STATE OF LOUISIANA	*	**NO. 2016-KA-1195**
VERSUS	*	
		COURT OF APPEAL
GERARD GRAY	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 521-734, SECTION "A"
Honorable Laurie A. White, Judge
* * * * * *
Judge Rosemary Ledet
* * * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Terri F. Love, Judge Rosemary Ledet)

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AFFIRMED

JUNE 28, 2017

In this criminal appeal, Gerard Gray appeals his convictions of two counts of attempted second degree murder and his consecutive sentences of fifty years on each count. For the reasons that follow, we affirm his convictions and sentences.

STATEMENT OF THE CASE

On July 8, 2014, Mr. Gray was charged with two counts of attempted second degree murder, violations of La. R.S. 14:27 and 14:30.1.[1] On September 9, 2014, Mr. Gray was arraigned; and he entered a plea of not guilty. As a result of various pre-trial motions by the State, the district court made two interrelated evidentiary rulings: (i) granted the State's notice of intent to introduce evidence of gang affiliation pursuant to La. C.E. art. 404(B); and (ii) granted the State's request to introduce two YouTube videos depicting, among other things, Mr. Gray's gang affiliation. Because the district court denied the State's request to introduce four

[1] A co-defendant, Jonterry Bernard, was jointly charged for the same offense. Although Mr. Bernard filed pretrial motions, Mr. Gray waived all pretrial motions on December 5, 2014, and February 26, 2015. Mr. Bernard also filed a motion to sever, which the trial court denied. This court denied Mr. Bernard's writ application. *State v. Bernard*, 15-0439 (La. App. 4 Cir. 5/4/15) (*unpub.*). Subsequently, the State filed a motion to sever, which the district court granted. The State opted to try Mr. Bernard first. Following a jury trial in October 2015, Mr. Bernard was convicted as charged. He was sentenced to one hundred years.

other YouTube videos, the State filed an application for supervisory writ. This court denied the State's writ for technical reasons. *See State v. Gray*, 16-0521 (La. App. 4 Cir. 5/23/16) (*unpub.*) (Tobias, J., concurring) (noting that "[p]art of the relator's filing is videos in a format that does not comply with [Local] Rule 24 [of the Fourth Circuit Court of Appeal], and we are unable to review them."). Granting the State's writ, in part, the Louisiana Supreme Court held that the district court abused its discretion in excluding one of the other four YouTube videos; the Supreme Court reasoned that the video in question "has significant probative value to show defendant's authority and the extent of his willingness to protect his territory." *State v. Gray*, 16-0977 (La. 5/24/16), 191 So.3d 1072. Before trial, the district court also granted the State's motion to exclude discussion of a possible multiple bill sentence.

A three-day jury trial was held in this matter, beginning on May 23, 2016, and ending on May 25, 2016. The jury found Mr. Gray guilty as charged on both counts. On June 17, 2016, the district court denied Mr. Gray's motion for new trial. On that same date, the district court sentenced Mr. Gray to fifty years on each count without the benefit of probation, parole, or suspension of sentence. The district court also ordered that the sentences run consecutively. On July 8, 2016, the district court denied Mr. Gray's motion to reconsider sentence. This appeal followed.

STATEMENT OF THE FACTS

On the morning of July 8, 2014, Christopher Chambers and eight family members—five minors and three adults—went to A.L. Davis Park (the "Park") to play basketball. The Park, which is also referred to as Shakespeare Park, is located at the intersection of Washington Avenue and LaSalle Street in New Orleans, Louisiana—the Central City or Uptown area. One of the adults who accompanied Mr. Chambers to the Park was his younger cousin, Marc Mitchell.[2] While at the park, Mr. Mitchell and his cousin, Mr. Chambers, had two encounters on the basketball court with Mr. Gray—also known as the rapper "Roy Da [the] Prince"[3] and a member, and an apparent leader, of the "Byrd Gang."[4]

The two encounters and the shootings

The first encounter was primarily between Mr. Gray and Mr. Mitchell. Mr. Mitchell stated to Mr. Gray that his group had "winners"[5] and thus could use the basketball court next; Mr. Gray replied: "I hope you make it home, homie." Mr. Mitchell described this encounter as a "mild mannered verbal dispute." He testified that it did not seem like a big deal at the time. He acknowledged, however, that he believed the encounter might turn into a physical altercation or fight, but not a shooting. Mr. Chambers witnessed the first encounter and heard Mr. Gray tell Mr.

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[2] In the record, the name of one of the victims, Marc Mitchell, is also spelled "Mark Mitchell."

[3] Another discrepancy in the record is that Mr. Gray's rapper name is referred to interchangeably as "Roy the Prince" and "Roy da Prince." For ease of discussion, we use "Roy the Prince" in this opinion.

[4] A final discrepancy in the record is that the Byrd Gang also is referred to as the "Bird Gang." In this opinion, we use the "Byrd Gang."

[5] According to Mr. Mitchell, the rule of the basketball court in the city of New Orleans is that the winners of the game "stay on and play" and that others "[w]ait for the next game, wait for their turn is up."

Mitchell that he hoped he made it home. Nonetheless, Mr. Chambers testified that because they were just playing basketball, he was unsure if Mr. Gray's statement was serious.

After the first encounter, two or three more basketball games were played. During this time, Mr. Chambers left the park and went to the grocery store across the street to get some candy and drinks. When he was walking back to the park, Mr. Chambers noticed the man who ultimately shot him—Mr. Bernard—on the neutral ground between the store and the park. After he returned to the basketball court, Mr. Chambers waited for the basketball game that was in session to end; he estimated that this took about five minutes. During this time, Mr. Gray was pacing back and forth on the court. At some point, Mr. Chambers saw Mr. Gray go into the back with several men, including Mr. Bernard, and get into a "huddle."

The second encounter primarily was between Mr. Chambers and Mr. Gray. This encounter occurred when Mr. Chambers and his family members headed back onto the basketball court and attempted to claim winners. Mr. Chambers testified that he was at the top of the court; Mr. Mitchell was on the side; and Mr. Gray's group was in the middle. Mr. Gray then walked between Mr. Mitchell and Mr. Chambers and stated to Mr. Chambers: "You flexing, big man." In response, Mr. Chambers told him: "Man, what you doing all this for, like you own the court or something, like come on man, what you doing?" Mr. Mitchell and the other family members admonished Mr. Chambers to "chill out, we at their house." As he prepared to leave, Mr. Chambers sensed someone behind him; that someone was

Mr. Bernard. At this point, neither Mr. Chambers nor Mr. Mitchell had interacted or exchanged words with Mr. Bernard. Mr. Chambers then turned around and went to shake Mr. Bernard's hand. When he did so, Mr. Bernard said, "F*** that" and started shooting. Mr. Chambers was shot three times—once in the neck and twice in the chest.

When he saw his cousin was shot and falling down, Mr. Mitchell ran back towards his cousin. As he did so, Mr. Bernard shot him. Mr. Mitchell testified that he was shot twice—once in his leg and once in his chest. Mr. Mitchell further testified that he was hospitalized for two months for a collapsed lung and that he almost died. Mr. Mitchell confirmed that immediately before the shooting, he heard Mr. Bernard make the statement "F*** that" and then shoot at Mr. Chambers. Mr. Mitchell estimated that when the shooting began, he was about ten feet away. Summarizing what occurred, Mr. Mitchell testified that he "got in a verbal altercation with one guy and got shot by another guy that [he] didn't know."

The investigation

In response to the call for service on July 8, 2014, shortly after noon, both New Orleans Police Department ("NOPD") Officer Lazano Black and NOPD Detective Walter Edmond went to the crime scene. When they arrived, they found two male victims who were suffering from multiple gunshot wounds; the victims were both lying on the basketball court. Because the victims appeared to be in critical condition, the Homicide Unit was called to the scene.

Officer Black conducted a general investigation of the crime scene. On the scene, twenty-eight shell casings were recovered.[6] Also, two houses located adjacent to the park were hit by stray bullets and had bullet holes in them—a green house on LaSalle Street and a yellow house located next door to the green house. After finding the stray bullets in those houses and collecting evidence for the crime lab, Officer Black had no further involvement in the investigation.

