

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2016 KA 0465**

*WBM*  
*Guidry*  
*PM*

**STATE OF LOUISIANA**

**VERSUS**

**EUGENE GUIDRY**

**Judgment Rendered: OCT 31 2016**

**Appealed from the  
Twenty-First Judicial District Court  
In and for the Parish of Tangipahoa, State of Louisiana  
Trial Court Number 1302325**

**Honorable Bruce Bennett, Judge Presiding**

\*\*\*\*\*

**Scott M. Perrilloux  
Patricia Parker Amos  
Amite, LA**

**Counsel for Appellee,  
State of Louisiana**

**Mary E. Roper  
Baton Rouge, LA**

**Counsel for Defendant/Appellant,  
Eugene Guidry**

**Bertha M. Hillman  
Covington, LA**

\*\*\*\*\*

**BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.**

## **WHIPPLE, C.J.**

Defendant, Eugene Guidry, was charged by amended grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1 (count 1); felon in possession of a firearm, a violation of LSA-R.S. 14:95.1 (count 2); obstruction of justice, a violation of LSA-R.S. 14:130.1 (count 3); and possession of a schedule II controlled dangerous substance (cocaine), a violation of LSA-R.S. 40:967(C) (count 4).<sup>1</sup> Defendant pled not guilty to all counts. Following a jury trial, defendant was found guilty as charged on each count. He filed motions for new trial and postverdict judgment of acquittal, both of which the trial court denied. On count one, the trial court sentenced defendant to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence; on count two, the trial court sentenced defendant to twenty years at hard labor, without the benefit of parole, probation, or suspension of sentence; on count three, the trial court sentenced defendant to forty years at hard labor, without the benefit of parole, probation, or suspension of sentence; and on count four, the trial court sentenced defendant to five years at hard labor. The trial court ordered all of the sentences to be served consecutively. Defendant filed a motion to reconsider his sentences, which the trial court denied. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm all of defendant's convictions and his sentences on counts 1, 2, and 4. We amend the sentence on count 3 to delete the restrictions on parole, probation, and suspension of sentence, and affirm that sentence as amended.

### **FACTS**

Late in the evening on May 9, 2013, Eugene Guidry (defendant) decided to purchase some crack cocaine. Joseph Montgomery and a woman identified only as

---

<sup>1</sup>The amended indictment actually numbered these counts as 1 and 3-5 because a codefendant was charged in count 2 with accessory after the fact to second degree murder. The codefendant agreed to plead guilty to his charged offense and testify at defendant's trial in exchange for the state's recommendation of probation, and he is not a party to the instant appeal. At defendant's trial, the counts were numbered 1-4, so we use the same designation on appeal.

“Deborah” picked up defendant from his girlfriend’s residence on South Spruce Street in Hammond. Montgomery, Deborah, and defendant drove to nearby Washington Avenue, where they picked up Jerrell Bird (the victim), whom they knew to sell drugs. After Bird entered the vehicle, defendant gave him \$10.00 in cash in exchange for a rock of crack cocaine. Defendant looked at the rock, stated he did not want it, and attempted to return it to Bird in exchange for the cash he had paid. Bird accused defendant of having “popped” the rock, or breaking part of it to keep for himself. This accusation caused a heated argument between Bird and defendant. The argument ended when Montgomery dropped defendant back off at his girlfriend’s house on South Spruce Street. When defendant exited the car, Bird had possession of both the cash and the drugs. Montgomery and Deborah brought Bird to Stanley Street, where he exited the vehicle.

After returning to his girlfriend’s residence, defendant placed a call to Earnest “Cookie” James, asking James to bring “that tool,” which James described as a handgun. Defendant’s girlfriend, Juanita Doakes, confirmed that defendant placed a call to James and also related that defendant went inside the home to change into black clothing. When James arrived at the South Spruce Street residence, Doakes witnessed that defendant retrieved an object from the trunk of James’s vehicle. James testified that defendant took a gun from the car and left the area on foot.

Shortly thereafter, both Doakes and James heard multiple gunshots. Defendant returned to Doakes’s home, either walking quickly or running. He gave the gun to James, who took it back to his own residence and hid it in a sock he placed underneath his home. Defendant went inside Doakes’s home, changed his clothes, and lay in bed. After initially denying his involvement to the police, James later disclosed where he had hidden the weapon.

