NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1529

STATE OF LOUISIANA

VERSUS

JONATHAN DEWAYNE YORK

Judgment Rendered: MAR 2 4 2014

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 05-11-0567

Honorable Mike Erwin, Judge Presiding

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

The defendant, Jonathan York, a.k.a. "Juvenile," a.k.a. "Juvey," was charged by grand jury indictment with one count of second degree murder (count I), a violation of La. R.S. 14:30.1; and one count of possession of a firearm after having been convicted of possession of a schedule II controlled dangerous substance (count II), a violation of La. R.S. 14:95.1. He pled not guilty on both counts. 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 at hard labor without benefit of probation, parole, or suspension of sentence to run concurrently with the sentence imposed on count I. He now appeals, filing a counseled and pro se brief. In his counseled brief, he challenges the sufficiency of the evidence and argues the trial court erred in failing to sever the offenses for trial. In his pro se brief, he contends: trial counsel labored under an actual conflict of interest; the record is incomplete to provide him his right to judicial review; the State elicited false testimony from a witness at trial; the trial court erred in overruling a hearsay objection at trial; and the trial court erred in failing to sever the offenses for trial. For the following reasons, we affirm the convictions and sentences on counts I and II.

FACTS

Michael Louis Johnese testified he was the father of the victim, Shantell Johnese. On April 1, 2011, Michael Johnese was working in his neighborhood in Baton Rouge doing lawn maintenance. According to Johnese, he learned that the victim and the defendant had a "beef" or argument with each other, and approached the defendant and his brother, who were in the defendant's mother's red car, and told the defendant that they needed to talk. Michael Johnese testified

the defendant was a passenger in the vehicle. Approximately twenty to twenty-five minutes later, Michael Johnese heard a shot ring out. He rushed back to where he had left the victim, and she told him, "he shooting at me." Johnese asked the victim who was shooting at her, and she replied, "John." Johnese indicated the victim identified her assailant by the names "Jonathan" and "Juvenile," and the defendant's nickname was "Juvenile." Michael Johnese went to look for the defendant, but approximately four to six minutes later, he heard at least five additional shots ring out and rushed back to the victim again. The victim had suffered five gunshot wounds, including a fatal wound to her left side. Michael Johnese indicated, prior to the incident, he considered the defendant his very good friend, had worked on cars with him, and had given him advice. Michael Johnese also testified the defendant had a birthmark over his eye.

Sherwood Gaines testified that on April 1, 2011 he travelled from the store to the victim's house, and the victim asked him if he had seen "Juvenile." Gaines replied he had seen the defendant down by the defendant's house. According to Gaines, approximately ten minutes later, the defendant drove up the street in a red car and shot the victim four or five times. Gaines testified he saw the defendant from a distance of approximately twenty feet, at 2:00 p.m. or 2:30 p.m., and was familiar with him because they "used to hang together a while back."

While investigating the offense, the police found a red vehicle, belonging to the defendant's mother, at her home, approximately one block from the crime scene. A .40 caliber shell casing was located in the area of the passenger-side windshield wiper. Subsequent analysis indicated the shell casing matched shell casings found at the crime scene. Additionally, in a recorded telephone conversation from prison, the defendant stated, "shit bad, forty shell, windshield, missed it."

SUFFICIENCY OF THE EVIDENCE

In counseled assignment of error number 1, the defendant contends the evidence was insufficient to support the convictions on counts I and II because Michael Johnese did not see the defendant shoot the victim, but rather testified he saw two people in the car from which the shots were fired; and because Sherwood Gaines was "an unreliable and inconsistent witness." Additionally, in regard to count II, the defendant argues the evidence was insufficient to establish his identity as the person who pled guilty to possession of cocaine in connection with 19th Judicial District Court Docket #01-07-0305.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

It is unlawful for any person who has been convicted of a violation of the Uniform Controlled Dangerous Substances Law which is a felony to possess a firearm or carry a concealed weapon. La. R.S. 14:95.1(A). It is well settled that to establish the defendant as the same person convicted of a prior felony, the State need not use a specific type of evidence, and that prior convictions may be proven by any competent evidence. Proof of identity can be established in various ways, including the State presenting: (1) the testimony of witnesses to prior crimes, (2) expert testimony matching the fingerprints of the accused with those in the record of the prior proceeding, (3) photographs contained in a duly authenticated record, or (4) evidence of identical driver's license number, sex, race, and date of birth. **State v. Taylor**, 12-25 (La. App. 5th Cir. 6/28/12), 97 So.3d 522, 536.