Detective Edmond, who was the lead investigative officer, interviewed two witnesses, both members of the victims' family. The witnesses provided the name of the suspect as "Roy the Prince." At that time, the NOPD's gang unit was contacted. It was determined that Mr. Gray was a Byrd Gang member and that he was the leader of that gang. At that juncture, however, Mr. Gray's role in the shooting was unclear.

Detective Edmond also interviewed the two victims at the hospital. One of the victims mentioned that he saw the shooter (later identified as Mr. Beard) shortly before the shooting occurred at the grocery store across the street from the Park. Based on this fact, the police obtained a copy of the surveillance footage from the grocery store. Both victims were shown a still photograph of Mr. Bernard from video surveillance footage; both victims positively identified Mr. Bernard as the shooter. Based on those interviews with the victims, Mr. Gray remained a suspect as the instigator of the altercation and cause of the shooting.

[6] At trial, photographs of the crime scene were introduced, including photographs of the shell casings.

Arrest warrants were prepared for both Mr. Bernard, as the shooter, and Mr. Gray, as the instigator. Explaining the grounds for obtaining the arrest warrant for Mr. Gray, Detective Edmond attested in the warrant as follows:

> Det. Edmond learned the victims were involved in a verbal altercation with Mr. Gerard Gray on the basketball court. The victims take on the incidents are as follow[s]: The victims were waiting to take their turn playing the winning team. Mr. Gray stated to the victims that they did not have next to play, and that he did. The victims argued that Mr. Gray was incorrect. Mr. Gray immediately began to state to the victims that he will show then that he had next. Mr. Gray stated to one of the victims that he might not make it home tonight. Mr. Gray stated to the victims that they must have not known where they were. Mr. Gray began to make phone calls and talk to a group of guys near the court. After several minutes the current game ends. The victims walk onto to the court and are immediately confronted by Mr. Gray and a second unknown black male wearing a red shirt. Mr. Gray and the unknown black male argued that they are playing. During arguing the unknown black male is observed pulling a black gun from his pocket waist area and began firing at the two victims. . . . Detectives conducted a 6 photo lineup with both victims, where they positively identified Mr. Gray as the subject who *initiated the altercation and caused the shooting.* (Emphasis supplied).

Trial testimony

At trial, the State called the following witnesses: the two investigating officers—Officer Black and Detective Edmond; the two victims—Mr. Mitchell and Mr. Chambers; a member of the NOPD's Multi-Agency Gang ("MAG") unit, Detective Kristen Krzemieniecki; and the former co-defendant, Mr. Bernard. The testimony of the investigating officers and the victims was consistent with the above statement of the facts. Detective Krzemieniecki's testimony centered on authenticating the three YouTube videos that the State introduced to establish Mr. Gray's affiliation with the Byrd Gang and his control of the area around the Park.[7]

[7] Following the introduction of the YouTube videos, the district court granted the State's request for Mr. Gray to stand and present his hands put straight out to the jury for their inspection. As the State pointed out in closing argument, Mr. Gray had tattooed on his hands bird wings.

Detective Krzemieniecki's testimony is summarized in further detail elsewhere in this opinion in addressing Mr. Gray's assignment of error regarding the alleged lack of authentication of the YouTube videos. Mr. Bernard's testimony is summarized below.

Mr. Bernard acknowledged that his extensive criminal history, including two counts of attempted second degree murder arising out of the crimes at issue here, and two prior firearm convictions for illegal use of a weapon and illegal possession of a stolen firearm.[8] On the day of the shooting, Mr. Bernard testified that he arrived at the Park around noon. He denied bringing a gun to the Park. After playing basketball for a while, he heard fussing on the court between Mr. Gray and one of the victims. After the fussing, "Melly"—another Byrd Gang member—approached him. Mr. Bernard explained that he and Melly had been good friends since the fifth or sixth grade. He stated that Melly gave him a gun, which he tucked in his waistband. When Melly gave him the gun, Mr. Gray was a just few feet directly behind Melly. No one else was around. After giving him the gun, Melly instructed Mr. Bernard to "handle that man you know, or I'm going to handle you." Mr. Gray walked past Mr. Bernard and stated: "You heard what he said."

After Melly gave him the gun, Mr. Bernard observed Mr. Mitchell and Mr. Chambers playing basketball. Mr. Bernard explained that he did not shoot the victim(s)[9] at that time because there were too many people present. Shortly

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[8] Mr. Bernard explained that the illegal possession of a stolen firearm charge was the result of him taking responsibility for charges for Eric Harris—another Byrd Gang member. Although the stolen gun actually belonged to Mr. Harris, he assumed responsibility because Mr. Harris had just been released from jail. Mr. Bernard thus was arrested at Mr. Harris' house. Although Mr. Bernard initially denied that he had ever lied under oath, he acknowledged that he had lied when he pled guilty to the gun charge for which Mr. Harris was responsible.

[9] The record is unclear as to which victim—or victims— Melly instructed Mr. Bernard "to handle." Mr. Bernard's testimony was that when Melly said "handle that or I'm going to handle

thereafter, Mr. Bernard observed Mr. Chambers leave the Park and go to the grocery store across the street. A couple of minutes later, Mr. Bernard likewise went to the grocery store. As Mr. Chambers testified, both Mr. Bernard and Mr. Chambers were on the neutral ground between the Park and the store at the same time. Mr. Bernard explained that the reason he did not shoot Mr. Chambers when he spotted him on the neutral ground—when no one else was around—was because he hoped that Mr. Chambers would not return to the Park and that he would not have to carry out the order to shoot him.

After they returned to the Park, Mr. Bernard saw Mr. Chambers go to his car and then return to the basketball court. After the basketball game ended, Mr. Gray walked onto the basketball court and started assembling a team. Mr. Chambers confronted Mr. Gray, telling him that his team had the court next. According to Mr. Bernard, at this point, Melly signaled for Mr. Bernard to shoot Mr. Chambers. Mr. Bernard conceded that Mr. Gray did not give him a signal to shoot; rather, Melly gave him a look and nodded his head, which indicated to Mr. Bernard that it was time to shoot. Mr. Bernard complied.[10] When Mr. Mitchell started to run, Mr. Bernard shot him too. According to Mr. Bernard, the reason he shot Mr. Mitchell was because he was with Mr. Chambers. Mr. Bernard acknowledged that he shot

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you," he was talking about "[t]he dude that had the altercation." The first altercation (encounter) was between Mr. Gray and Mr. Mitchell; the second was between Mr. Gray and Mr. Chambers. In response to the question "[w]hy didn't you shoot Mark [Mitchell] and Chris [Chambers] right then and there?," Mr. Bernard answered "[b]ecause they were playing a basketball game" and "too many people [were] right there." As noted elsewhere, Mr. Bernard also testified that the reason he shot Mr. Mitchell was because he was with Mr. Chambers.

[10] Mr. Bernard also testified that he decided to shoot because Mr. Chambers was making aggressive statements, such as "y'all don't own this park, y'all don't pay taxes." He stated he shot Mr. Chambers when he turned around because he thought Mr. Chambers might try to attack him and that Mr. Chambers might have a gun. He claimed that he did not shoot anyone in cold blood, but rather he fired his weapon because he felt threatened when Mr. Chambers turned around.

Mr. Mitchell when he was attempting to flee. He also testified that he shot Mr. Mitchell "hoping to kill him."

Shortly after he turned himself in to the police, Mr. Bernard gave three separate statements to the police. After he was tried and convicted in October 2015, Mr. Bernard gave a fourth statement to the district attorney's office, which was transcribed by a court reporter.

In his first statement, Mr. Bernard stated that he was at the Park for about one hour before the shooting. He explained that he was playing basketball. After shots were fired, he stated that he dropped the ball and took off running. He further stated that he knew Mr. Gray only as "Roy the Prince," a rapper. In his first statement, Mr. Bernard withheld the fact that Mr. Gray, through Melly, had ordered the shooting. He explained that he withheld this information because he feared reprisal against his family if he implicated Mr. Gray. Mr. Bernard described his first statement as "a bunch of lies."

In his second statement, he repeated the story of being at the Park, hearing shots, and taking off running. He again stated he knew Mr. Gray only as a local rapper by the name of Roy the Prince. He denied receiving any phone calls from Mr. Gray.

