NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1057**
VERSUS	*	**COURT OF APPEAL**
GERALD PRESTON AND PRINCE MORRISON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 383-809, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Chief Judge William H. Byrnes III
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin, Judge Miriam G. Waltzer)

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CONVICTIONS AND SENTENCES AFFIRMED

STATEMENT OF THE CASE

On June 27, 1996, the State jointly indicted Gerald Preston and Prince Morrison for the first-degree murder of Darnell Lopez, a violation of La. R.S. 14:30. Both defendants pled not guilty at their arraignments on July 9, 1996. On July 2, 1998, the court denied the motion to suppress the evidence and found probable cause. On July 6, 1999, the jury found the defendants guilty of second-degree murder. The court denied the defendants' motions

for new trial on October 1, 1999, and sentenced them to life imprisonment, without benefit of parole, probation or suspension of sentence.

STATEMENT OF FACT

In the early morning hours of May 10, 1996, after a night of socializing, friends Harold Fourcha, Jr., Darnell Lopez, Prince Morrison and Gerald Preston, purchased some liquor, and returned to the Desire Housing Project. Harold Fourcha, Jr. was driving with Darnell Lopez riding in the front passenger seat and Prince Morrison and Gerald Preston seated in the left and right rear seats, respectively. Lopez, Morrison and Preston carried firearms that night. Fourcha drove to a designated area within the project to drop off Morrison and Preston. Morrison goaded Darnell Lopez to get out of the car. When Lopez refused, Morrison told him, "Oh man, you fake." Immediately thereafter, Morrison shot Fourcha, who passed out. Fourcha regained consciousness as Morrison shot Lopez twice in the back of the head. Fourcha moaned; Morrison shot him again and Fourcha feigned death. As Morrison and Preston exited Fourcha's vehicle, Preston threw a rock of cocaine into the car, and the pair fled. When Fourcha was certain Morrison and Preston were gone, he drove Lopez to St. Claude General Hospital. Later, Fourcha and Lopez were transferred to Charity Hospital.

Detective Joseph Catalanato and Officer Tommy Mercadel were dispatched to investigate the shootings. When they arrived at Charity Hospital, they learned that Darnell Lopez had died. Officer Mercadel interviewed Harold Fourcha, who identified the assailants by their nicknames, “Jay Boo”(Gerald Preston) and “Prince”(Prince Morrison).

On May 11, 1996, pursuant to information supplied by Detective Catalanato, Officers Robert McNeil, Melvin Hunter, Ronald White and Gerald Kaczmanek proceeded to the Iberville Housing Development, where they arrested the defendants. The officers confiscated a loaded .380 caliber semi-automatic handgun from Gerald Preston and a .45 caliber handgun, containing seven cartridges, from Prince Morrison.

Officer Tamatra Green, NOPD crime scene technician, processed the vehicle in which the victims were shot. Officer Green recovered a loaded .9 mm automatic weapon and a bag of rock cocaine from the floor in the front passenger seat of the vehicle and one spent .45 caliber bullet casing lodged between the driver’s seat and door well.

Officer Kenneth Leary, NOPD firearms and ballistics expert, examined the weapon retrieved from the Fourcha vehicle and the weapons confiscated from the defendants. Testing proved that the handgun confiscated from Prince Morrison fired the .45 caliber bullet casing retrieved

from Harold Fourcha's car.

Dr. Richard Tracy testified by stipulation as an expert in forensic pathology that Darnell Lopez suffered two gunshot wounds to the head. The fatal shots entered the left and exited the right side of the victim's head. Dr. Tracy opined that the bullet trajectories were consistent with the victim being shot while seated in the front passenger seat of the vehicle by a shooter seated in the driver's side rear passenger seat. Because Lopez suffered through and through wounds, Dr. Tracey retrieved no bullets during the autopsy.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

