NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 KA 0382

STATE OF LOUISIANA

VERSUS

AHMAD LYNDELL LAWSON

Judgment Rendered: NOV 08 2018

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 710800

Honorable Juan W. Pickett, Judge

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The defendant, Ahmad Lyndell Lawson, 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 postverdict judgment of acquittal or in the alternative motion for new trial, which was denied. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating four assignments of error. We affirm the conviction and sentence.

FACTS

On the night of October 21, 2015, Lakesha Clay rode with Willie Hart, Jr. to 322 Roselawn Avenue in Houma to buy drugs from Troy Nixon, who is known as "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 Joshua Swan come from around the back of the house and then shoot Hart multiple times. Hart was killed. The defendant and Joshua then shot at the car Lakesha was in. The defendant approached the car window and, despite Lakesha's supplication to not shoot her, the defendant shot her once in the stomach. Lakesha then saw the defendant and Joshua get in a black car and drive away. Lakesha, wounded, went to the neighbor's house across the street, for help. 911 was called, and Lakesha was taken to the hospital where she underwent surgery for her gunshot wound.

The defendant and Joshua were members of the FabBoys in the Houma area. The leader of the FabBoys was Robert Swan, Joshua's brother. A couple of weeks before Hart was killed, Robert Swan was killed. Rumors began circulating that

[1] Co-defendant Joshua Rae Swan was also charged with second degree murder. Swan was tried together with the defendant and was also found guilty as charged. Swan also appealed and that appeal is currently pending before this court. See **State v. Swan** 2018 KA 0320.

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, Kyle Cedotal became the primary suspect and, on October 14, 2015, Cedotal confessed to killing Robert Swan. Before Hart was killed, Detective Lieutenant Prestenbach told Joshua 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 there was no forensic evidence to prove he killed Hart and that his identity as one of the perpetrators was not established by the State.[2]

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,

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[2] The defendant filed a "MOTION FOR POST VERDICT JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL." In both that motion and this assignment of error, the defendant argues in effect that the verdict was contrary to the law and evidence because the evidence was insufficient to prove his identity as one of the perpetrators who shot and killed Hart. That is, the issue here raised on appeal by the defendant is one of sufficiency of evidence, not the weight of the evidence. See La. C.Cr.P. art. 851(B)(1). A trial judge's determination regarding the weight of the evidence under La. C.Cr.P. art. 851(B)(1) is not reviewable on appeal, except for error of law. La. C.Cr.P. art. 858; **State v. Dyson**, 2016-1571 (La. App. 1st Cir. 6/2/17), 222 So.3d 220, 234. See **State v. Snyder**, 98-1078 (La. 4/14/99), 750 So.2d 832, 859 n.21; **State v. Skelton**, 340 So.2d 256, 259 (La. 1976) ("[W]e have uniformly held that a bill of exceptions reserved to the refusal of the trial judge to grant a motion for a new trial based on Article 851(B)(1), relative to sufficiency of the evidence presents nothing for our review."). Cf. **State v. Guillory**, 2010-1231 (La. 10/8/10), 45 So.3d 612, 614-15 (*per curiam*) (finding that a grant or denial of a motion for new trial pursuant to La. C.Cr.P. art. 851(B)(5) presents a question of law that is subject to appellate review and is reviewed for abuse of discretion). See **State v. Collins**, 2010-1181 (La. App. 4th Cir. 3/23/11), 62 So.3d 268, 275. In any event, we find no abuse of discretion or error in the trial court's denial of the defendant's motion for postverdict judgment of acquittal/new trial motion. See **State v. King**, 2015-1283 (La. 9/18/17), 232 So.3d 1207, 1210-15.

61 L.Ed.2d 560 (1979). See La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in La. C.C.P. art. 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 fact finder 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, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. **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.

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 that 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 the State's case against him was "riddled with evidentiary and legal holes that were never filled." According to the defendant, his conviction hinged solely upon statements from Lakesha Clay, who initially identified Joshua Swan as the shooter. The defendant also notes that almost a month after the shooting, Lakesha met with a detective and identified him (the defendant) as her assailant. The defendant also notes that Lakesha said the person who shot her was wearing a muscle shirt and shorts, did not have gold teeth, and had no visible tattoos. The defendant points out, however, that he has numerous gold teeth and "tattoos going up and down both of his arms, forearms and hands." The defendant further notes that a cigarette butt found near the scene was tested for DNA and that he and Joshua were both excluded as contributors.

Also, the defendant's fingerprints were not found on any firearms retrieved or any of the bullet casings recovered at the scene. According to the defendant, no reasonable juror could have determined that he was the person responsible for shooting Lakesha or for killing Hart.