In his third statement, Mr. Bernard admitted that he was the shooter, but he claimed that he fired the shots because Mr. Chambers was acting aggressive.[11] In his third statement, he also stated that Mr. Gray was not at the Park on the day of the shooting. Mr. Bernard explained that he lied when he said that Mr. Gray was

[11] The three statements to the police were introduced into evidence and played to the jury. Although the tape recording of the three statements to the police are contained in the record on appeal, this court notes that only the first two statements could be played. We thus rely on the

not at the Park because he feared retribution against his family if he implicated Mr. Gray in the shooting.

In his fourth statement at the district attorney's office, Mr. Bernard, for the first time, stated that Mr. Gray directed Melly to give Mr. Bernard the gun.

At trial, Mr. Bernard conceded all of his previous statements contained some truths and some lies. Nonetheless, he testified that he was truthful when he said he did not know the defendant as Gerard Gray, instead, he knew him only as Roy the Prince.

Mr. Bernard identified a "jail house" call to Melly. He testified that Melly died in July 2015. Before Melly died, he called Melly from jail. During the recorded jail house call, Melly inquired as to whether Mr. Bernard had implicated anyone in the shooting other than himself, asking "[d]id you up and do the rap?" Mr. Bernard replied: "I just did me." Mr. Bernard explained that he did so because he was afraid of what would happen if he told the police about the roles Melly and Mr. Gray played in the shootings.

Mr. Bernard also identified a "jail house" group photograph of him and several Byrd Gang members. He explained that the photograph was taken with a cell phone that someone sneaked into the jail.[12] The photograph depicted, among others, Mr. Bernard, Mr. Harris, and Mr. Gray. (As noted earlier, Mr. Harris was Mr. Bernard's friend for whom Mr. Bernard took responsibility for a gun charge.) The photograph depicted the trio—Mr. Bernard, Mr. Harris, and Mr. Gray—

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testimony at trial regarding the contents of the third statement.

[12] At the pre-trial hearing regarding the admissibility of the group photograph, the district court judge noted that "a camera in jail is probably contraband." The State's purpose for introducing the photograph was to show a cohesive unit between Mr. Gray and Mr. Bernard and that this was a "gang related incident."

flashing gang signs with their hands. In reference to the group photograph, Mr. Bernard stated the sheriff assigned the trio to the same tier after the shooting.

Finally, Mr. Bernard testified that he regretted the shooting and that he only followed orders because he was scared for his family and for himself. Mr. Bernard testified more than once that after Melly handed him the gun, Mr. Gray said "[y]ou heard what he [Melly] said." Although Mr. Bernard denied being promised anything by either the State or the judge to testify, he conceded that he was hoping to get his one hundred year sentence reduced. With regard to his trial testimony, the following question was posed to Mr. Bernard by the assistant district attorney: "You were arrested, you gave an interview, you didn't tell the truth then. You went to trial last October, you didn't tell the truth then, why now should this Jury believe you and think that you're telling the truth today?" Mr. Bernard's answer was that the jury should believe his trial testimony because all his family members were now out of town, and he could now tell the truth without worrying that they might be harmed.

DISCUSSION

Errors patent

A review of the record for errors patent reveals one. The district court denied Mr. Gray's motion for new trial and sentenced him on the same day without an express waiver by him of the twenty-four hour delay required by La.C.Cr.P. art. 873 (the "24-Hour Delay).[13] Nevertheless, we find that the district court's failure to observe the 24-Hour Delay here was harmless error.

[13] La.C.Cr.P. art. 873 provides that "[i]f a motion for new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled."

This court has held that the failure to observe the 24-Hour Delay is harmless error when the following three circumstances are present: (i) there is a sufficient delay between the conviction and the sentencing; (ii) there is no indication that the sentence was hurriedly imposed; and (iii) there is neither an argument nor a showing of actual prejudice by the failure to observe the 24-Hour Delay. *State v. Jasper*, 14-0125, pp. 6-8 (La. App. 4 Cir. 9/17/14), 149 So.3d 1239, 1245, *writ denied*, 14-2170 (La. 6/1/15), 171 So.3d 267.[14] We find all three circumstances were present here.

First, three weeks elapsed between Mr. Gray's conviction and his sentencing—he was convicted on May 25, 2016, and sentenced on June 17, 2016. Second, there is no indication that the district court imposed the sentence hurriedly. Third, Mr. Gray makes no argument on appeal that he was prejudiced by the failure to observe the 24-Hour Delay; and the record on appeal reflects none. Moreover, the record on appeal reflects that the district court considered Mr. Gray's challenges to his sentence when it heard and denied his motion to reconsider sentence on July 8, 2016. Accordingly, although the trial court erred in failing to observe the 24-Hour Delay, the error was harmless.

Assignments of error

Although Mr. Gray raises nine assignments of error,[15] we group his assignments into the following three categories for ease of analysis: (i) sufficiency

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[14] The jurisprudence also has recognized that the failure to observe the 24-Hour Delay is in two other circumstances—when "the defendant does not complain of his sentence on appeal" *State v. Duncan*, 11-0563, p. 8 (La. App. 4 Cir. 5/2/12), 91 So.3d 504, 511; and when "the sentence imposed was mandatory. *State v. Seals*, 95-0305, p. 17 (La. 11/25/96), 684 So.2d 368, 380. Neither of these circumstances are present here.

[15] Mr. Gray's assignments of error are as follows:

1. The verdicts were contrary to law and the evidence.

of the evidence; (ii) evidentiary rulings; and (iii) sentencing errors. We separately address each category.

Sufficiency of the evidence

Mr. Gray argues in his first three assignments of error that the verdict is contrary to law and the evidence; that the district court erred in the denial of his motion for post-verdict judgment of acquittal; and that the district court erred in the denial of his motion for new trial.[16] We collectively address these errors under the rubric of sufficiency of the evidence.

The standard for reviewing a claim of sufficiency of evidence is set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under the *Jackson* standard, a reviewing court is required to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

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2. The district court erred in the denial of the motion for post-verdict judgment of acquittal.
3. The district court erred in the denial of the motion for new trial.
4. The district court erred by admitting into evidence multiple videos without authentication.
5. The district court erred in granting the State's Motion to Exclude Sentence Information to the jury.
6. The sentences imposed were excessive.
7. The imposition of consecutive sentences totaling 100 years at hard labor without benefit of parole, probation or suspension of sentence for a first offender was unconstitutionally excessive and unduly harsh.
8. The district erred in the denial of the motion to reconsider sentence.
9. The individual maximum sentences imposed in this case were unconstitutionally excessive.

[16] Mr. Gray's counsel briefed these assignments of error under one argument—whether the evidence was constitutionally sufficient to convict.

reasonable doubt."443 U.S. at 319, 99 S.Ct. at 2789 (emphasis in original). If rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. *State v. Mussall*, 523 So.2d 1305, 1311 (La. 1988). This standard thus "preserves the role of the jury as the factfinder the case but it does not allow jurors 'to speculate if the evidence is such that reasonable jurors must have a reasonable doubt.'" *State v. Pierre*, 93-0893, p. 5 (La .2/3/94), 631 So.2d 427, 429 (quoting *Mussall*, *supra*) (quoting 2 C. Wright, Federal Practice & Procedure, Criminal 2d, § 467 (2d ed. 1982)).; *see also State v. Macon*, 06-481, p. 8 (La. 6/1/07), 957 So.2d 1280, 1285 (holding that "[a] reviewing court may impinge on the factfinding function of the jury only to the extent necessary to assure the *Jackson* standard of review.").

In *State v. Jones*, 15-0956, pp. 5-6 (La. App. 4 Cir. 3/22/17), 214 So.3d 124, 133, this court enumerated the following key principles governing a sufficiency of the evidence review:

> First, we examine all the evidence considered by the jury, including evidence which may have been erroneously admitted. *See* [*State v.*] *Hearold*, 603 So.2d [731,] 734 [(La. 1992)]. Second, all the evidence is viewed in the light most favorable to the prosecution. *See*. *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *State v. Clements*, 15-0630, p. 7 (La. App. 4 Cir. 5/4/16), 194 So.3d 712, 717. Thus, we may consider all reasonable inferences from the evidence which the fact-finder could have made. *See* [*I*]*d.*
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> Finally, as a reviewing court, we are highly deferential to the findings of the trier of fact. *See Jackson*, 443 U.S. at 319, 99 S.Ct. 2781; *State v. Armstead*, 14-0036, p. 11 (La. App. 4 Cir. 1/28/15), 159 So.3d 502, 512. A jury may accept as true the testimony of any witness, even a single witness, and find such testimony sufficient to establish each essential element beyond a reasonable doubt. *See Clements*, at p. 7, 194 So.3d at 717. And, we will only tread on a jury's presumed acceptance of a witness's testimony when that testimony is implausible or clearly contrary to the evidence. *See State v. Mussall*, 523 So.2d 1305, 1311 (La. 1988); *Armstead*, at p. 12, 159 So.3d at 512.

