STATE OF LOUISIANA	*	**NO. 2016-KA-0223**
VERSUS	*	
		COURT OF APPEAL
TYRONE K. DAVENPORT AND DALE M. ELMORE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 517-064, SECTION "I"
Honorable Karen K. Herman, Judge
* * * * * *
Judge Paula A. Brown
* * * * * *

(Court composed of Judge Joy Cossich Lobrano, Judge Regina Bartholomew Woods, Judge Paula A. Brown)

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CONVICTIONS AFFIRMED;
SENTENCES AMENDED AND
AFFIRMED AS AMENDED

OCTOBER 18, 2017

In this criminal appeal, Tyrone K. Davenport and Dale M. Elmore ("Mr. Davenport" and "Mr. Elmore") appeal their convictions for racketeering, in violation of La. R.S. 15:1353, second degree murder, in violation of La. R.S. 14:30.1 and La. R.S. 15:1403(B), and attempted second degree murder, in violation of La. R.S. 14(27)30.1 and La. R.S. 15:1403(B). For the reasons that follow, we affirm the convictions, amend the sentences and affirm the sentences as amended.

STATEMENT OF CASE

On August 14, 2013, the State indicted Dale "Check Peazy" Elmore and Tyrone K. "Tyga" Davenport along with several others[1] pursuant to the Louisiana Racketeering Act, La. R.S. 15:1351, *et seq*., alleging they were either members, associates, or both, of an organization known as "Taliban Survival Corporation," "The Taliban," "Hot Glocks," or "P-Block" (collectively "Taliban"), who engaged

[1] Jamal "Mal" Harris ("Harris"), Seyuntray "Brotha" Noel ("Noel"), Jerome "Sookie" Toliver ("Toliver"), Cornie "Porch" Jones ("Jones"), Darryl "Lil Darryl" Bannister ("Bannister"), and Tyrone "Goggles" Brooks ("Brooks") were also named in the indictment; however, the aforementioned co-conspirators were tried separately or pled to other offenses. Notably, Mr. Brooks' and Mr. Noel's guilty pleas included charges of racketeering. This appeal concerns Mr. Elmore and Mr. Davenport only.

and/or conspired to engage in a pattern of racketeering activity. The racketeering activities consisted of murder, conspiracy to commit murder, attempted murder and public intimidation, which occurred during the period of June 1, 2010 through March 31, 2012, primarily in the area on and around Monroe, General Ogden, Green and Hickory Streets in New Orleans, Louisiana. The State alleged that the organization's purpose was the enrichment of its members and associates through the sale of narcotics.

In a sixteen-count indictment, the State alleged that Mr. Elmore and Mr. Davenport (collectively the "Defendants") engaged in a drive-by shooting on January 5, 2011, on I-10 near the Broad Street overpass, killing Ralph Bias ("Bias") and wounding Corey Martin ("Martin"). On August 19, 2013, the Defendnats were arraigned and pled not guilty to the charges. Defendants were tried together by a trial by jury held on June 15 through 19, 2015. The jury subsequently convicted the Defendants of racketeering, second degree murder and attempted second degree murder.[2]

The Defendants filed Motions for New Trial, Post-Conviction Verdict/Judgment of Acquittal, and Appeal. On October 21, 2015, the district court granted each of the Defendant's Motions for Appeal, but denied all of their other post-trial motions. The Defendants waived all sentencing delays and were sentenced to fifty years at hard labor without the benefit of parole, probation or suspension of sentence for racketeering; and life at hard labor without the benefit of parole, probation or suspension of sentence for second degree murder with an additional fifty years for the gang enhancement provision to be served

consecutively to the sentences for racketeering and second degree murder. The Defendants were also sentenced to fifty years at hard labor without the benefit of parole, probation or suspension of sentence for attempted second degree murder with an additional twenty-five years without benefits for the gang enhancement provision to be served consecutively to the sentences for racketeering and second degree murder. Mr. Davenport also filed a Motion to reconsider after sentencing, which the district court denied. The instant appeal followed.

STATEMENT OF FACTS

The record shows that Mr. Martin has had multiple encounters with Defendants, which took place both before and after the January 2011incident. Mr. Martin reported that in 2007—after the murder of his brother—he became a target of violence. He said the people who killed his brother are related to Mr. Davenport. According to Mr. Martin, in June 2010, while living in the Pigeon Town neighborhood of New Orleans, while sitting in his truck he saw Jamal Harris ("Mr. Harris") and Mr. Davenport shooting at him. Again, in November 2010, while attending a nightclub on Louisiana Avenue with his friend Mr. Bias, he saw Mr. Davenport, Mr. Elmore, Mr. Harris and Mr. Noel. Mr. Harris approached him and a fight ensued. In January 2011, he was shot and Mr. Bias was killed. In March, 2012, while walking into a store in the Pigeon Town neighborhood with his friend Jamal Lewis ("Mr. Lewis"), a truck full of individuals connected with the Taliban fired upon them, striking Mr. Lewis.

The testimony elicited at trial is as follows:

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[2]The defendants' six co-conspirators/associates pled guilty to, or were convicted of, various offenses.

According to Mr. Willie Dixon ("Mr. Dixon"), in the early morning hours of January 5, 2011, Mr. Elmore approached him at his home seeking $15.00 he owed to Mr. Elmore for drugs he was given. He testified that he had previously purchased crack cocaine from local dealers in the Pigeon Town neighborhood, including Mr. Elmore. After Mr. Dixon told him he did not have the money, Mr. Elmore left, but returned shortly thereafter asking to borrow his car while also brandishing a gun. To ensure the safety of his family, Mr. Dixon gave him the keys to the silver Explorer he had rented from Enterprise Rental Car ("Enterprise"). Mr. Elmore, after parking the Explorer near the levee at Monticello Street, returned to Mr. Dixon's home around midnight the next morning, gave him the keys to the vehicle and $100 worth of drugs. Mr. Dixon testified that when he retrieved the vehicle, he noticed the right side rearview mirror was missing.

Mr. Dixon further testified that he was approached by two of the Defendants' associates on two different occasions and told not to testify in court. According to Mr. Dixon, Tyrone "Googles" Brooks ("Mr. Brooks") approached him, warning him not to testify "if he knew what was best for him."[3] During another encounter, Bryant Jarrow ("Mr. Jarrow"), an unindicted co-conspirator, gave him drugs in exchange for him not appearing in court. Mr. Dixon further testified that he felt that he was being intimidated and feared for the safety of his family if he testified in court.

Mr. Martin, the surviving victim, testified that after Mr. Bias picked him up from the Pigeon Town neighborhood, they entered the Carrollton Avenue on-ramp,

[3] In Detective Swalm's testimony, the jury was advised that the State charged Mr. Brooks with public intimidation and racketeering for his threats on Mr. Dixon, for which he plead guilty.

heading toward New Orleans East. Shortly thereafter, a silver Explorer followed them onto the interstate.[4] He testified that gunshots were fired soon after they entered I-10. After hearing the gunshots, he looked to his left and saw that the gunshots were coming from the Explorer, which was occupied by four individuals, Messieurs Harris, Noel, Elmore and Davenport.

According to Mr. Martin, Mr. Harris—the driver of the Explorer—pulled along the left side of their vehicle while Mr. Elmore and Mr. Davenport began shooting out of the window at him and Mr. Bias. Mr. Bias was killed immediately and Mr. Martin was shot in his legs and back, which required surgery. Mr. Martin testified that the shooting lasted four to five minutes. Mr. Martin identified the Defendants, and testified that he knew the Defendants from the neighborhood and school.

Dr. Michael Defatta, an expert in forensic pathology, conducted Mr. Bias' autopsy. He testified that Mr. Bias had nine penetrating body, head and extremity wounds that were inflicted by a weapon thirty-six to forty-three inches from his body. He also attested that Mr. Bias' cause of death was the result of two fatal wounds to his chest, which perforated his heart and lungs.

Anthony Pardo, a seventeen-year veteran with the NOPD assigned to the homicide and FBI Gang Task Force at the time of the shooting, arrived at the scene of the shooting around 1p.m. He testified that he conducted a general investigation of the crime scene and recovered fourteen .40 caliber shell casings from the scene.

Meredith Acosta, a firearms and ballistics identification and testing expert, testified that she examined the ballistic evidence recovered from the scene of the

[4] This fact was confirmed by the introduction of red light camera footage by the State, depicting the interstate entrance at Carrollton Avenue.

crime. She opined that the bullet fragments and cartridge cases recovered from the crime scene were from three separate weapons. However, at trial she did not identify the gun used in the shooting.

Detective Chris Harris, assigned to the NOPD/FBI Violent Crime Task Force, was also present at the crime scene. Detective Harris testified that upon arrival at the crime scene, he did a general investigation of the area and collected evidence. During his testimony Detective Harris identified the State's exhibits, which included photographs of the crime scene depicting the position of the Mr. Bias' vehicle when it crashed into the guardrail on the interstate, and Mr. Bias' body in the driver's seat of the vehicle, slumped over the steering wheel.

Sergeant Williams[5], the lead investigator who arrived on the scene at approximately 1:15 p.m., testified that her responsibility on the day of the shooting was monitoring the integrity of the crime scene, gathering evidence and assigning NOPD personnel in processing the scene. She recalled assigning Detectives Pardo and Harris to process the scene of the crime for evidence.

According to Sergeant Williams, the day after the shooting, she went to Enterprise on Carrollton and Tulane to conduct a search of the Explorer for evidence connected to the shooting. Although the vehicle had already been washed and vacuumed, she noticed that the passenger side rearview mirror was broken and there was a smudge mark on the bumper of the vehicle. While at Enterprise, she learned that the vehicle had previously been rented to Mr. Dixon.

Sergeant Williams testified that she spoke with Mr. Dixon who gave a statement wherein he acknowledged that he loaned his vehicle to a person named

[5] At the time of trial, Regina Williams had been promoted from detective to sergeant. For consistency, we will refer to her as Sergeant Williams.

"Peazy" and also gave her a physical description of him. Sergeant Williams testified that Mr. Dixon identified Mr. Elmore from a six-person photo lineup as the person to whom he loaned his vehicle.

