**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 0320

STATE OF LOUISIANA

VERSUS

JOSHUA RAE SWAN

***DATE OF JUDGMENT:*** DEC 1 7 2018

ON APPEAL FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 710800, PARISH OF TERREBONNE
STATE OF LOUISIANA

HONORABLE JUAN W. PICKETT, JUDGE

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

**Disposition: CONVICTION AFFIRMED; SENTENCE AMENDED TO PROVIDE IT BE SERVED AT HARD LABOR AND AFFIRMED, AS AMENDED; REMANDED, IF NECESSARY, FOR CORRECTION OF THE COMMITMENT ORDER AND FOR TRANSMISSION OF THE AMENDED RECORD TO THE DEPARTMENT OF CORRECTIONS.**

**CHUTZ, J.**

The defendant, Joshua Rae Swan, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1.[1] He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. He was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating three assignments of error. We affirm the conviction and amend the sentence to provide that it be served at hard labor, and affirm as amended.

## FACTS

On the night of October 21, 2015, Lakesha Clay rode with Willie Hart, Jr. ("Hart"), who was also known as "Chill Will," to 322 Roselawn Avenue in Houma to buy drugs from Troy Nixon ("TJ"). According to Lakesha, who testified at trial, Hart parked on the side of the street in front of the house and met TJ near the carport. Lakesha stayed in the car. Moments later, Lakesha saw the defendant and Ahmad Lawson, who she knew by the nickname "BadAzz," come from around the back of the house and shoot Hart multiple times. Hart was killed. The defendant and Lawson then shot at the car Lakesha was in. Lawson approached the car window and, despite Lakesha's pleas, Lawson shot her once in the stomach. Lakesha then saw the defendant and Lawson get in a black car and drive away. Lakesha rushed to the neighbor's house across the street for help. A call to 911 was made, and Lakesha was taken to the hospital where she underwent surgery for her gunshot wound.

The defendant and Lawson were members of the FabBoys gang in the Houma area. The leader of the FabBoys was Robert Swan, the defendant's brother.

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[1] Co-defendant Ahmad Lyndell Lawson was also charged with second degree murder. Lawson was tried together with the defendant and was also found guilty as charged. Lawson appealed, and his conviction and sentence were affirmed. See **State v. Lawson** 2018-0382 (La. App. 1st

A couple of weeks before Hart was killed, Robert Swan was killed. Rumors began circulating that Hart was involved in the murder of Robert Swan. Detectives investigating the case determined that Hart was not involved. According to Detective Lieutenant Glynn Prestenbach (TPSO), Kyle Cedotal became the primary suspect and, on October 14, 2015, he confessed to killing Robert Swan. Before Hart was killed, Detective Lieutenant Prestenbach had informed the defendant that he had Robert Swan's killer in custody and that Hart's involvement in his murder was just a rumor. The defendant did not testify at trial.

## ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to support the conviction. Specifically, the defendant contends that his identity as one of the perpetrators was not established by the State.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator,

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Cir. 11/8/18) (unpublished).

rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification.

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 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). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1st Cir. 1986). Deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill. See **State v. Robinson**, 2002-1869 (La. 4/14/04), 874 So.2d 66, 74, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004); **State v. Ducre**, 596 So.2d 1372, 1382 (La. App. 1st Cir.), writ denied, 600 So.2d 637 (La. 1992).

The parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. See **State v. Pierre**, 93-0893 (La. 2/3/94), 631 So.2d 427, 428 (per curiam). The State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting

another. **State v. Huey**, 2013-1227 (La. App. 1st Cir. 2/18/14), 142 So.3d 27, 30, writ denied, 2014-0535 (La. 10/3/14), 149 So.3d 795, cert. denied, __ U.S. __, 135 S.Ct. 1507, 191 L.Ed.2d 443 (2015). Further, when two or more persons embark on a concerted course of action, each person becomes responsible for not only his own acts but also for the acts of the other. See **State v. Smith**, 2007-2028 (La. 10/20/09), 23 So.3d 291, 296 (per curiam).

In his brief, the defendant avers that Lakesha, an admitted drug abuser, changed her statement three times, including that she was looking at the phone or at the apartments across the street when the shots were fired. The defendant further argues there was no forensic evidence to place him at the scene of the shooting or to dispute his alibi.

Lakesha testified at trial that she had had an on-and-off relationship with Hart since 2005, and they had two children together. At the time of his death, they remained friends and still dated. Lakesha gave the following account of what transpired the night Hart was killed. Hart picked Lakesha up from work in his sister's car and told her they were going to pick up "mollies" (drugs) from TJ. After he used Lakesha's phone to call TJ, Hart drove to Roselawn Avenue. Hart got out of the car and met TJ in the driveway, near the carport. They then walked under the carport. Lakesha stayed in the car. Two men came from around the back of the house and shot Hart several times. Lakesha identified the shooters as the defendant and as "BadAzz." She knew BadAzz from "off the street," and the defendant was her cousin. Lakesha also knew the defendant as "Ceno." She had known BadAzz for almost a year. In the following testimony on direct examination, Lakesha identified the defendant and Lawson as the shooters of Hart:

Q. After they finished shooting Willie, what happened next?
A. Then they was shooting at me.
Q. In the car?
A. Yes.
Q. Both of them or just one?

A. Both of them was shooting at the car.
Q. And then what happened; did you get hit at that point?
A. No.
Q. What happened after that?
A. And then he walked up to the car, and he stuck his face in the window. And I begged, and I pleaded for him not to shoot me - because I didn't do anything. He still shot me.
Q. Okay, who was it that shot you, that popped his head in the window?
A. BadAzz.
Q. Who was it that was with BadAzz, that was shooting Willie?
A. Ceno.
Q. Do you know Ceno?
A. Yes.
Q. Do you know his name?
A. Joshua Swan.
Q. Are you related to Joshua Swan?
A. Yes.
Q. How are you related to Joshua Swan?
A. He's my cousin.