Under the *Jackson* standard, the totality of the evidence—both direct and circumstantial—must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. *See State v. Jacobs*, 504 So.2d 817, 820 (La. 1987). Addressing the principles governing circumstantial evidence, this court in *State v. Watkins*, 13-1248, 13-0931, p. 14 (La. App. 4 Cir. 8/6/14), 146 So.3d 294, 303 (quoting *State v. Huckabay*, 00-1082, p. 32 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093, 1111), noted the following:

> "[W]hen circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Shapiro*, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from *Jackson v. Virginia*, *supra*, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs*, 504 So.2d 817 (La. 1987)."

Mr. Gray was convicted of two counts of attempted second degree murder. The gravamen of attempted murder—whether first- or second-degree—is the specific intent to kill and the commission of an overt act tending toward the accomplishment of that goal. *State v. Huizar*, 414 So.2d 741, 746 (La. 1982) (citing *State v. Butler*, 322 So.2d 189 (La. 1975)). Second degree murder is defined as including the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1).

The two essential elements of the crime of attempted second degree murder are as follows: (i) the specific intent to kill the victim; and (ii) the commission of an overt act that tends toward the accomplishment of the victim's death. *See State v. Jones*, 12-0891, p. 21 (La. App. 4 Cir. 8/7/13), 122 So.3d 1065, 1077 (citing

State v. Johnson, 08-1488, p. 9 (La. App. 4 Cir. 2/10/10), 33 So.3d 328, 334; La. R.S. 14:27; and La. R.S. 14:30.1); *see also State v. Dove*, 15-0783, p. 23 (La. App. 4 Cir. 5/4/16), 194 So.3d 92, 109. Under the circumstances of the instant case, to obtain a conviction for attempted second degree murder, the State additionally had to prove that Mr. Gray was a principal to the offenses, having the specific intent to kill.

The law of principals is codified in La. R.S. 14:24, which provides that "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." A principal is equally as culpable regardless of whether the principal directly commits the crime. *See State v. Pollard*, 14-0445, p. 11 (La. App. 4 Cir. 4/15/15), 165 So.3d 289, 298, *writ denied*, 15-0926 (La. 4/22/16), 191 So.3d 1044.

Mr. Gray contends the evidence was insufficient to convict him of attempted second degree murder. He cites the lack of physical evidence connecting him to the offenses. He argues that the jail house phone call and YouTube video evidence was inconclusive and that Mr. Bernard's testimony should not be believed. Mr. Gray emphasizes that Mr. Bernard, by his own admission, gave conflicting accounts of Mr. Gray's role in the shootings. In addition to challenging the probative value of the circumstantial evidence and Mr. Bernard's credibility, Mr. Gray contends that the State failed to prove specific intent because it presented no expert medical testimony or records from the victims' doctors.

The State counters that the evidence establishes Mr. Gray, directly or indirectly, counseled or procured Mr. Bernard to commit the shootings. In support,

the State cites Mr. Bernard's testimony that Mr. Gray directed Melly to give Mr. Bernard the gun and that after Melly gave Mr. Bernard the gun, Mr. Gray told Mr. Bernard to heed Melly's directive to "handle" the victim(s) or he would be handled. Emphasizing Mr. Bernard's testimony that he feared disclosure of Mr. Gray's role in the shootings would put Mr. Bernard's family in danger, the State discounts Mr. Bernard's conflicting accounts of the shootings.

The jury apparently credited Mr. Bernard's trial testimony that he was truthful when he stated that Mr. Gray directed Melly to give Mr. Bernard the gun and encouraged Mr. Bernard to "handle" the victim(s). "A factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence." *State v. Wells*, 10-1338, p. 5 (La. App. 4 Cir. 3/30/11), 64 So.3d 303, 306 (citing *State v. Huckabay*, 00-1082 (La. App. 4 Cir 2/6/02), 809 So.2d 1093; and *State v. Harris*, 99-3147 (La. App. 4 Cir. 5/31/00), 765 So.2d 432). The testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction. *State v. White*, 28,095, p. 14 (La. App. 2d Cir. 5/8/96), 674 So.2d 1018, 1027.[17]

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[17] Addressing the credibility of witnesses, this court noted in *State v. Barbain*, 15-0404, pp. 8-9 (La. App. 4 Cir. 11/4/15), 179 So.3d 770, 776-77, *writs denied*, 15-2213, 15-2179 (La. 4/4/16), 190 So.3d 1201, 191 So.3d 578, the following:

> The determination of credibility is a question of fact within the sound discretion of the trier of fact and will not be disturbed unless clearly contrary to the evidence. *State v. Brown*, 12-0853, p. 2 (La. App. 4 Cir. 2/6/13), 109 So.3d 966, 968 (citing *State v. Holmes*, 06-2988, p. 34 (La. 12/2/08), 5 So.3d 42, 68; *State v. Vessell*, 450 So.2d 938, 943 (La. 1984)). "It is not the function of the appellate court to assess the credibility of witnesses or reweigh the evidence." *State v. Richards*, 11-0349, p. 9 (La. App. 4 Cir. 12/1/11), 78 So.3d 864, 869 (citing *State v. Cummings*, 668 So.2d 1132 (La. 1996); *State v. Rosiere*, 488 So.2d 965, 968 (La. 1986)).
>
> In the absence of internal contradiction or an irreconcilable conflict with the physical evidence, a single witness' testimony, if believed by the fact finder, is sufficient to support a factual conclusion. *State v. Rapp*, 14-0633, pp. 6-7 (La. App. 4 Cir. 2/18/15), 161 So.3d 103, 108 (citing *State v. Marshall*, 04-3139, p. 9 (La. 11/29/06), 943 So.2d 362, 369). When there is conflicting testimony about factual matters, the resolution of which depends upon a determination of credibility of the witness, the matter is one of the weight of the evidence, not its

A review of the evidence reveals that the State proved Mr. Bernard—and, and by legal inference, Mr. Gray—had the specific intent to kill. Specific intent "is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed 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*, 01-2548, p. 4 (La. 1/14/03), 835 So.2d 434, 437; *State v. Summers,* 10-0341, p. 7 (La. App. 4 Cir. 12/1/10), 52 So.3d 951, 956. "A defendant's act of aiming a lethal weapon and discharging it in the direction of his victim supports a finding by the trier of fact that the defendant acted with specific intent to kill." *State v. Bernard*, 14-0580, p. 12 (La. App. 4 Cir. 6/3/15), 171 So.3d 1063, 1073, *writ denied*, 15-1322 (La. 6/17/16), 192 So.3d 776, *cert. denied*, ___ U.S. ___, 137 S.Ct. 387, 196 L.Ed.2d 305 (2016).

At trial, Mr. Bernard testified that he shot Mr. Mitchell, hoping to kill him. At least twenty-eight bullets were fired. Officer Black testified the victims appeared to be in critical condition when he arrived on the scene. Indeed, the Homicide Unit was called to the scene because it was believed that at least one of the victims might die. Mr. Mitchell testified that he had a collapsed lung and almost died. Mr. Chambers testified that he was shot once in the neck and twice in the chest. The State thus proved that Mr. Bernard had the specific intent to kill. Accepting the testimony that Mr. Bernard acted, at least in part, based on Mr.

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sufficiency. *State v. Edgar*, 12-0744, p. 16 (La. App. 4 Cir. 9/18/13), 140 So.3d 22, 34 *writ denied*, 13-2452 (La. 4/4/14), 135 So.3d 638 (citing *State v. Allen*, 94-1895, p. 7 (La. App. 4 Cir. 9/15/95), 661 So.2d 1078, 1084).