Six days after the I-10 shooting, Sergeant Williams met with Mr. Martin at his home. Sergeant Williams testified that she presented Mr. Martin with several photo lineups. In the first lineup, he identified Mr. Elmore as the shooter sitting in the rear passenger side of the vehicle from where the shots were fired. In the second photo lineup, he identified Mr. Davenport as the shooter sitting in the front passenger side of that vehicle; and in subsequent lineups, he identified the vehicle's other occupants. According to Sergeant Williams, Mr. Martin's identification of the persons involved in the shooting was immediate upon seeing the photo lineups.

Lastly, Sergeant Williams identified associates of the Defendants who were present in the courtroom. She testified that she felt threatened with their presence in the courtroom during her testimony.

Detective Timothy Bender testified that after Mr. Martin identified the persons responsible for the 1-10 shooting, he obtained a search warrant for Mr. Elmore's residence. At the time of the shooting, Mr. Elmore was residing with his girlfriend and her mother on Eagle Street in the Pigeon Town neighborhood. During the initial search, Detective Bender recovered Mr. Elmore's wallet and identification card. However, an intercepted jailhouse phone call between Mr. Elmore and his girlfriend revealed that evidence had been removed from the house prior to the search. After learning this information, Detective Bender returned to the residence and spoke with them. They admitted that they removed evidence from the home and placed it in the backyard. Detective Bender testified that after

learning the location of the evidence from one of the women, he recovered a white plastic bag containing a .380 caliber semi-automatic handgun, a gun magazine, bullets and crack cocaine. He identified these items at trial, in addition to photos taken at Mr. Elmore's residence during the subsequent search.

Detective Swalm, a ten year veteran of the NOPD and member of the Multi-Agency Gang Unit ("MAG") with the Bureau of Alcohol, Tobacco, Firearms and Explosives, testified as the State's gang expert. His testimony detailed his gang-related work history, such as his role as the Project Safe Neighborhood Detective for the Second District of the NOPD and his assignment to MAG at the time of trial. Detective Swalm had encountered the Taliban as part of his general assignment and narcotic work in the Pigeon Town neighborhood.

Detective Swalm identified Defendants, along with other indicted and unindicted co-conspirators, as members of the Taliban gang. He testified that the gang members had common tattoos and wore T-shirts bearing the name Taliban. As part of his investigation, Detective Swalm accessed the Facebook accounts of the Defendants, in addition to the individual accounts of indicted and unindicted co-conspirators, which provided further evidence of each individual's membership in and connection to the Taliban. According to Detective Swalm, the members produced and appeared in social media videos together and professed association with the Taliban, street violence and weapons. He also noted that Taliban members rapped about their involvement in this shooting. Detective Swalm testified that unlike other well-known gangs, i.e. 'Bloods, "Crips", etc.," the gangs in New Orleans usually do not have a formal power structure. Most times, the New Orleans gangs consist of individuals who grew up in the same neighborhood or attended the same school and thus, identify themselves as members of a

common gang. However, Detective Swalm did identify Mr. Jarrow— an unindicted co-conspirator— as the Taliban member who was "calling the shots" as opposed to a member who actually went out and did "the dirt."

Detective Swalm testified that residents of the Pigeon Town neighborhood supplied information on the gang members and their activities, as did witnesses to the various criminal acts committed by gang members. Detective Swalm compiled a map of the Pigeon Town area and marked the map with fifty-one incidents in which the Defendants and the indicted and unindicted co-conspirator/members of the Taliban were arrested on firearms and narcotics charges and violent crimes— shootings and homicides. He testified that members of the Taliban had been arrested together and that the Defendants had been arrested together for a prior, unrelated case. He identified a member of the Taliban, an unindicted co-conspirator, as a shooter in the 2012 incident involving Mr. Martin. He also identified Mr. Davenport's Facebook account, wherein Mr. Davenport writes in part, "what you think my pistol in my hand for." During his testimony, Detective Swalm also identified two other Taliban members who were sitting in the courtroom.

Detective Richard Chambers, assigned to the Cold Case Division of the Homicide Division, was called to testify on behalf of the Defendants. Detective Chambers testified that he visited Mr. Martin the day of the shooting at the hospital before he went into surgery. His purpose was to check on the victim's status, retrieve evidence and get a short statement of what occurred. He stated that Mr. Martin was frustrated about the day's events, but did give him a brief interview. The interview included few details about the shooting and ended without Mr.

Martin identifying the persons who shot him. Detective Chambers testified that at no time did Mr. Martin indicate he did not know who shot him.

His girlfriend testified that Mr. Elmore was her boyfriend and that he lived with her and her mother at the time of the shooting. She also testified that on the day of the shooting, Mr. Elmore left her company for an unspecified period of time; however, she could not pinpoint exactly his departure and return times. Her testimony also revealed that Mr. Elmore asked her and her mother to provide alibis for him by saying that he was at the Eagle Street home all day on the day of the shooting.

Contrary to Mr. Martin's testimony, Delta Elmore—Mr. Elmore's aunt—and Trenell Woods—Mr. Davenport's mother—both testified that the Defendants attended school in Jefferson Parish, not Orleans Parish. Ms. Woods testified that Mr. Davenport is an artist/rapper and was a member a rap group called "The Taliban Survival Corporation."

Charles Thibodeaux, a hip-hop magazine publisher, testified on behalf of the Defendants. According to Mr. Thibodeaux, he knew of the "Taliban Survival Corporation" as an up and coming rap group that performed in different venues around New Orleans and had gained notoriety as a rap group. Mr. Thibodeaux testified that his knowledge of the group came from his routine review of local music acts. He noted that Taliban won a talent competition at a New Orleans area venue. On cross examination, however, Mr. Thibodaux admitted he did not know the members of the Taliban or their names.

Errors Patent

A review of the record for errors patent reveals two—an error in the Defendants' sentences for racketeering and the gang enhancement. The district

court imposed sentences pursuant to La. R.S. 15:1354(A) without benefit of parole, and La. R.S. 15:1403(B) without benefit of parole. However, neither La. R.S. 15:1354(A) nor La. R.S. 15:1403(B) restricts the benefit. The district court imposed illegal sentences. La. C.Cr. P. art. 881.5 provides that on motion of the state or the defendant, or on its own motion, at any time, the court may correct a sentence imposed by that court which exceeds the maximum sentence authorized by law. As such, we amend the Defendants' sentences for racketeering and gang enhancement to eliminate the restriction of parole.

DISCUSSION

Defendants appeal the jury's verdict, seeking to have their convictions overturned. They argue that the State failed to meet its burden of proof of guilt beyond the reasonable doubt in the murder of Ralph Bias and the attempted murder of Corey Martin. Collectively, the Defendants list twelve assignments of error, some of which overlap. Where possible, we will address the Defendants assignments of error jointly.

Davenport's Assignment of Error Number 1; Elmore's Assignments of Error Number 1 and 2

Defendants contend that the evidence is insufficient to support their convictions of second degree murder and attempted second degree murder, and racketeering and/or conspiracy to commit racketeering. We will first address the sufficiency of the evidence as to Defendants' convictions of second degree murder and attempted second degree murder.

A. Second Degree Murder and Attempted Second Degree Murder

Defendants were convicted of second degree murder and attempted second degree murder. Second degree murder is the killing of a human being where "the offender has the specific intent to kill or inflict great bodily harm ..." La. R.S. 14.30.1. La. R.S. 14:10(1) defines specific criminal intent 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."

Pursuant to La. R.S. 14:27(A):

> Any person who, having specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his objective is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

Defendants argue that the State failed to elicit sufficient evidence to prove their identity as the suspects who killed Mr. Bias and shot Mr. Martin. Defendants contend that the only eyewitness identification came from Mr. Martin, the surviving victim, whose statements to police were inconsistent. Defendants point to Mr. Martin's first encounter with Detective Chambers who sought to question him shortly before he was taken into surgery after the shooting. According to the trial testimony of Detective Chambers, Mr. Martin did not identify the individuals who shot him. Defendants argue that it was only during Sergeant Williams' subsequent visit with Mr. Martin that he identified the Defendants.

This Court, in *State v. Hickman*, 2015-0817, p. 9 (La. App. 4 Cir. 5/16/16), 194 So.3d 1160, 1165-1166, set forth the standard for determining a claim of insufficiency of evidence as follows:

> When reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts are controlled by the standard

> enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under this standard, the appellate court "must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Neal*, [20]00-0674 (La.6/29/01) 796 So. 2d 649, 657 (citing *State v. Captville*, 448 So. 2d 676, 678 (La.1984)).
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> When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 requires that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." *Neal*, 796 So. 2d at 657. Ultimately, all evidence, both direct and circumstantial must be sufficient under *Jackson* to prove guilt beyond a reasonable doubt to a rational jury. *Id.* (citing *State v. Rosiere*, 488 So.2d 965, 968 (La. 1986)).

"If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all of the evidence most favorable to the prosecution must be adopted." *State v. Green*, 588 So.2d 757, 758 (La. App. 4th Cir. 1991). It is not the function of the appellate court to assess the credibility of witnesses or reweigh the evidence. *State v. Scott*, 2012-1603, p. 11 (La. App. 4 Cir. 12/23/13), 131 So.3d 501, 508 (citing *State v. Johnson*, 619 So. 2d 1102, 1109 (La. App. 4 Cir. 1993)). Credibility determinations, as well as the weight attributed to the evidence, are soundly within the province of the fact finder. *Id.* (citing *State v. Brumfield*, 1993-2404 (La. App. 4 Cir. 6/15/94), 639 So.2d 312, 316). Moreover, conflicting testimony as to factual matters is a question of weight of the evidence, not sufficiency. *State v. Jones*, 537 So.2d 1244, 1249 (La. App. 4th Cir. 1989). Absent internal contradiction or irreconcilable conflict with physical evidence, a single eyewitness' testimony, if believed by the fact finder, is sufficient to support a factual conclusion. *State v. Marshall*, 2004-3139, p. 9 (La. 11/29/06), 943 So.2d 362, 369).