Gerard Thomas, Bird’s older brother, testified that he saw Bird exit a vehicle on West Stanley Street prior to the shooting. Thomas briefly spoke with Bird, but

he eventually walked away from the area because of his knowledge that Bird was engaged in selling drugs. As Thomas walked down Washington Avenue, he saw a tall man wearing black clothing exit a dark-colored vehicle.<sup>2</sup> He watched as this man approached Bird and began to argue heatedly with him. Thomas heard at least part of the argument where “ten dollars” was mentioned. Believing Bird could handle the issue himself, Thomas continued to walk away from the area until he heard multiple gunshots. At that time, he asked someone on the street to go check on his brother. After the shooting, Thomas saw someone who appeared to be the same tall individual as before. This person was running down Newman Street toward Mary’s Alley. Thomas could not positively identify the tall man in black clothing as defendant.

Angela Clemmons was living in a residence on the corner of Washington Avenue and East Stanley Street on the night of the shooting. When she heard the initial gunshots after midnight on May 10, 2013, she looked out her window and saw two silhouettes running through a field across from her house. She observed that the silhouette in front was that of a shorter man wearing a white t-shirt, a description consistent with that of the victim, Bird. The rear silhouette was a taller man she could not identify. Clemmons observed that the shorter man’s silhouette disappeared from view, but the taller man continued to run in the direction of Washington Avenue. Soon thereafter, a neighbor knocked on Clemmons’s door and asked for her help. Clemmons went outside and saw Bird lying on the ground in the area where she had seen the shorter man’s silhouette disappear. Clemmons called 911 and later gave statements to the police.

Ballistics testing matched three casings recovered at the crime scene and a bullet retrieved from the victim’s body as having been fired from the gun found

---

<sup>2</sup>Thomas testified that his height is 5’8” and that the man was taller than he. Defendant’s height is approximately 6’1” or 6’2” according to testimony admitted at trial.

beneath James's home. An autopsy indicated that the victim died at the scene of multiple gunshot wounds with perforating injuries to the heart, lungs, and liver.

Regarding count 2 (felon in possession of a weapon), at trial, the state presented evidence that defendant had a 1997 felony conviction for unauthorized entry of an inhabited dwelling, as well as a 2007 conviction for aggravated battery. Defendant's fingerprints were used to prove his connection to these prior offenses.

Defendant did not testify at trial. The state played for the jury a recorded statement that defendant gave to the police on the day following the incident. Defendant confirmed the events leading up to the shooting – including his attempt to buy crack cocaine from the victim and the resulting argument. However, he stated that he was at his girlfriend's home when he heard the gunshots, and he explained that James had come over only to discuss the argument defendant had with the victim. Defendant denied that James supplied him with a weapon and that he shot Bird. The state also introduced a written statement that defendant sent to the court prior to trial. In this statement, defendant wrote, "Defendant was at 5115 Noah James Dr. in Hammond[,] Louisiana sleep [sic] at the time of question May 10, 2013. Miles away, in an entirely different neighborhood." The jury returned verdicts of guilty as charged for each alleged offense.

### **BATSON CHALLENGES**

In his first assignment of error, defendant argues that the state improperly exercised peremptory challenges against prospective jurors on the basis of race. While defendant argues that the state's challenges demonstrated a pattern of purposeful discrimination against five prospective black, female jurors, he ultimately takes issue with the trial court's ruling as to only two of these individuals.

In Batson v. Kentucky, 476 U.S. 79, 93-98, 106 S. Ct. 1712, 1721-1724, 90 L. Ed. 2d 69 (1986), the United States Supreme Court adopted a three-step analysis to determine whether the constitutional rights of a defendant or prospective jurors

have been infringed by impermissible discriminatory practices. First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. State v. Handon, 2006-0131 (La. App. 1st Cir. 12/28/06), 952 So. 2d 53, 56.

To establish a *prima facie* case, the defendant must show: (1) the defendant is a member of a cognizable group and the prosecutor exercised peremptory challenges to remove venire members of the defendant's race; (2) the challenge was peremptory rather than for cause; and (3) relevant circumstances sufficient to raise an inference that the prosecutor struck the venire person on account of his being a member of that cognizable group. See Batson, 476 U.S. at 96, 106 S. Ct. at 1723. Without an inference that the prospective jurors were stricken because they are members of the targeted group, the defendant is unable to make a *prima facie* case of purposeful discrimination, and his Batson challenge expires at the threshold. State v. Sparks, 88-0017 (La. 5/11/11), 68 So. 3d 435, 468, cert. denied sub nom., El-Mumit v. Louisiana, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1794, 182 L. Ed. 2d 621 (2012).