Gray's directive, the State presented sufficient evidence to show that Mr. Gray had the specific intent required to convict him as a principal.

As noted, a sufficiency review "encompasses all the evidence introduced at trial, inadmissible as well as admissible." *State v. Bolden*, 11-2435, p. 2 (La. 10/26/12), 108 So.3d 1159, 1161 (citing *State v. Hearold*, 603 So.2d 731, 734 (La. 1992)). Here, the State's case hinged on whether Mr. Gray ordered the shooting of the victims. The State presented uncontroverted evidence that Mr. Gray had two encounters with the victims at the Park shortly before the shootings. Both the two victims and two witnesses, who were family members of the victims, identified Mr. Gray as the instigator of the offenses. The State's evidence also included Mr. Bernard's testimony that Mr. Gray instructed another party—Melly—to give Mr. Bernard the gun, in addition to the circumstantial evidence of the YouTube videos, photographs, and jail house phone call. This evidence established, at least in part, Mr. Gray's motive and Mr. Bernard's relationship with Mr. Gray. Moreover, Mr. Gray failed to rebut the two victims' testimony that he made the following threatening statement to Mr. Mitchell: "I hope you make it home, homie"

Construing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could conclude that Mr. Gray was guilty beyond a reasonable doubt of two counts of attempted second degree murder. Accordingly, we find Mr. Gray's sufficiency of the evidence assignments of error unpersuasive.[18]

[18] Mr. Gray's assignments of error regarding the denial of the motions for post-verdict judgment of acquittal and new trial may be considered waived because they were not directly addressed in his counseled brief. *See* Rule 2-12.4, Uniform Rules-Courts of Appeal; *see also State v. Dewey*, 408 So.2d 1255, 1256, n. 1 (La. 1982). Regardless, these assignments are unpersuasive. La. C.Cr.P. art. 851(A) provides in part that a motion for new trial shall be denied unless the motion supports an injustice has been done to the defendant. La. C.Cr.P. art. 851(B)(1) provides that a motion for new trial shall be granted whenever the verdict is contrary to the law and evidence.

Evidentiary rulings—YouTube videos

Mr. Gray's next assignment of error is that "the district court erred by admitting into evidence multiple [YouTube] videos without authentication." A prerequisite for admitting evidence at trial is that it be authenticated and identified. *See State v. Wells*, 11-0744 at p. 18 (La. App. 4 Cir. 4/13/16), 191 So.3d 1127, 1142 (citing *State v. Norah*, 12-1194, p. 31 (La. App. 4 Cir. 12/11/13), 131 So.3d 172, 192). Evidence is authenticated by a showing "sufficient to support a finding that the matter in question is what its proponent claims." La. C.E. art. 901(A).[19] One method of authenticating evidence is testimony by a witness with knowledge that the "matter is what it is claimed to be." La. C.E. art. 901(B)(1). Evidence must either be authenticated as provided in La. C.E. art. 901, or must be self-authenticating. *See* La. C.E. art. 902.[20]

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *State v. Wright*, 11-0141, pp. 10-11 (La. 12/6/11), 79 So.3d

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Under La. C.Cr. P. art. 821(B), a defendant may move for a post-verdict judgment of acquittal if the court finds that the evidence, viewed in the light most favorable to the State does not reasonably permit a finding of guilty. Here, Mr. Gray failed to establish that the verdict was contrary to the law or that the evidence viewed in the light most favorable to the State would prohibit a guilty verdict. Accordingly, notwithstanding Mr. Gray's counsel's failure to separately brief these alleged assignments of error, these assignments lack merit because the evidence was legally sufficient to convict.

[19] La. C.E. art. 901 provides, in pertinent part, as follows:

> **A. General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> **B. Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Article:
>
> **(1) Testimony of witness with knowledge.** Testimony that a matter is what it is claimed to be.

[20] It is undisputed that the three YouTube videos were not self-authenticating under La. C.E. art. 902; hence, the State was required to authenticate the videos under La. C.E. art. 901.

309, 316 (citing *State v. Cosey*, 97-2020 (La. 11/28/00), 779 So.2d 675, 684). Likewise, "[a] trial court has great discretion in determining whether a sufficient foundation has been laid for the introduction of evidence." *State v. Ashford*, 03-1691, p. 14 (La. App. 4 Cir. 6/16/04), 878 So.2d 798, 806 (citing *State v. Lewis*, 97-2854, p. 31 (La. App. 4 Cir. 5/19/99), 736 So.2d 1004, 1022); *Pollard*, 14-0445 at p. 17, 165 So.3d at 301.

As noted elsewhere in this opinion, the issue of the admissibility of the YouTube videos[21] was addressed pre-trial by various motions. The ultimate outcome of those motions was that three of the six YouTube videos the State requested to introduce were determined to be admissible. The issue of authentication, however, was not raised in connection with those pre-trial motions. At trial, however, Mr. Gray objected to the introduction of the three YouTube videos on that basis. The district court overruled the objection; and the videos were played for the jury.

On appeal, Mr. Gray contends that the three YouTube videos the State introduced at trial were not properly authenticated, as required by La. C.E. art. 901; thus, he contends that the district court erred in admitting them. The State counters that before it introduced the YouTube videos, it properly authenticated those

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[21] We note that the following description of "YouTube":

> YouTube, now owned by Google, is a popular website for sharing videos. It is one of the primary Internet video-hosting platforms . . . . Additionally, YouTube has been brought up in the courts regarding [among other matters] association with gang members in rap videos. .. . . While YouTube does allow private videos, most videos are public. . . .

Dan Grice & Dr. Bryan Schwartz, *Social Incrimination: How North American Courts Are Embracing Social Network Evidence in Criminal and Civil Trials*, 36 Manitoba L.J. 221, 226 (2012).

videos through Detective Krzemieniecki's testimony. To place this issue in context, we first review Detective Krzemieniecki's trial testimony.

Detective Krzemieniecki—a veteran of the Sixth District and MAG, a gang investigative unit—testified that between 2010 and 2013, she looked to social media, including YouTube, to investigate crimes and gang activity. The detective explained that before her assignment to the MAG Unit, she was in the Sixth District Investigative Unit, whose territory included the Park. During her time in the Sixth District, she investigated crimes in the Park and the surrounding area.

As part of her investigations with the MAG Unit and the Sixth District, Detective Krzemieniecki testified that she became familiar with the Byrd Gang. She defined the Byrd Gang as "a gang that operates in and around the park, A.L. Davis Park at LaSalle and Washington and the surrounding area." She explained that the Byrd Gang is not a social club, but "a gang that's involved in criminal activity." She further explained that the Byrd Gang is based in the Central City, Uptown areas of the City of New Orleans and that this gang normally hangs out at the Park and the surrounding area. She identified Mr. Gray as one of the Byrd Gang's leaders. She testified that she located and viewed several YouTube videos associated with the Byrd Gang—some of which included Mr. Gray, also known as Roy the Prince—and that those videos were available to the general public.

Detective Krzemieniecki was shown, outside the viewing of the jury, each of the three YouTube videos that the State, by pre-trial motion, was allowed to introduce.[22] She identified the first one as a video of Mr. Gray that was filmed in

[22] The three videos that the State was allowed to introduce—in the order in which they were introduced at trial and in which Detective Krzemieniecki identifies them in her testimony—were as follows:

front of the snowball stand at LaSalle Street and Washington Avenue. She estimated that the video was recorded during the three-year period from 2010 to 2013, when she investigated crimes in the Sixth District. At this juncture, defense counsel objected to the video, claiming lack of authentication because Detective Krzemieniecki could not provide the precise date it was recorded.[23] The district court overruled the objection and allowed the video to be admitted into evidence. Detective Krzemieniecki described the location of the video, pointing out a snowball stand and the Park. She also identified landmarks depicted in the video—the Park and its basketball courts. After the video was played, Detective Krzemieniecki clarified that the word "banger," used in the video, is slang term for weapon.

As to the second YouTube video, Detective Krzemieniecki testified that she recognized the location in which it was filmed as the basketball court within the

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1. "*Byrdgang—Roy the Prince*"—This video was filmed in front of the snowball stand located across the street from the Park. In this video, Mr. Gray is depicted raping about, among other things, using guns to resolve arguments. He is depicted with other gang members.