Lakesha Clay testified at trial that she had an on-and-off relationship with Hart since 2005. They remained friends and still dated. They had two children together. 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 while 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 Joshua and as "BadAzz." She knew BadAzz from the street, and Joshua was her cousin. Lakesha also knew Joshua as "Ceno." She had known BadAzz for almost a year. In the following testimony on direct examination, Lakesha identified the defendant and Joshua Swan 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, BadAzz (the defendant) and Joshua shot at the car Lakesha was in. When the defendant approached and put his face to the window, Lakesha begged him not to shoot her. The defendant shot her anyway in her stomach. Lakesha testified that she was one-hundred percent sure the defendant and Joshua were the shooters, and she identified both of them in court.

Lakesha further testified that after the shootings, the defendant and Joshua ran toward the back of the house and got into a small, black car. Lakesha, 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, Lakesha stated she had told a police officer who questioned her that Joshua Swan had shot her. She did not identify the defendant as a shooter until November 17, 2015, when she was interviewed by Detectives David Wagner and Michael Scott, both with the Houma Police Department. In her interview, Lakesha said the defendant was wearing a muscle shirt and black gym shorts. She indicated the defendant did not have gold teeth; when asked in the interview if the defendant had any tattoos, she shook her head "no." The defendant revealed in court that he had four gold front teeth and tattoos on both arms. Lakesha testified at trial that she did not see the defendant's tattoos that night.

On redirect examination, Lakesha indicated she had a clear view of the defendant 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 the defendant 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 Joshua. 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. Officer Jackson testified that Joshua Swan became the suspect after talking with Lakesha about who shot her.

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 Joshua as the person who shot her. Detective Scott obtained information that Mindy Gauno, Joshua's ex-girlfriend, was nearby at 318 Roselawn Avenue. Mindy was brought in for questioning, provided Joshua's cell phone number to the police, who contacted AT&T, the provider, to track the location of the phone. By pinging the phone, the police found Joshua at a trailer home on Norman Street in Houma, which is in the Mechanicville area. Joshua was brought in for questioning and denied any involvement in the shooting of Hart. The trailer that Joshua was found in by the police belonged to Keisha Price, TJ's girlfriend.

Detective Wagner went to the hospital to talk to Lakesha while she was being prepared 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" (Joshua Swan) 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."

Later, after Lakesha had gotten out of the hospital, she went to the police station for more questioning. There, she identified the defendant (BadAzz) as the second suspect. She also identified the defendant and TJ in photographic lineups.

The defendant in brief 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. It appears from the record that the casings were never tested for DNA or fingerprints; nor were they tested to determine if they were fired from different guns. DNA testing on the cigarette butt, found about forty feet from Hart, indicated it was not the defendant or Joshua. Joshua Swan was found by the police at Keisha Price's (TJ's girlfriend) trailer, and a .40 caliber Glock handgun was found there; this gun, however, was not used in the shootings. A 9mm extended magazine was also found in the trailer.

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 the eyewitness testimony of Lakesha Clay. Positive identification by only one witness is sufficient to support a conviction. It is the fact finder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **Hughes**, 943 So.2d at 1051; **Davis**, 822 So.2d at 163-64.

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 (Michael Kennedy) 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 fact finder's discretion "only to the extent necessary to guarantee the fundamental protection of due process of law." **Mussall**, 523 So.2d at 1310; 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 evidence regarding 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. 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 fact finder'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. 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. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). 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 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 Hart. 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 that prosecutorial misconduct so permeated the trial and prejudiced the jury that he was denied a fair trial.

The defendant's other attorney, Miles W. Swanson, filed a pretrial motion in limine, seeking to exclude any mention of the defendant's involvement or association in any gang or gang-related activity. After voir dire but prior to

opening statements, the trial court, as noted by the defendant in brief, granted the motion in limine only to the extent of not allowing counsel to use the words "gang" or "gang member," or to refer to Hart's killing as a "gangland" killing. The defendant points out that the prosecutor said the word "gang" during trial; Swanson moved for a mistrial, which was denied.

The defendant further notes that Swanson moved for a mistrial (which was denied), averring in brief that it was after "the State mentioned Lawson's previous convictions." Swanson also moved for a mistrial, which was denied, when the prosecutor threw something during closing arguments. Also, during closing arguments, the prosecutor remarked on his personal relationship with the trial court; these remarks, according to the defendant, fueled perceptions of unfairness and created an "uneven playing field" in the "eyes and minds of jurors," making it appear the defendant did not "even have a chance at a fair trial."

