the trial court denied the motion. The arguments (or the hearing on the motion, if there was one) were not made a part of the appellate record. In his brief, defendant contends that the murder and attempted murder at the Elmgrove Garden Apartments had nothing in common with the two murders near Kingfisher Avenue. According to defendant, there was nothing connecting the incidents or victims, the incidents were not part of a common scheme or plan, and they occurred at different times in different places. Although the incidents both involved shooting, defendant suggests they were not sufficiently unique to qualify as signature crimes. Defendant does not maintain that the conviction for possession of a firearm by a convicted felon should have been severed.

We find no reason to disturb the trial court's ruling. La. C.Cr.P. art. 493 states:

> 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.

La. C.Cr.P. art. 782(A) provides in pertinent part:

> Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

The punishment for the four (shooting) offenses the defendant was charged with is necessarily confinement at hard labor. See La. R.S. 14:27(D)(1)(a) & La. R.S. 14:30.1(B). Thus, joinder of the offenses is proper under La. C.Cr.P. art. 493 and triable by a twelve-person jury. This does not complete our inquiry because under La. C.Cr.P. art. 495.1, the trial court may order separate trials, or grant other relief, whenever it appears that the defendant or state is prejudiced by the joinder. ***State v. Allen***, 95-1515 (La. App. 1st Cir. 6/28/96), 677 So.2d 709, 713, writ denied, 97-0025 (La. 10/3/97), 701 So.2d 192.

In ruling on a motion for severance, the trial court should consider a variety of factors in determining whether or not 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. A severance need not be granted if the prejudice can effectively be avoided by other safeguards. In many instances, the trial judge can mitigate any prejudice resulting from joinder of offenses by providing clear instructions to the jury. The State can further curtail any prejudice with an orderly presentation of evidence. A motion for severance is addressed to the sound discretion of the trial

court, and its ruling should not be disturbed on appeal absent a showing of an abuse of discretion. 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. ***State v. Allen***, 677 So.2d at 713.

In ***State v. Roca***, 2003-1076 (La. App. 5th Cir. 1/13/04), 866 So.2d 867, 872-74, writ denied, 2004-0583 (La. 7/2/04), 877 So.2d 143, the fifth circuit found a severance was not warranted where the defendant was charged with aggravated rape, aggravated rape of a juvenile, oral sexual battery of a juvenile, and molestation of a juvenile, which involved different victims: the defendant's biological daughter and his girlfriend's daughter. The ***Roca*** court stated that the evidence of each offense would have been admissible as other crimes evidence at the trial of the other offense to show defendant's propensity to sexually abuse young females under his supervision and care under La. C.E. art. 412.2. Accord ***State v. Burks***, 2004-1435 (La. App. 5th Cir. 5/31/05), 905 So.2d 394, 396-401, writ denied, 2005-1696 (La. 2/3/06), 922 So.2d 1176.

Similarly in the instant matter, evidence of the murder and attempted murder at one scene would have been admissible as other crimes evidence at the trial of the two murders at the other scene to show defendant's motive, opportunity, or intent. See La. C.E. art. 404(B)(1).

Moreover, despite defendant's contention, all four charges against him were of the same or similar character. In both locations of the murders, defendant was driving his white Ford Explorer with Baker as his passenger. In both locations, a 9mm handgun and a smaller handgun, probably a .25 auto handgun, were used by defendant and Baker to kill the victims. In both locations, unarmed, female drivers were shot at. Despite the lapse of time between the Elmgrove Garden Apartments murder and attempted murder, and the Kingfisher Avenue double murder, the identity of defendant as the perpetrator and the similar character of the offenses

remained unchanged. See ***State v. H.A., Sr.***, 2010-95 (La. App. 3d Cir. 10/6/10), 47 So.3d 34, 37, 41-43 (trial court's denial of a motion to sever was upheld where the charges of aggravated incest and molestation of a juvenile occurred between eight and fifteen years apart and were committed against different victims); see also ***State v. Dickinson***, 370 So.2d 557, 559-60 (La. 1979) (trial court's denial of a motion to sever was upheld where defendant was tried on charges of the kidnapping-attempted rape of one victim along with the kidnapping-attempted rape of a second victim, which had occurred one year earlier).

The charges were properly joined. The incidents involved, while committed on separate dates, were of a similar character. Further, the evidence of each offense was simple and distinct, and the State presented the evidence in a clear, orderly fashion to minimize any possible confusion. While the trial court did not in its jury charges expressly instruct jurors that they could not consider the elements of one offense in determining their verdict as to any of the other crimes charged, the trial court discussed the elements of the charged offenses and their responsive verdicts in the context of addressing the separate verdict forms that the trial court would provide jurors on each count to record their verdicts. See ***State v. Crochet***, 2005-0123 (La. 6/23/06), 931 So.2d 1083, 1088 (per curiam). Accordingly, the trial court did not abuse its discretion in denying defendant's motion to sever.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, defendant urges that under the Sixth Amendment to the United States Constitution, he was denied his right to confront a witness. Specifically, defendant contends that he was entitled to know Darion Burkes's record of juvenile adjudications when he inquired about it on the cross-examination of Burkes.