In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court set forth five factors—based on the totality of the circumstances—for courts to consider in determining whether a suggestive identification procedure presented a substantial likelihood of misidentification. The five *Manson* factors are as follows: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson*, 432 U.S. at 114-15

Although Defendants do not suggest that the identification procedure in this case was suggestive, this court employs the five *Manson* criteria to assist in assessing the reliability of eyewitness identifications when reviewing the sufficiency of the evidence insofar as the State's burden to negate any reasonable probability of misidentification when a defendant disputes identity. See *State v. Santos-Castro*, 2012-0568, p. 22 (La. App. 4 Cir. 7/31/13), 120 So.3d 933, 946-947 (citing *State v. Lewis*, 2011-0999, pp. 6-9 (La. App. 4 Cir. 5/23/12), 95 So.3d 533, 537-538). A positive identification by only one witness is sufficient to support a conviction. *State v. Neal*, 2000-0674, p. 11 (La. 6/29/01), 796 So.2d 649, 658. Even in the absence of any physical evidence to tie a defendant to a case, the testimony of one witness, if believed by the jury, is sufficient to support a conviction. *State v. Dussett*, 2013-0116, p. 11 (La. App. 4 Cir. 10/2/13), 126 So.3d 593, 601). Moreover, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed—as in this case—the State is also required to negate any reasonable probability of misidentification in

order to satisfy its burden under *Jackson*. *See State v. Green,* 2016-0793, pp. 6-7 (La. App. 4 Cir. 5/3/17), 220 So.3d 103.

In the case *sub judice*, Mr. Martin testified that he saw the Defendants leaning out of an Explorer firing at Mr. Bias and him while they were traveling on I-10. He recounted many encounters with the Defendants and members of the Taliban before and after the January 5, 2011 shooting. Specifically, Mr. Martin testified that Mr. Davenport and Mr. Harris shot at him in June 2010; he got into a fight with Mr. Harris in November 2010; and he was shot at while walking with a friend in March 2012. According to Mr. Martin, the shooting lasted approximately four or five minutes, affording him sufficient opportunity to get a good look at the shooters. Although on the day of the shooting—after being shot and prior to undergoing surgery— Mr. Martin did not identify the shooters to the police, he never denied knowing who shot him; moreover, he immediately and positively identified the Defendants as the shooters six days later when Sergeant Regina Williams presented him with photo lineups.

Viewing the evidence in the light most favorable to the State, it was not unreasonable for the trier of fact—here, the jury—to conclude that Mr. Davenport and Mr. Elmore were the shooters during the January 5, 2011 incident and had the specific intent to kill Mr. Bias and Mr. Martin, by intentionally discharging a weapon during the commission of an act of violence**.** We find the record contains sufficient evidence to support the Defendants' second degree murder and attempted second degree murder convictions beyond a reasonable doubt.

These assignments of error lack merit.

B. Racketeering Convictions

Defendants contend that the State failed to meet an essential element of the crime of racketeering and/or conspiracy to commit racketeering when they failed to prove that an "enterprise" existed within the meaning of La. R.S. 15:1351-1356, the Louisiana Racketeering Act.

I. Law of Racketeering

La. R.S. 15:135 provides in pertinent part:

> B. It is unlawful for any person, through a pattern of racketeering activity, knowingly to acquire or maintain directly or indirectly, any interest in or control of any enterprise or immovable property.
> C. It is unlawful for any person employed by, or associated, with any enterprise knowingly to conduct or participate in directly or indirectly, such enterprise through a pattern of racketeering.

Racketeering activity means "committing, attempting to commit, conspiring to commit, or soliciting, coercing, or intimidating another person to commit any crime which is punishable under certain enumerated provisions of Title 14 of the Louisiana Revised Statutes of 1952, the Uniform Controlled Substances Law, or the Louisiana Securities Law." La. R.S. 15:1352. Racketeering activity under the statue includes second degree murder, distribution of a Schedule I controlled dangerous substance, and public intimidation.[6]

The term "pattern of racketeering activity" means "engaging in at least two incidents of racketeering activity that have the same or similar intents, results, principals, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurs after August 21, 1992, and that the last of such incidents

occurs within five years after the prior incident of racketeering." La. R.S. 15:1352(C).

An enterprise is "any individual, sole proprietorship, partnership, corporation or other legal entity, or any unchartered association, or group of individuals associated in fact and includes unlawful, as well as, lawful enterprises and, other entities. La. R.S. 15:1352(B). The United States Supreme Court, in *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981), explained that an enterprise is an entity of a group of persons associated together for a common purpose of engaging in a course of conduct and that a pattern of racketeering activity is a series of criminal acts. The Court concluded that the enterprise must be separate and apart from the pattern of activity in which it engages.

Jurisprudence regarding the Louisiana Racketeering Act is limited. In *State v. Touchet*, 1999-1416 (La. App. 3 Cir. 4/5/00), 759 So.2d 194, the appellate court noted that Louisiana racketeering laws are modeled after the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Thus, the appellate court looked to federal jurisprudence interpreting RICO for guidance in interpreting the Louisiana counterpart.

In *Touchet*, a jury convicted the defendant of racketeering in violation of La. R.S. 15:1353(C). Mr. Touchet appealed his conviction, arguing that there was insufficient evidence to convict him of the charge. The Court reversed the conviction and sentence, finding that the State's failure to prove beyond a reasonable doubt that Mr. Touchet intended to conduct or participate in a racket or criminal enterprise within the meaning of the statute. The Court, citing *Crowe v.*

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[6] *See* La. R.S. 15:1352 A(3), (13) and (32).

Henry, 43 F. 3d 198 (5th Cir. 1995)[7], reasoned that an enterprise may be either a legal entity or an association in fact. In order to be an association in fact, the enterprise must: (1) have an existence separate and apart from the pattern of racketeering; (2) be an ongoing organization; and (3) have members functioning as a continuing unit as shown by a decision-making structure.

The *Touchet* Court opined:

> The enterprise is an entity ... a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by participants in the enterprise.... The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government...

Id., 759 So.2d at 197-198.

The *Touchet* Court found that the drug conspiracy was not an enterprise under the statute because the organization's existence was for the sole purpose of engaging in "racketeering activity"—distribution of controlled dangerous substances.

In contrast, the appellate court in *State v. Sarrio*, 2001-0543 (La. App. 5 Cir. 11/27/01), 803 So.2d 212, reached the opposite result and upheld the trial court conviction under La. R.S. 15:1353. In *Sarrio*, the Defendant was convicted of one count of racketeering occurring between April 23, 1996 and May 20, 1996, and

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[7] In *Crowe, supra,* the Court held that an association-in-fact enterprise must: (1) have an existence separate and apart from the pattern of racketeering, (2) be an ongoing organization, and (3) have members functioning as a continuing unit as shown by a decision-making structure. The racketeering activity in *Crowe* consisted of mail and wire fraud, financial institution fraud, and theft of goods in interstate commerce. The *Crowe* Court found that there was sufficient proof to

two counts of distribution of marijuana, which occurred on May 14, 1996 and May 28, 1996. Noting that there was a better organized drug distribution operation in *Sarrio* than in *Touchet,* the Fifth Circuit found that the State had proved the existence of an enterprise for purposes of a racketeering prosecution and the drug conspiracy in that case, satisfying the statute's "enterprise" requirement. The *Sarrio* court opined:

> From the evidence presented, it is clear that there was an "enterprise," which was separate and apart from "the pattern of racketeering activity," in this case. The evidence indicates that there is "a group of individuals who are associated-in-fact." LSA-R.S. 15:1352(B). The group consisted of Chauncey, McGehee, Marcel, Tonya Sarrio and Roy Sarrio. Roy Sarrio was the management head of the group. In this capacity, he procured the drugs to be sold, set the price, set the quantity and manner of sale, received the proceeds, procured and paid the participants. As functioning elements of the enterprise, Chauncey was a courier, McGehee was a facilitator, Marcel was the "front man" and Tonya was the storage person. These individuals received direction from and participated with Sarrio and, in turn, received payment from Sarrio.
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> Under these circumstances, the state proved the existence of an "enterprise" as well as the defendant's control and participation in the enterprise. LSA-R.S. 15:1353(B) and (C); 15:1352(B). Additionally, the state proved the "racketeering activity" which was commission of the crime of distribution of marijuana. LSA-R.S. 15:1352(A)(11); 40:966(A).
>
> Finally, the state proved "the pattern of racketeering activity" within the requisite statutory time limit. LSA-R.S. 15:1352(C). That is, the state proved, on May 24, 1996, that Roy Sarrio sold marijuana to undercover agent Bruce Harrison.

Id., 2001-0543, pp. 25-26, 803 So.2d at 227-228[8].

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establish an enterprise—a farming venture that produced and sold crops for four years, whose partners met regularly.

[8] The split in the circuits, created by *Touchet* and *Sarrio*, was addressed by the Fifth Circuit in *Johnson v. Cain,* 347 Fed.Appx. 89,91 (5th Cir. 2009). In that case, a similar claim was made by the defendant in a *habeas corpus* appeal. There, the Defendant was convicted of racketeering in violation of La. R.S. 15:1353(C). He alleged he was convicted in the absence of any evidence of him being associated with an "enterprise". He argued that the "enterprise" element required that the State prove that the enterprise existed separate and apart from the racketeering activities it

Subsequent to *Sarrio, supra,* in *Boyle v. United States,* 556 U.S. 938, 129 S.Ct. 2337, 173 L.Ed.2d 1265 (2009), the Supreme Court expounded further on the elements of an association-in-fact enterprise. The Court—affirming the defendant's convictions for racketeering and conspiracy to commit racketeering—addressed whether an association-in-fact enterprise must have "an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it

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engaged in. In support of his argument, the Defendant cited *Touchet*, *supra*, which followed a line of federal RICO cases in support of its holding that an enterprise for purposes of the Louisiana statute must "exist[ ] separate and apart from the racketeering activities at issue." *Id.* at 199.

The facts in *Johnson v. Cain* indicated that Johnson was a resident of Long Beach, California. Johnson sold marijuana to Marvin Wiley, a resident of Houma, Louisiana, many times between May 1996 and February 1998. During that period of time, Wiley paid several women to travel between Long Beach and Houma transporting marijuana from Johnson to Wiley. In general, the women would travel by air from Louisiana to Long Beach and then return to Louisiana by train with the marijuana. On at least one occasion, the women making the trip was bringing over $24,000 in cash to California. In addition, Wiley had different women wire money for him to Johnson or Johnson's associates.