The trial court may “effectively collapse the first two stages of the Batson procedure, whether or not the defendant established a *prima facie* case of purposeful discrimination, and may then perform the critical third step of weighing the defendant's proof and the prosecutor's race-neutral reasons to determine discriminatory intent.” State v. Jacobs, 99-0991 (La. 5/15/01), 803 So. 2d 933, 941, cert. denied, 534 U.S. 1087, 122 S. Ct. 826, 151 L. Ed. 2d 707 (2002). A trial judge may take into account not only whether a pattern of strikes against a suspect class of persons has emerged during voir dire, but also whether the opposing party's questions and statements during voir dire examination and in exercising his

challenges may support or refute an inference of discriminatory purpose. See State v. Duncan, 99-2615 (La. 10/16/01), 802 So. 2d 533, 545, cert. denied, 536 U.S. 907, 122 S. Ct. 2362, 153 L. Ed. 2d 183 (2002).

The state, in presenting race-neutral reasons for its excusal of prospective jurors, need not present an explanation that is persuasive, or even plausible; unless a discriminatory intent is inherent in the state's explanation after review of the entire record, the reason offered will be deemed race neutral. For a Batson challenge to succeed, it is not enough that a discriminatory result be evidenced; rather, that result must ultimately be traced to a prohibited discriminatory purpose. Thus, the sole focus of the Batson inquiry is upon the intent of the opposing party at the time he exercised his peremptory strikes. See State v. Green, 94-0887 (La. 5/22/95), 655 So. 2d 272, 287. A reviewing court owes the trial court's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. Handon, 952 So. 2d at 58.

Defendant contends that five black females were peremptorily stricken from the jury by the state: Stella Batiste-Zanders, La'Dacia James, Lekyra Dunn-Steel, Alma Thomas, and Patricia Morris. Of these prospective jurors, defendant argues that the state failed to give sufficient race-neutral reasons only for Ms. Batiste-Zanders and Ms. James.

The record indicates that Ms. Batiste-Zanders, Ms. James, and Ms. Dunn-Steel were part of the first panel of prospective jurors. Ms. Thomas and Ms. Morris were part of the second panel. The state peremptorily struck Ms. Batiste-Zanders immediately following the examination of panel one. Ms. James and Ms. Dunn-Steel were initially accepted as jurors. On panel two, Ms. Morris was initially accepted as a juror. In the middle of the selection from panel two, the state informed the trial court of its desire to backstrike Ms. James and Ms. Dunn-Steel from panel

one. Defense counsel objected and made a Batson challenge that the state was attempting to backstrike all black jurors.

In addressing defense counsel's objection, the trial court began to review the state's peremptory challenges to that point. At that time, the state had peremptorily stricken two white, female prospective jurors (Louise Billingsley and Dorothy Soley), and three black, female prospective jurors (Ms. Batiste-Zanders, Ms. James, and Ms. Dunn-Steel). In response to defense counsel's objection, the state provided race-neutral reasons for striking Ms. Batiste-Zanders, Ms. James, and Ms. Dunn-Steel. The state explained that Ms. Batiste-Zanders "had a sort of scowl on her face that was noticed by both attorneys," and she seemed unreceptive to questioning. Regarding Ms. James, the state explained that she had said she was unsure whether she would give a witness more or less credit "because of deals." With respect to Ms. Dunn-Steel, the state noted that she has a sister who is currently being prosecuted for murder and being represented by defendant's defense counsel. Ultimately, the trial court noted defendant's objection, but found no pattern of exclusion.

Immediately following the trial court's ruling, the state peremptorily struck Ms. Thomas, and defense counsel lodged another Batson objection. In response, the trial court asked how many black females were currently on the jury. The state pointed out that there were two – a Pamela Haynes and Ms. Morris. The trial court again concluded that the state's strikes were insufficient to show a pattern. At that time, the state also gave a race-neutral reason for striking Ms. Thomas, who the state described as having detailed her relationship with two prospective state witnesses and her predisposition not to trust them.

Thereafter, the parties interviewed a third panel of prospective jurors. During the selection from panel three, the state exercised backstrikes on a Stephanie Waguespack (a white female) and Ms. Morris (one of the two remaining black females seated on the jury). When the state backstruck Ms. Morris, defense counsel



urged a final Batson objection. In light of the backstrike of Ms. Morris, the trial court noted that it was recognizing a pattern and asked the state for a race-neutral reason. The state explained:

She was asked a question by Mr. Cascio [co-counsel] as to if she had five kids, the kids ate the cookies and two of the kids said that was the one who did it, would you believe them, and she said no. And then he said what if all the rest of your kids said that's the kid who did it, would you believe them, and she said no.