Lakesha indicated there were a lot of shots fired. After shooting Hart, the defendant and BadAzz shot at the car she was in. When BadAzz approached and put his face to the window, Lakesha begged him not to shoot her. BadAzz shot her anyway in her stomach. Lakesha testified that she was one-hundred percent sure the defendant and BadAzz (Lawson) were the shooters, and she identified them both in court.

Lakesha further testified that after the shootings, the defendant and Lawson ran toward the back of the house and got into a small, black car. Lakesha, who was wounded, ran across the street to a neighbor's house for help. She was taken by ambulance to Terrebonne General Medical Center, where she underwent surgery.

On cross-examination by one of Lawson's defense counsel,[2] Lakesha stated that she had told a police officer who questioned her that the defendant had shot her. She did not identify Lawson as a shooter until November 17, 2015, when she was interviewed by Detectives David Wagner and Michael Scott, both with the Houma Police Department (HPD). In her interview, Lakesha said Lawson was

[2] Unless otherwise indicated, all references made herein to "defense counsel" are references to the defendant's counsel.

wearing a muscle shirt and black gym shorts. She indicated Lawson did not have gold teeth; when asked in the interview if Lawson had any tattoos, she shook her head "no." Lawson revealed in court that he had four gold front teeth and tattoos on both arms. Lakesha testified at trial that she did not see Lawson's tattoos that night.

On redirect examination, Lakesha indicated she had a clear view of Lawson when he was at the car window. When he shot her, the window broke, causing glass to enter her body. She also made clear that Lawson was not smiling when he put his face to the car window, so she would not have seen his gold teeth.

Officer Jeffery Jackson, with the Houma Police Department, was on patrol with two other officers when he heard the gunshots fired by the defendant and Lawson. He testified that he heard a lot of shots, "real fast." Within seconds, he was on Roselawn Avenue at the scene. He went inside the house to speak to Lakesha. He was wearing a body camera, which recorded the conversation. After Officer Jackson talked with Lakesha about who shot her, the defendant was identified as a suspect.

Detective Scott, the lead investigator of the Hart killing, testified at trial that he was at the scene soon after Hart was shot. He viewed Officer Jackson's body camera footage, in which Lakesha identified the defendant as the person who shot her. Detective Scott obtained information that Mindy Gauno, the defendant's ex-girlfriend, was nearby at 318 Roselawn Avenue. Mindy was brought in for questioning regarding the defendant's whereabouts. Mindy informed the police she had been with the defendant earlier on the day of the shooting. After she provided the police with the defendant's cell phone number, they contacted AT&T, the provider, to track the location of the phone. Pinging of the phone began about 5:00 a.m. (the day after the shooting), but there was no progress because the phone had been turned off. For five hours, the phone remained off, until about 10:00

a.m., when the phone was turned on. The phone was pinged and indicated the location of a residence on Norman Street in Houma (in the Mechanicville area).

The police went to the location indicated, found the defendant, and detained him at 10:56 a.m. He was brought to the Houma Police Department for questioning. The defendant's recorded interview was played for the jury. The defendant denied any involvement in Hart's shooting. The residence where the defendant was found by the police belonged to Keisha Price, TJ's girlfriend.

Detective Wagner went to the hospital to talk to Lakesha while she was being prepped for surgery. Detective Wagner indicated at trial that Lakesha was nervous and apprehensive about some of the questions he was asking her. When he asked who shot her, she told him she thought it was "Ceno" who shot her. Detective Wagner then testified: "After she said, I thought it was Ceno, I asked her, did you specifically see who shot you; and again, she said no but - in a - in a manner I interpreted as she was frightened." Lakesha told Detective Wagner that two guys walked up to the vehicle and that despite her entreaty, multiple shots were fired. Detective Wagner testified that Lakesha told him that the Hart shooting was retaliation "over Willie Hart killing Robert Swan."

After she was released from the hospital, Lakesha later went to the police station for more questioning during which she identified BadAzz (Lawson) as the second suspect. She also identified Lawson and TJ in photographic lineups.

In brief, the defendant points out the lack of physical evidence in the State's case. For example, twenty-three 9mm bullet casings were found around the scene, seventeen by the carport and six near the car where Lakesha was shot. There were three different brands of casings. However, the defendant points out that the casings were not tested to determine if they were fired from different guns; nor were they tested for DNA or fingerprints. The defendant notes there were two keys and a cigarette butt found about forty feet from Hart; the keys were not tested, and

DNA testing on the cigarette butt indicated it was not DNA of the defendant or Lawson. The defendant further notes he was located by the police at the residence of Keisha Price (TJ's girlfriend), where a .40 caliber Glock handgun was found, but that the gun was not used in the shooting. A 9mm extended magazine was also found in the trailer. The defendant suggests that the timing of the 911 calls reporting the shooting indicate Hart was killed between 10:18 p.m. and 10:21 p.m.[3] Phone records obtained by the State revealed several phone calls and texts were made between the defendant and Darnesha McKinley, who was present in the house where Lakesha sought help after being shot, from 10:24 p.m. to 10:51 p.m., then a number of additional texts were sent until 1:38 a.m. There were also several phone calls made to the defendant by his ex-girlfriend (Mindy Gauno) the same night from 10:21 p.m. to 10:54 p.m. and one phone call made by the defendant to her the following morning at 2:23 a.m. According to the defendant, at the very same time Hart was shot, he (the defendant) was calling and texting Darnesha and Mindy and, therefore, he could not have been firing a gun and running from the scene while texting. The defendant also notes that he provided a taped statement to detectives wherein he denied culpability. His alibi was that he was at home watching "Empire" at the time Hart was shot.