In Long Beach, when the women arrived at the airport, Johnson would retrieve them and bring them to a hotel room. Once in the hotel room, Johnson would give the women a suitcase of marijuana. Johnson, for his part, had at least two women receive wired money for him. Johnson also received wired money and signed for it under the name Kevin Hill. The state appellate court characterized this operation as "an enterprise ..., in which [Johnson] sold marijuana to Wiley and assisted in the transporting of the marijuana from California to Houma, where Wiley sold it to others."

Id., 347 Fed.Appx. at 90.

Noting the split between the Louisiana Third and Fifth Circuits on whether La. R.S. 15:1353 requires an enterprise have a purpose separate and apart from the racketeering activity, the *Johnson* Court determined that there was sufficient evidence under either interpretation – the more lenient *Sarrio* interpretation on one hand, and the more stringent *Touchet* interpretation on the other – for a jury to find Johnson guilty. The court explained:

> The Louisiana state courts could have interpreted the statute of conviction as not requiring that the enterprise have a purpose separate and apart from the racketeering activity. Their decision would only be an unreasonable application of or contrary to *Jackson* [*v. Virginia,*443 U.S. 307, 99S.Ct. 2781, 61 L.Ed.2d 560 (1979)] if the evidence introduced at trial fell short based on that interpretation. There can be no dispute that the evidence introduced at Johnson's trial met this more lenient interpretation of an "enterprise" – and, applying that definition, that there was sufficient evidence to support his conviction that a group of individuals associated together to engage in racketeering activities.

Johnson, 347 Fed.Appx. 89, 91.

engages."[9] The Court explained that under RICO terms, the enterprise must have a "structure" with at least three features: a purpose, relationships among the associates, and longevity sufficient to permit the associates to pursue the enterprises purpose. *See* also *United States v. Turkette,* 452 U.S. 576, 101 S.Ct. 2524, 69L.Ed.2d 246 (1981). The Court further opined that the phrase "beyond that inherent in the pattern of racketeering activity" is correctly interpreted to mean that the enterprises existence is a separate element that must be proved, not that such existence may never be inferred from the evidence showing that the associates engaged in a pattern of racketeering activity. *Boyle,* 556 U.S., at pp. 946-947.

The *Boyle* court explained "the RICO statute provides that its terms are to be liberally construed to effectuate its remedial purposes." *Boyle* The Court reasoned:

> As we said in *Turkette,* an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. *Such a group need not have a hierarchical structure or a "chain of command"*; decisions may be made on an *ad hoc* basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. *The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies.* While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct,

[9] In *Boyle* the court instructed the jurors that, in order to establish the existence of an enterprise, the Government had to prove that: "(1) there [was] an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose. The court also told the jury that it could "find an enterprise where an association of individuals, without structural hierarchy, form[ed] solely for the purpose of carrying out a pattern of racketeering acts" and that "[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." *Id.,* 556 U.S. at 942.

> nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. (Emphasis added).

Id. at 948.

II. Law of Conspiracy to Commit Racketeering

La. R.S. 14:26(A) defines general criminal conspiracy as "the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination."

The federal RICO conspiracy statute, 18 U.S.C.A. § 1962(d), provides "[i]t shall be unlawful for any person to conspire to violate any provisions of subsection (a), (b), or (c) of this section." Similarly, conspiracy under La. R.S. 15:1353(D) provides "[i]t is unlawful for any person to conspire or attempt to violate any of the provisions of Subsections A, B, or C of this section."

In analyzing the elements of conspiracy to commit racketeering under the Louisiana Racketeering Act, we, once again, look to federal jurisprudence for guidance. Under 18 U.S.C.A. § 1962(d),[10] to prove conspiracy to commit

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[10] 18 U.S.C.A. § 1962 provides in pertinent part:

> Prohibited activities
>
> * * *
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

racketeering, the Government must prove the defendants purely conspired to violate § 1962(c). In *Salinas v. United States,* 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed. 352 (1997), the Supreme Court held as follows:

> There is no requirement of some overt act or specific act in the statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an "act to effect the object of the conspiracy." § 371. The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in § 371.
>
> * * *
>
> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators. As Justice Holmes observed: "[P]lainly a person may conspire for the commission of a crime by a third person." *United States v. Holte,* 236 U.S. 140, 144, 35 S.Ct. 271, 272, 59 L.Ed. 504 (1915).

Salinas, 522 U.S. at 63-64 (alteration in original) (internal citations and quotation omitted).

Thus, under § 1962(d), it is sufficient that the defendants "adopt the goal of furthering or facilitating the criminal endeavor" to prove conspiracy to violate RICO. *Salinas*, 522 U.S. at 65. Distinguishing 18 U.S.C.A. § 1962(d) from 18 U.S.C.A. § 1962(c), in *Boyle, supra,* the Supreme Court noted that while the elements of proof overlap between a conspiracy to commit a RICO predicate crime and participating in a pattern of racketeering crimes, both require the creation of an association-in-fact enterprise. *Id.,* at 949.

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18 U.S.C.A. § 1962

In *United States v. Nieto,* 721 F.3d 357 (5th Cir.2013) (quoting *United States v. Delgado,* 401 F.3d 290 (citation omitted), the U.S. Fifth Circuit required the State to prove two elements—which may be proven by circumstantial evidence—in a conspiracy to commit racketeering charge: "(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense."[11]

III. Case Sub Judice

In the instant case, we first note that the Defendants were charged with racketeering and convicted of racketeering under La. R.S. 15:1353(D).[12] Our review of the evidence shows the testimony of Detective Swalm established that Messieurs Elmore and Davenport, along with Harris, Noel, Toliver, Jones,

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[11] See also *Smith v. United States,* ___U.S.___, 133 S.Ct. 714, 719, 184 L.Ed.12d 570 (2013) (the State must prove beyond a reasonable doubt that (1) "a conspiracy existed" and (2) the "defendant knowingly and willfully participated" in it). Thus, the second count requires sufficient evidence, direct or circumstantial, to prove each defendant agreed to "pursue the same criminal objective" even if taking on different roles within the organization. *Salinas,* 522 U.S. at 63, 118 S.Ct. 469.

[12] In the briefs filed by Mr. Elmore and the State, the offense charged is described as "conspiracy to commit racketeering." The screening forms, the indictment, and the prosecutor's statement to the judge prior to the beginning of trial, indicate that count one (1) of the indictment charged the defendants with racketeering.

The jury instructions provided: "In the first count, the defendants are charged with a violation of La. R.S. 15:1353, charging that they knowingly and unlawfully conspired with each other and others to conduct or participate in, directly or indirectly a criminal enterprise through a pattern of racketeering activity… In the first count the defendants are charged with conspiracy to commit racketeering… To convict the defendants of this offense, you must find beyond a reasonable doubt … [t]hat one or more of the conspirators committed an act in furtherance of the conspiracy."

In the briefs filed by Elmore and the State, the offense charged is described as "conspiracy to commit racketeering." The jury verdicts list the offense as "conspiracy to commit racketeering." However, Defendants can only be tried for the crime they were charged with—racketeering. Further, La. R.S. 15:1353(D) provides that "[i]t is unlawful for any person to conspire or attempt to violate any of the provisions of Subsections A, B, or C or this subsection." Thus, conspiracy is an element of the substantive racketeering offense, rather than a separate charge carrying a reduced penalty under R.S. 14:26.

Bannister, Brooks, Jarrow and other unindicted co-conspirators were members of a gang called Taliban or P-Block, of which Mr. Jarrow "called the shots."

The Taliban members grew up together, primarily in an area called "Pigeon Town," and many of them had been arrested together for previous incidents involving violent crimes, firearms and narcotics charges. The Taliban members and the unindicted co-conspirators wore common tattoos, T-shirts bearing the name Taliban, produced and appeared in social media videos together and professed association with the Taliban, street violence and weapons. The evidence further showed that in addition to murdering Mr. Bias on January 5, 2011 and attempting to murder Mr. Martin from June 2010 to March 2012, the Taliban's purpose was the sale of narcotics and public intimidation. This was corroborated by Mr. Dixon, who testified that before and after the shooting he received drugs from Mr. Davenport, and Mr. Davenport threatened him with a gun. Mr. Dixon was likewise threatened by Taliban members regarding his testimony at the instant trial. He feared for the safety of his family.

Hence, the evidence presented at trial was sufficient for a rational trier of fact to conclude that the State proved beyond a reasonable doubt the following: (1) the Taliban was an association-in-fact enterprise in which the Defendants were members, with the structural components as espoused in *Boyle, supra,*—purpose (the commission of violent crimes, public intimidation and the sale of narcotics); relationships among the individuals involved in the enterprise (the Taliban members grew up together in the same neighborhood); and the amount of time sufficient to permit the associates to pursue the enterprise purpose (the Taliban committed numerous crimes and attempted to commit violent crimes on Mr. Martin on four separate occasions from 2010-2012); (2) that an enterprise—public

intimidation and the sale of narcotics—existed separate and apart from the individual predicate acts of second degree murder and attempted second degree murder; (3) Taliban members were engaged in numerous incidents of violent, criminal behavior in the Pigeon Town area; (4) the Taliban's criminal acts—prior attempts to shoot and kill Corey Martin, the sale of controlled dangerous substances and public intimidation—comprised a pattern of racketeering activity, in addition to the predicate second degree murder and attempted second degree murder charge; and (5) the Taliban members were aware of, conspired and acquiesced in the criminal acts of the racketeering enterprise.

As noted earlier, it is not the function of the appellate court to assess the credibility of witnesses or reweigh the evidence. *State v. Scott*, *supra* at 508. Moreover, the jury's credibility determinations in this case were amply supported by the evidence. Thus, viewing the evidence in the light most favorable to the prosecution, we find that there was sufficient evidence to convict the Defendants of racketeering.

Accordingly, these assignments of error lack merit.

Elmore's Assignment of Error Number 4

Mr. Elmore contends that conspiracy to commit the offense of racketeering is not a crime, given the inability to conspire to commit an inchoate offense. Although Mr. Elmore concedes that in federal court the crime of conspiracy to commit racketeering is a possible verdict, he argues the Louisiana statutory scheme differs in that it includes attempt, conspiracy, and solicitation in the definition of an element of the crime, while the Federal RICO Statue does not. Thus, Mr. Elmore argues that it is not possible for a RICO conspiracy to include an inchoate offense as a predicate.

As previously discussed, we find that Mr. Elmore was charged with and convicted of racketeering pursuant to La. R.S.15:1353(D). Accordingly, this assignment of error lacks error.