Finally, the defendant asserts in brief that the State's use of bad acts or other crimes evidence was a "ruse to get prejudicial, irrelevant evidence in front of the jury." According to the defendant, law enforcement witnesses were allowed to testify "at the behest of the State" about rumors of Robert Swan (Joshua Swan's brother) being the leader of the FabBoys before he was killed, as well as about Willie Hart, Jr. having allegedly killed Robert Swan. The defendant suggests, thus, that the trial was centered, not on whether he was guilty, but his "being a member" of the FabBoys and the group's reputation for criminal activity. This prejudicial evidence, according to the defendant, was harmful beyond a reasonable doubt, resulting in him being "viewed by the jury as a previously convicted felon and gang member not even deserving of the State respecting him enough for the Assistant District Attorney to not throw something in the direction of defense counsel" in front of the jury.

We first address the defendant's argument regarding the State's alleged use of bad acts or other crimes evidence. The State's theory of the case was that Hart's killing was gang-related. The prosecutor, J. Christopher Erny, 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, Erny argued to the trial court that co-defendant Joshua Swan 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 the death of Robert Swan. Thus, the prosecutor argued that the defendant's and Joshua's killing of Hart was a retaliation murder for Hart's killing of Robert Swan. Erny's witness, a detective, was not available to testify, so the trial court deferred ruling.

A few days later at the **Prieur** hearing,[3] Erny called Detective Jeffery Lirette, with the Houma Police Department, to testify. According to Detective Lirette, who has been with the police department for over twenty years, he held 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. The FabBoys and Smurder gangs are localized in the Mechanicville, Village East, and Ashland North communities.

According to Detective Lirette, Robert Swan, brother of co-defendant Joshua Swan, 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

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

and trafficking, armed robberies, "just about anything really." According to Detective Lirette, gang members usually have nicknames, and the defendant's was "Bad Azz" and Joshua Swan's was "Ceno." Robert Swan was known as "Big Swan." Troy Nixon, who was affiliated (but not necessarily a member) of the FabBoys was known as "TJ." Nixon's sister is Yanni Nixon, who 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 Joshua with Robert Swan, "holding a pile of money." There was a picture with Joshua, Robert Swan, and the defendant. 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 Mr. Erny; 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.

Detective Lirette offered similar testimony at trial as that offered at the **Prieur** hearing. Detective Keith Craft, with the Houma Police Department, grew up in the Mechanicville area and, at trial, described the FabBoys as a group of people who grew up together in Ashland North. Detective Craft was not cross-examined by either the defendant's or Joshua's counsel. Thus, what the defendant

suggests constituted bad acts or other crimes evidence testimony by "law enforcement witnesses" was nothing more than generalized descriptions of groups in the Mechanicville and Ashland North areas of Houma 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 "gangs" were referred to as groups or associations.

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. C.E. 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 less probable than it would be without the evidence. La. C.E. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. La. C.E. 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. C.E. art. 403.

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 Joshua Swan, and Robert Swan, Joshua'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 "BadAzz" and Joshua was known as "Ceno." Robert Swan was killed in early October 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 and Joshua shoot Hart.

To the extent that being a member of a "gang" is even considered other crimes evidence or bad acts, such evidence was properly allowed at trial. 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 also **State v. Sumlin**, 44,806 (La. App. 2nd Cir. 10/28/09), 25 So.3d 931, 937-40, writ denied, 2009-2738 (La. 11/19/10), 49 So.3d 400. It was the State's theory,

based on the foregoing, that Joshua, along with the defendant, killed Hart in retaliation for Hart having killed (insofar as the rumors went) Joshua'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. C.E. art. 404(B).

Any prejudicial effect was outweighed by the probative value of such evidence. See La. C.E. 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); see also **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. 2nd 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. C.E. 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 (and his cohort Joshua'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. C.E. 404(B)(1); **State v. Taylor**, 2001-1638 (La. 1/14/03), 838 So.2d 729, 741-42, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). *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, 1075-1076 (*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. 3rd Cir. 12/10/08), 999 So.2d 239. Accordingly, the defendant's argument regarding evidence of bad acts or other crimes evidence is baseless.

The defendant further notes in brief that Swanson's motion for mistrial was denied when the prosecutor, Erny, said the word "gang" during trial. This portion

of testimony, however, had nothing to do with other crimes evidence or bad acts by the defendant. On direct examination, Erny, the prosecutor was asking 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. Erny asked the detective if he knew other individuals in the group, to which he replied in the affirmative. Erny 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 for Joshua objected and moved for a mistrial because Erny used the word "gang." Swanson joined in the motion for mistrial. Erny 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 defendants did not want the trial court 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 remarks by the prosecutor fall under La. C.Cr.P. art. 770. The applicable law, therefore, is La. C.Cr.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[.]