2. "*Byrdgang Holdin Uptown Down*"—This video was filmed at the Park on the basketball court—the scene of the shootings at issue here. In this video, Mr. Gray and other gang members rap about using guns on the streets of the city and make the threat "we better not catch you Uptown."

3. "*Roy the Prince—Uptown New Orleans*"—This video, which the Louisiana Supreme Court held was admissible, depicts Mr. Gray rapping about using guns to kill children and other members of the community. This video was filmed at the Park on the basketball court. As the Supreme Court noted, this video "has significant probative value to show defendant's authority and the extent of his willingness to protect his territory." *Gray*, 16-0977 at p. 1, 191 So.3d at 1072; *see also State v. Jackson*, 16-1715, p. 1 (La. 9/16/16), 200 So.3d 363, 364 (Crichton, J., dissenting from writ denial) (citing *Gray, supra*, and noting that "[t]his Court has previously ruled that a trial court abused its discretion in excluding lyrics which had significant probative value to show the defendant's authority and the extent of his willingness to protect his territory.").

[23] During Detective Krzemieniecki's testimony, the defense also objected to her testimony regarding Mr. Gray's membership in the Byrd Gang as irrelevant. The State countered that this issue was litigated pre-trial under La. C.E. art. 404 B. The trial court overruled the objection. Mr. Gray does not raise this issue on appeal.

Park, which was where the shooting occurred. She identified Mr. Gray as the person in the forefront of the video. After the video was played, Detective Krzemieniecki explained the meaning of the following terms used in the video: "shotter" is someone who shoots weapon; "what's the DL" means down low; down low means don't tell everybody-keep it a secret; and a "223" is a caliber of a rifle.

Finally, Detective Krzemieniecki identified the third YouTube video, which was captioned "Roy the Prince, Uptown, New Orleans." She testified that this video was filmed at the basketball court in the Park and estimated that it was recorded between 2010 and 2013. The video was introduced into evidence, without objection, and published to the jury. After it was played, Detective Krzemieniecki explained that the term "AR" used in the video means an automatic rifle.

On cross-examination, Detective Krzemieniecki testified that she assumed the videos were filmed sometime between 2010 and 2013 because that is when she viewed them on YouTube. She conceded she could not provide an exact date on which the videos were filmed.

Summarizing, Detective Krzemieniecki identified the three YouTube videos, made a visual in-court identification of Mr. Gray as the person spotlighted in the videos, and identified the location in which the videos were filmed and landmarks in the videos. The first video was filmed in front of the snowball stand across the street from the Park; the other two, on the basketball court in the Park where the shootings occurred. Although she could not give a precise date on which the videos were filmed, she estimated that all the videos were filmed between 2010 and 2013.

On appeal, Mr. Gray argues that the trial court erred in finding the State authenticated the YouTube videos. In support, he cites *State v. Smith*, 15-1359 (La. App. 4 Cir. 4/20/16), 192 So.3d 836. Paraphrasing *Smith* in his appellate brief, Mr.

Gray contends that the State failed to utilize any of the following three common and acceptable methods of authenticating social media evidence:

> One method would be to call the creator of the videos. This is considered the first and most obvious methods for authentication. The creator would be asked if he/she added the post in question. A second common approach, is to search the computer of the person who created the profile. This would involve an examination of the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting. The third method, is to obtain information directly from social networking website. This would link together the profile and entry to the person or persons who created them.

Given the State's failure to use any of these methods, Mr. Gray contends that the State failed to authenticate the YouTube videos. He further contends that the State failed to introduce any evidence to properly authenticate the YouTube videos. He still further contends that the district court's evidentiary error in admitting these videos was not harmless. In support, he points out that the jury, during its deliberations, asked to review one of the You Tube videos in the jury room. He thus submits that the admission of the YouTube videos was "overly prejudicial" and reversible error.

In *Smith*, we addressed the issue of whether the trial court's pre-trial ruling that the State could introduce social media posts was erroneous. Answering that question in the affirmative, we granted the defendant's writ application and remanded for an evidentiary hearing, outside the jury's presence, for the State to present evidence to establish the authenticity under La. C.E. art. 901 of the social media posts.

In *Smith,* we noted that "[a]uthentication of electronic messaging . . . is an issue which Louisiana courts have dispensed limited guidance, particularly as it relates to social media." 15-1359 at p. 7, 192 So.3d at 840. We thus turned to out-

of-state and federal jurisprudence for guidance. Citing *Sublet v. State*, 442 Md. 632, 113 A.3d 695 (2015), we noted, as Mr. Gray paraphrases in his appellate brief, that there are three common and acceptable methods to authenticate social media posts. Continuing, we noted that authentication of social media evidence is a case-specific issue, explaining as follows:

> [W]e find the proper inquiry is whether the proponent has "adduced sufficient evidence to support a finding that the proffered evidence is what it is claimed to be...." *Sublet*, 113 A.3d at 717 (quoting [*U.S. v.*] *Vayner*, 769 F.3d [125,] 131). Sufficient proof will vary from case to case, and "[t]he 'proof of authentication may be direct or circumstantial.' " *Id.* at 716 (quoting *Vayner*, 769 F.3d at 130). Consequently, the type and quantum of evidence will depend on the context and the purpose of its introduction. Evidence which is deemed sufficient to support a reasonable juror's finding that the proposed evidence is what it is purports to be in one case, may be insufficient in another.

Smith, 15-1359 at pp. 9-10, 192 So.3d at 842.[24]

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[24] In *Smith*, we further explained the importance of the interplay between La. C.E. arts. 901 and 104(A) in this context, stating as follows:

> La. C.E. art. 104(A) provides in pertinent part, "[p]reliminary questions concerning ... the admissibility of evidence shall be determined by the court, subject to the provisions of Paragraph B," which states:
>
> > Subject to other provisions of this Code, when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court *shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition*.
>
> (emphasis added). According to the provisions of La. C.E. art. 104, preliminary questions regarding the admissibility of evidence shall be determined by the court, unless the relevancy of the evidence depends on the resolution of a question of fact; in which case, the issue of relevancy goes to the fact finder. Traditionally, when this framework is applied to an evidentiary challenge for lack of authentication, trial courts have exercised their gatekeeping function and determined for the jury whether the facts reasonably support the authenticity of the proffered evidence. However, if both parties supply equally plausible facts from which a reasonable jury may or may not conclude that the evidence is what the proponent purports it to be, the evidence is provisionally admissible. Authenticity of the evidence, in that instance, depends on the resolution of the disputed question of fact. Thus, the determination of the authenticity of the proffered evidence is left for the trier of fact, wherein it decides whether to accept or reject the proffered evidence.

Authentication of YouTube videos has received scant judicial attention; most of the cases that have addressed the issue are unpublished decisions. *See United States v. Broomfield*, 591 Fed.Appx. 847, 851 (11th Cir. 2014) (*unpub*), *cert. denied*, ___ U.S. ___, 135 S.Ct. 1726, 191 L.Ed.2d 694 (2015); *People v. Torres*, 2012 WL 1205808, at *4 (Cal. Ct. App. 4/11/12) (*unpub.*). Indeed, the State, in its appellate brief, cites *Torres*, *supra*.[25]

In one published decision, *Jordan v. State,* 212 So.3d 836 (Miss. Ct. App. 2015), *aff'd by equally divided court*, 212 So.3d 817, 824 (Miss. 2016), a

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> We note La. C.E. art. 104 also to highlight an important distinction between the trial court's gatekeeping function and the jury's factfinding role. . . . [W]hether the opposing party can attack the reliability of the evidence at trial is not part of the trial court's preliminary inquiry under La. C.E. arts. 901. *See also* La. C.E. art. 104. Therefore, the trial court's determination is only whether the proponent, in this case the State, "has adduced sufficient evidence to support a finding that the proffered evidence is what it is claimed to be." *Sublet*, 113 A.3d at 717 (quoting *Vayner*, 769 F.3d at 131). If the trial court deems the evidence admissible, "the opposing party 'remains free to challenge the reliability of the evidence, to minimize its importance, or to argue alternative interpretations of its meaning, but these and similar other challenges go to the weight of the evidence—not to its admissibility.'" *Id*. (quoting *Vayner*, 769 F.3d at 131 (quoting another source) (emphasis in the original)).