All of the foregoing lack of forensic evidence and/or lack of corroborating evidence pointed out by the defendant was brought out at trial and argued by defense counsel. Despite this, however, the jury chose to believe Lakesha's eyewitness testimony. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051. **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

[3] According to Detective Wagner, the time of the shooting was about 10:20 p.m.

The jury that found the defendant guilty of second degree murder was fully informed of the inconsistencies between Lakesha's trial testimony and her previous statements to authorities. In fact, much of the cross-examination of Lakesha by defense counsel pointed out the inconsistencies. Further, the defense elicited testimony regarding other leads investigated by detectives and other possible perpetrators. The trier of fact, however, makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness; thus, a reviewing court may impinge on the factfinder's discretion "only to the extent necessary to guarantee the fundamental protection of due process of law." **State v. Mussall**, 523 So.2d 1305, 1310 (La. 1988); see also **State v. Weary**, 2003-3067 (La. 4/24/06), 931 So.2d 297, 311-12, cert. denied, 549 U.S. 1062, 127 S.Ct. 682, 166 L.Ed.2d 531 (2006).

Accordingly, the assessment of the evidence regarding the defendant's alibi and the potential inconsistencies in the testimony of an eyewitness who placed the defendant in a certain place at a certain time was based on credibility determinations. Based on sufficient evidence, the jury found the defendant guilty, which was a direct refutation of the believability of some of the witnesses, including and especially the defendant. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83; **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the

trier of fact insufficient. **Quinn**, 479 So.2d at 596. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

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. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury heard all of the testimony and viewed the evidence presented to it at trial and found the defendant guilty. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. See **Moten**, 510 So.2d at 61. Although there were inconsistencies in the testimony, there was sufficient evidence for the jury to have found the necessary elements of second degree murder proved beyond a reasonable doubt. See **Weary**, 931 So.2d at 312.

After a thorough review of the record, we find the evidence negates any reasonable probability of misidentification and supports the jury's unanimous guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the second degree murder of Willie Hart, Jr. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

## ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in allowing other crimes evidence at trial. Specifically, the defendant contends the State should not have been allowed to introduce evidence of the defendant's involvement with a gang or "group" to show motive, and that such evidence was not relevant and, even if relevant, more prejudicial than probative.

The State's theory of the case was that Hart's killing was gang-related. The prosecutor filed a notice of intent to use La. Code Evid. art. 404(B) evidence to prove motive, opportunity, intent, knowledge, and/or absence of mistake or knowledge. At a pretrial hearing, the prosecutor argued to the trial court that the defendant and his brother, Robert Swan, were members of the same gang. When Robert Swan was killed, there were rumors "on the street" that Hart was involved in his death. Thus, the prosecutor argued defendant's killing of Hart was a retaliation murder for Hart's killing of the defendant's brother, Robert. Because the prosecutor's witness on gang-related activity was not available to testify that day, the trial court deferred ruling on the admissibility of evidence of gang relations by the defendant.

A few days later at the **Prieur** hearing,[4] the prosecutor called Detective Jeffery Lirette, with the Houma Police Department, to testify. At that time, Detective Lirette was the supervisor of the Narcotics/Street Crimes Division. He testified he had been with the Houma Police Department for over twenty years, holding several positions before being promoted to the rank of sergeant, including patrol, investigative services, school resource officer, and a member of the Terrebonne Parish Narcotics Task Force. Detective Lirette indicated he was aware of many gangs in Terrebonne Parish, including UBB (Up the Bayou Boys), the Banditos, Galloping Goose, Satan's Tramps, the Smurder gang, and the FabBoys.

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[4] See **State v. Prieur**, 277 So.2d 126, 130 (La. 1973).

The FabBoys and Smurder gangs are localized in the Mechanicville, Village East, and Ashland North areas in Houma.

According to Detective Lirette, Robert Swan, the defendant's brother, was the leader of the FabBoys. Regarding the FabBoys, Detective Lirette stated, "I know there's a lot of people in [the] community that were concerned and in fear of that group." He further stated that the most common reason why people come together to form gang affiliations is criminal activity, such as drug dealing and trafficking, armed robberies, "just about anything really." According to Detective Lirette, gang members usually have nicknames, and the defendant's was "Ceno," and Lawson's was "BadAzz." Robert Swan was known as "Big Swan." Troy Nixon, who was affiliated (but not necessarily a member) of the FabBoys is known as "TJ." TJ's sister, Yanni Nixon, was Robert Swan's girlfriend.

According to Detective Lirette, after Robert Swan was killed, the Mechanicville area had a spike in violence, directly related to the killing. People were trying to figure out who killed him, and did not believe that the suspect who was arrested, Kyle Cedotal, was the person who killed Robert Swan.

Detective Lirette testified it was common for the FabBoys to use social media, such as Facebook, Instagram, and Snapchat. The detective identified several Facebook pictures of the defendant with Robert Swan, "holding a pile of money." There was a picture with the defendant, his brother, and Lawson. There was a picture with several members of the FabBoys. The photographs were introduced into evidence for purposes of the hearing.

The trial court ruled in pertinent part:

> So the Court is going to grant the Motion *in Limine* as far as labeling this as a gangland killing, or using the word gang member. There may be other words that - I mean, those are the only words I'm limiting right now. As far as, if we went a little bit further, which I don't need to go to, I think it would show motive; and there's numerous cases cited by [the prosecutor]; and I spent the weekend going through criminal gang activity cases. But there is a lot of cases

> that show that it's - that gang activities and gang associations is relevant to show motive, intent, and identity.