Even assuming that, *arguendo*, Mr. Elmore was charged and convicted of conspiracy to commit racketeering, his argument would still fail.

18 U.S.C.A. § 1962 provides in pertinent part: "(a)[i]It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity …" Section (d) provides, "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. "Racketeering activity" under 18 U.S.C. § 1961(1)(A) includes "any act or threat involving murder…". Additionally, under 18 U.S.C.§1961(1)(D), "racketeering activity" means "any offense involving fraud…or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs…".

Federal jurisprudence has consistently held that conspiracy could serve as a predicate to a substantive offense under RICO. In *United States v. Weisman,* 624 F.2d 1118 (2d Cir.), *cert. denied,* 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980), *abrogated on other grounds as recognized by Ianniello v. United States*, 10 F.3d 59, 62 (2d Cir. 1993), the U.S. Second Circuit held "that conspiracy can properly be charged as a predicate act of racketeering under RICO, at least when it involves any of the substantive offenses listed in section 1961(1)(D)." 624 F.2d at 1123. The defendant in this case challenged an inchoate crime being used as a predicate in his substantive RICO prosecution on the grounds that inchoate crimes were not included in the definition of racketeering activity provided in 18 U.S.C. § 1961(1)(D). In reaching its conclusion, the Second Circuit viewed the phrase "any

offense involving", found in § 1961(1)(D), as "certainly broad enough on its face to include *conspiracies* involving securities and bankruptcy fraud and drug related offenses." *Id.* at 1124 (Emphasis added). The Court explained:

> While this specific reference to conspiracy was deleted from the final version of RICO, the expansive language [any offense involving] … was retained in a separate section 1961(1)(D). Thus, the alterations of section 1961 (1) are most logically interpreted as an attempt to restrict the conspiracies chargeable as predicate offenses to those involving offenses listed in subsection (D). This conclusion is bolstered by the fact that subsections (B) and (C), which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" language of subsection (D) and, in fact, require that the act be indictable under specifically enumerated sections of the criminal code. Finally, the present indictment is not rendered invalid simply because some hypothetical prosecutions under the statute as presently interpreted would fall beyond the pale of intended application.

In *United States v. Phillips,* 664 F.2d 971, 1015 (5th Cir. 1981), *cert. den.,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1382), the U.S. Fifth Circuit held that "[c]onspiracy may properly be alleged as a predicate act of racketeering under RICO when it involves any of the substantive offenses listed in 18 U.S.C.A. § 1961(1)(D)," which defines racketeering activity. *Id.* at 1015.

Later, the U. S. Fifth Circuit in *United States v. Welch,* 656 F.2d 1039, (5th Cir. 1981), *cert. den.,* 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 173 (1982),—applying the foregoing reasoning with regard to 18 U.S.C. § 1961(1)(D) to predicate acts under 18 U.S.C. § 1961(1)(A)—found that conspiracy to commit murder could serve as a predicate in a substantive RICO prosecution. The Court reasoned:

> There is merit to the argument that subsection A [of 18 U.S.C. § 1961(1)] is broad and inclusive as the language of subsection D. If conspiracy to commit a section D offense can serve as a predicate act for a RICO charge, then conspiracy to commit a subsection A offense should also be able to serve as a predicate act. The language of

> subsection A itself—which includes "any act or threat involving murder"—appears to contemplate a conspiracy to commit murder. A conspiracy to commit murder is an act involving murder.

Id. at 1063 n. 32.

Likewise, the U.S. Sixth Circuit in *United States v. Corrado*, 227 F.3d 528,541-542 (6th Cir. 2000) held that "a RICO conspiracy … is considered a single object conspiracy with that object being the violation of RICO. … [T]hus, the underlying acts of racketeering in a RICO conspiracy are not considered to be the objects of the conspiracy, but simply conduct that is relevant to the central objective—participating in a criminal enterprise." (Emphasis in original; internal citations omitted).

Even in the absence of inchoate crimes in the language of the Federal RICO statute's definition of racketeering activity, the definition has been broadly interpreted to include conspiracies and attempts; and the foregoing case law indicates that federal law does allow for a RICO conspiracy to include an inchoate offense. Thus under RICO, the crime of conspiracy to commit racketeering is a possible verdict.[13]

In contrast to the Federal RICO laws, but consistent with the federal courts' interpretation of the RICO laws, La. R.S. 15:1352 makes clear that "racketeering activity" means committing, *attempting to commit, conspiring to commit*, or soliciting, coercing, or intimidating another person to commit *any crime*" enumerated and listed under section 1352(A) (Emphasis added). As discussed earlier, under La. R.S. 15:1353(D), the act of conspiracy is specifically a prohibited activity.

[13]*See Adams v. United States*, 474 U.S. 971; 106 S.Ct. 336; 88 L. Ed. 2d 321 (1985).

In *State v. Livingston,* 39,390 (La. App. 2 Cir. 4/6/05), 899 So.2d 733, fn. 1, the Second Circuit noted:

> . . . there is no such charge as conspiracy to commit an attempt. Conspiracy and attempt are classified as inchoate offenses. They provide a basis for intervention to prevent a crime or to punish an actor who tries but fails to accomplish his intended crime. One cannot attempt to attempt, conspire to conspire, or conspire to attempt. *See State v. Sloan,* 32,101 (La.App.2d Cir.08/18/99), 747 So.2d 101.

While we acknowledge conspiracy and attempt are inchoate offenses, we note that neither we, nor any of our sister courts have directly addressed whether an inchoate offense is considered a predicate under the Louisiana Racketeering Act. Applying federal precepts to the instant case, it stands to reason that conspiracy to commit racketeering under La. R.S. 15:1353(D) is a valid crime, even though an underlying inchoate crime may be a part of the racketeering activity on which the crime is based. Consequently, proof of a violation of either—conspiracy or attempt of the enumerated predicate acts—along with participation in an enterprise and a pattern of racketeering activity, which may include an inchoate crime, is sufficient evidence to prove racketeering, as well as, conspiracy to commit racketeering under La. R.S. 15:1353.

Elmore's Assignment of Error Number 3

Mr. Elmore argues that a conviction for racketeering (or conspiracy to commit racketeering) coupled with the gang enhancement sentence enhancement constitutes double jeopardy. He argues that the underlying acts of Mr. Bias' murder and Mr. Martin's attempted murder, which are charged in the bill of indictment for the racketeering charge, are the same for the gang enhancement. As

such, he contends that the gang enhancement sentencing should be vacated if the racketeering charge is not vacated.

The bill of indictment in this case alleges that the second degree murder of Mr. Bias and the attempted murder of Mr. Martin were committed for the benefit of, at the direction of, and/or in association with a criminal street gang, with the intent to promote, further or assist in the affairs of the criminal street gang in violation of La. R.S. 15:1403(B).

La. R.S. 15:1403(B) provides:

> Any person who is convicted of a felony or an attempted felony which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the intent to promote, further, or assist in the affairs of a criminal gang, shall, upon conviction for that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be imprisoned for not less than one year nor more than one-half of the maximum term of imprisonment provided for that offense.

In 2011, when the offenses at issue in this case were committed, La. R.S. 15:1404(A) defined the phrase "criminal street gang" as follows:

> [a] "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, which has as one of its primary activities the commission of one or more of the criminal acts enumerated in Paragraphs (1) through (8) of Subsection B of this Section or which has a common name or common identifying sign or symbol, whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.[14]

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[14] La. R.S. 15:1404(B) defines the phrase "pattern of criminal gang activity" as follows:

> [a] "pattern of criminal gang activity" means the commission or attempted commission of two or more of the following offenses, provided at least one of those offenses occurred after September 7, 1990 and the last of those offenses occurred within three years after a prior offense, and the offenses are committed on separate occasions or by two or more persons:
> (1) Aggravated battery or second degree battery as defined in R.S. 14:34 and R.S. 14:34.1.
> (2) Armed robbery as defined in R.S. 14:64.

As articulated in *State v. Texada,* 1999-1009, p. 29 (La. App. 3 Cir. 2/2/00), 756 So.2d 463, 485:

> [I]n order to prove a violation of La. R.S. 15:1403, the State must prove the existence of an organization, association, or group of three or more persons, which has as its primary activity one or more of a list of enumerated offenses. Alternatively, the State may show that the organization, association, or group has a common name, sign, or symbol and its members individually or collectively engage in or have engaged in a pattern of criminal gang activity. Thus, the State is required to prove the commission of at least one of the underlying criminal offenses listed in La. R.S. 15:1404 to establish a violation of La.R.S. 15:1403.

While both the Fifth Amendment of the United States Constitution and La. Const. Ann. Art. 1, Sect. 15(1974) guarantees that no person shall be twice placed in jeopardy for the same offense, jurisprudence clarifies that the prohibition against double jeopardy also protects an accused from multiple punishments for the same criminal conduct. *State v. Gibson*, 2003-0647 (La. App. 4 Cir. 4/4/04), 867 So.2d 793. Louisiana courts use two separate tests—the *Blockburger* test and the *same evidence test*—to determine whether a double jeopardy violation has been established. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 26 L.Ed. 306(1932).

The applicable rule when using the *Blockburger* test is, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to

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(3) First or second degree murder or manslaughter, as defined in R.S. 14:30, 30.1, and 31.
(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances, as defined in R.S. 40:961 et seq.
(5) Illegal use of weapons or dangerous instrumentalities, as defined in R.S. 14:94.
(6) Aggravated arson as defined in R.S. 14:51.
(7) Intimidating, impeding, or injuring witnesses; or injuring officers, as defined in R.S. 14:129.1.
(8) Theft, as defined in R.S. 14:67, of any vehicle, trailer, or vessel.

be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, *supra* at 304; citing *Gaviers v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L. Ed. 489. Under the *same evidence test*, if the evidence required to support a finding of guilt of one offense would also have supported conviction of the other, the two offenses are the same under a plea of double jeopardy, and a defendant can be placed in jeopardy for only one. The same evidence test depends on the evidence necessary for a conviction, not all of the evidence introduced at trial. *State v. Smith*, 1995-0091, (La. 7/2/96); 676 So.2d 1068.