PRESTON ASSIGNMENT OF ERROR NUMBER 1; MORRISON ASSIGNMENT OF ERROR NUMBER 1

In this assignment, the defendants complain that the trial court erred in overruling their objections to the State's using its peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Under *Batson*, a defendant objecting to a peremptory challenge must first establish a prima facie case of discrimination by showing facts and relevant circumstances which raise an inference that the prosecutor used the challenges to exclude potential jurors because of race. The burden of

production then shifts to the prosecutor to provide a race-neutral explanation for the challenges. The explanation need not be persuasive, or even plausible, and unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered may be deemed race-neutral. *Purkett v. Elem*, 514 U.S. 765, 767 (1995)(per curiam) *Purkett, supra*. The trial court then must decide whether the defendant has proved purposeful racial discrimination. *State v. Collier*, 553 So.2d 815, 818 (La.1989). The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. *Id*.; *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

The proper inquiry in the final stage of the *Batson* analysis is whether the defendant's proof, when weighed against the prosecutor's proffered race-neutral reasons, is sufficient to persuade the trial court that such discriminatory intent is present. *State v. Hobley*, 98-2460, (La.12/15/99), 752 So.2d 771, 782, *cert.den. Hobley v. Louisiana*, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed.2d 61 (10/2/2000). The trial judge's determination of purposeful discrimination rests largely on credibility evaluations, and these findings are entitled to great deference by the reviewing court. *Batson*, 476 U.S. at 99 n. 21.

In this case, the voir dire transcript shows that the defendants made

their objection after the State had exercised its peremptory challenges on the first panel of prospective jurors. The transcript further indicates that after defense counsel made the *Batson* objection, the trial court required the prosecutor to provide race-neutral reasons for his peremptory challenges.

Once the trial judge has demanded race-neutral reasons for the prosecution's peremptory strikes, the issue of a prima facie case of discrimination becomes moot. See *State v. Green*, 94-0887 (La.5/22/95), 655 So.2d 272, applying *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). Thus, the issue becomes whether the defendant's proof, when weighed against the prosecutor's proffered race-neutral reasons, is sufficient to persuade the trial court that such discriminatory intent was present. *Id.*

The prosecutor in this case dismissed juror 20 because he voted not to convict in a criminal proceeding in which the victim testified. The prosecutor presumably excused juror 20 out of a belief that he would be somehow biased against the prosecution, and this justification is plausible. Jurors 2 and 11 were dismissed by the State because the prosecutor noted those jurors nodding and agreeing with defense counsel and because the prosecutor opined that the jurors were "aligned with the defense". This also appears to be a legitimate reason and not a pretext for purposeful racial

discrimination. The prosecutor deemed juror 3 “not cooperative” in response to questioning and believed the juror did not understand the legal concepts; juror 8 was dismissed because he was sleeping and “inattentive”. The trial judge, who was able to observe the venire during voir dire, was in the best position to know if this reason by the prosecutor had merit. Because the trial record cannot indicate the attentiveness of the venire members during voir dire, this Court must defer to the trial court's determination of whether this reason was legitimate and related to the particulars of the case. See *State v. Knighten*, 92-0341 (La. App. 4 Cir. 12/24/92), 609 So.2d 950. Jurors 15 and 18 were excluded because they were the same age as the defendant. 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. den*., 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988).

The record in this case shows that as to each challenge, the State was able to offer a race-neutral reason that was accepted by the trial court. **The record also shows that eleven of the twelve jurors seated were African-American.** The trial court was satisfied with the State's explanations, and nothing in the record indicates the trial court erred in denying the defendants’ *Batson* challenge. This assignment is without merit.

PRESTON ASSIGNMENT OF ERROR NUMBER 2

By this assignment the defendant contends that the evidence is insufficient to prove that he was a principal to second-degree murder. He argues that at best, the evidence proves him guilty of being an accessory after the fact.

The standard of appellate review for sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). A credibility determination is within the discretion of the trier of fact and will not be disturbed unless clearly contrary to the evidence. *State v. Vessel*, 450 So.2d 938, 943 (La.1984).