The defendant sets out twelve numbered paragraphs in brief and argues that these were the erroneously admitted testimony of "bad acts and other crimes." According to the defendant, they also constitute hearsay, in whole or in part. Defendant contends the designated testimony should have been excluded because none of it was relevant, and it was more prejudicial than probative.

We note initially that many of the instances set out in these paragraphs have nothing to do with any prohibited other crimes evidence or bad acts committed by the defendant. These paragraphs, for the most part, address testimony by police officers concerning various "groups" around town, including the FabBoys, with which the defendant and his brother, Robert, were associated. In any event, we will address each paragraph separately.

> 1. Officer Jeff Lirette testified to his many assignments in the Houma Police Department that led to his position as supervisor of the *narcotics* division. He was not offered as an expert, yet he was allowed to testify as to his opinions and interpretations of the behaviors of "groups" of young men in the Mechanicville and Ashland North areas of Houma. Officer Keith Craft grew up in the Mechanicville area and described the FabBoys as a group of people who grew up together in Ashland North. They had no leader.

What the defendant incorrectly suggests constituted other crimes evidence in the first paragraph was nothing more than generalized descriptions of groups in the Mechanicville and Ashland North areas of Houma that were well-known by police officers in the Houma Police Department. This type of testimony was, in fact, precisely what the trial court ruled *could* be testified about, as long as "group" or "association" was used in place of the term "gang."

> 2. The prosecutor referred to them as a "gang," despite the court's ruling that the State could not make that claim. The motion for mistrial was denied.

This portion of testimony had nothing to do with other crimes evidence or bad acts by the defendant. On direct examination, the prosecutor was questioning

Detective Lirette about different groups or associations in the Mechanicville, Village East, and Ashland North areas. Detective Lirette said the FabBoys was one such group and that Robert Swan was the leader. The prosecutor asked Detective Lirette if he knew other individuals in the group, to which he replied in the affirmative. The prosecutor then stated, "Give me some of the names of the individuals that you have personal knowledge of being involved in the gang - involved in the group." Defense counsel objected and moved for a mistrial because the prosecutor used the word "gang." The prosecutor explained it was a "slip" and that he "caught himself" and used the word "group" right after. The trial court denied the motion for mistrial, stating in pertinent part: "I heard what was said, but he quickly - I think it was inadvertent - I don't think it was done intentionally. And he quickly corrected himself and said the word "group[.]"" Defense counsel for both the defendant and Lawson declined the trial court's offer to admonish the jury.

Louisiana Code Criminal Procedure article 770 governs mistrials and provides:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:
>
> (1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury;
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> (3) The failure of the defendant to testify in his own defense; or
>
> (4) The refusal of the judge to direct a verdict.
>
> An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

None of the prosecutor's remarks fall under La. Code Crim. P. art. 770. The applicable law, therefore, is La. Code Crim. P. art. 771, which provides in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
>
> (1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770[.]
>
> ***
>
> 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.

Thus, a mistrial under the provisions of La. Code Crim. P. art. 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. **State v. Tran**, 98-2812 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1280, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101. A mistrial is warranted when certain remarks are considered so prejudicial and potentially damaging to the defendant's rights that even a jury admonition could not provide a cure. See **State v. Edwards**, 97-1797 (La. 7/2/99), 750 So.2d 893, 906, cert. denied, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999). A mistrial is a drastic remedy that should only be declared upon a clear showing of prejudice by the defendant. In addition, a trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. **State v. Smith**, 418 So.2d 515, 522 (La. 1982). See **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. A reviewing court in Louisiana should not reverse a defendant's conviction and sentence unless the error has affected the substantial rights of the accused. See La. Code Crim. P. art.

921.

There is no showing of clear prejudice to the defendant, given the prosecutor's single utterance of the word "gang" during questioning of Detective Lirette on direct examination. The utterance occurred during a portion of Detective Lirette's testimony that, in fact, made no reference at all to the defendant. The prosecutor's use of the word "gang," after which he almost immediately substituted the word "group," was vague and too generalized to have made any substantial impact in the mind of the jurors. See **State v. Edwards**, 2001-116 (La. App. 5th Cir. 6/27/01), 790 So.2d 109, 115-16, writ denied, 2001-2235 (La. 8/30/02), 823 So.2d 935. Under these circumstances, there has been no showing of any prejudice tending to deprive the defendant of the reasonable expectation of a fair trial, and the trial court did not abuse its discretion in denying the motion for mistrial. See **Berry**, 684 So.2d at 449.

> 3. Officer Lirette testified that the FabBoys was a "group" that started in 2013 and Robert Swan was the leader until his death in October of 2015. He named all of the men that he considered members or associates of the FabBoys, including Joshua Swan, but not Willie Hart, Jr. He claimed to know this information "for a fact." But he previously revealed that it was rumors from informants and information from Facebook photos and neighborhood gossip.

There is a tendency toward obfuscation in the third paragraph. The defendant suggests that while Detective Lirette claimed to know "for a fact" that the defendant was associated with the FabBoys, Detective Lirette had previously revealed that his information was based on "rumors from informants." This contention is a reference to testimony Detective Lirette gave at the ***Prieur*** hearing to the effect that the rumor that Hart had killed Robert Swan had come from confidential informants, (*not*, as the defendant suggests, that it was a rumor and just "street talk" that the defendant was associated with the FabBoys).

Moreover, the defendant also suggests in brief the information Detective Lirette testified to came "from Facebook photos and neighborhood gossip." But it

did not. It came from Detective Lirette's many years on the police force and experience dealing with these various groups.