Smith, 15-1359, pp. 13-14, 192 So.3d at 844; *see also* Hon. Paul W. Grimm, Daniel J. Capra, & Gregory P. Joseph, *Authenticating Digital Evidence*, 69 Baylor L. Rev. 1, 11 (2017) (noting that "[c]areful attention to the interplay between Rule 104(a) and 104(b), as well as consideration of the abundant authentication tools identified in Rules 901(b) and 902, will go a long way towards removing the mystery about authenticating digital evidence, even when the technology at play is unfamiliar to the judge.").

[25] In *Torres*, the California appellate court, addressing a similar issue regarding authentication, reasoned as follows:

> Although Wilson [of the Riverside County Sheriff's Department gang unit] testified that he did not know when the video was made or who produced it or made it, nevertheless, Wilson adequately authenticated the video by testifying that he found the video on YouTube and the video was an accurate depiction of what it looked like on YouTube. The trial court could reasonably conclude the videotape was a reasonable representation of the YouTube video and that the video would assist the jurors in determining the facts of the case and motivation for the crimes. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 952.)
>
> As to defendant's contention there was no authentication evidence as to when the video was created and posted, who produced it, and whether defendant was aware of it, such facts go to the reliability and weight of the video evidence.

Mississippi appellate court rejected a defendant's suggestion that an investigator's knowledge was insufficient to authenticate a YouTube video because the investigator "did not know when the video was made, who produced it, or when it was published on the internet." *Jordan*, 212 So.2d at 845. The Mississippi appellate court reasoned that the investigator "had sufficient knowledge to authenticate that the video was what the State claimed it to be—a video published on YouTube." *Id.* Continuing, the Mississippi appellate court stated that it was "of the same mind as the California Court of Appeals, which found similar challenges to a YouTube video went to the issues of the reliability and weight of the video, not its authentication." *Id.* (citing *Torres*, 2012 WL 1205808, at *4). We agree.[26]

Torres , 2012 WL 1205808 at *3-4.

[26] Elaborating on the unique aspect of YouTube videos, the federal district court in *Broomfield*, *supra*, rejecting a defendant's argument that the State failed to authenticate a YouTube video, reasoned as follows:

> Relying on *United States v. Biggins*, 551 F.2d 64 (5th Cir. 1977), Broomfield [the defendant] argues that the video was not adequately authenticated because there was no testimony establishing that the recording equipment was reliable or that the video was not altered or staged. Broomfield's reliance on *Biggins* is misplaced. The Court in *Biggins* stated that to authenticate a sound recording made by investigators during the government's electronic surveillance, the prosecution had to establish: the competence of the government's recording operator; "the fidelity of the recording equipment"; "the absence of material deletions, additions, or alterations" in the recording; and "the identification of the relevant speakers." *Biggins*, 551 F.2d at 66. The Court applied these factors to a recording that the government created, and this was critical to the Court's analysis. *Id*. The Court stated that this "burden properly falls to the government because it has access to such information in a way the criminal defendant does not." *Id*.
>
> Here, where the government did not make the video, but merely found it on YouTube, that particular reasoning does not apply. Indeed, if the *Biggins* factors were to apply under these circumstances, as *Broomfield* suggests it should, the prosecution could seldom, if ever, authenticate a video that it did not create. Because the government did not record the video in question, the *Biggins* factors are inapposite.

Broomfield, 591 Fed.Appx. at 852. The reasoning set forth in *Broomfield* explains why Mr. Gray's reliance on jurisprudence regarding authentication of other types of evidence in criminal trials—in narcotics cases, evidence tags and receipts; emergency calls (911 calls); and jailhouse calls—is misplaced.

As in *Jordan*, *supra,* we find Mr. Gray's argument that there was no authentication evidence as to when the three YouTube videos were recorded and posted or who posted the videos addresses the reliability and the weight of the video evidence, not the authenticity. As noted, the testimony of a witness with personal knowledge may provide the authentication of evidence necessary for its admission. *See* La. C.E. art. 901(B)(1); *State v. Magee*, 11-0574, pp. 41-42, 103 So.3d at 315-16. Detective Krzemieniecki's testimony provided sufficient support for the district court's finding that the YouTube videos were what the State claimed them to be—videos posted on YouTube depicting Mr. Gray and other Byrd Gang members in the Park and the surrounding area. We thus find this assignment of error unpersuasive.

Sentencing errors

Under the heading of sentencing errors, we group Mr. Gray's assignments of error numbers six through nine.[27] Simply stated, Mr. Gray's sentencing errors argument is that the district court erred in the following four ways: (i) ordering consecutive, as opposed to concurrent, sentences; (ii) failing to adequately consider the sentencing guidelines in La. C.Cr.P. art. 894.1; (iii) imposing a constitutionally excessive sentence; and (iv) denying his motion to reconsider sentence. Because these alleged errors substantially overlap, we address them together.

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[27] Assignments of error six through nine collectively argue the sentences imposed are constitutionally excessive. Assignment of error number six is that the sentences imposed were excessive. Assignment of error number seven alleges the imposition of consecutive sentences totaling one hundred years at hard labor without benefit of parole, probation, or suspension of sentence for a first offender was unconstitutionally excessive and unduly harsh. Assignment of error number eight contends the district court erred in the denial of the motion to reconsider sentence. Assignment of error number nine maintains the individual sentences imposed of fifty years hard labor are unconstitutionally excessive.

This court, in *State v. Boudreaux,* 11-1345, pp. 5-6 (La. App. 4 Cir. 7/25/12), 98 So.3d 881, 884-85, noted the following well-settled principles that govern our review of a defendant's excessive sentence claim:

> • Article 1[sic], Section 20 of the Louisiana Constitution of 1974 provides that "No law shall subject any person ... to cruel, excessive, or unusual punishment."
>
> • On appellate review of an excessive sentence claim, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. *State v. Walker,* 00-3200, p. 2 (La. 10/12/01), 799 So.2d 461, 462.
>
> • The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D). *State v. Robinson,* 11-0066, p. 17 (La. App. 4 Cir. 12/7/11), 81 So.3d 90, 99; *State v. Major,* 96-1214 (La. App. 4 Cir. 3/4/98), 708 So.2d 813, 819.
>
> • An appellate court reviewing an excessive sentence claim must determine whether the trial court adequately complied with the statutory sentencing guidelines set forth in La. C.Cr.P. art. 894.1, as well as whether the particular circumstances of the case warrant the sentence imposed. *State v. Trepagnier,* 97-2427 (La. App. 4 Cir. 9/15/99), 744 So.2d 181, 189; *State v. Black,* 98-0457, p. 8 (La. App. 4 Cir. 3/22/00), 757 So.2d 887, 891.
>
> • The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. 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. *State v. Lanclos,* 419 So.2d 475, 478 (La. 1982); *State v. Davis,* 448 So.2d 645, 653 (La. 1984) (the trial court need not recite the entire checklist of article 894.1, but the record must reflect that it adequately considered the guidelines).
>
> • If the appellate court finds the trial court adequately complied with Article 894.1, it then must determine whether the sentence imposed is too severe in light of the particular defendant and the particular circumstances of the case, "keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged." *State v. Landry,* 03-1671, p. 8 (La. App. 4 Cir. 3/31/04), 871 So.2d 1235, 1239.

> • A trial judge has broad discretion when imposing a sentence, and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Cann,* 471 So.2d 701, 703 (La. 1985).
>
> • Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. *State v. Sepulvado,* 367 So.2d 762, 767 (La. 1979). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." *State v. Soraparu,* 97-1027 (La. 10/13/97), 703 So.2d 608.
>
> • A sentence, although within the statutory limits, is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless and needless imposition of pain and suffering." *State v. Caston,* 477 So.2d 868, 871 (La. App. 4th Cir.1985).

Id.; *see also State v. Jasper*, 14-0125, pp. 19-20 (La. App. 4 Cir. 9/17/14), 149 So.3d 1239, 1252-53, *writ denied*, 14-2170 (La. 6/1/15), 171 So.3d 267.