In regard to count II, the State introduced into evidence certified copies of the bill of information and minutes filed in 19th Judicial District Court Docket #01-07-

0305. The bill of information, filed February 15, 2007, charged that on or about November 8, 2006, Jonathan Dewayne York, a black male, born on July 29, 1983, whose address was 2457 Valley Street, Baton Rouge, Louisiana 70802, knowingly and intentionally possessed with intent to distribute or produced, manufactured, or distributed cocaine. The minutes of September 19, 2007, indicated that Jonathan Dewayne York, appearing with counsel, withdrew his former plea of not guilty, and pled guilty to possession of cocaine after being advised of and waiving his **Boykin**[1] rights.

In the instant case, the indictment charged that on or about April 1, 2011, Jonathan York, a black male, born on July 29, 1983, whose address was 2457 Valley Street, Baton Rouge, Louisiana 70806, committed counts I and II. The defendant did not challenge the accuracy of the identifying information on the indictment.

Any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of counts I and II and the defendant's identity as the perpetrator of those offenses. The verdicts rendered against the defendant indicate the jury accepted the testimony of Michael Johnese and Gaines and rejected the defendant's attempts to discredit these witnesses. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case. Further, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any

[1] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, in reviewing the evidence, we cannot say the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662.

An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

JOINDER OF OFFENSES

In counseled assignment of error number 2 and pro se assignment of error number 5, the defendant argues that the trial court erred in refusing to sever the offenses and order separate trials because the State included the charge of possession of a firearm by a convicted felon to put the defendant's prior conviction before the jury.

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. Code Crim. 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. La. Code Crim. P. art. 495.1.

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. **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.

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. Evidence of a crime other than the one charged, which may not, for some reason, be admissible under **Prieur**[2] in a separate trial of that charge, does not prevent the joinder and single trial of the charge of multiple crimes, if the joinder of the crimes is otherwise permissible. **Allen**, 677 So.2d at 713.

[2] **State v. Prieur**, 277 So.2d 126 (La. 1973).

Prior to the presentation of evidence, the defendant moved for severance of the offenses, arguing a joint trial of the offenses would allow the State to "back-door" the fact of the defendant's prior conviction for possession of drugs to the jury contrary to the defendant's right to the presumption of innocence and his privilege against self-incrimination.

At the hearing on the motion, the State argued that the addition of the charge of possession of a firearm by a convicted felon did not violate the defendant's presumption of innocence and also did not force him to testify contrary to his privilege against self-incrimination. The State pointed out proof of the defendant being a felon in a prior case is always part of the charge of felon in possession of a firearm. Additionally, the State argued proof of the second degree murder was necessary to establish the defendant was in possession of a firearm, and if the counts were severed, the State would have to prove the murder twice. The trial court denied the motion to sever, noting, the offenses were of the same or similar character and were based on the same act or transaction.

There was no abuse of discretion in the denial of the motion to sever offenses. Joinder of counts I and II in a single indictment was proper under La. Code Crim. P. art. 493. The offenses occurred simultaneously, arose out of one continuous transaction, and were triable by the same mode of trial, i.e., a jury composed of twelve jurors, ten of whom must concur to render a verdict. See La. Const. art. I, § 17(A), La. Code Crim. P. art. 782(A), La. R.S. 14:30.1(B); La. R.S. 14:95.1(B); **State v. Morris**, 99-3075 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 913-15, 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); **State v. Brown**, 504 So.2d 1025, 1029-30 (La. App. 1st Cir.), writ denied, 507 So.2d 225 (La. 1987). Prejudice, if any, resulting from joinder of the offenses was mitigated by the orderly presentation of evidence by