> 4. Over a hearsay objection, Officer Lirette said the rumor in the area was that Willie Hart, Jr. killed Robert Swan. He claimed that after Robert Swan's death, violent crime in the area increased.

The foregoing "rumor" testimony was ruled as non-hearsay because it was not being offered for the truth of the matter asserted. Moreover, there is nothing in this paragraph regarding other crimes evidence or bad acts of the defendant.

> 5. While the State was allowed to use rumors as evidence, the defendant was prevented from bringing up the rumor that Davonte Maryland was having a beef with Chill Will [Hart] and killed him. Davonte had told his mother that Chill Will was out to get him.

The rumor that Hart killed Robert Swan was used throughout trial as non-hearsay evidence not offered for its truth, being referred to by several police officers to explain how their investigations unfolded and developed. Detective Lirette testified he was aware of the rumor about Hart, that the TPSO had investigated Robert Swan's death, that arrests had been made pretty quickly in the case, and that someone other than Hart was charged with Robert Swan's murder. Conversely, the defendant offered the rumor about the Davonte Maryland and "Chill Will" (Hart) "beef" for its truth. Defense counsel explained to the trial court that the police report prepared by Detective Wagner (HPD) noted that "Chill Will" was out to kill Davonte Maryland. Defense counsel, thus, wanted to present to the jury, through the testimony of Detective Scott (HPD) that someone may have acted on a false rumor that "Chill Will" (Hart) was out to kill Davonte.

Aside from the irrelevancy of the foregoing information, it was layered with inadmissible hearsay. Davonte Maryland is dead. Davonte had spoken to Detective Wagner, not Detective Scott. Apparently, Davonte told Detective Wagner that Davonte's mother told him other people were out to get him. Thus, defense counsel wanted to get Davonte's statement regarding what his mother told

him into evidence through Detective Scott's police report. Based on what Detective Wagner told him Davonte said, Detective Scott had incorporated this information into his own report. This evidence was at least triple hearsay, and the trial court correctly ruled it inadmissible

> 6. Officer Keith Craft was allowed to testify about an incident in December of 2015, two months after the killing of Willie Hart, where Donovan Clay, the son of Lakesha Clay, claimed Brian Gibson, a FabBoy associate, fired a gun at him. Gibson was arrested for attempted murder.

Significantly, nothing in the referenced testimony had anything to do with other crimes evidence or bad acts of the defendant. Moreover, no objection was raised until *after* Detective Craft (HPD) had already testified about the incident involving Donovan Clay and Gibson. Only then did defense counsel for co-defendant Lawson object, stating that "this is all hearsay," and the trial court sustained the objection.

> 7. Although Joshua Swan was incarcerated at the time of Gibson's arrest, Officer Craft monitored Joshua Swan's phone calls. In one, Officer Craft alleges that Joshua Swan called Randy "Shaggy" Turner to say that the "punk ass white boy is probably about to get out."

The "white boy" was never identified. Further, the exchange included no references to other crimes evidence or bad acts by the defendant. Moreover, defense counsel did not object to the introduction of the recorded phone call. See La. Code Crim. P. art. 841(A).

> 8. On January 14, 2016, according to Officer Craft, one call allegedly was to Yanni Nixon, the former girlfriend of Robert Swan, and used "code" to tell Nixon to have the witnesses shot ("yacht stick" and "go to firing") if persuasion ("finesse") did not work to obtain affidavits from Donovan Clay ("Plute"). The officer claimed to know Yanni's voice, without establishing a foundation, and the prosecution claimed that her mention of the name "Hezehiah" referred to Willie Hart's son.

Detective Craft testified that during the phone conversation between the defendant and Yanni Nixon, he (Craft) heard the phrases "yacht stick" and "go to firing," which he understood to refer to a gun. Despite the defendant's suggestion

that Detective Craft indicated the defendant "used 'code' to tell [Yanni] to have witnesses shot," our review of both the recorded conversation and Detective Craft's testimony reveals no such statement. The mention of a gun arose in the conversation when Yanni told the defendant about someone she knew with a gun. Following is the relevant exchange:

> Yanni: [she knew someone] "with the yacht stick, he just go to firing"
> The defendant: At who?
> Yanni: Them little dudes from Village East.
> The defendant: Man, no.
> Yanni: Yeah, man, I like, I, son, I got on Black ass so bad.
> The defendant: Where he got a stick from?
> Yanni: Man, I don't know who the f--k gave that shit to Black.

In any event, there was no reference in the conversation to any other crimes evidence or bad acts by the defendant. Moreover, while defense counsel objected that part of Detective Craft's testimony called for his opinion about what the parties meant and, further, that the words in the recording speak for themselves, defense counsel did not object to the introduction of the recorded phone calls. See La. Code Crim. P. art. 841(A).

> 9. The State had represented that it would not use either defendants' prior convictions. Nonetheless, the prosecution made no attempt to skip or delete Joshua Swan's admission in the video statement to having two prior convictions and the officer compiling the photo identification testified that the photos were of convicts. The motions for mistrial were denied.

During the direct examination of Detective Scott (HPD), the defendant's videotaped statement to the police was played for the jury. At one point during his statement, the defendant stated, "I'm a two-time convicted felon." Following the playing of the statement, the testimony of Detective Scott continued. After some time had elapsed,[5] defense counsel moved for a mistrial, arguing the State should have redacted the impermissible other crimes reference to the defendant's prior

[5] The record does not establish how long Detective Scott continued to testify after the video statement was played before defense counsel finally moved for mistrial. However, the transcript of Detective Scott's testimony during the ensuing period comprises approximately six pages of the appellate record, which suggests it was not an inconsequential lapse of time.

felony convictions from the video recording.