Fifteen-year-old Darion Burkes testified on direct examination at trial that defendant sold him the Ruger 9mm handgun used in the murders. On cross-examination, defense counsel asked Darion if he had ever been adjudicated delinquent of any crimes. The prosecutor objected on the grounds of relevance and that juvenile records were under seal. Defense counsel argued that the witness's juvenile record affected his credibility. The prosecutor contended that evidence of juvenile delinquency adjudication was not admissible under the Code of Evidence. The trial court sustained the objection

Generally, evidence of juvenile delinquency adjudications is not admissible in a criminal case. La. C.E. art. 609.1(F). However, there are times when the confidentiality of juvenile records must yield to a defendant's constitutional rights. ***State v. Smith***, 97-1075 (La. App. 5th Cir. 4/15/98), 710 So.2d 1187, 1189.

In ***State v. Toledano***, 391 So.2d 817, 820 (La. 1980) (on rehearing), the court said:

> The extreme importance and constitutional status of the right to confrontation (which includes the reasonable opportunity to impeach the witness' credibility) requires that any statutory right to confidentiality of juvenile proceedings under these circumstances must yield if the discrediting value of a prior juvenile adjudication is such that its disclosure is essential to a fair trial.

In ***State v. Francis***, 93-953 (La. App. 5th Cir. 3/16/94), 635 So.2d 305, 307, the court expounded:

> Indeed, the Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The principal interest secured by this right is the right to cross-examine witnesses. ***State v. Haywood***, 491 So.2d 1318 (La.1986). This interest was recognized and articulated by the United States Supreme Court in ***Davis v. Alaska***, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)[,] wherein it held that the right of confrontation is paramount to the state's policy of protecting a juvenile offender. Additionally our State Constitution expressly guarantees a defendant the right to cross-examine adverse witnesses. La. Const. art. I, § 16.

The record shows that defense counsel filed a pretrial motion for criminal record and pending charges of witnesses. In this motion, defense counsel noted that these records, which the State had access to, were discoverable and exculpatory, and he further stated: "All records and information revealing the juvenile criminal record, adult criminal record and pending charges of the State[']s witnesses is indispensable in the confrontation of the witnesses, not only to show interest, bias, motive, credibility but also to impeach the witness." It is not clear from the record if the State provided defendant with Darion's juvenile record, or even if Darion had a juvenile record. At trial during Darion's cross-examination, it was not determined, or even discussed, if Darion had a "rap sheet," to which defense counsel may have been potentially entitled. Had defense counsel requested specific relevant evidence with possible impeachment value, the trial judge would have then been required to order submission of Darion's record of juvenile adjudications (assuming one existed) for an in-camera inspection to determine materiality. The issue would have then been whether Darion's juvenile adjudications had such discrediting value that there existed a reasonable likelihood that evidence of the adjudications would have affected the verdicts and, as such, must be viewed as evidence favorable to the accused. See ***Toledano***, 391 So.2d at 820. However, no such request was made by defense counsel at trial.

We find no error in the trial court's sustaining the State's objection to the admissibility of Darion's juvenile record. A trial court is afforded great discretion in controlling the scope and extent of cross-examination and its findings will not be disturbed absent a finding of an abuse of discretion. Furthermore, any failure on the part of the trial judge to allow cross-examination pursuant to La. C.E. art. 609.1, thereby resulting in an infringement on a defendant's right of confrontation, is subject to harmless error analysis. See ***State v. Coleman***, 32,906 (La. App. 2d

Cir. 4/5/00), 756 So.2d 1218, 1244-45, writ denied, 2000-1572 (La. 3/23/01), 787 So.2d 1010.

Even had Darion's juvenile criminal record (assuming there was one) been introduced into evidence and defense counsel thereafter cross-examined him regarding the contents, thereby damaging his credibility, the State presented other witnesses who placed the Ruger handgun in the possession of defendant or his accomplice, Baker, at the time of the murders. Accordingly, there would have been nothing in the rap sheet that was of such a discrediting value that there could have been a reasonable possibility that it would have affected the jury's verdict. See ***Smith***, 710 So.2d at 1189-90. See also La. C.Cr.P. art. 921; ***Sullivan v. Louisiana***, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993) (the guilty verdicts were surely unattributable to any alleged error in the trial court's ruling).

This assignment of error is without merit.

DECREE

For these reasons, we affirm the convictions and sentences of defendant, Preston Nelson.

CONVICTIONS AND SENTENCES AFFIRMED.