In *State v. Bailey,* 97-0302, (La. App. 5 Cir. 4/28/98), 713 So.2d 258, a case analogous to the one before this court, the appellate court addressed the issue of whether double jeopardy barred the defendant's convictions on one count of racketeering, seven counts of attempted possession of cocaine, one count of distribution of cocaine, and one count of attempted distribution of cocaine. On appeal, the defendant argued that the trial court erred in denying his motion to quash, which alleged that his convictions on the racketeering charge and on the nine overt acts violated the constitutional guarantee against double jeopardy. The court, finding that double jeopardy did not bar convictions on both the racketeering offense and the other offenses, explained:

> . . . [I]n looking to our federal counterpart we note that the federal courts have consistently held that prosecuting and sentencing of a defendant for both Racketeer Influenced and Corrupt Organization (RICO), 18:1961 et seq. violations and the predicate offenses does not violate double jeopardy. *United States v. Padgett,* 78 F.3d 580 (4th Cir.1996); *United States v. O'Connor,* 953 F.2d 338 (7th Cir.), *cert. denied,* 504 U.S. 924, 112 S.Ct. 1979, 118 L.Ed.2d 578 (1992); *United States v. Evans,* 951 F.2d 729 (6th Cir.1991), *cert. denied,* 504 U.S. 920, 112 S.Ct. 1966, 118 L.Ed.2d 567 (1992); *United States v. Arnoldt,*

> 947 F.2d 1120 (4th Cir.1991), *cert. denied,* 503 U.S. 983, 112 S.Ct. 1666, 118 L.Ed.2d 387 (1992); *United States v. Erwin,* 793 F.2d 656 (5th Cir.), *cert. denied,* 479 U.S. 991, 107 S.Ct. 589, 93 L.Ed.2d 590 (1986).

Id.

In the case *sub judice*, applying either the *Blockburger* or *same evidence test*, demonstrates no double jeopardy violation.

The elements to prove conspiracy to commit racketeering differ from the elements required under the gang enhancement statute. The racketeering statute requires the State to prove that an enterprise—an individual, sole proprietorship, partnership, corporation or other legal entity, or any uncharged association, or a group of individual associated in fact—unlawfully participated in a pattern of racketeering activity. *See* La. R.S. 15:1352(B). In contrast, the gang enhancement statute particularly targets any person who participates or is in association with a criminal street gang, whose members threaten, terrorize and commit multiple crimes against the peaceful citizens in their neighborhoods. *See* the Louisiana Street Terrorism Enforcement and Prevention Act, La. R.S. 15:1401, *et seq*. To support a finding of guilt under the gang enhancement statute necessarily requires a nexus to a gang affiliation. Moreover, the existence of a criminal street gang can be proven by a common name or symbol, an element unique to the gang enhancement.

As to racketeering, Mr. Elmore was convicted of racketeering under the conspiracy portion of the statute;[15] thus, the State needed to prove elements related to conspiracy—two or more people agreeing to commit one of the enumerated racketeering activities and Mr. Elmore's knowing participation in the conspiracy.

These elements are not required to prove gang affiliation. For these reasons, there is no double jeopardy under either the *Blockburger* or *same evidence test*.

This assignment of error lacks merit.

Davenport's Assignment of Error Number 3; Elmore's Assignment of Error Number 6

In these assignments of error, the Defendants raise a number of evidentiary arguments which we will address separately.

I. The Defendants first contend that a climate of fear was present during their trial which resulted in an inflammatory and prejudicial atmosphere that negatively impacted the verdict and ultimately violated their due process rights to a fair trial. Defendants argue that they were unfairly prejudiced when the State: (1) continually referenced them as members of the "Taliban"—which inferred they were associated with the international terrorist organization of the same name; (2) referenced them and their associates as members of a "gang" without evidence to support such an assertion; and (3) commented in the presence of the jury that police reports about the shooting were redacted "because witnesses were being shot."

Every defendant is guaranteed the right to an impartial jury and a fair trial. La. Const. art. I, § 16; *State v. Sparks,* 88–0017, p. 15 (La. 5/11/11), 68 So.3d 435, 456. "In unusual circumstances, prejudice against the defendant may be presumed." *State v. Manning,* 2003–1982, p. 7 (La.10/19/04), 885 So.2d 1044, 1061, *citing State v. David,* 425 So.2d 1241, 1246 (La. 1983).[16] In other respects,

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[15] *See* La. R.S. 15:1353(D)

[16] *Stave v. David, supra*, described unusual circumstance as, "unfairness of a constitutional magnitude will be presumed in the presence of a trial atmosphere…which is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any

the defendant has the burden of showing actual prejudice. *State v. Lee,* 2005–2098, p. 32 (La.1/16/08), 976 So.2d 109, 132. Whether a defendant has made the requisite showing of actual prejudice is "a question addressed to the trial court's sound discretion which will not be disturbed on appeal absent an affirmative showing of error and abuse of discretion." *State v. Lee*, 2005-2098, p. 33 (La. 1/16/08), 976 So.2d 109, 133.

A review of the record demonstrates the Defendants identified themselves as members of a group who used the name Taliban to identify themselves. The Defendants displayed Taliban tattoos on their arms and depicted themselves as Taliban members on Facebook postings and YouTube videos. Further, Detective Swalm—a member of a multi-agency gang unit with more than ten years intensive investigation of gang activity in New Orleans, including the criminal behavior of the P-Block or Taliban gang in the Pigeon Town area of the city—identified Defendants, other indicted and unindicted co-conspirators, as members of the Taliban gang. Detective Swalm testified that the gang members wore common tattoos and T-shirts bearing the name Taliban. In light of all of the aforementioned, we find that the State's references to "Taliban" and "gang" were permissible and supported by the evidence.

As to the State's comment that "Sergeant Williams' report was redacted because witnesses were being shot," Defendants claim the statement was made by the prosecutor at the State's table, within earshot of the jury. The district court judge stated on the record that she did not hear the comment—although the court acknowledged the State's table was closer to the jury box. Aside from the

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notion of fairness and rejects the verdict of the mob." *citing Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44L.Ed.2d 589 (1975).

Defendants' objection made outside the presence of the jury, there is nothing in the record to suggest the jury heard the comment. Moreover, there is no evidence that the prosecutor specifically connected the Defendants or their unindicted co-conspirators to the demise of witnesses.

It is well settled that statements made by attorneys are not "evidence" as that term is used in the Code of Evidence. *State v. Williams*, 2015-0866 (La. App. 4 Cir. 1/20/16), 186 So.3d 242, 250. Further, Defendants should have requested an admonishment to the jury. Even assuming the statements, constituted impermissible references to other crimes, they would be reviewed under a harmless error standard. *State v. Copelin*, 2016-0264, p.22 (La. App. 4 Cir. 12/7/16), 206 So.3d 990, 1005. "[A]n error is harmless if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error." *State v. Blank*, 2004-0204, p.53 (La. 4/11/07) 955 So.2d 90, 133.

We find this comment had little, if any, prejudicial effect on the Defendants. Thus, after a review of the record, we do not find any unusual circumstances that presume unfairness of a constitutional magnitude against the Defendants so as to violate their rights to due process.

II. Defendants argue that a climate of fear was created and present during their trial when the district court restricted access to the courtroom for anyone that was not an immediate family member of the victims or Defendants.

Pursuant to the sixth amendment of the United States Constitution and Article I, § 16 of the Louisiana Constitution, every person charged with a crime is entitled to a public trial. As the appellate court espoused in *State v. Canales* as follows:

> The right to a public trial is not a "limitless imperative[,]" the right is subject to the trial judge's power to keep order in the courtroom or to prevent unnecessary pressures or embarrassment to a witness. A trial judge may, in his sound discretion, exclude spectators from the courtroom while the testimony of a witness in a criminal case is being taken, if such a step is reasonably necessary to prevent embarrassment or emotional disturbance of that witness or to enable that witness to testify to facts material to the case.

State v. Canales, 2016-0272, (La. App. 5 Cir. 12/7/16) 206 So.3d 458. (citations omitted)

Upon review of the record, we find that the district court's decision to restrict the public's access to the courtroom had little prejudicial impact, if any, on the Defendants. During the trial, and particularly, during their testimony, Sergeant Williams and Detective Swalm identified other members of the Taliban present in the courtroom. Sergeant Williams testified that she felt threatened with the presence of the Defendants' associates in the courtroom and Willie Dixon testified that he had been intimidated with a firearm by Mr. Brook, one of the Defendants' associates. We find no error in the district court's decision to limit access in the courtroom to family members of the Defendants and victims in an effort to prevent unnecessary pressure to the witnesses. Moreover, the presence of only blood relatives of the Defendants and victims minimized the likelihood the jury would be impacted by an empty courtroom and negated any appreciable impact on witnesses' testimony.

III. Defendants argue that the following were unduly prejudicial: (1) the admission of Facebook photos of the Defendants and co-conspirators; (2) rap lyrics; (3) Detective Swalm's crime map of the Pigeon Town neighborhood pinpointing fifty-one crimes in the Pigeon Town area; and (4) YouTube videos depicting the Defendants and their associates were unduly prejudicial. For the

foregoing reasons, we find no error in the district court's ruling to the contrary or admitting them into evidence.

It is well-settled that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time." La. C.E. art. 403; *See also, State v. Wilson*, 2012-1765, p. 21 (La. App. 4 Cir. 2/12/14), 138 So.3d 661, 676. Unfair prejudice, as defined in La. C.E. art. 403, means "the offered evidence has 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Id.* (internal quotations omitted). A trial court's ruling as to the admissibility of evidence will not be disturbed absent a clear abuse of discretion. *State v. Cyrus,* 2011–1175, p. 20 (La. App. 4 Cir. 7/5/12), 97 So.3d 554, 565. A trial court's ruling admitting/permitting the introduction of evidence carries with it an implicit conclusion that the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, as per La. C.E. art. 403. *State v. Magee,* 2011–0574, p. 49, fn. 37 (La. 9/28/12), 103 So.3d 285, 320.

In *State v. Ross*, 2015-1031 (La. App. 4 Cir. 6/15/16), 195 So.3d 1210, the prosecution sought to admit videos of the Defendant rapping about being involved in a gang and killing people. The Defendant objected to the introduction of the videos arguing that the videos were prejudicial and irrelevant in establishing his guilt. Additionally, the Defendant argued the videos and lyrics therein were artistic expressions and that the introduction of the videos was misleading to the jury.