To preserve the right to seek appellate review, a party must object contemporaneously with the occurrence of the alleged error and state the grounds for the objection. See La. Code Crim. P. art. 841(A). In properly denying the motion for mistrial in this case, the trial court noted that defense counsel had ample opportunity to address the redaction of the defendant's statement, but failed to do so:

> No, I'm going to deny the Motion for Mistrial on that ground. I mean, everybody knew we were going to play the videotape. We took almost a 2-hour lunch. It could have been brought up before that - you know, that hey, we watched the videotape and the videotape is going to state that Mr. Swan mentioned something - you know, but you waited until after it was said, and then bring it up. So, the Court is going to deny the Motion for Mistrial, on that ground.

Further, the defendant also complains that Detective Scott, who compiled the photographs for the photographic lineup, testified that "the photos were of convicts." Defense counsel moved for a mistrial on this basis, which the trial court denied. The objected to comment was made as Detective Scott was describing how he had compiled the photograph lineup for co-defendant, Lawson. Detective Scott stated in pertinent part: "So once we develop the alias BadAzz, we came up with Ahmad Lawson, in our ARMS system. It had already been reported, convicted, so on and so forth." Thus, Detective Scott's testimony referred to *Lawson* only and had nothing to do with the defendant in the instant matter. Therefore, the defendant was not prejudiced by the comments.

The interrelated tenth and eleventh paragraphs state the following:

> 10. Terrebonne Parish Sheriff Office investigator Ryan Trosclair learned that a cell phone had been taken from Joshua Swan at jail between May 2 and May 3, 2017. He investigated the alleged intimidation of a witness by getting the records for that phone. He found a 33 second call on the phone to Ashanti Johnson at 11:31 p.m. He went to talk to Kristin Bennett, who was terrified and trembling. He took a screen shot of a message she received from Ashanti Johnson at 11:40 p.m. on May 2, 2017.

> 11. Fourteen year old Ashanti "Ti" Johnson lives at 324 Roselawn, where Lakesha Clay went for help. Late at night, after one of the first days of trial, she was texted through Facebook Messenger by someone using the "BLM Boy Ceno" address, asking if she still saw Kristin Bennett. Then someone called and asked her to tell Kristin to "watch out for the police on Friday." Ashanti relayed the message to Kristin on Facebook.

Mid-trial, while the defendant was in jail, he somehow obtained a cell phone and called his fourteen-year-old cousin, Ashanti Johnson. While the facts were never fully developed, it appeared that Kristin Bennett, who was a possible witness, was the subject of the defendant's and Ashanti's phone conversation. Out of an abundance of caution, the prosecutor filed a motion to introduce other crimes evidence the morning of trial (May 5, 2017) regarding the cell phone found on the defendant in jail one or two nights before. The prosecutor thought the phone conversation might be relevant if it had anything to do with the destruction of evidence or intimidation of a witness. Further, the prosecutor thought the defendant might have instructed Ashanti to "wipe" a phone. At any rate, the trial court permitted the testimony of both Ashanti Johnson and of Detective Ryan Trosclair (TPSO), who investigated the cell phone incident.

After the cell phone was seized from the defendant, Detective Trosclair obtained a search warrant for the information on it and learned that a particular number belonged to Ashanti. He further learned there were allegations of possible intimidation from the defendant to one of the witnesses in the case, namely Kristin Bennett. Detective Trosclair noted that when he interviewed Kristin, she was "terrified" and "trembling the entire time." The content of Kristin's interview was never discussed, and Kristin did not testify at trial.[6] Detective Trosclair looked at Kristin's phone and took a photograph of a screenshot that indicated Ashanti had called Kristin.

Ashanti Johnson testified at trial that the defendant, her cousin, called her

[6] The prosecutor indicated during his questioning of Ashanti Johnson that there was a material

from jail. According to Ashanti, the defendant told her to tell Kristin "to watch out for the police Friday." Ashanti then contacted Kristin through Facebook and conveyed what the defendant had said.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. **State v. Lockett**, 99-0917 (La. App. 1st Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So.2d 115. The trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. See **State v. Galliano**, 2002-2849 (La. 1/10/03), 839 So.2d 932, 934 (per curiam). When seeking to introduce evidence pursuant to La. Code Evid. art. 404(B), the State need only make a showing of sufficient evidence to support a finding that the defendant committed the other crime, wrong, or act. **State v. Taylor**, 2016-1124 (La. 12/1/16), 217 So.3d 283, 291.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

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witness warrant out on Kristin Bennett for her to appear to testify.

less probable than it would be without the evidence. La. Code Evid. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. La. Code Evid. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. La. Code Evid. art. 403.

We find nothing improper in the trial court's ruling on the admissibility on the foregoing evidence. The only testimony adduced regarding the defendant's communication to Kristin was his message to her to watch out for the police Friday; and whatever the meaning of this message, coded or not, was never made clear. In any event, in the middle of trial, it appeared the defendant was still trying to make contact with witnesses. Accordingly, the State sought to introduce evidence that the defendant obtained a cell phone while in jail in order to contact someone about destroying evidence or to intimidate a witness regarding testifying (or both). This was not evidence of impermissible other crimes evidence to show bad character or a criminal disposition; rather, it had independent relevance to the issues of motive, opportunity, intent, and knowledge.[7] This evidence also had particular relevance to the issue of identity, since the defendant's theory was that he was not the individual who shot and killed Hart. Accordingly, it was admissible other crime evidence. See La. Code Evid. art. 404(B)(1); **State v. Taylor**, 2001-1638 (La. 1/14/03), 838 So.2d 729, 746, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). See also **State v. Johnson**, 2015-528 (La. App. 5th

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[7] Prior to the testimony of Detective Trosclair, the trial court provided the following limiting instruction to the jury: "The evidence that Joshua Swan allegedly used a cell phone, while in jail, to contact witnesses is an offense for which he is not on trial for. This evidence may be used and considered for the limited purposes of showing knowledge. And whether or not Mr. Swan actually used a cell phone while [in] jail to contact a witness, is solely for you to determine. The fact that I'm giving you this instruction does not mean that you must find that he did commit this action, for which he is not on trial."