The state also put on the record that it had struck “several other Caucasian people.” The trial court ruled that, although it had found a pattern, the state had been able to give race-neutral reasons over the course of the proceedings. Thus, the trial court denied defendant's Batson objection.

After jury selection was complete, the trial court allowed the state to clarify for the record the demographics of its peremptory challenges. According to the state, for the main jury panel, eight peremptory strikes were used, with five against black females. The state noted that there was only one black male in the jury pool, and he was ultimately selected to be seated on the jury. Additionally, the state noted that its sole peremptory strike of an alternate juror was against a white female. Following this statement, the trial court again noted its prior rulings would stand.

Our review of the state's explanations for the peremptory challenges against the prospective jurors at issue – Ms. Batiste-Zanders and Ms. James – reflects race-neutral justifications. The state explained that it struck Ms. Batiste-Zanders because she had a “scowl” and seemed unreceptive to questioning. While these concerns cannot be reproduced in the record, they are indeed race neutral, and the trial court had the opportunity to assess them. The state's race-neutral reason pertaining to Ms. James was that she was unsure how she would credit a witness who had received a deal. On appeal, defense counsel challenges the characterization of this reason, citing the exchange between defense counsel and Ms. James that was the basis for the state's explanation:

[Defense counsel:] If you could pass the mic to Ms. James. What's your thoughts on a witness that cuts a deal with the state to testify against another person? How do you feel about that?

Ms. James: I feel like it's their choice to decide if that's what they want to do with what was present.

[Defense counsel:] Can you give them more credibility, less credibility?

Ms. James: I'm not sure.

[Defense counsel:] You would just have to see if that occurred?

Ms. James: Right.

The state's appreciation of Ms. James's response is also a race-neutral reason, and the state's concern about Ms. James's ability to credit the testimony of a witness who received a deal would have been of great importance, considering the testimony of James, who had received such a deal. Notably, Ms. Billingsley, a white female, also expressed concern about her ability to credit such testimony, and she was subsequently peremptorily challenged by the state.

The state's race-neutral explanations were reasonable, and the proffered rationales had some basis in accepted trial strategy. See Handon, 952 So. 2d at 59. Other than the reliance upon the number of black females who were peremptorily stricken, defense counsel offered no facts or circumstances supporting an inference that the state exercised its strikes in a discriminatory manner. Thus, defendant's proof, when weighed against the state's race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. See Green, 655 So. 2d at 290. Moreover, a review of the entire voir dire transcript fails to reveal any evidence that the use of peremptory strikes by the prosecutor was motivated by impermissible considerations. See Handon, 952 So. 2d at 59. Accordingly, we find no abuse of discretion by the trial court in its denials of defendant's Batson challenges regarding these prospective jurors.

This assignment of error is without merit.

## MOTION FOR MISTRIAL

In his remaining assignment of error, defendant argues that the trial court erred in denying his motion for a mistrial. Specifically, defendant contends that he was entitled to a mistrial when Hammond Police Detective Rodney Germar repeatedly used hearsay statements from a witness who was not called to testify at trial.

Detective Germar testified at trial regarding his involvement in the investigation of the victim's homicide. On cross-examination, defense counsel questioned Detective Germar about witness interviews he had conducted and information he gleaned from these interviews. Defense counsel twice attempted to ask about information Detective Germar had learned from witnesses concerning what the suspect may have worn during the shooting. Both times, the state successfully objected on the basis of hearsay.

Thereafter, defense counsel continued to question Detective Germar with respect to what certain witnesses had told him. Nearly all of this testimony – including a description of the suspect's clothing and the suspect's gender – involved hearsay. Neither the state nor defense counsel objected to this testimony.

On appeal, defendant takes particular issue with the following exchange:

[Det. Germar:] I'm saying we knew it was a man.

[Defense counsel:] Who told you that it was a man?

[Det. Germar:] Frankie [Doakes] said she saw him shooting.

[Defense counsel:] Okay. Well, we've never heard from Frankie [Doakes].

[Det. Germar:] She's not here today.

[Defense counsel:] Okay. Well, I can tell you that no witness has said that they could identify who the suspect was: man, woman, child.

[Det. Germar:] No witnesses are here today have testified. But I'm telling you Frankie [Doakes] said that I saw him shoot.

Cross-examination continued in a similar manner, with defense counsel asking Detective Germar questions about information he had discovered from talking to

witnesses during his investigation. Again, at no point did the state or defense counsel object to Detective Germar's testimony.