A mistrial under the provisions of La. C.Cr.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. C.Cr.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 a detective

on direct examination. The portion of this testimony, in fact, made no reference at all to the defendant. The instance of the word "gang" followed immediately by 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.

The defendant further points out that Swanson moved for a mistrial (which was denied), after "the State mentioned Lawson's previous convictions." We assume the defendant is arguing the State referred to inadmissible other crimes evidence.

The defendant's argument is baseless. Erny made no such reference to any other crimes committed by the defendant. On direct examination, Erny asked Detective Scott, regarding a photographic lineup, "Okay, what are looking at here?" Detective Scott responded it was a photograph "sixpack" lineup and continued:

> So, this is the photograph sixpack lineup. So basically, we use a program called ThinkStream Photo Lineup. 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. We use his physical characteristics, and we enter it into the system. So, basically, what it does is, ThinkStream photo lineup will give five other similar subjects, height, weight, skin color, hair style, so on and so forth.

Swanson moved for a mistrial, arguing that Detective Scott said that his client has been convicted and, as such, the entire proceeding has been tainted. The trial court denied the motion for mistrial, stating in pertinent part: "The Officer was explaining how the process of obtaining the photographs - he never stated that

Mr. Lawson was convicted of a particular crime." The trial court offered to admonish the jury, but Swanson did not want any such admonishment to be given.

We see no reason to disturb the trial court's denial of the motion for mistrial. As noted by the trial court, Detective Scott was simply explaining how photographic lineups were put together. His explanation was not a specific reference to a previous conviction or arrest of the defendant. The detective's ambiguous, oblique reference to "convicted" did not so prejudice the defendant as to deny him a fair trial. See **State v. Novel**, 2011-1569 (La. App. 4th Cir. 10/24/12), 2012 WL 6618758 (*unpublished*), writ denied, 2012-2543 (La. 4/26/13), 112 So.3d 838; **State v. Smart**, 2005-814 (La. App. 5th Cir. 3/14/06), 926 So.2d 637, 646-48, writ denied, 2006-1225 (La. 11/17/06), 942 So.2d 533; **State v. Harris**, 97-2903 (La. App. 4th Cir. 9/1/99), 742 So.2d 997, 1002-1003, writ denied, 99-2835 (La. 3/24/00), 758 So.2d 146.

Moreover, Detective Scott's comment was unsolicited testimony. Louisiana Code Criminal Procedure article 770 provides, in pertinent part:

> 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:
>
> * * * * *
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> * * * * *
>
> 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.

A police officer is not a court official within the meaning of La. C.Cr.P. art. 770. **State v. Watson**, 449 So.2d 1321, 1328 (La. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 952 (1985). Instead, the applicable provisions contained in La. C.Cr.P. art. 771 provide, 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:
>
> * * * * *
>
> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is 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.

A mistrial under the provisions of La. C.Cr.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. Jack**, 554 So.2d 1292, 1296 (La. App. 1st Cir. 1989), writ denied, 560 So.2d 20 (La. 1990). The jurisprudence has held that an impermissible reference to another crime deliberately elicited of a witness by the prosecutor would be imputable to the State and would mandate a mistrial. **State v. Madison**, 345 So.2d 485, 494 (La. 1977). Unsolicited and unresponsive testimony, however, is not chargeable against the State to provide a ground for mandatory reversal of a conviction. **Jack**, 554 So.2d at 1296. See **State v. Thompson**, 597 So.2d 43, 46 (La. App. 1st Cir.), writ denied, 600 So.2d 661 (La. 1992). Accordingly, the trial court did not abuse its discretion in denying the motion for mistrial.

Finally under this assignment of error, the defendant notes he moved for a mistrial, which was denied, when the prosecutor threw something during closing arguments. Also during closing arguments, the prosecutor remarked on his personal relationship with the trial court, which, according to the defendant, fueled perceptions of unfairness and created an "uneven playing field" in the "eyes and minds of jurors."

During closing argument, the defendant's other counsel (not Swanson), used a board to write on as he discussed issues. When he was done with his argument,

John Thomas, Joshua's attorney (who had already made his closing argument), moved the board out of the way and began to erase it. Erny told Thomas to stop erasing the board because he (Erny) wanted to use what had already been written on the board in his rebuttal closing argument. Thomas erased the board anyway. Erny became angered and threw something. The record is not clear on what was thrown or where it was thrown. Erny apologized, and Thomas moved for a mistrial, based on Erny's "outbursts." Swanson joined in the motion for a mistrial. The trial court denied the motion, finding it did not rise to the level of a mistrial. The trial court further informed defense counsel it would instruct the jury that closing argument is not evidence, what was written on the board was not evidence, and the attorneys were under no obligation to keep what was written on the board.