12/9/15), 182 So.3d 378, 388-89, writ denied, 2016-0028 (La. 2/24/17), 216 So.3d 61; **State v. Lawson**, 2008-123 (La. App. 5th Cir. 11/12/08), 1 So.3d 516, 526; **State v. Wright**, 2002-1268 (La. App. 3d Cir. 3/5/03), 839 So.2d 1112, 1120-21; **State v. Miller**, 98-0301 (La. 9/9/98), 718 So.2d 960, 966-67; **State v. Michel**, 93-0789 (La. App. 1st Cir. 3/11/94), 633 So.2d 941, 942-43. Any prejudicial effect was outweighed by the probative value of such evidence. See La. Code Evid. art. 403; **State v. Scales**, 93-2003 (La. 5/22/95), 655 So.2d 1326, 1330-31, cert. denied, 516 U.S. 1050, 116 S.Ct. 716, 133 L.Ed.2d 670 (1996).

We find, further, that even if the other crimes evidence had been inadmissible, the admission of such evidence would have been harmless error. See La. Code Crim. P. art. 921. The erroneous admission of other crimes evidence is a trial error subject to harmless-error analysis on appeal. **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 102. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); **Johnson**, 664 So.2d at 100. The evidence at trial established, through the eyewitness testimony of Lakesha Clay, that the defendant shot and killed Hart and, as such, any error in allowing such evidence to be presented to the jury would have been harmless beyond a reasonable doubt. La. Code Crim. P. art. 921; **Sullivan,** 508 U.S. at 279, 113 S.Ct. at 2081.

> 12. From TJ Nixon's girlfriend's trailer, Mr. Cunningham photographed and recovered a Glock 22 gun, that was loaded with a 40 caliber magazine. It was not the gun used in the shooting. There was a .9 millimeter magazine in the house, but no 9 mm gun. The evidence was not shown to have any relation to this offense or to Mr. Swan.

These items, including many others, were part of the list of evidence or possible evidence found at scenes. Nothing here has anything to do with other crimes evidence of bad acts by the defendant.

The trial court in the instant matter specifically ruled that the group or association of members belonging to the FabBoys (or other groups that might come up at trial) could not be referred to as "gang members," and that the killing of Hart could not be referred to as a "gangland killing." Despite these limitations, the State was able to demonstrate at trial that, among others, the defendant, co-defendant Lawson, and Robert Swan, the defendant's brother, were members of the FabBoys, and that Robert Swan was the leader of this group. In this group, the defendant was known as "Ceno" and Lawson was known as "BadAzz." Robert Swan was killed in early October of 2015. It was rumored on the street, and detectives in the area were well aware of these rumors, that Hart was involved in the murder of Robert Swan. A few weeks later, on October 21, 2015, Hart was shot and killed by two men. Lakesha Clay, the eyewitness to Hart's murder, testified that she saw the defendant shoot Hart.

Evidence of gang affiliation may be relevant and admissible to show motive, identity, and intent. **State v. Jones**, 2015-0956 (La. App. 4th Cir. 3/22/17), 214 So.3d 124, 140; see **State v. Sumlin**, 44,806 (La. App. 2d Cir. 10/28/09), 25 So.3d 931, 938-40, writ denied, 2009-2738 (La. 11/19/10), 49 So.3d 400. It was the State's theory, based on the foregoing, that the defendant and Lawson killed Hart in retaliation for Hart having killed (insofar as the rumors went) the defendant's brother, Robert Swan. Accordingly, the State used the FabBoys associations to show motive of why Hart was killed. The evidence of the FabBoys group and its affiliations was, therefore, relevant and properly admissible under La. Code Evid. art. 404(B). Any prejudicial effect was outweighed by the probative value of such evidence. See La. Code Evid. art. 403; **Scales**, 655 So.2d at 1330-31. See **Jones**, 214 So.3d at 140-41 (finding other crimes evidence of gang affiliation relevant and admissible to show motive, identity, and intent, since the prosecution's theory of the case at trial was that the defendant attempted to kill two members of a rival

gang that had a long and reciprocal history of violence with the defendant's gang, and further, since the defense at trial appeared to be that he was not the perpetrator, his identity and motive had substantial independent relevance to the case); **State v. Brown**, 42,054 (La. App. 2d Cir. 8/29/07), 965 So.2d 580, 586-88, writ denied, 2007-1939 (La. 2/15/08), 976 So.2d 174 (finding the State proved the evidence came under one of the exceptions set forth in La. Code Evid. art. 404(B) in that the fact of gang affiliation was relevant to show the defendant's motive to injure the intended victim, who was affiliated with a rival gang); **State v. Weatherspoon**, 2006-539 (La. App. 5th Cir. 12/12/06), 948 So.2d 215, 228, writ denied, 2007-0462 (La. 10/12/07), 965 So.2d 398 (finding that admission of gang-related evidence was proper and relevant to show the defendant's motive of specific intent to injure where the State's theory was that the shooting was a result of gang members seeking revenge for an earlier altercation); **State v. Williams**, 2002-645 (La. App. 5th Cir. 11/26/02), 833 So.2d 497, 507, writ denied, 2002-3182 (La. 4/25/03), 842 So.2d 398, (finding the defendant's gang affiliation had independent relevance in establishing the defendant's motive and intent for second degree murder).