the State. After presenting evidence concerning the charge of second degree murder, the State introduced into evidence certified copies of the bill of information and criminal court minutes concerning the defendant's guilty plea, under 19th Judicial District Court Docket #01-07-0305, to possession of cocaine. Further, the jury was provided with separate verdict forms and separate lists of responsive verdicts for the two charges. The court also provided separate, clear instructions concerning each of the charges and responsive verdicts and instructed the jury that it was not to consider the prior conviction of the defendant in assessing whether or not the State proved the defendant possessed the firearm at the time of the offense charged.

These assignments of error are without merit.

CONFLICT OF INTEREST

In pro se assignment of error number 1, the defendant argues that trial counsel labored under an actual conflict of interest because he had previously represented Sherwood Gaines.

In determining whether or not a conflict exists, courts often look to the Rules of Professional Conduct. Furthermore, the Louisiana Supreme Court has determined that the ethical rules which regulate attorneys' law practices have been recognized as having the force and effect of substantive law. The burden of proving disqualification of an attorney or other officer of the court rests on the party making the challenge. **State v. Letell**, 2012-0180 (La. App. 1st Cir. 10/25/12), 103 So.3d 1129, 1140, writ denied, 2012-2533 (La. 4/26/13), 112 So.3d 838.

Louisiana State Bar Articles of Incorporation, Art. XVI, Rules of Prof. Conduct, Rule 1.7, provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or another proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

At trial on December 6, 2012, a recess was granted at the request of defense counsel Stephen Sterling after the State called Gaines to the stand. Outside the presence of the jury, Sterling advised the court he had formally represented Gaines, recognized him, and may be listed as counsel of record "on some of the many numerous cases on his record." The State indicated that Gaines's last conviction was in 2009, at least three years had passed since that time, and "that file has been dead-filed in today's testimony." The State further indicated it was planning on introducing the prior convictions of Gaines into evidence, and it expected him to testify truthfully that he had prior felony convictions. Additionally, the State set forth that it could not think of anything that might come out of Gaines's prior arrests and convictions for possession of cocaine that might have anything to do with the murder in the instant case. The court stated, "I don't know that there is a conflict," noting that none of defense counsel's past prior representations had anything to do with the

case. Sterling responded, "I agree. I totally agree, but I – just again, I felt like it was my duty to make sure that everybody knew, so."

Subsequently, on direct-examination, Gaines testified he had three prior felony convictions for possession of cocaine and possession of firearms. He indicated the last conviction was in 2008.

On cross-examination, Sterling asked Gaines, "[a]nd you don't deny that you have a sordid history, that you've got multiple arrests and convictions on your record, and that you're a drug user, et cetera? You don't deny that?" Gaines replied, "[r]ight. I don't deny it." Additionally, Sterling asked Gaines if the victim had sold drugs to him, and Gaines answered, "[n]o, if anything, I sold drugs to her."

The defendant fails to carry his burden of proving Sterling violated State Bar Articles of Incorporation, Art. XVI, Rules of Prof. Conduct, Rule 1.7. The defendant fails to show that Sterling's representation of Gaines was adverse to the defendant or that Sterling's representation of the defendant was materially limited by Sterling's responsibilities to Gaines. Sterling's representation of Gaines ended at least three years prior to the instant trial, and Sterling thoroughly cross-examined Gaines concerning his criminal convictions and "sordid history."

This assignment of error is without merit.

INCOMPLETE RECORD

In pro se assignment of error number 2, the defendant argues that the record is incomplete to provide him his right to judicial review because the trial transcript fails to reflect that Sterling "object[ed] to the conflict of interest due to [his] previously representing [Gaines], and [Sterling] didn't think it would be fair to [the defendant]." The defendant also claims the record omits the trial court's response to Sterling's objection, to-wit, "Oh, it shouldn't be a problem."