Eventually, the trial court instructed the state and defense counsel to approach the bench. The trial court inquired whether either party planned to call Doakes. Neither party did. The trial court then noted that Detective Germar had been allowed to testify about statements from an absent eyewitness. The trial court noted that it was not sure whether doing so was a part of defense counsel's strategy, but that it was clearly objectionable. Thus, the trial court offered to instruct the jury to disregard those parts of Detective Germar's testimony. Defense counsel stated that it was not his strategy to elicit hearsay testimony, and he moved for a mistrial. The state argued that defense counsel should not be purposefully allowed to elicit hearsay testimony and then to ask for a mistrial and contended instead that an instruction to the jury was sufficient. Ultimately, the trial court issued the following curative instruction:

Okay. Ladies and gentlemen of the jury, there's been some testimony concerning an absent witness who has not testified in the form of hearsay. You are directed to disregard that testimony. It's obviously inflammatory testimony and it's obviously prejudicial testimony, and you haven't heard from the witness and consequently, you are directed to disregard the testimony.

The witness is further instructed not to testify as to what other[s] told you, [Doakes] or anybody else.

Cross-examination continued without further incident.

On appeal, defendant now argues that he was entitled to a mistrial because of the inflammatory nature of Detective Germar's hearsay testimony concerning an eyewitness who allegedly saw him shoot the victim.

Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771. LSA-Cr.P. art. 775. When a remark or comment made by a witness during

the trial is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, the state, or in the mind of the jury, the court shall promptly admonish the jury to disregard the remark or comment. See LSA-C.Cr.P. art. 771(2). In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial. LSA-C.Cr.P. art. 771. Mistrial is a drastic remedy that is only authorized where substantial prejudice will otherwise result to the accused. A trial court ruling denying mistrial will not be disturbed absent an abuse of discretion. State v. Smith, 418 So. 2d 515, 523 (La. 1982).

In the instant case, we first doubt whether defendant's motion for a mistrial was procedurally effective. Defense counsel repeatedly questioned Detective Germar regarding information that he had discovered from interviewing witnesses, primarily Doakes. Because Doakes was not present to testify at trial, the entirety of this testimony regarding her statements implicated the hearsay rule. See LSA-C.E. arts. 801(C) & 802. The state made two successful hearsay objections, but defense counsel continued to elicit hearsay testimony. As the trial court noted after it called the parties to the bench, defense counsel never objected to Detective Germar's testimony. Only after the trial court made this point did defense counsel opt to move for a mistrial. At this time, the proceedings were several pages of testimony past that which defendant now highlights as objectionable on appeal. Thus, we doubt whether defendant has even preserved this issue for review because the objection was not contemporaneous. See LSA-C.Cr.P. art. 841(A). Defense counsel should not be allowed to repeatedly and deliberately elicit hearsay testimony in order to later move for a mistrial on the basis of the same.

Even addressing the merits of defendant's assignment of error, we find it to be without merit. Detective Germar's hearsay statement concerning an eyewitness who allegedly saw defendant shoot the victim was undoubtedly prejudicial.

However, the trial court, in an attempt to ensure defendant a fair trial, raised the hearsay issue *sua sponte* and crafted an instruction for the jury to disregard the offensive testimony. Under these circumstances, the admonition generated at the court's initiative was more likely to produce a fair trial than allowing the jury to consider the hearsay testimony. Therefore, the trial court did not err or abuse its discretion in denying the motion for a mistrial and admonishing the jury to disregard most of Detective Germar's testimony to that point.

This assignment of error is without merit.

### **PATENT 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). Having reviewed the record, we note errors with respect to two of defendant's sentences.

Defendant's sentence for felon in possession of a firearm fails 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). However, this error is not inherently prejudicial to defendant, and the state does not complain about it on appeal. Therefore, we decline to correct this sentence. See State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123-125 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277.

Additionally, defendant's sentence for obstruction of justice improperly restricts the benefits of parole, probation, and suspension of sentence. See LSA-R.S. 14:130.1(B)(1). Thus, it is illegally excessive. An illegal sentence can be corrected at any time by the court that imposed the sentence or by an appellate court on review. LSA-C.Cr.P. art. 882(A). Because the trial court imposed the maximum term of

forty years for defendant's obstruction of justice conviction, correction of this sentence requires only that the offending restrictions on parole, probation, and suspension of sentence, be deleted. Accordingly, we amend defendant's sentence on count three to forty years at hard labor and affirm this sentence as amended.

**CONVICTIONS AFFIRMED; SENTENCES ON COUNTS 1, 2, AND 4 AFFIRMED; SENTENCE ON COUNT 3 AMENDED TO DELETE RESTRICTIONS ON PAROLE, PROBATION, AND SUSPENSION OF SENTENCE, AND AFFIRMED, AS AMENDED.**