Addressing this issue, this Court held that the videos were relevant in establishing that the Defendant was affiliated with a group and that the videos had probative value and were admissible to establish this affiliation. The Court also found that there was ample evidence demonstrating Defendant's involvement; therefore, the introduction of the videos likely had little prejudicial effect on the jury.

In like manner, the videos and pictures admitted into evidence in this case were relevant in proving that the Defendants were members of a gang in support of the racketeering charge and gang enhancement charge. The videos were relevant in proving there was an enterprise by highlighting the Defendants' association with other Taliban members.

Furthermore, because Mr. Martin's eyewitness identification of the Defendants as the shooters gives credence to the jury's verdict, it is unlikely the videos, photos, rap lyrics and crime map of Pigeon Town had any significant prejudicial effect on the jury, such that it would outweigh the probative value of the evidence.

Accordingly, for the reasons stated above, these assignments of error lack merit.

Davenport's Assignment of Error Number 2; Elmore's Assignment of Error Number 5

The Defendants argue the district court improperly charged the jury on attempted second degree murder. Mr. Elmore further argues that there was an error in charging the jury on the conspiracy to commit racketeering. Defendants concede that their trial attorneys failed to object to the jury charge on attempted

second degree murder, but argue no contemporaneous objection was necessary due to the plain and fundamental error of the faulty jury charge.

It is well settled that "[a] party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error."[17] In order to preserve a jury charge issue for review[18], a defendant must make a timely objection[19]. In *State v. Alverez,* 2013-1652, pp.9-10 (La. App. 4 Cir. 12/23/14), 150 So.3d 142, 150, the appellate court explained:

> To preserve the right to appellate review of an alleged trial court error, a party must state a contemporaneous objection with the occurrence of the alleged error as well as the grounds for the objection. La. C. Cr. P. art. 841(A).
>
> The purpose behind the contemporaneous objection rule is to put the trial judge on notice of an alleged irregularity, allowing him the opportunity to make the proper ruling and correct any claimed prejudice to the defendant. A defendant is limited to the grounds for objection that he articulated in the trial court, and a new basis for the objection may not be raised for the first time on appeal.

Id., 10-925 at pg. 9, 71 So.3d at 1085.

Even assuming Defendants' claim regarding the jury charges were preserved for appellate review, their claim fails to warrant the relief sought.

The trial court is required to charge the jury "as to the law applicable to the case." La. C.Cr. P. art. 802(1). When considering whether a jury instruction is improper, a reviewing court must determine whether it is "reasonably likely" that the jury applied the challenged instruction in an unconstitutional manner, not

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[17] La. C.Cr.P. art. 801(C) provides "a party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error. The nature of the objection and ground therefor shall be stated at the time of objection. The court shall give the party an opportunity to make the objection out the presence of the jury."

[18] La. C.Cr.P. art. 841 provide in pertinent part, "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence".

whether it is possible that the jury misapplied the instruction. In determining whether it is reasonably likely that the jurors misapplied the instruction, the challenged terms are considered in relation to the instructions as a whole. *State v. Juarbe*, 2001-2250, p. 14 (La. App. 4 Cir. 7/31/02), 824 So.2d 1240, 1250–1251. The test is whether—taking the instruction as a whole would reasonable persons of ordinary intelligence understand the charge. *State v. Bunley,* 2000–0405, p. 14 (La. App. 4 Cir. 12/12/01), 805 So.2d 292, 303. A conviction will not be reversed on the ground of an erroneous jury charge unless the disputed portion, when considered in connection with the remainder of the charge, is erroneous and prejudicial. *Id* at 303.

Further, if the evidence is otherwise sufficient to support the jury's verdict and the jury would have reached the same result if it had never heard the erroneous instruction, an invalid instruction on the elements of an offense is harmless. *State v. Hongo*, 1996-2060, p. 3 (La. 12/02/97), 706 So.2d 419, 421. The determination is based upon "whether the guilty verdict actually rendered in the trial was surely unattributable to the error." *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). While a defendant is entitled to a fair trial, he is not entitled to a perfect one. *Bruton v. United States,* 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968).

It is well settled jurisprudence that a conviction for attempted second degree murder requires proof that the offender "had the specific intent to kill and committed an act tending toward the accomplishment of that goal." *State v. Sullivan*, 1997-1037, p. 20 (La. App. 4 Cir. 2/24/99), 729 So.2d 1101, 1111.

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[19] *See* La. C.Cr.P. art. 801(C).

"Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). "Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant." *State v. Bishop*, 2001-2548, p. 4 (La. 1/14/03), 835 So.2d 434, 437 *State v. Caliste*, 2012-0533, p.9 (La. App. 4 Cir. 9/4/13), 125 So.3d 8 Nevertheless, "an invalid instruction on the elements of an offense is harmless if the evidence is otherwise sufficient to support the jury's verdict and the jury would have reached the same result if it had never heard the erroneous instruction." *State v. Hongo,* 1996-2060 (La. 12/02/97), 706 So.2d 419.

In this case, at the close of trial, the district court gave the following charge to the jury:

> A person who has a specific intent to commit a crime and who does or omits an act for the purpose of intending directly toward accomplishing his or her object is guilty of an ***attempt to commit the crime*** intended. It is immaterial whether under the circumstances the defendant would have actually accomplished his or her purpose.[20]
>
> * * *
>
> Thus, in order to convict the defendant of an attempted offense you must find: One, that the defendant had a specific intent to commit the crime.
>
> And two, that the defendant did an act for the purpose of intending directly toward the commission of a crime.
>
> * * *
>
> The next potential verdict on count four is ***second degree murder***. Again, in order to convict the defendants of second degree murder you must find the State proved beyond a reasonable doubt that one, the

[20] La. R.S. 14:27 defines Attempt as follows:

(A) Any person who, having specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

> defendants killed Ralph Bias, and two, that the defendants acted with the specific intent to kill or inflict great bodily harm.[21]
>
> * * *
>
> In the final count, the defendants are charged with ***attempted second degree murder*** for the benefit of or at the direction of or in the association with a criminal street gang.
> In considering this count during your deliberations remember that there are seven possible verdicts. Guilty of attempted second degree murder for the benefit of at the direction of or in association with a criminal street gang, guilty of attempted second degree murder…
>
> In considering these possible verdicts, you are to use the definitions I have already provided to you in regards to second degree murder…
> (emphasis added)

After review of the record, we find that the district court, by charging the jury to apply the definition of second degree murder in its deliberations on Defendants' charge of attempted second degree murder—which suggested to the jury that intent to inflict great bodily harm could be an element of attempted second degree murder—was improper. Having found the charge was improper, we must next determine if 1) whether it is reasonably likely that the jury applied the challenged instruction in an unconstitutional manner and 2) taking the instruction as a whole, whether reasonable persons of ordinary intelligence would understand the charge.

The evidence presented at trial established the Defendants intended to kill the victim and not just to inflict great bodily harm. Mr. Martin testified that shortly after he and Mr. Bias entered the I-10 ramp at Carrollton Avenue, a vehicle occupied by Messieurs Harris, Noel, Elmore and Davenport, pulled alongside his vehicle and started shooting at him and Mr. Bias. Mr. Martin's testimony

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[21] La. R.S. 14:30.1 provides in pertinent part:
A. Second degree murder is the killing of a human being:
(1) When the offender has a specific intent to kill or inflict great bodily harm;

established that Mr. Elmore and Mr. Davenport were the shooters. Mr. Bias was killed immediately while Mr. Martin was shot seven times, which hospitalized him for several days. In fact, Mr. Martin testified he was not certain he would survive the incident.

There is no evidence to suggest that the jury applied the instruction in an unconstitutional manner or that the jury did not comprehend the jury instructions as a whole. Contrary to Defendants assertions, there was sufficient evidence to prove the defendants intended to kill the victims, not just injure them, in spite of the erroneous jury instruction. We find the erroneous jury instruction to be harmless error and unattributable to the guilty verdicts for attempted second degree murder. This assignment of error has no merit.

As for Elmore's assignment of error that the district court improperly charged the jury on conspiracy to commit racketeering, once again the issue has not been preserved for appellate review because Mr. Elmore failed to lodge a contemporaneous objection. Notwithstanding the failure to object, Mr. Elmore's argument is based upon the assertion the crime he was charged with was racketeering and/or that conspiracy to commit racketeering is a non-crime.

As previously discussed, in the briefs filed by Mr. Elmore and the State, the offense charged is described as "conspiracy to commit racketeering." The jury verdict lists the offense as "conspiracy to commit racketeering." The Defendants aver that the screening forms, the indictment, and the State's statement to the judge prior to the beginning of trial, indicate that count 1 of the indictment charged the Defendants with racketeering and that, in fact, was what they would be tried for. Moreover, the trial court charged the jury with the following instruction:

> In the first count, the defendants are charged with the violation of La. R.S. 15:1353 charging that they knowingly and unlawfully conspired with each other and others to conduct or participate in, directly or indirectly, a criminal enterprise through a pattern of racketeering activity.
>
> * * *
>
> In the first count the defendants are charged with conspiracy to commit racketeering. Again, a conspiracy is an agreement between two or more persons to join together to accomplish some unlawful purpose…

La. R.S. 15:1353 (C), of the Louisiana Racketeering Act, provides "[i]t is unlawful for any person employed by, or associated with, any enterprise knowingly to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering." La. R.S. 13:1353(D) further provides that "[i]t is unlawful for any person to conspire or attempt to violate any of the provisions in Subsections A, B, or C of this subsection." Because conspiracy may be an element of the substantive racketeering offense, rather than a separate charge carrying a reduced penalty under R.S. 14:26, we find no merit in this assignment of error.

Davenport's Assignment of Error Number 4

Mr. Davenport argues that the State made inflammatory remarks and argued facts not in evidence during its closing statements that were improper and that influenced the jury to his detriment. Specifically, Mr. Davenport points to the State's remark that the Defendants "had the audacity to get some of their guys to shoot at [Martin] and Ralph's cousin" and the remarks about the "red smudge marks" on the Explorer. Mr. Davenport argues that the State's remarks were made to connect him to the Explorer used in the shooting.