Article I, § 19 of the Louisiana Constitution guarantees defendants a right of appeal "based upon a complete record of all the evidence upon which the judgment is based." Material omissions from the transcript of the proceedings at trial bearing on the merits of an appeal will require reversal. On the other hand, inconsequential omissions or slight inaccuracies do not require reversal. Finally, a defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcripts. **State v. Frank**, 99-0553 (La. 1/17/01), 803 So.2d 1, 19-20 (citations omitted).

In the instant case, the alleged omissions in the trial transcript were inconsequential and did not affect substantial rights of the defendant. See La. Code Crim. P. art. 921. The record reflects that Sterling raised the issue of his former representation of Gaines sufficiently to preserve the issue for review and, indeed, we addressed the issue of conflict of interest raised by the defendant in pro se assignment of error number 1. The record also contains discussion between Sterling, the State and the trial court on the issue, as well as the subsequent direct, cross, and redirect examination of Gaines.

This assignment of error is without merit.

PROSECUTORIAL MISCONDUCT

In pro se assignment of error number 3, the defendant argues that the State knowingly elicited false testimony from Gaines because in a pretrial pleading, the State indicated that there were outstanding warrants for Gaines, but "did nothing to correct" Gaines's denial of "recent run-ins with the law" or arrests on direct examination. (Pro se brief, pp. 6-7).

The record discloses no contemporaneous objection raising claims of prosecutorial misconduct. An irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence. See La. Code Evid. art.

103(A)(1); La. Code Crim. P. art. 841(A). Accordingly, the defendant has waived any error based on this allegation by his failure to enter a contemporaneous objection. See **State v. Sisk**, 444 So.2d 315, 316 (La. App. 1st Cir. 1983), writ denied, 446 So.2d 1215 (La. 1984).

This assignment of error is without merit.

HEARSAY

In pro se assignment of error number 4, the defendant argues that the trial court erred in overruling a hearsay objection concerning what the victim told her father "without stating any reason."

The following exchange occurred at trial:

[State]: You called up your daughter –

[Johnese]: Correct. And so, after that, I went over to get the lunch for me and my daughter, so as I heard the gun ring, the gunshot made – so, I rushed back over there, and she say daddy, daddy, he shooting at me. Who's shooting at you? John.

[Defense]: Judge, I'm going to object. Hearsay.

[Court]: Overruled.

Thereafter, Michael Johnese testified as follows:

[State]: Are you sure this is the Jonathan that she was talking about?

[Johnese]: Yes, Sir.

[State]: How can you be sure?

[Johnese]: Because I be knowing (inaudible) all his life.

[State]: Say that again.

[Johnese]: Because I know him all his life, from a small baby until now, where he at now.

[State]: Do you know if [the defendant] has a nickname?

[Johnese]: Juvenile.

[State]: Did she – did your daughter, did [the victim] refer to [the defendant] by his name or his -

[Johnese]: She be knowing both of them, York and Juvenile.

[State]: She called him both names? She said, both, Jonathan and Juvenile?

[Johnese]: Right.

[State]: And that's how you know for sure that that's who she was talking about?

[Johnese]: Yes.

The trial court properly overruled the objection to hearsay. The challenged testimony was admissible under the hearsay exceptions for present sense impression and excited utterance because the victim was describing or explaining the defendant's attack on her immediately after the attack and while she was still under the stress of excitement caused by the attack. See La. Code Evid. art. 803(1) & (2). Moreover, error, if any, in the overruling of the hearsay objection was harmless because Michael Johnese subsequently testified, without objection, that the victim identified the defendant by name and nickname after he initially shot at her. See La. Code Crim. P. art. 921; **Delaware v. Van Arsdall**, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986).

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. Code Crim. 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." La. Code Crim. P. art. 920(2).

In sentencing on the possession of a firearm by a convicted felon conviction, the trial court failed to impose the mandatory fine of not less than one thousand

dollars nor more than five thousand dollars. See La. R.S. 14:95.1(B). Although the failure to impose the fine is error under La. Code Crim. 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 (La. App. 1st 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.