The sentencing range for attempted second degree murder is not less than ten or more than fifty years without benefit of parole, probation, or suspension of sentence. La. R.S. 14:27 and 14:30.1. Here, the district court imposed the maximum sentence—fifty-years—on each count. Contrary to Mr. Gray's contention, we find that the district court adequately complied with the statutory sentencing guidelines set forth in La.C.Cr.P. art. 894.1

At the sentencing hearing, the district court provided the following reasons for the sentence she imposed on Mr. Gray:

> [Mr. Gray is t]wenty five years old. On July 8, 2014 at A.L. Davis Park, Mark Mitchell and Christopher Chambers were playing basketball with family members. There were other small children at the park. Because of a very minor dispute over who had next on the basketball court a shooting ensued involving Jonterry Bernard, after you told them to take care of it through another individual that's now dead. This is one of the saddest cases.
>
> So two people who were out trying to shoot some hoops end up with shooting erupting, shots firing, multiple times. They are both

> shot multiple times. They have had multiple surgeries. It's a wonder that they lived.
>
> The Court found you guilty—not the Court, the jury—on Count 1, guilty as charged of attempted second degree murder of Christopher Chambers. This is a crime of violence.
>
> They found you guilty as charged on Count 2 to attempted second degree murder of Mark. Mitchell. This is also a crime of violence.
>
> This Court is going to sentence you to 50 years at hard labor on each count. Those sentences will be without benefit of parole, probation, or suspension of sentence. Those sentences will run consecutive to each other. Your sentence will be 100 years.
>
> The fact that you created a risk of undue harm to everyone in that neighborhood. Shots went into the homes. The fact that a lesser sentence would deprecate the seriousness of your crime, I feel you need this correctional treatment in a custodial environment. This would be most effective for your commitment to an institution.
>
> I find that the incident between two individuals that did not even know you, and for you to profess ownership of a public park and have another person pull out a gun in an attempt to either gain favor with you or to become a gang member is despicable. The fact that those two individuals lived to testify, now twice, and your co-defendant to testify all proves that you deserve the maximum sentence in this case.

The district court, as quoted above, articulated its factual basis for imposing the maximum penalty of fifty years on each count. The court noted that Mr. Gray was convicted of being a principal to unprovoked shootings that not only seriously wounded the victims, but also endangered the public, especially children and the surrounding neighborhood. The court found that Mr. Gray posed a safety risk to the public. To comply with La. C.Cr.P. art. 894.1, "the record must reflect that the judge adequately considered the guidelines." *Davis*, 448 So.2d at 653. Simply stated, "[t]he judge must, in effect, justify his sentence with factual reasons." *Id.* Here, the district court adequately complied with La. C.Cr.P. art. 894.1.

Once adequate compliance with La. C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious offenders. *State v. Bell*, 09-0588, p. 4 (La. App. 4 Cir. 10/14/09), 23 So.3d 981, 984 (quoting *State v. Ross*, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So.2d 757, 762). As noted earlier, "[a]lthough a sentence is within statutory limits, it can be reviewed for constitutional excessiveness." *Sepulvado*, 367 So.2d at 767.

Mr. Gray contends that the district court erred in imposing the maximum sentence on each count given the lack of evidence that he falls within the category of the most egregious offenders. This argument overlaps with the argument that there is no support for the district court ordering the sentences be served consecutively, as opposed to concurrently. Indeed, Mr. Gray frames the argument as follows: "this sentence is not only wrong for being consecutive but is also impermissibly excessive by its nature." He further argues that the district court overlooked the lack of any evidence of a prior criminal history and his ability for rehabilitation. He points out that concurrent, rather than consecutive, sentences are the norm for a defendant without a previous criminal record. *See State v. Jett*, 419 So.2d 844, 852 (La. 1982).

As to the consecutive nature of the sentences, Mr. Gray contends that because his two convictions arose from a single course of action, he should have received concurrent sentences under La. C.Cr.P. art. 883. He further contends that although the district court has discretion to impose consecutive sentences, it failed to articulate particular justification for the consecutive sentences. This issue is governed by La. C.Cr.P. art. 883, which provides, in pertinent part, as follows:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently.

In the instant case, it is undisputed that both of the offenses for which Mr. Gray was convicted and sentenced were based on the same act or transaction, or constituted parts of a common scheme or plan. Thus, under La. C.Cr.P. art. 883, both fifty-year terms of imprisonment were to be served concurrently unless the district court expressly directed otherwise.

Despite the presumptive status given to concurrent sentences for crimes committed as part of a single transaction, a trial court has discretion to impose consecutive sentences on the basis of other factors, including the offender's past criminality, violence in the charged crimes, or the risk he or she poses to the general safety of the community. *State v. Marcelin*, 12-0645, p. 17 (La. App. 4 Cir. 5/22/13), 116 So.3d 928, 938-39 (quoting *State v. Thomas,* 98-1144 (La. 10/9/98), 719 So.2d 49). When consecutive sentences are imposed for crimes arising out of the same act, the district court must articulate particular justification for such sentences beyond a mere articulation of the standard sentencing guidelines set forth in La. C.Cr.P. art. 894.1. *Marcelin*, 12-0645 at p. 19, 116 So.3d at 939; *State v. Williams*, 11-0414, p. 29 (La. App. 4 Cir. 2/29/12), 85 So.3d 759, 777 (quoting *State v. Jefferson,* 04-1960 p. 39 (La. App. 4 Cir. 12/21/05), 922 So.2d 577, 604). Accordingly, an appellate court must analyze whether the trial court provided additional reasons to justify consecutive sentencing. Here, the district court did so.

The district court justified the consecutive sentences on the senseless, violent nature of the offenses and the dangerous propensities exhibited by Mr. Gray and

Mr. Bernard at the time of the shootings. The district court expressly specified that the reason it issued consecutive sentences was because of the presence of children in the Park, the risk of undue harm the gunfire caused to everyone in the surrounding neighborhood, and the fact that the dispute arose over a trivial issue—who had "next" on a public basketball court. The district court also noted that the victims underwent multiple surgeries and could have died. The district court characterized the shootings as crimes of violence and concluded that a lesser sentence—below one hundred years—would undermine the seriousness of the offenses.

The reasonableness of Mr. Gray's sentences also is supported by the jurisprudence. This court has upheld on appeal maximum fifty-year sentences for attempted second degree murder as not excessive.[28]

In sum, the district court did not abuse its discretion in sentencing Mr. Gray to fifty years on each count without benefit of parole, probation, or suspension of sentence, in ordering him to serve his two sentences for attempted second degree murder consecutively, and in denying his motion to reconsider sentence. Both the facts and the jurisprudence support a finding that Mr. Gray's sentences are not

[28] *See State v. Nix*, 07-1431 (La. App. 4 Cir. 6/18/08), 987 So.2d 855 (defendant's consecutive maximum sentences of fifty years for attempted second degree murder involving an unprovoked stabbing of the victim and forty years for a manslaughter conviction by stabbing were not excessive, given defendant's criminal history and fact that defendant committed a very similar stabbing resulting in a death only a few weeks earlier); *State v. Lewis*, 03-1234 (La. App. 4 Cir. 6/2/04), 876 So.2d 912 (two concurrent fifty-year sentences for attempted second degree murders committed during separate armed and attempted armed robberies not excessive where defendant remorseless and each shooting victim endured enormous pain and suffering during multiple surgeries for their wounds, with one suffering from permanent physical problems as a result); *State v. Davis*, 93-0663 (La. App. 4 Cir. 2/25/94), 633 So.2d 822 (two consecutive fifty-year sentences for attempted second degree murder and consecutive sentence of forty-nine and one-half years for attempted armed robbery not excessive considering injuries and complications sustained by one shooting victim and defendant's record of thirty three arrests, including one resulting in prior conviction for armed robbery).

unconstitutionally excessive. Accordingly, all of Mr. Gray's assignments of error grouped under the sentencing errors heading are unpersuasive.[29]

DECREE

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

AFFIRMED

[29] Mr. Gray's assignment of error number five is that the district court erred in granting the State's Motion to Exclude Sentence Information to the Jury. Mr. Gray's counsel, however, failed to brief this assignment of error. Thus, this assignment of error is considered waived. *See* Rule 2-12.4, Uniform Rules Courts of Appeal. Regardless, even if we were to consider this assignment of error and find it to have merit, it would amount to harmless error because Mr. Gray failed to demonstrate that it contributed to the jury verdict. *State v. Wells*, 14-1701, p. 14 (La. 12/8/15), 209 So.3d 709, 717-18.