Prosecutors have wide latitude in their closing argument. *State v. Haynes,* 2013–0323, p. 12 (La. App. 4 Cir. 5/7/14), 144 So.3d 1083, 1090. The scope of

closing argument shall be confined to the evidence admitted, the lack of evidence, conclusions of fact that the State or the defendant may draw therefrom, and the law applicable to the case. La. C.Cr.P. art. 774. The State's rebuttal shall be confined to answering the argument of the defendant. *Id.* Closing argument shall not appeal to prejudice. *Id., see also State v. Simms,* 2013–0575, p. 18 (La. App. 4 Cir. 6/18/14), 143 So.3d 1258, 1269, *writ denied,* 2014–1542 (La.2/27/15), 160 So.3d 963.

Even where a prosecutor exceeds the bounds of proper argument, a reviewing court will not reverse a conviction unless thoroughly convinced that the argument influenced the jury and contributed to the verdict. *State v. Caliste,* 2012–0533, p. 17 (La. App. 4 Cir. 9/4/13), 125 So.3d 8, 18. A trial court has broad discretion in controlling the scope of closing arguments. *State v. Webb,* 2003–0146, p. 26–27 (La. App. 4 Cir. 1/30/14), 133 So.3d 258, 275–276. Further, common sense and logic dictate that a reviewing court must be thoroughly convinced that the improper argument influenced the jury and contributed to it rendering a verdict based, at least in part, on prejudice or some reason other than the weight of the evidence presented. Credit should be accorded to the good sense and fair-mindedness of the jurors who have heard the evidence. *State v. Bailey,* 2012–1662, p. 8 (La. App. 4 Cir. 10/23/13), 126 So.3d 702, 707.

During closing statements, the Defendant objected to the State's remarks. With regards to the first remark—that the Defendants "had the audacity to get some of their guys to shoot at [Martin] and Ralph's cousin—the district court sustained the objection. The district court overruled Defendant's objections to the State's remark connecting Mr. Elmore to the Explorer and its remark about "[r]ed smudge marks" on the Explorer, as being within the scope of the evidence since

photos of the Explorer was made part of the record. Even assuming that all the State's remarks that Mr. Davenport objected to were improper, considering the evidence as a whole, and crediting the jurors' good sense and fair-mindedness, we are not "thoroughly convinced" that the remarks influenced the jury and contributed to the verdict. This assignment of error lacks merit.

Davenport's pro se Assignment of Error

Mr. Davenport argues that the district court exceeded its jurisdiction in proceeding to trial on the charges against him because the record does not reflect that the indictment was returned in open court as required by La. C.Cr.P. art. 383.[22] This issue is raised for the first time on appeal. Pursuant to La. C.Cr. P. art. 531 "[a]ll pleas or defenses raised before trial, other than mental incapacity to proceed, or pleas of 'not guilty' and of 'not guilty and not guilty by reason of insanity,' shall be urged by a motion to quash."

Mr. Davenport did not file a motion to quash or object that the record did not indicate the indictment was returned in open court. In this case, absent a motion to quash or an objection, the Defendant waived his right to argue this claim on appeal. *See* La. C.Cr.P. art. 841.[23]

This assignment of error is meritless.

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[22] La.C.Cr.P. art.383 provides in pertinent part that [i]ndictments shall be returned into the district court in open court".

[23] La.C.Cr.P. art. 841 provides in pertinent part:

> A. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of the occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or if his objections to the action of the court, and the grounds therefor.

Elmore's Assignment of Error Number 7

Mr. Elmore argues that his sentence for conspiracy to commit racketeering and the gang enhancement sentences are illegally excessive in that both sentences were imposed without the benefit of parole, probation or suspension of sentence.

La. Const. art. I, § 20 explicitly prohibits excessive sentences. A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or it is nothing more than the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. *State v. George,* 2015-1189, pp. 17-18 (La. App. 4 Cir.11/9/16), 204 So.3d 704, 715 (2016); citing *State v. Ambeau*, 2008-1191, p. 9 (La. App. 4 Cir. 2/11/09), 6 So.3d 215, 221. A sentence is grossly out of proportion to the seriousness of the crime if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *George,* 2015-1189 p. 18; 204 So.3d at 715; citing *State v. Vargas-Alcerreca,* 2012-1070, p. 25 (La. App. 4 Cir. 10/2/13), 126 So.3d 569. Although the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society, a sentence—even within the statutory limits—may still violate a defendant's constitutional right against excessive punishment. *See State v. Baxley,* 94–2982 p. 10, (La./5/22/95), 656 So.2d 973, 979, citing *State v. Ryans,* 513 So.2d 386, 387 (La. App. 4 Cir.1987); *see* also *State v. Brady,* 97–1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So.2d 1264, 1272, *rehearing granted on other grounds,* (La. App. 4 Cir. 3/16/99).

It is well settled that a district court judge is given wide discretion in the imposition of sentences within the statutory limits, and the sentence imposed by

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B. The requirement of an objection shall not apply to the court's ruling on any written motion.

her should not be set aside as excessive absent a manifest abuse of discretion. *Ambeau*, 2008–1191, p. 10, 6 So.3d at 222; citing *State v. Howard,* 414 So.2d 1210, 1217 (La. 1982). Thus, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La.C.Cr.P. art. 894.1[24] and whether the sentence is warranted in light of the particular circumstances of the case. *Ambeau*, 2008–1191, p. 9, 6 So.3d at 222; citing *State v. Soco,* 441 So.2d 719 (La. 1983). However, where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. *Ambeau*, 2008–1191, p. 9, 6 So.3d at 222.

In the instant case, Defendant was charged and convicted of racketeering and the gang enhancement provision for his conviction of second degree murder.

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[24] La. C.Cr.P. art. 894.1 provides, in pertinent part:

> A. When a defendant has been convicted of a felony or misdemeanor, the court should impose a sentence of imprisonment if any of the following occurs:
>
> (1) There is an undue risk of that during the period of a suspended sentence or probation the defendant will commit another crime.
>
> * * *
>
> B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:
>
> (1) The offender's conduct during the commission of the offense manifested deliberate cruelty to the victim.
>
> * * *
>
> (5) The offender knowingly created a risk of death or great bodily harm to more than one person.
> (6) The offender used threats of or actual violence in the commission of the offense.
> (7) Subsequent to the offense, the offender used or caused others to use violence, force, or threats with the intent to influence the institution, conduct, or outcome of the criminal proceedings.
>
> * * *
>
> (10) The offender used a dangerous weapon in the commission of the offense.
>
> * * *

The governing penal statute for racketeering, La. R.S. 15:1354(A) provides that "any person who violates any provision of R.S. 15:1353 shall be fined not more than one million dollars, or imprisoned at hard labor for not more than fifty years or both." Under the gang enhancement provision, codified in La. R.S. 15:1403, provide that criminal penalties under the statute is "punishment by imprisonment for not less than one year not more than one-half of the maximum term of imprisonment …".[25]

Before sentencing, the district court judge stated:

> Gentlemen, a jury of your peers found you Guilty as Charged for three separate counts in this Section of court.
>
> That trial was presided over by me. I had the opportunity to hear the witnesses and testimony that was elicited throughout the course of that trial. The trial began on June 17, 2015, and concluded during that week.
>
> During the course of testimony that was taken over multiple days from multiple witnesses, it was clear to me, from hearing the chain of events that transpired, involving the murder of Ralph Bias and the attempted murder of Corey Martin, that both of you have absolutely no consideration for society in New Orleans.
>
> You treated the streets of this city like your own personal shooting gallery, putting the lives of innocent people at risk for your own personal gain.
>
> Whatever games you all thought you were playing during the course of the terror acts that you committed — I just don't understand it. You obviously don't have any kind of value for humanity.

The district court judge then sentenced Mr. Elmore to a term of imprisonment of fifty years without benefit of parole for racketeering and an additional twenty-five

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[25] La. R.S. 15:1403(A) provides that, "[a]ny person who intentionally directs, participates, conducts, furthers, or assists in the commission of a pattern of criminal gang activity as defined in this Chapter shall be punished by imprisonment for not less than one year nor more than one-half of the maximum term of imprisonment provided for an underlying offense committed in a pattern of criminal gang activity and may be fined an amount not to exceed then thousand

years without benefit of parole under the gang enhancement provision for his conviction of second degree murder.

As discussed earlier, our review of the record shows that the evidence supports Defendant's conviction of racketeering and the increase of his sentence under the gang enhancement provision for his conviction of second degree murder. Applying the precepts of La. C.Cr.P. art. 894.1 to the facts of this case, we find that the record clearly demonstrates that: (1) Mr. Elmore knowingly created a risk of death or great bodily harm to more than one person; (2) Mr. Elmore used threats of or actual violence in the commission of the offense; (3) Mr. Elmore caused others to use violence, force, or threats with the intent to influence the institution, conduct, or outcome of the criminal proceedings; and (4) Mr. Elmore used a dangerous weapon in the commission of the offenses. Noting that maximum sentences should be reserved for the most egregious violators of the offenses charged,[26] we find no error in the district court's imposition of the maximum sentences on Defendant's conviction of racketeering (fifty years) and the gang enhancement provision for his conviction of second degree murder (fifty years).

This assignment of error as to the excessiveness of the sentences is without merit.

However, as to Defendant's argument that the aforementioned sentences illegally restrict benefits, we find that this argument has merit. Neither the sentencing provision for racketeering— La. R.S. 15:1354(A)—nor a sentence

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dollars. Any sentence of imprisonment shall be in addition and consecutive to any sentence imposed for an underlying offense committed in the pattern of the criminal gang activity.

[26]*See Ambeau*, 2008-119 p. 10; 6 So.3d at 222; citing *State v. Quebedeaux,* 424 So.2d 1009 (La.1982).

under the gang enhancement provision— La. R.S. 15:1403— restrict the benefit of parole. La. C.C.Pr. art. 882 provides that "[a]n illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." Accordingly, we amend Mr. Elmore's sentences on the racketeering and gang enhancement provision convictions to delete the prohibition of parole.

DECREE

For the foregoing reasons, we affirm Mr. Davenport's and Mr. Elmore's convictions. We amend Mr. Davenport's and Mr. Elmore's sentences on the racketeering and gang enhancement provision convictions to delete the prohibition of parole. We affirm, as amended, Mr. Davenport's and Mr. Elmore's sentences.

CONVICTIONS AFFIRMED; SENTENCES AMENDED AND AFFIRMED AS AMENDED.