We also find this evidence helped explain and complete the story by proving the defendant's state of mind and the immediate context of events near in time and place. Integral act (res gestae) evidence incorporates a rule of narrative completeness without which the State's case would lose its narrative momentum and cohesiveness. See La. Code Evid. 404(B)(1); **Taylor**, 838 So.2d at 741-42. Res gestae events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the State could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes evidence to insure that the purpose served by admission of other crimes evidence is not to depict

defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1075-76 (per curiam). The res gestae doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances. **Taylor**, 838 So.2d at 741; see **State v. Anderson**, 2009-934 (La. App. 5th Cir. 3/23/10), 38 So.3d 953, 960-61, writ denied, 2010-0908 (La. 11/12/10), 49 So.3d 887; **State v. Jones**, 2008-687 (La. App. 3d Cir. 12/10/08), 999 So.2d 239, 252.

Based on all of the foregoing, this assignment of error is without merit.

## ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court erred in not instructing the jury that a unanimous verdict was required.

There is no merit to this argument, which has been repeatedly raised without success. Moreover, in the instant case, the defendant's guilty verdict for second degree murder was unanimous.[8]

The defendant contends that La. Code Crim. P. art. 782(A) and the Louisiana constitutional provision allowing non-unanimous jury verdicts violate the Fourteenth Amendment's Equal Protection Clause of the United States Constitution. According to the defendant, La. Const. art. I, § 17(A) and La. Code Crim. P. art. 782 should be declared unconstitutional because "Louisiana's non[-]unanimous jury law was born of a legislative mindset that by today's standard can safely be labeled as disgraceful and shameful."

Whoever commits the crime of second degree murder shall be imprisoned at

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[8] Before trial, the defendant filed a motion to declare La. Code Crim. P. art. 782 and La. Const.

hard labor. La. R.S. 14:30.1(B). Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both State and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon,**[9] 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard,** 410 So.2d 720, 726 (La. 1982). See also **State v. Smith**, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352.

The defendant also asserts in his brief that Louisiana's non-unanimous jury verdict scheme violates equal protection because racial discrimination was a factor behind the enactment of the constitutional provision. According to the defendant, the mission of Louisiana's non-unanimity rule, adopted in 1898, was to establish the supremacy of the white race in the State.

Our supreme court has previously addressed this issue. In **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738, 742, the supreme court noted, "defendants argue that the use of non-unanimous verdicts [has] an insidious racial component, allow[s] minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution has proscribed." **Bertrand**, 6 So.3d at 742. The **Bertrand** Court found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments.[10] Regarding the equal

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art. 1, § 17(A) unconstitutional, which was denied.

[9] The provision of Oregon's state constitution that allowed non-unanimous jury verdicts was challenged in **Apodaca. Johnson v. Louisiana**, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), decided with **Apodaca**, upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

protection argument that such verdicts have an insidious racial component, the **Bertrand** Court noted that this argument had already been found to be meritless by a majority of the United States Supreme Court in **Apodaca**. **Bertrand**, 6 So.3d at 743.

Thus, while **Apodaca** was a plurality rather than a majority decision, the United States Supreme Court, as well as other courts, has cited or discussed the opinion multiple times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. **Bertrand**, 6 So.3d at 742. Thus, Louisiana Constitution article I, § 17(A), as well as La. Code Crim. P. art. 782(A), is not unconstitutional and, therefore, not in violation of the defendant's constitutional rights. See **State v. Hammond**, 2012-1559 (La. App. 1st Cir. 3/25/13), 115 So.3d 513, 514-15, writ denied, 2013-0887 (La. 11/8/13), 125 So.3d 442, cert. denied, 572 U.S. 1090, 134 S.Ct. 1939, 188 L.Ed.2d 965 (2014).

This assignment of error is without merit.

**SENTENCING ERROR**

Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error.

For a conviction of second degree murder, the offender shall be imprisoned *at hard labor* for life without benefit of parole, probation, or suspension of sentence. La. R.S. 14:30.1(B). According to the sentencing transcript, however, the trial court failed to provide that the defendant's life sentence was to be served

[10] The **Bertrand** Court only considered Article 782, while the defendant in the instant case also attacks Article I, § 17(A). We find this to be a distinction without a difference, because Article 782(A) closely tracks the language of Article I, § 17(A).

at hard labor.[11] La. Code Crim. P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. Code Crim. P. art. 882(A) authorizes correction by the appellate court.[12]

We find that because correction of the defendant's illegally lenient sentence does not involve the exercise of sentencing discretion, there is no reason this court should not simply amend the sentence. **State v. Ford**, 2017-0471 (La. App. 1st Cir. 9/27/17), 232 So.3d 576, 589. Accordingly, since a sentence at hard labor was the only sentence that could properly be imposed, we correct the defendant's sentence by providing that it be served at hard labor. See **Ford**, 232 So.3d at 589; **State v. McGee**, 2008-1076 (La. App. 1st Cir. 2/13/09), 2009 WL 390809 (unpublished) at *4. We remand to the trial court for correction, if necessary, of the commitment order.

**CONVICTION AFFIRMED; SENTENCE AMENDED TO PROVIDE IT BE SERVED AT HARD LABOR AND AFFIRMED, AS AMENDED; REMANDED, IF NECESSARY, FOR CORRECTION OF THE COMMITMENT ORDER AND FOR TRANSMISSION OF THE AMENDED RECORD TO THE DEPARTMENT OF CORRECTIONS.**

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[11] The minutes indicate the sentence is at hard labor. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[12] "An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." La. Code Crim. P. art. 882(A).