We see no reason to disturb the trial court's ruling. 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.

In his closing argument, to make his point that Lakesha Clay knew the defendant even though she did not see his tattoos the night she was shot, Erny informed the jury that he knew the trial judge, but would not know if he had any tattoos. Specifically, Erny stated in pertinent part:

> She only knows him as BadAzz. And when he was shooting at her, walking up to her, popped his head in that window - I'm sure he wasn't smiling so he could show his pearly golds. Gold teeth and tattoos - really? I've known this man a long time. We used to work together, at the DA's Office. He has been to my house. I have been to his house. I don't know if he has got tattoos. I know he doesn't have them on his face. I don't know what he's got under the black robe, and I don't care.
>
> If somebody asked me if Juan Pickett has tattoos, I would say I don't know - not that I know of. That's not a reason to discredit Lakesha.

There was no objection of record lodged by any defense counsel at this

point, or even at the end of Erny's closing argument. The issue as to the propriety of remarks made in closing argument is not preserved for review where defense counsel makes no objection to the statement either during argument or after the argument. See La. C.Cr.P. art. 841(A); **State v. Burge**, 515 So.2d 494, 505 (La. App. 1st Cir. 1987), writ denied, 532 So.2d 112 (La. 1988). This lack of a contemporaneous objection by the defendant prevented the trial court from immediately remedying the situation, had corrective action been required. **State v. Spencer**, 93-571 (La. App. 5th Cir. 1/25/94), 631 So.2d 1363, 1369, writ denied, 94-0488 (La. 2/3/95), 649 So.2d 400. Further, there was no request for an admonition or a mistrial. Absent such an objection, the defendant is deemed to have waived any such error, and is now precluded from raising the issue on appeal. See **State v. Francis**, 95-194 (La. App. 5th Cir. 11/28/95), 665 So.2d 596, 603. It is true that, despite the lack of an objection, extremely prejudicial and inflammatory remarks require reversal. See **State v. Hayes**, 364 So.2d 923 (La. 1978). Our review of the relevant portion of the prosecutor's closing argument, however, convinces us that his remarks were not so inappropriate or prejudicial as to require reversal. See **Francis**, 665 So.2d at 603.

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 granting, then subsequently denying, the defendant's **Batson** challenge to the State's peremptory strike of prospective juror, Jamie Johnson; and the trial court erred in denying his motion for mistrial based on the denial of the **Batson** challenge.

In **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court adopted a three-step analysis to determine whether or not 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. The second step of this process does not demand an explanation that is persuasive, or even plausible. At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. **Purkett v. Elem**, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (*per curiam*). See La. C.Cr.P. art. 795(C), (D), & (E); **Snyder v. Louisiana**, 552 U.S. 472, 477, 128 S.Ct. 1203, 1208, 170 L.Ed.2d 175 (2008); **Miller-El v. Dretke**, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324, 162 L.Ed.2d 196 (2005).

By the end of the second panel of voir dire, after cause challenges and peremptory strikes had been made, a twelve-member jury had been picked. Only after Erny exercised his first back strike did John Thomas, counsel for Joshua Swan, make a **Batson** challenge. Thomas argued the State had excluded three African-American females. Michael Kennedy, one of the defendant's counsel, joined in the challenge. After the defense identified four African-American females who had been peremptorily struck by the State, the trial court found the defense had made a prima facie showing that the prosecutor had exercised peremptory challenges on the basis of race and, accordingly, asked the prosecutor to articulate a race-neutral explanation for striking the jurors in question.

We note initially that it is not clear from the record what the race was of each prospective juror, as well as the twelve people (and one alternate) who served as jurors for the trial. Although the mere presence of some African-Americans on the jury is no bar to finding a prima facie case, it is appropriate to consider the fact that

the State did not eliminate all African-Americans when deciding whether there exists a prima facie case of discrimination. See **State v. Duncan**, 99-2615 (La. 10/16/01), 802 So.2d 533, 549, cert. denied, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002). In any event, Erny, the prosecutor, explained that Jamie Johnson was only twenty-one years old and that "normally" he did not pick jurors that young because they "don't understand, or have enough life experiences." Erny added, "I rarely keep anybody at that age on a jury." As to the other three prospective jurors, Erny offered the following race-neutral explanations:

> So with respect to Ms. Gwendolyn Carter, she was on a criminal jury and voted not guilty. If the Court remembers that, I weighed keeping her or not, I thought she was a nice lady. I thought she would make a potentially good juror; but that just tipped the edge to me, to strike her. She voted not guilty on a prior criminal jury.
>
> With respect to Ms. Lydia Gwin, Battery of a Police Officer - do I need anymore on that? I mean, that was right off of the top.
>
> And then, Ms. [Doris] Trahan[4], I initially did keep her. She's very intelligent, you know, professional, and in the educational system. But I felt that there are other people that are better. So I decided to strike her. There was some indication earlier about her possibly having some related information because of her brother-in-law, which I think she survived a cause challenge on that. So, I decided out of an abundance of precaution to use a peremptory on her.
>
> And the Court, there is still Ms. Lana Holmes, who is sitting right here. I liked her a lot. She actually wants to be on this jury. And I have not stricken her. I kept her.
>
> And she, just to let the Court know, she's African-American, for the record - or appears to be.

The trial court denied the **Batson** challenges to prospective jurors Carter, Gwin, and Trahan, finding that the reasons given by the prosecutor were race-neutral. The trial court granted the **Batson** challenge to Jamie Johnson. Erny argued the **Batson** challenge regarding Johnson had not been raised timely because she had already been released (not serving) the day before on the first panel. The trial court agreed, then denied the **Batson** challenge to Johnson. Both defense counsel moved for a mistrial, which was denied.

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[4] After the voir dire of the first panel, Erny cause challenged Doris Trahan because she had indicated she talked to her brother-in-law, Mr. Swan, and there were discussions about it. Erny averred she "knew information about it." The trial court denied the cause challenge.

Shortly thereafter, counsel finished picking jurors from the second panel, resulting in eleven prospective jurors selected up to this point. Following a lunch recess, the trial court addressed counsel regarding the **Batson** challenge to Johnson:

> All right, I just wanted to put something on the record. Over lunch, I looked at a case and I want to address the **Batson** challenges earlier. There was a challenge, Ms. Jamie Johnson and the Court was going to grant the **Batson** challenge. I am going to - the Court is going to change his opinion and deny the **Batson** challenge on Jamie Johnson. Over the break, I did pull up a case, where the Courts have held that youth is a race-neutral reason to exclude a person from a jury; and that is **Hidalgo versus Fagan**. There's a **State versus Ilum** case, and a **State versus Lee**, and there is **United States versus Joe**.

It is only this issue - the granting then denying the **Batson** challenge to Jamie Johnson - that the defendant has raised in this assignment of error. The defendant avers in brief that once the trial court realized Johnson had been dismissed from the venire panel the previous day, it reversed itself and denied the **Batson** challenge without stating race-neutral reasons for the reversal and denial.

We agree with the above implication by the defendant that the trial court erred in denying the **Batson** challenge on untimeliness. A ruling, and thus the prerequisite **Batson** objection, must be made at a time when the trial court can correct any misuse of peremptory challenges. **State v. Dominguez**, 2014-1 (La. App. 5th Cir. 8/28/14), 148 So.3d 648, 657-58, writ denied, 2014-2033 (La. 5/22/15), 170 So.3d 982. See **State v. Williams**, 524 So.2d 746 (La. 1988) (*per curiam*); **State v. Lamark**, 584 So.2d 686, 696-697 (La. App. 1st Cir.), writ denied, 586 So.2d 566 (1991). Although jurisprudence has indicated that **Batson** objections should at least be made "at some time before the completion of the jury panel," in order to fulfill the purpose of that principle, a defendant must make a **Batson** objection contemporaneously with the State's exercise of the allegedly racially biased peremptory challenges, or at the least, reasonably soon enough thereafter that the stricken jurors have not been dismissed from service. An

objection made even before the entire jury panel is sworn and completed is untimely if the prospective jury has been chosen, individually sworn and dispensed to return at a subsequent date, and those against whom the State has allegedly misused its peremptory challenges have been dismissed completely. **State v. Aubrey**, 609 So.2d 1183, 1185 (La. App. 3rd Cir. 1992). See **Dominguez**, 148 So.3d at 657-58.

On the other hand, "[t]he issue of the timeliness of **Batson** objections is difficult because a pattern of discrimination may not become evident in early stages of voir dire." **State v. Jacobs**, 99-0991 (La. 5/15/01), 803 So.2d 933, 939, cert. denied, 534 U.S. 1087, 122 S.Ct. 826, 151 L.Ed.2d 707 (2002). While counsel should preferably make the objection as soon as the discriminatory pattern is evident, "[c]ontemporaneous objections are not always feasible . . . because a pattern of invidious discrimination may not be evident until jury selection is complete." **Tursio v. United States**, 634 A.2d 1205, 1210 (D.C. App. 1993). See **Duncan**, 802 So.2d at 546 (finding defendant's global objection timely even though made when all but one of the jurors had been selected, and the State had exercised eight of its twelve available peremptory challenges).

Herein, while Johnson had already been dismissed, defense counsel Thomas indicated to the trial court that Trahan had not been excluded at that point (when Johnson was dismissed), and the "pattern" had not yet emerged. Defense counsel raised the **Batson** challenge during the second panel of voir dire when a pattern of potential discrimination had arisen, and it took a third panel to complete the voir dire process and select a jury. We agree, thus, that the objection was raised early enough so as to be considered timely. Accordingly, the trial court's denial of the **Batson** objection for untimeliness is not persuasive.

We disagree with the defendant, however, that the trial court did not provide race-neutral reasons for denying the **Batson** challenge. Erny explained he

peremptorily struck Johnson because of her youth. The trial court, after researching the issue on its own, agreed with Erny and, only a short time later that same day, specifically set out its reasons on the record for the denial of the **Batson** challenge to Johnson. The inference, thus, of the trial court's subsequent denial of the **Batson** challenge regarding Johnson was that the defendant did not meet his burden of proving purposeful discrimination.

In any event, when Erny offered race-neutral reasons for his use of peremptory challenges, the preliminary issue of whether the defendant made a prima facie showing became moot. See **Hernandez v. New York**, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991); **Jacobs**, 803 So.2d at 941. At this point, 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." **Jacobs**, 803 So.2d at 941. Accordingly, we consider the third step of the **Batson** challenge. The inquiry is whether the trial court erred in determining there was no discriminatory intent when weighing the defendant's proof and the prosecutor's race-neutral reasons. See **Jacobs**, 803 So.2d at 941. For a **Batson** challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result "must ultimately be traced to a racially discriminatory purpose." **Batson**, 476 U.S. at 93, 106 S.Ct. at 1721, quoting **Washington v. Davis**, 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). Thus, the sole focus of the **Batson** inquiry is upon the intent of the prosecutor 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. The

Batson explanation does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. See **State v. Elie**, 2005-1569 (La. 7/10/06), 936 So.2d 791, 795-96.

Our review of Erny's explanation for the peremptory strike against Johnson reflects a race-neutral justification. Louisiana courts have found a myriad of explanations to qualify as race-neutral reasons. See **State v. Parker**, 2004-1017 (La. App. 5th Cir. 3/29/05), 901 So.2d 513, 523, writ denied, 2005-1451 (La. 1/13/06), 920 So.2d 235 (finding that when accepted by the trial judge, the lodging of a peremptory challenge based on a juror's body language did not violate **Batson**); **State v. Woods**, 97-0800 (La. App. 1st Cir. 6/29/98), 713 So.2d 1231, 1234-35, writ denied, 98-3041 (La. 4/1/99), 741 So.2d 1281 (finding that a prospective juror's mistaken belief that the prosecutor had represented a prospective juror in a lawsuit was a legitimate, race-neutral justification for the State's peremptory strike). See **State v. Nelson**, 2010-1724 (La. 3/13/12), 85 So.3d 21, 29.

Herein, Erny explained he peremptorily struck Johnson, who was single with no children, because she was too young and inexperienced. A juror's age has been found to be an acceptable race-neutral reason for the State to exercise a peremptory challenge. See **State v. Thompson**, 516 So.2d 349, 354 (La. 1987), cert. denied, 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). **State v. Perrilloux**, 2003-0917 (La. App. 5th Cir. 12/30/03), 864 So.2d 843, 850, writ denied, 2004-0418 (La. 6/25/04), 876 So.2d 830. Erny's explanation, thus, was not unreasonable and had some basis in accepted trial strategy. See **State v. Handon**, 2006-0131 (La. App. 1st Cir. 12/28/06), 952 So.2d 53, 59; **Sanchez v. Roden**, 808 F.3d 85, 87-88, 93 (1st Cir. 2015), cert. denied, __ U.S. __,136 S.Ct. 1685, 194 L.Ed.2d 788 (2016)

(finding the prosecutor's proffered reason for striking a prospective black male juror was that he routinely used peremptory challenges to strike young jurors, was a nondiscriminatory reason for the strike under **Batson**); **Sims v. Brown**, 425 F.3d 560, 574-76 (9th Cir. 2005) (finding prospective juror's youth and lack of life experience constituted race-neutral reasons for striking him). See also **Rice v. Collins**, 546 U.S. 333, 341-342, 126 S.Ct. 969, 975-976, 163 L.Ed.2d 824 (2006) (finding that even if overly cautious prosecutor, who struck prospective juror because she was young, single, and lacked ties to the community, the prosecutor's wariness of the young and rootless could be seen as race-neutral); **State v. Wilson**, 2009-170 (La. App. 5th Cir. 11/10/09), 28 So.3d 394, 403-06, writ denied, 2009-2699 (La. 6/4/10), 38 So.3d 299 (finding valid the prosecutor's race-neutral explanation for striking a prospective juror who, as a young student, would tend to have liberal attitudes).

The defendant did not offer any facts or circumstances that supported an inference that the State exercised its strike against Jamie Johnson in a racially discriminatory manner. We find, thus, that the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. See **Green**, 655 So.2d at 289-291. 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 the trial court's acceptance of the State's race-neutral reasons for peremptorily striking Johnson was not clearly erroneous; and, as such, we find no abuse of discretion in the trial court's denial of the motion for mistrial.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues ineffective assistance

of counsel. Specifically, the defendant contends that his defense counsel's failure to sever his case from that of his co-defendant, Joshua Swan, was unreasonable "in light of the merits of the issue."

No counsel filed a motion to sever in this case. According to the defendant, his defense counsel should have filed a motion to sever because of the plethora of evidence introduced at trial, which was inadmissible against him, but admissible against Joshua, and prejudicial and detrimental to him (the defendant). The defendant avers that the jury had insurmountable difficulty in distinguishing his alleged acts from those of Joshua's and/or the FabBoys; and he would have been insulated from this prejudice if he had been tried separately.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." **Strickland**, 466 U.S. at 688, 104 S.Ct. at 2065. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068. It is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an

inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993). A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, where the record discloses evidence needed to decide the issue of ineffective assistance of counsel, and that issue is raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

Claims of ineffective assistance of counsel, by their very nature, are highly fact-sensitive. **State v. Henry**, 2000-2250 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 540, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. A defendant who asserts a claim of ineffective counsel based upon a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of a trial or sentencing. General statements and conclusory charges will not suffice. See **State v. Castaneda**, 94-1118 (La. App. 1st Cir. 6/23/95), 658 So.2d 297, 306; **State v. Jordan**, 35,643 (La. App. 2nd Cir. 4/3/02), 813 So.2d 1123, 1134, writ denied, 2002-1570 (La. 5/30/03), 845 So.2d 1067. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. **Strickland**, 466 U.S. at 690-91, 104 S.Ct. at 2066. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. **Id**. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. **Id**.

The filing and pursuit of pretrial motions are squarely within the ambit of the attorney's trial strategy, and counsel is not required to engage in efforts of futility. See **State v. Shed**, 36,321 (La. App. 2nd Cir. 9/18/02), 828 So.2d 124, 132, writ denied, 2002-3123 (La. 12/19/03), 861 So.2d 561. Moreover, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rest with an accused and his attorney, and the fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1st Cir. 1993).

Regarding these claims of ineffective assistance of counsel, the defendant has made no showing of deficient performance by defense counsel; and even had he shown deficient performance, the defendant has failed to demonstrate how such deficiency would have prejudiced him. In simply setting out unsubstantiated assertions, the defendant has failed to offer sufficient facts to establish deficient performance by counsel.

Moreover, a severance is permitted to co-defendants whose defenses are antagonistic to each other, that is, when each defendant intends to exculpate himself by putting the blame for the offense on a co-defendant. See La. C.Cr.P. art. 704; **State v. Dilosa**, 2001-0024 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 669, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153. Herein, the defenses of the defendant and Joshua Swan were not antagonistic. Neither of them admitted to any involvement in Hart's murder; nor did either attempt to implicate the other. While the defendant suggests that evidence of Joshua Swan's gang affiliation reflected adversely on him, and that he was thereby prejudiced, it was clearly established at trial that the defendant himself was a member of the FabBoys. See **State v. Cedrington**, 98-253 (La. App. 5th Cir. 12/16/98), 725 So.2d 565, 577-78, writs denied, 99-0190 (La. 6/4/99), 743 So.2d 1249 & 99-0431 (La. 6/25/99), 745 So.2d 1182. See also **State v. Bennett**, 517 So.2d 1115, 1119-20 (La. App. 1st Cir.

1987), writ denied, 523 So.2d 1335 (La. 1988).

The defendant herein has provided only general statements and conclusory assertions, failing to set forth his arguments with any specificity to support his assertions regarding counsel's deficiencies. The defendant's claim of ineffective assistance of counsel, therefore, must fall. See **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

If the defendant feels there is evidence to present beyond what is contained in the instant record, such evidence must be adduced in an evidentiary hearing in the district court. The defendant would have to satisfy the requirements of La. C.Cr.P. art. 924, *et seq.*, in order to receive such a hearing. See **State v. Albert**, 96-1991 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363; see also **State v. Johnson**, 2006-1235 (La. App. 1st Cir. 12/28/06), 951 So.2d 294, 304.

This assignment of error is without merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.