Preston was charged with first-degree murder, La. R.S. 14:30, but convicted of the lesser-included offense of second-degree murder, La. R.S. 14:30.1, which is defined in pertinent part as "the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm..." La.R.S. 14:30.1. Specific intent is defined as "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). The determination of whether the requisite intent is

present in a criminal case is for the trier of fact. *State v. Huizar*, 414 So.2d 741, 751 (La.1982). Specific intent need not be proven as fact but may be inferred from the circumstances and actions of defendant. *State v. Maxie*, 93-2158, (La. 4/10/95), 653 So.2d 526, 532.

La. R.S. 14:24 defines "principals" as: "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...." See *State v. Brooks*, 505 So.2d 714 (La.1987), *cert.den., Brooks v. Louisiana*, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987); *State v. Watson*, 529 So.2d 94 (La.App. 4 Cir.1988).

To support a defendant's conviction as a principal, the State must show that the defendant had the requisite mental state for the crime. *Brooks supra*; *State v. Spotville*, 583 So.2d 602 (La.App. 4 Cir.1991). Evidence of flight, concealment, and attempt to avoid apprehension is relevant. It indicates consciousness of guilt and, therefore, is one of the circumstances from which the jury may infer guilt. *State v. Fuller*, 418 So.2d 591, 593 (La.1982).

In *State v. Anderson*, 97-1301 (La. 2/6/98), 707 So.2d 1223, 1225, the Louisiana Supreme Court addressed the issue of principals. Quoting 2 W.

LaFave, A. Scott, Substantive Criminal Law, § 6.7, p. 138 (West 1996), the court commented: "It is sufficient encouragement that the accomplice is standing by at the scene of the crime ready to give some aid if needed, although in such a case it is necessary that the principal actually be aware of the accomplice's intention."

In this case, Fourcha's unrefuted testimony established that Preston was armed the night of the shooting and aware that Morrison was also. Preston remained on the scene while Morrison goaded and ridiculed Lopez. After the shooting, Preston fled the scene with Morrison without attempting to aid Lopez, and made no attempt to report the shooting to the police. In addition, he planted the rock of cocaine in the car for the police to find.

It is not the function of an appellate court to assess credibility or to reweigh the evidence. *State v. Stowe*, 93-2020 (La. 4/11/94), 635 So.2d 168. The appellate court gives great deference to a jury's decision to accept or reject a witness's testimony in whole or in part. *State v. Points*, 2000-1371 (La. App. 4 Cir. 4/11/01), 787 So.2d 396 citing *State v. Richardson*, 425 So.2d 1228 (La.1983).

Based on the evidence in this case, the jury could have reasonably concluded that Preston played an active role in the commission of the murder. This assignment is without merit.

MORRISON ASSIGNMENT OF ERROR NUMBER 2

By this assignment, Morrison charges error in the trial court's denial of his motion for severance.

This assignment stems from Fourcha's pre-trial assertion that Preston had a bag of rock cocaine the night of the shooting. At a conference in the judge's chambers, Preston moved to prohibit any reference to the cocaine as prejudicial "other crimes" evidence. Morrison, however, favored admission of the evidence for cross-examination and impeachment purposes against Fourcha. Morrison wanted to explore the possibility that Fourcha fabricated the story of Preston's possession of cocaine to cover up the fact that the one rock of cocaine retrieved from Fourcha's vehicle actually belonged to Fourcha. The judge ruled the evidence inadmissible. Morrison argues Preston's right to exclusion of "other crimes" evidence infringed upon his constitutional right to present a defense by curtailing his confrontation and cross-examination of Fourcha.

Jointly indicted defendants shall be tried jointly unless the State elects to try them separately or the trial court determines, on the defendant's motion and after a contradictory hearing, that justice requires a severance. La.C.Cr.P. art. 704. The defendant must show by convincing evidence that a severance is warranted. *State v. McNeill*, 98-0954, 98-0955 (La.App. 4 Cir.

2/16/00) 753 So. 2d 938, *writ den*. *State v. Washington*, 2000-0973, (La. 3/16/01), 786 So.2d 744 (La. 1984). The decision on whether to grant or deny a severance is within the sound discretion of the trial court, and the trial court's decision will not be disturbed on appeal absent a clear abuse of discretion. *State v. August*, 96-2777 (La.App. 4 Cir. 9/16/98), 719 So.2d 536. The standard for a severance prior to trial is broader because of speculation as to what the evidence will be, whereas the standard for a severance after trial is stricter because the trial court can examine the evidence. *State v. Burton*, 96-1248 (La.App. 4 Cir. 12/9/98), 727 So.2d 518.

Generally, to be entitled to a severance, the defendant must meet the "antagonistic defenses" test. *State v. Prudholm*, 446 So.2d 729 (La. 1984). See also La.C.Cr.P. art. 704, comment (c). When one defendant makes a statement inculpating the other and the State plans to use that statement at a joint trial, the defendant is forced to defend against the State and his co-defendant. In such a case justice usually requires a severance. *State v. Burton*, 96-1248 (La. App. 4 Cir. 12/9/98), 727 So.2d 518.

In support of his position, Morrison cites *State v. Webb*, 424 So.2d 233 (La.1982) for the proposition that antagonistic defenses are not the only instances where denial of a motion to sever will constitute an abuse of discretion. Morrison argues that severance should be granted where the ends

of justice will best be served. La. C.Cr.P. art. 704; *Webb*, *supra*.

In *Webb*, the court agreed with the mover that joint trial prevented cross-examination of the co-defendant's exculpatory statement as to the mover, and amounted to "a deprivation of [mover's] constitutional right to put on a defense." 424 So.2d at 238. However, *Webb* offers no support to Morrison because it is an antagonistic defense case. The mover in *Webb* was restricted in his efforts to put on a defense, which would have shown that his co-defendant had confessed to the crime.

Unlike W*ebb*, there is no exculpatory statement in this case. Morrison's purpose in pursuing Fourcha's belated revelation concerning the bag of cocaine was solely to discredit Fourcha's earlier denial as to drug use. This is not a contradictory defense. The trial judge did not abuse his discretion in denying the severance. However, even assuming the denial of severance was error, it was harmless. Through cross-examination, defense counsel called into question Fourcha's credibility by revealing to the jury his 1995 convictions for possession with intent to distribute cocaine and car jacking. This assignment is without merit.

MORRISON ASSIGNMENT OF ERROR NUMBER 3

In a final assignment, Morrison asserts that the trial court erred in allowing the State to elicit hearsay evidence from Officer Mercadel by allowing him to "read" from his investigative report.

Under direct questioning by defense counsel, Officer Mercadel verified the contents and his authorship of the report, the circumstances under which he received the information from Fourcha and the time that he drafted his report. The State then pointedly referred to and cross-examined Officer Mercadel as to the specifics of the report. Defense counsel objected that the State was attempting to circumvent the prohibition against the admissibility of police investigative reports. The trial court overruled the objection, citing the hearsay exception of C.E. art. 803(5).

Under La. C.E. arts. 803(8)(b)(i) and 803(6), investigative reports by police and other law enforcement personnel are not admissible as exceptions to the hearsay rule, and are not otherwise admissible under the Code of Evidence.

In this case, Officer Mercadel did not read his report into the record; however, through leading questions, the prosecutor attempted to do so. It is apparent from the tenor of the State's cross-examination that the prosecutor questioned the officer point by point on the contents of the report. The prosecutor's questions were so specific, detailed and oriented as to time and

place that he had to have been reading from the report. It appears the prosecutor was attempting to accomplish indirectly what he could not otherwise have accomplished directly and that the trial court erred in allowing the line of questioning. However, because Mercadel's testimony under cross-examination was cumulative and corroborative of his and Fourcha's trial testimony, the admission of the line of questioning and responses into evidence was harmless. Trial error is harmless where the verdict rendered cannot be attributed to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Considering all the facts of this case, particularly Fourcha's unrefuted eyewitness account identifying Morrison as the shooter, the jury's verdict in this case was surely not attributable to the error. *Sullivan v. Louisiana, supra.* This assignment is meritless.

DECREE

The convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED