No. 14-

IN THE
Supreme Court of the United States

JABARI WILLIAMS,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

Michael Admirand
Counsel of Record
The Promise of Justice Initiative
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
MAdmirand@thejusticecenter.org

QUESTION PRESENTED

In *Johnson v. California*, 545 U.S. 162 (2005), this Court observed that the three-part framework for addressing claims of racial discrimination in jury selection "is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." The Louisiana Supreme Court has held, "[n]otwithstanding this non-compliance with the observation the United States Supreme Court made in *Johnson*," that a trial judge can supply its own race-neutral reason at step two of the framework, even though "this procedure does not accord with . . . the Court's evolving *Batson* jurisprudence."

In Petitioner's case, the prosecution exercised all eleven of its peremptory challenges against African-Americans. After finding a *prima facie* case of racial discrimination, the trial judge provided the race-neutral reasons for three of the strikes. On appeal, a divided court followed Louisiana jurisprudence in affirming that procedure, over a dissent noting that "the most significant element of the analysis is the actual reason the State struck the potential juror, not the court's speculation."

This gives rise to the following question:

1) Whether, at step two of the three-part framework established in *Batson v. Kentucky*, 476 U.S. 79 (1986), a trial judge can assume the responsibility of providing race-neutral justifications for the State's peremptory challenges?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jabari Williams respectfully petitions for a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal in *State v. Williams*, No. 13-KA-0283 (La. App. 4 Cir. 04/23/2014).

OPINIONS BELOW

The majority opinion of the Louisiana Fourth Circuit Court of Appeal is reported at *State v. Williams*, 13-0283 (La. App. 4 Cir. 04/23/2014); 137 So.3d 832, and reprinted at Pet. App. 1a-18a. Judge Belsome's dissenting opinion is reprinted at Pet. App. 19a. The Louisiana Supreme Court's order denying review is available at *State v. Williams*, 14-1231 (La. 01/16/2015); 2015 La. LEXIS 78, and reprinted at Pet. App. 20a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fourth Circuit Court of Appeal was entered on April 23, 2014. The Louisiana Supreme Court denied review on January 16, 2015. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

A. The Crime

Early in the morning of April 10, 2011, Selvin Gonzalez was shot and killed while walking home from a nearby gas station convenience store. The 911 callers reporting the incident declared that it was a drive-by shooting, one that also appeared to be captured from a surveillance video across the street.

In the course of investigating what had been reported to be a drive-by shooting, the police recovered separate surveillance videos from the store Mr. Gonzalez had visited just before his death. The first series of videos captured Mr. Gonzalez interacting with Petitioner and another unidentified man, both of whom are African-American. All three men left the station at the same time, heading on foot in opposite directions. Mr. Gonzalez was killed minutes later.

Minutes after that shooting, Petitioner once again appeared on the convenience store footage, having again arrived to the gas station on foot. There was no sign of blood on him, nor was there any indication that he had been carrying a weapon.

Police did not make any immediate arrests.

B. Petitioner's Interrogation

Unable to develop any leads, the New Orleans Police Department broadcast images of Petitioner's face taken from the surveillance footage, labeling him a "person of interest" and asking him to come in.

Ten days after the crime, Petitioner, then twenty years old but with the IQ of 63, recognized himself on the television and went to police headquarters.[1]

Over the course of his approximately ninety-minute interrogation, Petitioner repeatedly denied shooting Mr. Gonzalez. Near the middle of his interrogation, however, Petitioner yielded to the detective's use of the Reid Technique, and ultimately agreed with the detective that he had shot the victim. Almost immediately after that declaration, Petitioner again denied responsibility, telling the detective that he "thought I was telling you what you wanted to hear," that he only said it because he was "uncomfortable" and that the detective was "pressuring me here." He continued to deny responsibility for the duration of the interrogation.

Based on that statement,[2] the State charged Petitioner with second-degree murder, which carries

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[1] Because of Petitioner's apparent intellectual deficits, defense counsel obtained an independent psychological evaluation. The examining psychologist evaluated Petitioner for three days, during which she learned that Petitioner had repeated at least three grades and never completed high school. She also conducted extensive psychological testing, which yielded a Full-Scale IQ of 63 and deficits within the "Extremely Low Range" for all but one composite index. In her report, the psychologist further explained that "out of 100 of his age-matched peers, [Petitioner] would score below all but one individual," noting that his deficits were so profound that he performed "below the average score of individuals with mental retardation found incompetent to stand trial."

[2] The police never recovered any ballistics or forensic evidence linking Petitioner to the crime. Believing that Petitioner followed Mr. Gonzalez on foot and shot him on the

with it a mandatory life sentence. *See* La. R.S. 14:30.1.

PROCEEDINGS BELOW

A. Jury Selection

Jury selection occurred on June 19, 2012. The parties questioned jurors across two panels, and exercised cause and peremptory challenges following each panel's questioning.

At the conclusion of the first panel, the State used six peremptory challenges, all against African-Americans. Pet. App. 11a. Defense counsel objected to the strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court found a prima facie case and asked the State to provide race-neutral reasons. Pet. App. 11a. After the State provided reasons, the trial court denied the *Batson* objection. Pet. App. 11a-12a.

Following questioning of the second panel of jurors, the State exercised five more peremptory challenges, each against African-Americans. Pet. App. 12a. Defense counsel raised another *Batson* challenge, after which the trial court acknowledged that "the pattern [to the State's strikes] may be that they're African-American."

The trial judge proceeded to step two of the analysis but, in keeping with Louisiana law, provided its own reasons for three of the strikes. *See*

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street, they also disregarded the 911 calls and other surveillance footage that appeared to cast this homicide as a drive-by incident.

La. C.Cr.P. art. 795(C) (codifying *Batson* and requiring the State to provide race-neutral reasons for its challenges at step two "unless the court is satisfied that such reason is apparent from the voir dire examination of the juror"); *State v. Elie*, 05-1569 (La. 07/10/2006); 936 So.2d 791, 797 (noting that "this procedure does not accord with . . . the [United States Supreme] Court's evolving *Batson* jurisprudence" but nevertheless affirming its constitutionality).

At step two, the trial court stated, "I do believe there was sufficient conversation with them, as far as the State striking those individual jurors. I don't know what specifically their reason is. But I do recall the answers to both of you in the voir dire." The trial court continued:

> I mean, the pattern may be that they're African-American, but they have to strike them simply because of that. And what I'm saying to you is I do recognize that as to [Juror] West, I recall the answer he gave, [Juror] Washington. For [Juror] Ballard, I do recall the answers she gave and [Juror] Ballard's body language.

Pet. App. 12a.[3]

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[3] None of the three jurors provided many answers during voir dire, and particularly in light of the fact that the State never had to give a reason for its strikes, judging the legitimacy of the strikes is a speculative exercise. Nevertheless, there is reason to doubt the legitimacy of at least the strike against Juror Ballard, whose only substantive answer came in response

For the remaining two jurors—Jurors Jackson and Carter—the trial court could not surmise a reason for the strike and did not "have anything" for them—nor could it have, for neither party asked a single question of them during voir dire. The trial court then asked the State to provide reasons specifically for those two jurors.

With respect to Juror Carter's strike, the State asserted that the juror had laughed in response to another juror's answer. Pet. App. 12a. As for Juror Jackson, the State maintained that he had a prior arrest, proof of which was neither provided to defense counsel nor included in the record on appeal. Pet. App. 12a.

Over defense counsel's objections that the reasons were based on untested information outside the record and, in Juror Carter's case, wholly speculative, the trial court denied the *Batson* challenge.

B. Trial

Petitioner prepared to proceed to trial raising an innocence defense, urging that he falsely confessed in

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to a question about whether she thought an individual would falsely confess to the crime: "Well, if they didn't do it, you can't trick nobody into saying something they didn't do." In a case that revolved around whether Petitioner falsely confessed, this answer suggests she would have been an ideal juror for the State. *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose.") (quotation marks and citation omitted).

part because of his intellectual deficits. *Cf. Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (noting the "enhanced . . . possibility of false confessions" arising out of prosecutions of intellectually disabled individuals). The trial judge prevented him from presenting any evidence regarding his intellectual deficits, however, even insofar as they bore on the unreliability of his statement. *But see Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (authorizing defendants to introduce evidence about the circumstances giving rise to a statement in order to show that the statement is "'insufficiently corroborated or otherwise . . . unworthy of belief'") (quoting *Lego v. Twomey*, 404 U.S. 477, 485-86 (1972)).[4]

The jury thus ultimately never heard the primary evidence supporting Petitioner's innocence defense before convicting him of second-degree murder. He was then sentenced to mandatory life imprisonment without the possibility of parole.

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[4] The trial judge found that that the evidence was "a back door way" of trying to raise a diminished capacity defense—forbidden in Louisiana—or, alternatively, a way to challenge the voluntariness of the statement. Defense counsel strenuously urged the contrary, noting that Petitioner's defense was that he was innocent, and that this evidence undermining the reliability of the statement was the "lynch pin" to his case. Nevertheless, the trial court maintained its ruling, and when subsequently provided with a State-filed motion to exclude any reference to Petitioner's intellectual disabilities, granted that motion.

C. Appellate Proceedings.

On appeal, Petitioner raised multiple assignments of error, including challenges to the trial court's *Batson* rulings during jury selection. A divided Fourth Circuit Court of Appeal affirmed the trial court's rulings.

Following Louisiana law, the majority opinion held that La. C.Cr.P. art. 795(C) "permits a trial judge to note a race-neutral reason for a peremptory challenge based upon the voir dire examination of a juror." Pet. App. 13a. *See Elie*, 936 So.2d at 797 (affirming Louisiana procedure "[n]otwithstanding this non-compliance with" this Court's precedents). The court then brushed aside the challenge because "none of the reasons offered by the State are inherently based on race"—including those reasons the trial court provided with respect to Jurors West, Washington, and Ballard. For Juror Jackson, the majority also determined that the juror's failure to "engage in conversation with the State or the defense" during voir dire was a valid reason for the challenge. Finally, the majority opinion also incorrectly found that "the State articulated race neutral reasons as to each potential juror excluded" before denying relief.

Judge Belsome dissented. Pet. App. 19a. Explaining his position that the trial court "erred in substituting its *own* race-neutral reasons for that of the State," he wrote:

> As the Louisiana Supreme Court has repeatedly noted, "the ultimate focus of the

> *Batson* inquiry is on the prosecutor's intent at the time of the strike." As discussed in *Johnson v. California*, 545 U.S. 162, 171-72 (2005), the most significant element of the analysis is the actual reason the State struck the potential juror, not the court's speculation. Furthermore, if the State's reason is superficial, the discriminatory implication is not overcome because a trial judge, or an appeals court, can formulate a legitimate reason. *Miller-El v. Dretke*, 545 U.S. 231 (2005).

Pet. App. 19a (some internal citations omitted). *See also id.* (noting that trial judge "sidestepped the most critical step of the *Batson* analysis").

The dissenter acknowledged that although the Louisiana Supreme Court had previously affirmed the constitutionality of this procedure in *Elie*, he believed this Court's jurisprudence invalidated that decision and thus, controlled Petitioner's case:

> However, the United States Supreme Court has made clear in *Batson*, *Johnson*, and *Miller-El* that the State is obligated to offer a race-neutral reason. The judge is an arbiter not a participant in the judicial process. Allowing the court to provide race-neutral reasons for the State violates Due Process as well as Equal Protection. These Constitutional guarantees should be vigorously protected.

Pet. App. 19a.

On January 16, 2015, the Louisiana Supreme Court declined to exercise discretionary review of the Fourth Circuit's decision. This petition follows.

REASONS FOR GRANTING THE WRIT

I. LOUISIANA'S STEP-TWO PROCEDURE IS IN EXPLICIT CONFLICT WITH THIS COURT'S *BATSON* JURISPRUDENCE.

A. The Louisiana Supreme Court Has Sanctioned the Procedure Even Though It "Does Not Accord With . . . the Court's Evolving *Batson* Jurisprudence."

The majority opinion in Petitioner's case is rooted in a prior Louisiana Supreme Court decision that explicitly rejected this Court's decisions in *Johnson v. California*, 545 U.S. 162 (2005) and *Miller-El v. Dretke*, 545 U.S. 231 (2005). In *Elie*, the Louisiana Supreme Court addressed the compatibility of this Court's then-recent decisions in *Johnson* and *Miller-El* with La. C.Cr.P. art. 795(C), which authorizes a trial court to supply race-neutral reasons when it deems them to be "apparent from the record." *See Elie*, 936 So.2d at 794-97. In analyzing this Court's decisions, the Louisiana court acknowledged this Court's admonition that:

> a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives . . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial

> judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Elie, 963 So.2d at 796 (quoting *Miller-El*, 545 U.S. at 252).

The Louisiana court also acknowledged this Court's statements that the *Batson* framework:

> is designed to produce *actual answers* to suspicions and inferences that discrimination may have infected the jury selection process . . . . [T]he inherent uncertainty present in inquiries of discriminatory purpose counsel against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.

Elie, 936 So.2d at 797 (quoting *Johnson*, 545 U.S. at 172) (emphasis added by Louisiana Supreme Court).

Despite these recognitions, the Louisiana Supreme Court nevertheless held without analysis that the trial court can provide its own reasons at step two. In reaching this conclusion, the court explicitly noted the conflict between this Court's jurisprudence and Louisiana law:

> From the outset, **we note that this procedure does not accord with the observation in *Johnson*** that the Court's evolving *Batson* jurisprudence "is designed to produce *actual answers* to suspicions and inferences that discrimination may have

> infected the jury selection process" . . . . *Johnson*, 545 U.S. at 172 (emphasis added). **Notwithstanding this non-compliance with the observation the United States Supreme Court made in *Johnson***, we find La. C.Cr.P. art. 795(C) does not require articulation if "the court is satisfied that such reason is apparent from the voir dire examination of the juror."

Elie, 936 So.2d at 797 (emphases added).

The court's opinion in *Elie* has allowed trial courts in Louisiana to insert themselves into step two of the *Batson* framework, which in turn has relieved prosecutors of their responsibility to explain suspicious strikes. Louisiana's jurisprudence is not based on a nuanced or principled reading of this Court's *Batson* opinions; it is instead a declaration that it will refuse to honor this Court's decades-old precedents unless and until directed otherwise. This Court should provide that much-needed direction.

B. Louisiana Has Created a Conflict Among Lower Courts Regarding the Trial Court's Role in Step Two of the *Batson* Framework.

Perhaps unsurprisingly, other lower courts have had little occasion to address situations in which the trial judge supplies reasons for the State at step two, either because of State refusal or a trial judge's initiative. *Cf. Johnson*, 545 U.S. at 171 n.6 (noting the "unlikely hypothetical in which the prosecutor declines to respond to a trial judge's inquiry

regarding his justification for making a strike"). To the extent other jurisdictions have opined on the propriety of a trial judge providing reasons, however, Louisiana's approach stands in direct conflict with them, which provides additional justification for this Court's intervention.

The Third Circuit Court of Appeals has rejected the proposition that "apparent" reasons can sufficiently satisfy step two of the *Batson* analysis, noting that "[a]pparent or potential reasons do not shed any light on the prosecutor's intent or state of mind when making the peremptory challenge." *Riley v. Taylor*, 277 F.3d 261, 282 (3d Cir. 2001). As that court further explained, "[t]he inquiry required by *Batson* must be focused on the distinctions actually offered by the State in the state court, not on all possible distinctions we can hypothesize." *Id. See also Holloway v. Horn*, 355 F.3d 707, 725 (3d Cir. 2004) (speculation "does not aid our inquiry into the reasons the prosecutor actually harbored" for a peremptory challenge).

The Seventh Circuit Court of Appeals has also recognized an important "difference between actual and apparent reasons," observing that while there may be apparent reasons "discernible from the record," that does not mean "they were the actual motivation for the challenges." *Mahaffey v. Page*, 162 F.3d 481, 483 n.1 (7th Cir. 1998). Thus, while apparent reasons may help negate an inference of discrimination at step one, they are irrelevant at step two, where the focus is on "the actual reason for the challenges." *Id.* at 484.

The Ninth Circuit Court of Appeals has reached a similar conclusion. *See Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004) ("[I]t does not matter that the prosecutor might have had good reasons . . . [w]hat matters is the real reason they were stricken.").

Despite the clarity of this Court's *Batson* jurisprudence regarding the three-part framework, Louisiana has created a conflict where one has never previously existed.

II. LOUISIANA'S PROCEDURE SUBVERTS THE PURPOSE OF THIS COURT'S THREE-STEP *BATSON* FRAMEWORK.

A. It Is Impossible to Ferret Out Discrimination if the Prosecutor Is Not Forced to Respond to a *Prima Facie* Case of Racial Discrimination.

In *Batson*, this Court explained that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. As the *Batson* Court recognized, however, racial discrimination harms not only the defendant on trial, but also the excluded juror himself. *Id.* at 87. Indeed, "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* As this Court emphasized:

> Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."

Id. at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)) (alterations in original).

Recognizing the importance of eliminating racial discrimination in jury selection, this Court has created a three-step framework "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson*, 545 U.S. at 172. *See also id.* ("The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.").

The overriding purpose behind this Court's *Batson* framework is frustrated when trial courts inject themselves into step two. This Court long ago held that "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Hernandez v. New York*, 500 U.S. 352, 367 (1991) (plurality opinion). Put somewhat differently:

> the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence on that issue, and

> the best evidence often will be the demeanor of the attorney who exercises the challenge.

Id. at 365. In order to resolve the "decisive question," this Court has required the prosecutors to produce race-neutral reasons so that the trial judge can conduct an "evaluation of the prosecutor's state of mind based on demeanor and credibility." *Id.* That evaluation cannot happen, however, if the trial judge performs the prosecution's task for them.

This Court has previously acknowledged that, in the *Batson* context, "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature." *Miller-El*, 545 U.S. at 238. In Louisiana, that effort has become impossible.

B. This Court Intended Trial Courts to Be Arbiters in the Process, Not Participants.

Most recently, this Court has emphasized that the trial court's role in the three-step *Batson* framework comes at the third step of the process, after the State has proffered its reasons. In *Snyder v. Louisiana*, the Court made clear that the trial judge's role is to evaluate the credibility of the State's reasons, not to provide them on its own:

> The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* framework involves an evaluation of the prosecutor's credibility, and the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge. In addition, race-neutral reasons for

> peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.

Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (internal citations and quotation marks omitted).

Of course, this pronouncement regarding the trial court's role is not recent. Prior to *Snyder*, this Court explained that the first two steps "govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim" at the third step. *Johnson*, 545 U.S. at 171. And long before this Court's recent *Batson* decisions, the Court held that the trial court's responsibilities arrive in the first step, in determining whether a *prima facie* case of discrimination has been established; and in the third step, "in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). The second step, by contrast, is one for the State alone. Indeed, as the dissenting judges in *Elie* noted, the "trial court cannot 'assist' the prosecutor by eliminating *Batson*'s requirement for the articulation of race-neutral reasons once a prima facie case has been made even when it believes the reasons are 'obvious.'" *Elie*, 936

So.2d at 805 (Kimball, J., dissenting). As the dissenters further explained, "constitutional demands clearly prevail over the statutory framework." *Id.*

In Louisiana, however, the opposite has held true. The result is that Petitioner—an intellectually disabled African-American man whose defense was that he falsely confessed to the crime—was convicted by a jury following a selection process that was tainted with racial discrimination. Of the eleven strikes the State utilized, 100% of them were against African-Americans, including one against an African-American juror whose only answer in voir dire was that she did not think police could trick anyone into confessing to a crime he did not commit. Although she was seemingly an ideal juror for the State in this case, it is possible the State had legitimate reasons for striking her. Because of Louisiana's implementation of *Batson*, however, those reasons will remain hidden absent this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Michael Admirand
Counsel of Record
The Promise of Justice Initiative
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
MAdmirand@thejusticecenter.org

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 14th day of April, 2015, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Orleans Parish District Attorney
Attn: Appeals Division
619 South White Street
New Orleans, LA 70119
(504) 822-2414

Counsel for the State of Louisiana

_____

Michael Admirand

STATE OF LOUISIANA VERSUS JABARI WILLIAMS

NO. 2013-KA-0283

COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

2013-0283 (La.App. 4 Cir. 04/23/14); ***137 So. 3d 832; 2014 La. App. LEXIS 1108***

April 23, 2014, Decided

SUBSEQUENT HISTORY: Rehearing denied by *State v. Williams, 2014 La. App. LEXIS 1299 (La.App. 4 Cir., May 14, 2014)*
Writ denied by *State v. Williams, 2015 La. LEXIS 78 (La., Jan. 16, 2015)*

PRIOR HISTORY: [**1]
APPEAL FROM CRIMINAL DISTRICT COURT ORLEANS PARISH. NO. 508-064, SECTION "E". Honorable Keva M. Landrum-Johnson, Judge.
State v. Williams, 90 So. 3d 445, 2012 La. LEXIS 1895 (La., 2012)

DISPOSITION: AFFIRMED; MOTION DENIED.

COUNSEL: Leon A. Cannizzaro, Jr., District Attorney, Kyle Daly, Assistant District Attorney, Parish of Orleans, New Orleans, LA, COUNSEL FOR APPELLEE/STATE OF LOUISIANA.

Michael Admirand, Rachel Lindner, New Orleans, LA, COUNSEL FOR DEFENDANT/APPELLANT.

JUDGES: (Court composed of Judge Max N. Tobias, Jr., Judge Roland L. Belsome, Judge Rosemary Ledet). BELSOME, J., DISSENTS WITH REASONS.

OPINION BY: Rosemary Ledet

OPINION

[*838] [Pg 1] This is a criminal appeal. The defendant, Jabari Williams, appeals his conviction and sentence for second degree murder. Finding no reversible error, we affirm. We also deny the Motion to Designate Attached Exhibits as Part of the Record on Appeal filed by Mr. Williams.

STATEMENT OF THE CASE

On August 11, 2011, the State indicted Mr. Williams for second degree murder of Selvin Gonzales. On August 18, 2011, Mr. Williams pled not guilty. On January 26, 2012, the trial court denied Mr. Williams' motions to suppress the evidence and identification.

On May 22, 2012, Mr. Williams filed a motion for a competency hearing. Following the May 31, 2012 hearing, Mr. Williams [**2] was found competent to stand trial.[1] Both this court[2] and the Louisiana Supreme Court[3] denied Mr. Williams' writ applications seeking review of that ruling.

1 Two court-appointed psychiatrists called by the State, Dr. Raphael Salcedo and Dr. Richard Richoux, testified as to their opinion that Mr. Williams was competent to stand trial. Further, the defense's expert, Dr. Jill Hayes, submitted a report on her opinion that Mr. Williams was mildly retarded based on his I.Q. test score of 63.

2 *State v. Williams*, 12-0855 (La. App. 4 Cir. 6/11/12) (*unpub*.).

3 *State v. Williams, 12-1366 (La. 6/15/12), 90*

So.3d 445.

[Pg 2] On June 15, 2012, Mr. Williams filed a motion to continue trial on the ground that a material witness he intended to call was unavailable for trial. The trial court denied the motion. On June 18, 2012, Mr. Williams again moved for a continuance of trial or for permission to call his expert witness out of order and prior to the State's case. The trial court denied the motion[4] and began the trial. Following the three-day trial, the jury found Mr. Williams guilty as charged.

4 This court denied Mr. Williams' writ application seeking review of this ruling. *State v. Williams*, 12-0908 (La. App. 4 Cir. 6/18/12) [**3] (*unpub*.)

On September 27, 2012, Mr. Williams filed a motion for post-verdict judgment of acquittal, new trial, or both. On September 28, 2012, he filed other post-trial motions. The trial court denied all of his post-trial motions, with the exception of the motion for appeal, and sentenced him to life imprisonment without benefit of parole, probation, or suspension of sentence. This timely appeal followed.

STATEMENT OF THE FACTS

In the early morning hours of April 10, 2011, Selvin Gonzales, a Honduran national, who lived in New Orleans for about five years, was shot and killed near his home in the 600 block of South Salcedo Street.

Jorge Rodriguez, Mr. Gonzales' housemate, testified that shortly before the shooting, Mr. Gonzales and their other housemate, Carlos Sabillion, left their residence on foot to purchase soda and beer from a neighborhood gas station. About twenty minutes later, Mr. Rodriguez heard gun shots. He stepped outside and saw by Mr. Sabillion, who told him Mr. Gonzales had been shot. Mr. Rodriguez found the victim lying in the street. He called 911, mistakenly reporting the incident as a drive-by shooting. Mr. Rodriguez identified his voice on the [Pg 3] recording of [**4] that call, and he explained that he had assumed the shooting was a drive-by because his neighborhood had many such occurrences. By the time the police arrived, the victim was dead.

Mr. Sabillion, with the assistance of an interpreter, testified that he and the victim [*839] had been friends for about two years before the victim's death. He, the victim, and Jorge Rodriguez were housemates on Baudin Street at the time of the shooting. He testified that at approximately 2:00 a.m. on the day of the shooting, he and the victim walked to the gas station on the corner of Tulane Avenue and Jefferson Davis Parkway. While he and the victim were paying for their purchases at the outside window of the gas station, Mr. Williams, who was wearing blue jeans and a white shirt, and another black male, approached the victim. Mr. Williams solicited a drug purchase by the victim. The victim handed Mr. Williams money in exchange for drugs. Mr. Sabillion cautioned the victim not to flash his money on the street. He also advised the victim to return the drugs and get his money back, which the victim did.

Mr. Sabillion and the victim then walked from the gas station in the direction of D'Hemecourt Street, and Mr. [**5] Williams and the other black male walked in the opposite direction. However, when Mr. Sabillion and the victim turned toward South Salcedo Street, the victim observed Mr. Williams and the other black male following them. When Mr. Sabillion turned to look, Mr. Williams was very close to them; and he was armed with a gun. As Mr. Williams pointed his gun at the victim's forehead, Mr. Sabillion heard the victim plead for his life and tell Mr. Williams to take his money instead. Mr. Sabillion ran to their residence, and as he did so, he heard gunshots. He told Mr. Rodriguez about the shooting, and Mr. Rodriguez called the police. Mr. Rodriguez and Mr. Sabillion [Pg 4] found the victim lying in the street, still alive. By the time the ambulance arrived, the victim was dead.

New Orleans Police Department ("NOPD") Detective Andrew Packer testified that he was the lead homicide investigator on this case. He and Detective Jeffrey Vappie responded to the scene of the homicide within about ten minutes of the 911call. The area had already been roped off by the responding officers, and the crime lab technicians had already photographed the scene and collected evidence, including seven .380 caliber [**6] and nine millimeter bullet casings. Detective Packer noted that the victim was lying in the street suffering from what appeared to be gunshot wounds to his hand and chest. Pursuant to his conversation with Mr. Rodriguez on the night of the shooting, Detective Packer retrieved the surveillance video from the gas station located on the corner of Tulane Avenue and Jefferson Davis Parkway. The video, dated April 10, 2011 and timed 3:00 a.m., shows the victim speaking with Mr. Williams and then the two engaged in what appeared to

be an argument.

On April 13, 2011, Detective Packer spoke to Mr. Sabillion at his residence. Mr. Rodriguez translated their conversation. Detective Packer showed Mr. Sabillion the gas station surveillance video in which he identified himself and the victim. He also pointed out Mr. Williams as the shooter. In a subsequent interview with Mr. Sabillion, which was translated by a bi-lingual NOPD officer, Detective Packer showed Mr. Sabillion a freeze frame photo of Mr. Williams in the gas station video. From that photo, Mr. Sabillion identified Mr. Williams as the shooter.[5]

5 However, at this time neither Detective Packer nor Mr. Sabillion knew Mr. Williams' name.

[Pg [**7] 5] On cross-examination, Mr. Sabillion testified that he had been robbed in the past and that on each occasion the perpetrator [*840] was a black male. Although he stated he finds it "difficult to distinguish" one black person from another, he stated that he was certain of his identification of Mr. Williams as the shooter because he was so close to him at the time the shooting occurred. He admitted that he was in this country illegally. He testified that the police said they would help him if he helped catch the shooter.[6] He told the police he was not assisting them for the purpose of immigration papers but rather to catch his friend's killer.

6 Before trial, two defense representatives, one of whom spoke Spanish, came to Mr. Sabillion's residence and took a signed statement from him in which he disclosed the State's offer to help him. At the time he gave the statement, he believed he was speaking to a police representative. Later, a defense representative revisited Mr. Sabillion and requested that he withdraw the charges. Mr. Sabillion refused to do so because the victim was his friend.

Detective Packer released a portion of the gas station video to the news media on April 19, 2011, for help [**8] in identifying the then-unknown perpetrator. Detective Packer testified that at approximately 1:00 a.m. on April 20, 2011, Mr. Williams voluntarily came to police headquarters. Detectives Packer and Vappie escorted Mr. Williams to an interview room and offered him food, drink and use of the bathroom, all of which he declined. Shortly thereafter, Detective Packer began videotaping the discussions he and Detective Vappie had with Mr. Williams.[7]

7 Detective Packer explained that the three videos were actually one continuous interview with Mr. Williams, separated into three discs because the approximately one hour and thirty minute interview could not be recorded on one disc.

Initially, Mr. Williams told Detectives Packer and Vappie that he had seen himself on television, and that he wanted to set the record straight by denying that he shot the victim. Detective Packer told Mr. Williams, though untrue, that the police had a video of him shooting the victim. Mr. Williams admitted that he was [Pg 6] carrying a .380 caliber weapon the night of the murder.[8] Eventually, Mr. Williams admitted that he killed the victim, but he claimed the shooting was in self-defense. At the conclusion of Mr. Williams' [**9] statement, Detective Packer secured a warrant for Mr. Williams' arrest and escorted him to Orleans Parish Prison.

8 The fact that the victim had been shot by a .380 caliber weapon had not been released to the media or the public.

Detective Packer informed the court that a search warrant executed at Mr. Williams' residence on South Scott Street did not produce any evidence. Detective Packer also noted that the police were never able to identify the second black male depicted in the gas station surveillance video. Detective Packer determined that the victim was unarmed at the time of the shooting and his money was missing.

Detective Vappie, a fifteen-year NOPD veteran, testified that he assisted Detective Packer at the homicide scene in this case. Pursuant to Detective Packer's direction, he viewed the gas station surveillance tape. He recognized the victim in the tape by his clothing. He notified Detective Packer, who relocated to the gas station and viewed the video. Detective Vappie testified that on April 20, 2011, he was at police headquarters when Mr. Williams came in to give a statement to Detective Packer. He sat in on the pre-interview and the main interview and participated in [**10] asking questions. That was his last involvement with the case.

Detective Vappie testified that he was instructed in the Reid Interrogation Technique and trained by the Department of [*841] Justice in interview and

interrogation procedures. As part of that training, the detective acknowledged that it is an acceptable tactic to tell either falsehoods or half-truths to a possible perpetrator.

Dr. Richard Tracy, who was stipulated to be an expert in the field of forensic pathology, testified that he conducted the autopsy on the victim's body on April [Pg 7] 10, 2011. He opined that the victim suffered two fatal wounds to the front torso, which severed the spine causing instant paralysis and death by loss of blood. Examination of the bullet wounds indicated that they were fired from a distance of eighteen or twenty inches from the skin. He also noted that the victim's blood alcohol content was .188 at the time he died.

ERRORS PATENT

A review for errors patent on the face of the record reveals one. The trial court sentenced Mr. Williams immediately after denying his motions in arrest of judgment and for new trial. Under *La. C.Cr.P. art. 873*, if a motion for new trial or motion in arrest of judgment [**11] is filed, a sentence shall not be imposed until at least twenty-four hours after the motion is denied, unless the defendant expressly waives the delay or pleads guilty. It is well-settled that a defendant may implicitly waive the twenty-four hour delay. *See State v. Pierre, 99-3156, p. 7 (La. App. 4 Cir. 7/25/01), 792 So.2d 899, 903* (implicit waiver where defense counsel responds in the affirmative when trial court inquires if he is ready for sentencing). In *State v. Robichaux, 00-1234, p. 7 (La. App. 4 Cir. 3/14/01), 788 So.2d 458, 464-65*, at the beginning of the sentencing hearing, defense counsel noted: "Judge, prior to the sentencing, I would like to put on the record an oral motion for a new trial ..." This court held that "by virtue of the defense counsel's statement, defendant announced his readiness for sentencing, which implicitly waived the waiting period." *Id., 00-1234 at p. 7, 788 So.2d at 465*.

In this case, before sentencing, Mr. Williams' counsel announced to the court: "Judge, I've filed today into the record and served on the State, two motions prior to sentencing...." As in *Robichaux*, by virtue of defense counsel's statement announcing Mr. Williams' readiness for sentencing, [**12] he implicitly waived the [Pg 8] waiting period. Moreover, the sentence imposed was mandatory; and Mr. Williams has not shown any prejudice by the failure to observe the delay.

ASSIGNMENT OF ERROR NUMBER I

In his first of eleven assignments of error, Mr. Williams argues that the trial court committed reversible error by forcing him to stand trial even though he was incompetent to do so.

"Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." *La. C.Cr.P. art. 641*.

In *State v. Bennett, 345 So.2d 1129, 1138 (La. 1977)*, the Louisiana Supreme Court held that the appropriate considerations for determining whether the accused is fully aware of the nature of the proceedings include the following:

> [W]hether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences [**13] of conviction.

[*842] Additionally, in determining an accused's ability to assist in his defense, consideration should include:

> [W]hether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial.

Bennett, 345 So.2d at 1138 (citations omitted).

[Pg 9] Given the presumption of sanity in Louisiana jurisprudence, a defendant has the burden to establish his incapacity to stand trial by a preponderance of the evidence. *La. R.S. 15:432*. A reviewing court owes the trial court's determination as to the defendant's competency great weight, and the trial court's ruling thereon will not be disturbed on appeal absent a clear abuse of discretion. [**14] *State v. Bridgewater, 00-1529, p. 14 (La. 1/15/02), 823 So.2d 877, 892*.

During the May 31, 2012 competency hearing, the trial court heard testimony from the State's experts, Dr. Raphael Salcedo and Dr. Richard Richoux. Both experts testified that Mr. Williams had neither a reported history of mental illness nor showed any signs of a major psychiatric illness. The physicians stated that Mr. Williams did not present as an individual with substantial intellectual limitations, and they opined his I.Q. was in the borderline range, i.e., seventy to seventy-nine.[9] He displayed an understanding of the legal system; why and what he was charged with; had no memory problems; was clearly capable of making simple decisions in response to well-explained alternatives; and was capable of assisting his attorney with trial preparation and testifying on his own behalf. Dr. Salcedo, however, noted that: "The court may need to be aware that he does seem to have some cognitive limitations but not within the low 60's I.Q. --- not enough as to impair his ability to meet the *[State v.] Bennett [345 So.2d 1129 (La. 1977)]* criteria.... and we recommend that he be found competent to proceed."

> 9 Dr. Salcedo explained [**15] that an I.Q. of sixty-nine and below is considered the beginning of the mild mentally retarded range.

During the hearing, Dr. Salcedo also noted that the defense's expert, Dr. Jill Hayes (who was not called to testify but whose report had been submitted into evidence), found that Mr. Williams was mildly retarded based on an I.Q. test score [Pg 10] of 63. Dr. Salcedo also noted that Dr. Hayes "kind of hedge[d]" in her report concerning malingering, and he quoted from her report: "My clinical impression and validity indicate or suggest that he [Mr. Williams] extended good effort during the current evaluation. However, I will reserve an opinion to malingering, level of effort, until additional data is received or generated." Dr. Salcedo verbalized his opinion on this portion of Dr. Hayes' report:

> I think what she is talking about there is that if you have an I.Q. of 63, you would be flagged by the school system. You know, there would be special education records, which he denied ever being in special education. With 63 [*843] [I.Q.], you probably would be getting a Social Security disability check. So you would be flagged by the Social Security administration, and I think that's what she was alluding [**16] to. I mean, I'm not trying to speak for her, but that's the protocol.

The trial judge evaluated the conflicting findings of the defense expert, Dr. Hayes, and the court-appointed psychiatrists, Dr. Salcedo and Dr. Richoux. Based upon the evidence, we find that the trial court did not abuse its discretion by determining that Mr. Williams understood the proceedings, could assist in his defense, and that he was competent to proceed to trial. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER II

Mr. Williams argues that the trial court erred when it granted the State's motion in limine seeking to prevent him from introducing any evidence of his mental retardation. He maintains he should have been allowed to introduce the evidence as part of the circumstances surrounding his confession.

In granting the State's motion, the trial court stated the following: "[it was] a back door way of trying to get in a mental disease or defective disorder or diminished capacity or a different way of trying to back door in about his ability to [Pg 11] waive his rights as to the statement. And, again, I think that if you were going to produce any of those, you would have had to enter . . . a plea [**17] of not guilty; not guilty by reason so insanity."

Mr. Williams maintains that his mental retardation made him susceptible to manipulation, which in turn casts doubt on the reliability of his confession. Further, he argues that the jury should have been allowed to consider the evidence "to determine the weight and probative value of the statement."

Under *La. C.Cr.P. art. 651*, in pertinent part, provides that when a defendant is tried upon a plea of "not guilty," evidence of insanity or mental defect at the time of the offense shall not be admissible. Under *La. R.S.14:14*, the Louisiana codification of the *McNaughten* rule,[10] an offender is exempt from criminal responsibility only if he is incapable of distinguishing between right and wrong with reference to the conduct in question. As a result, evidence of a mental defect which does not meet the *McNaughten* definition of insanity cannot negate a specific intent to commit a crime and reduce the degree of the offense. *See State v. Deboue, 552 So.2d 355, 366 (La. 1989)* (while not claiming insanity at time of commission of the murders, defendant argued in vain that mental retardation rendered him incapable of forming specific intent for aggravated [**18] burglary of the murder victims' home).

10 *McNaughten's Case*, 1 Car. & K. 130 (1843).

Notwithstanding *La. C.Cr.P. art. 651*, the Louisiana Supreme Court has recognized a defendant's constitutional right to present a defense. *See State v. Whitton, 99-1953, p. 17 (La. App. 4 Cir. 9/27/00), 770 So.2d 844, 854* (citing *State v. Van Winkle, 94-0947 (La. 6/30/95), 658 So.2d 198*). In *Whitton*, this Court found [Pg 12] the trial court erred when it excluded evidence that the defendant suffered from blackouts caused by substance abuse to challenge the voluntariness of his confession. *Id., 99-1953 at p.14-17, 770 So.2d at 852-54*. The defendant maintained he had been truthful when he initially told police that he did not recall committing the multiple murders and had later been supplied with the facts that he related in his confession to police both before and during his recorded statement. *Id., 99-1953 at p. 14-15, 770* [*844] *So.2d at 852*. The *Whitton* court held that "some evidence of mental defect may be admissible when it concerns the circumstances surrounding the making of a confession in order to enable the jury to determine the weight to be given the confession." *Id., 99-1953 at p. 17, 770 So.2d at 854* [**19] (citing *La. C.Cr.P. art. 703(G)*[11] and *Van Winkle, 94-0947 at p. 8, 658 So.2d at 203* (suggesting the trial court erred when excluding evidence of defendant's mental state during her various inculpatory statements)).[12]

11 *La. C.Cr.P. art. 703(G)* provides:

> When a ruling on a motion to suppress a confession or statement is adverse to the defendant, the state shall be required, prior to presenting the confession or statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement.
>
> A ruling made adversely to the defendant prior to trial upon a motion to suppress a confession or statement does not prevent the defendant from introducing evidence during the trial concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement.

12 *See also Crane v. Kentucky, 476 U.S. 683, 689, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636, 644 (1986)* ("[R]egardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful [**20] motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubts on its credibility."); *State v. Williams, 01-1650, p. 8 (La.11/1/02), 831 So.2d 835, 843* (holding that the statutory rule of *La. C.Cr.P. art. 703(A)* which permits the defendant to introduce evidence at trial as to the circumstances surrounding his confession "has its underpinnings in the *Due Process Clause* and it necessarily operates independently of any credibility determinations the trial court made in ruling on the voluntariness of the statement as a matter of law.").

[Pg 13] Accordingly, there exists jurisprudential support for Mr. Williams' claim that he should have been allowed to introduce evidence concerning mental

retardation for the limited purpose of determining the weight to be accorded his statement. Nonetheless, the erroneous exclusion of this evidence is subject to the harmless error standard of review. *State v. Holmes, 06-2988, p. 48 (La.12/2/08), 5 So.3d 42, 76*. An error is harmless if it can be said beyond a reasonable doubt that the guilty verdict rendered [**21] in the case was surely unattributable to that error. *State v. Barbour, 09-1258, p. 14 (La. App. 4 Cir. 3/24/10), 35 So.3d 1142, 1150*.

The videotaped confession does not show any signs of Mr. Williams' claim of mental retardation.[13] His responses to Detective Packer are measured, cautious and precise. There is no indication he was confused during the statement, or that his responses were offered to please Detective Packer. In fact, in the beginning of the statement, he denies killing the victim. Then, as the statement continues, he admits that he shot the victim but quickly added that the shooting was in self-defense. Additionally, he challenges Detective Packer, that if, as the detective said, the police had video of the defendant shooting the victim, why was there no video of the defendant robbing the victim.

> 13 The defendant's confession was played in whole and in part numerous times during the trial.

Before any questioning by Detective Packer, Mr. Williams admitted he voluntarily appeared at police headquarters after seeing himself on the gas station surveillance video aired by the media and that he wanted to proclaim his innocence. Later in the interview, he said he used "a [*845] thirty-eight [**22] or three eighty" to shoot the victim. Mr. Williams' claim of mental retardation is thus questionable.

[Pg 14] Regardless, considering all of the evidence, the jury's unanimous verdict was unattributable to the exclusion of the defense expert's expected testimony regarding Mr. Williams' alleged subnormal I.Q., and thus was harmless error.

ASSIGNMENT OF ERROR NUMBER III

Mr. Williams argues the trial court erred in denying his motion to suppress his statement to the police. In support, he argues that he was not advised of his *Miranda* rights; he was restrained during the interrogation; and the statement was not voluntary, but rather constructed by Detectives Packer and Vappie.

This court has discussed the requirements for admitting into evidence an inculpatory statement, as follows:

> Before the state may introduce an inculpatory statement or confession into evidence, it must affirmatively show that the statement was free and voluntary and not the result of fear, duress, intimidation, menace, threats, inducements, or promises. *La. R.S. 15:451*; *La. C.Cr.P. art. 703(D)*; *State v. Gradley, 97-0641 (La. 5/19/98), 745 So.2d 1160, 1166*. The State must prove that the accused was advised of his *Miranda* [**23] rights and voluntarily waived these rights in order to establish the admissibility of a statement made during custodial interrogation. *State v. Green, 94-0887, pp. 9-10 (La. 5/22/95), 655 So.2d 272, 280*; *State v. Labostrie, 96-2003, p. 5 (La. App. 4 Cir. 11/19/97), 702 So.2d 1194, 1197*. A court must look to the totality of the circumstances surrounding the confession to determine its voluntariness. *State v. Lavalais, 95-0320, p. 6 (La.11/25/96), 685 So.2d 1048, 1053*. The testimony of police officers alone can be sufficient to prove the defendant's statements were freely and voluntarily given. *State v. Jones, 97-2217, p. 11 (La. App. 4 Cir. 2/24/99), 731 So.2d 389, 396*.

State v. Butler, 04-0880, p. 4 (La. App. 4 Cir. 1/27/05), 894 So.2d 415, 418.

Whether a statement was voluntary is a fact question. Thus, the trial court's ruling, based on conclusions of credibility and the weight of the testimony, is entitled to great deference and will not be disturbed on appeal unless there is no [Pg 15] evidence to support it. *State v. Byes, 97-1876, pp. 11-12 (La. App. 4 Cir. 4/21/99), 735 So.2d 758, 765*.

Mr. Williams' claim that he was not advised of his *Miranda* rights is without merit. Detective [**24] Packer testified both at the suppression hearing and at trial that he advised him of his *Miranda* rights at least twice before his statement and that Mr. Williams indicated he understood his rights. After being advised, Mr. Williams

signed a waiver of rights form. Detective Packer also noted, and Mr. Williams agreed, that Mr. Williams appeared at police headquarters voluntarily, stating that he wanted to give a statement. Moreover, Detective Packer advised Mr. Williams that he was not under arrest, and that he was free to leave the unlocked interview room at any time. The videotaped confession also confirms that Mr. Williams was advised of, understood, and waived his rights, and his statement was given of his own free will. Mr. Williams denied being coerced or offered any promises in return. The video shows that he was not restrained in any manner.

Where conflicting testimony is offered, credibility determinations lie within the sound discretion of the trial court, and his ruling will not be disturbed unless clearly contrary to the evidence. *State v. Gradley, 97-0641, pp. 9-10 (La. 5/19/98),* [*846] *745 So.2d 1160, 1166* (citing *State v. Vessell, 450 So.2d 938, 943 (La. 1984))*. The trial court [**25] found Detective Packer's testimony credible. Given the testimony adduced at the suppression hearing and at trial, there is no indication that the court abused its discretion in its credibility finding. *See State v. Carter, 99-2234, p. 18 (La. App. 4 Cir. 1/24/01), 779 So.2d 125, 138* (when reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider evidence given at trial.)

[Pg 16] Even assuming the trial court erred in denying Mr. Williams' motion to suppress his statement, the erroneous admission of a statement or confession is subject to a harmless error analysis. *State v. LeBlanc, 10-1484, p. 29 (La. App. 4 Cir. 9/30/11), 76 So.3d 572, 590*. Mr. Sabillion unequivocally identified Mr. Williams at trial as the shooter. Mr. Sabillion said he could never forget the face of the man who killed his friend. Thus, the verdict was unattributable to Mr. Williams' confession. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER IV

Mr. Williams argues that the trial court erred in denying his motion to suppress the identification on the grounds that it was unconstitutionally [**26] suggestive.

The law regarding suppression of out-of-court identifications is well-settled:

> To suppress an identification, a defendant must first prove that the identification procedure was suggestive. *State v. Prudholm, 446 So.2d 729, 738 (La.1984)*. An identification procedure is suggestive if, during the procedure, the witness' attention is unduly focused on the defendant. *State v. Robinson, 386 So.2d 1374, 1377 (La.1980)*. Moreover, a defendant who seeks to suppress an identification must prove both that the identification itself was suggestive and that a likelihood of misidentification existed as a result of the identification procedure. *State v. Valentine, 570 So.2d 533 (La. App. 4 Cir.1990)*.

The Supreme Court has held that even if the identification could be considered suggestive, it is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. *State v. Thibodeaux, 98-1673 (La.9/8/99), 750 So.2d 916, 932*. Fairness is the standard of review for identification procedures, and reliability is the linchpin in determining the admissibility of identification testimony. *Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977)*. [**27] Even a suggestive, out-of-court identification will be admissible if it is found reliable under the totality of circumstances. *State v. Guy, 95-0899 (La. App. 4 Cir. 1/31/96), 669 So.2d 517*. If a suggestive identification procedure has been proved, a reviewing court must look to several factors to determine, from the totality of the circumstances, whether the suggestive identification presents a substantial likelihood of misidentification at trial. *State v. Martin, 595 So.2d 592, 595 (La.1992)*. The U.S. Supreme Court has set forth a five-factor test to determine whether a suggestive identification is reliable: (1) the [Pg 17] opportunity of the witness to view the assailant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time

> between the crime and the confrontation. *Manson v. Brathwaite, Id.* The corrupting effect of [*847] the suggestive identification itself must be weighed against these factors. *Martin, 595 So.2d at 595*.

State v. Holmes, 05-1248, p. 6 (La. App. 4 Cir. 5/10/06), 931 So.2d 1157, 1161. Further, the trial court's [**28] determination on the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal in the absence of an abuse of discretion. *Holmes, 05-1248 at p. 7, 931 So.2d at 1161*.

Mr. Williams complains that rather than displaying a six-member photo lineup to Mr. Sabillion at police headquarters, Detective Packer, at Mr. Sabillion's home, showed him a freeze frame photo from the gas station video of the suspected perpetrator, from which he identified Mr. Williams as the killer.

At the January 26, 2012 suppression hearing, Detective Packer testified that he interviewed Mr. Sabillion, the eyewitness, twice after the shooting. In the first interview, three days after the shooting, he described the shooter as a black male wearing a black T-shirt and blue jean pants, who approached him and the victim at the gas station. Mr. Sabillion stated he had a good look at his face while at the gas station because the area was well lighted. At that time, Detective Packer showed Mr. Sabillion the gas station video, from which Mr. Sabillion identified himself, the victim and the shooter. Detective Packer testified that Mr. Sabillion did not display any hesitancy in identifying [**29] the black male in the video as the shooter.

During the second interview, Detective Packer provided Mr. Sabillion a freeze frame photo from the gas station video of the person Mr. Sabillion identified as the shooter. Mr. Sabillion confirmed that the photo was a picture of the shooter. Mr. Sabillion said he looked at the shooter as the shooter ran toward him and the [Pg 18] victim. Mr. Sabillion ran away only when the shooter was upon them aiming a gun at the victim's head. At that time, neither Detective Packer nor Mr. Sabillion knew the identity of the shooter. Detective Packer first learned the name of the shooter when Mr. Williams came to police headquarters after the media aired portions of the gas station video.

There are no signs that the video surveillance presented to Mr. Sabillion was suggestive. Detective Packer initially showed Mr. Sabillion the video so that he could identify himself and the victim. On his own account, Mr. Sabillion also identified the shooter in the video. Although showing the freeze frame photo from the footage is more problematic, consideration of the five *Manson* factors shows that the identification was reliable. Mr. Sabillion testified that he observed [**30] the shooter approach the victim at the gas station under good lighting conditions. He also testified that he looked directly at the shooter just before the shooting. Even after Mr. Sabillion's identification, the identity of the shooter was unknown and Detective Packer had no motive for Mr. Sabillion to identify Mr. Williams as the shooter. Further, Mr. Sabillion's in-court identification of Mr. Williams was unwavering. He positively identified him as the shooter. Moreover, defense counsel subjected Mr. Sabillion to thorough cross-examination on his identification of Mr. Williams as the man who shot the victim. Thus, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER V

Mr. Williams argues that he suffered violations of his right to due process pursuant to *Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)*, when the State suppressed evidence that it had offered Mr. Sabillion immigration assistance in exchange for his cooperation. Mr. Williams also argues [Pg 19] that the State compounded its error at trial by failing to [*848] correct Mr. Sabillion's false testimony pursuant to *Napue v. People of State of Ill., 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959)*, [**31] that he was testifying not "for any kind of [immigration] papers," but instead out of a desire to ensure that the victim's death would not "be in vain."

The *Brady* rule was summarized by this court in *State v. Hollins, 11-1435, pp. 23-24 (La. App. 4 Cir. 8/29/13), 123 So.3d 840, 858*, as follows:

> Due process requires the disclosure of evidence that is both favorable to the accused and material either to guilt or punishment. The *Brady* rule also requires the disclosure of evidence adversely affecting the credibility of government witnesses. *See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)*. When such information is not

> disclosed and it is material in that its suppression undermines the confidence in the outcome of the trial, then constitutional error occurs and the conviction must be reversed. *United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985)*. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id*. Materiality hinges on "not whether the defendant would more likely than not have received a different verdict with [**32] the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995)*. Further, the defendant must show that "'disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.'" *State v. Marshall, 81-3115, 94-0461 (La.9/5/95), 660 So.2d 819, 826* (quoting *Kyles, 514 U.S. at 441, 115 S.Ct. at 1569*).

The *Napue* case stands for the principle that where a prosecutor allows a state witness to give false testimony without correction, a reviewing court must reverse the conviction if the testimony reasonably could have affected the jury's verdict, even if the testimony goes only to the credibility of the witness. *360 U.S. at 269-70, 79 S.Ct. at 1177*.

[Pg 20] At trial, Mr. Sabillion testified that about two months after the murder,[14] two representatives from the public defender's office came to speak to him at his house. Mr. Sabillion believed the individuals were police personnel - "the ones who were defending [the victim]." Under the impression he was speaking to the police, Mr. Sabillion told the two [**33] representatives what happened the night of the shooting. The representatives composed a statement for him, and he signed it.[15] The defense investigators returned a second time and "said for us to withdraw the statement; that [the defendant] couldn't be jailed."

14 On cross examination, it was established that the date was January 19, 2012.

15 During trial, defense counsel referred to the statement as Defense Exhibit 1 and showed the document to Mr. Sabillion during cross examination. However, the record shows that the defense never introduced the statement into evidence.

Mr. Williams claims that Mr. Sabillion indicated to the defense investigators that the police offered to help him obtain a visa in exchange for his testimony against the defendant, and to that end gave him the name and telephone number of an immigration attorney to assist him. At the conclusion of Mr. Sabillion's cross examination, defense counsel unsuccessfully [*849] moved for mistrial arguing that the State committed a *Brady* violation by withholding exculpatory evidence of the State's promise to assist Mr. Sabillion in exchange for his testimony.

Under the *Brady* rule, there is no violation "where a defendant knew or should have [**34] known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source, because in such cases there is really nothing for the government to disclose." *State v. Hobley, 98-2460, p. 25 n. 10 (La. 12/15/99), 752 So.2d 771, 786*.

Here, there was no *Brady* violation. The defense was well aware prior to trial that Mr. Sabillion claimed, and Detective Packer denied, that the State offered [Pg 21] him assistance with his immigration status. The defense investigators reported the allegation in the statement they composed and wrote for Mr. Sabillion. Moreover, defense counsel thoroughly explored that issue during its cross-examinations of Mr. Sabillion and Detective Packer in an effort to impeach both witnesses.

Nor was there a *Napue* violation. During the State's case in chief, Detective Packer denied making any promises to Mr. Sabillion in exchange for his testimony. Detective Packer's testimony during cross-examination was also a blanket denial of any offers of assistance. Further, Mr. Sabillion could not remember who made the offer or when it was made. Most significant, Mr. Sabillion emphatically stated that he testified [**35] only because Mr. Williams was the man who killed his friend. He denied doing so out of self-interest. Finally, there is no evidence in the record that Mr. Sabillion

actually received any assistance from the State.

Even assuming the facts written by the defense investigator in the statement Mr. Sabillion signed are true, Mr. Williams has not shown any prejudice because he was aware of the information before trial and used it to his best advantage at the trial. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER VI

Mr. Williams argues that the trial court erred in not finding a pattern of racially motivated peremptory challenges when the State utilized eleven of its twelve peremptory challenges to strike African Americans from the jury. Mr. Williams argues a violation of his rights to due process and equal protection.

In *Batson v. Kentucky, 476 U.S. 79, 104, 106 S.Ct. 1712, 1727, 90 L.Ed.2d 69 (1986)*, the United States Supreme Court held that the *Equal Protection Clause* [Pg 22] prohibits the use of peremptory challenges to discriminate on the basis of race.[16] The Supreme Court established a three-step analysis to determine whether a peremptory challenge has been used in violation [**36] of the *Equal Protection Clause*. The district court must first determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis [*850] of race. *Batson, 476 U.S. at 94-97, 106 S.Ct. at 1722-23*. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. *Batson, 476 U.S. at 97, 106 S.Ct. at 1723*. This second step "does not demand an explanation that is persuasive or even plausible," as long as the reason is not inherently discriminatory. *Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995)*. Finally, the court must determine whether the defendant established purposeful discrimination. *Batson, 476 U.S. at 98, 106 S.Ct at 1724*.

16 *Batson* has been codified in Louisiana Law under *La. C. Cr. P. art. 795(C)*, as follows:

> No peremptory challenges made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror, solely on the basis of race, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory [**37] racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

In *Snyder v. Louisiana, 552 U.S. 472, 477, 128 S.Ct. 1203, 1208, 170 L.Ed.2d 175 (2008)*, the Supreme Court reemphasized the district courts' role under the third step of *Batson*: to carefully scrutinize the plausibility of the prosecutor's explanation for a peremptory strike by evaluating the prosecutor's credibility, assessing "not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor."

[Pg 23] In this case, at the end of the first panel of voir dire, the State exercised six peremptory challenges as to potential jurors Joseph, Butler, Villavaso, Marshall, Sansom and Davis. The defense made a *Batson* challenge, noting all foregoing potential jurors were either "black male or female."

The State responded to the trial court's request that it supply [**38] race-neutral reasons for the record for excusing the jurors:

> . . . [Ms. Joseph] was the foreperson on a burglary that came back not guilty. She also was the person that first began the conversation about coercion, in talking about statements given by defendants. And she also said the testimony and evidence needs to be really strong if she's depending on an eyewitness.
>
> . . . Mr. Butler, I believe he was just this month on a criminal trial where he returned, of the four counts, I believe it was three not guilty verdicts. The court - - the jury returned three not guilty verdicts. He also, when asked about statements

given by defendants, was the first to offer up the possibility that the defendant may have been beaten outside of the interview room prior to confessing.

. . . Ms. Villavaso was the first one to, I guess, mention cognitive ability. She's a special-ed teacher. She talked about mental ability of a person with regard to them giving a confession.

Mr. Marshall, judge , when -- you know, speaking about confessions - - went into a long conversation about someone may be taking the fall for another person and how one person may have a positive background and a person with a negative background [**39] would step up and, essentially, take the fall for the person who's going somewhere with their life...

. . . Mr. Sansom - - well, first, when talking about the possibility of a life sentence and needing proof beyond a reasonable doubt, as opposed to proof beyond all doubt, I believe Ms. Burton said she wanted a higher level of proof. Mr. Sansom at that time began to nod his head in agreement with - - I believe it was Miss Burton.

He was also on the case with Mr. Butler, where there were four counts and there were three not guilty verdicts on four counts...

[Pg 24] Mr. Davis. . . he - - well, first of all, there was a point where I thought him and [co-prosecutor] were about to engage in an argument.... And had somewhat bad body language throughout [*851] after that interaction with [the co-prosecutor]. He went on to kind of talk about confessions... And if they have a certain mental state and they're tired and they get drilled mentally, then they would just go ahead and confess to something that they didn't do.

The trial judge denied the defense's *Batson* challenges.

Following the second round of voir dire, the State excused jurors West, Carter, Washington, Jackson and Ballard. The defense raised [**40] a *Batson* objection noting that the five jurors excused were African-Americans, which, he maintained, constituted a pattern of racial exclusion. The trial court disagreed, stating:

> . . . I disagree with you.... I mean, the pattern may be that they're African American; but they have to strike them simply because of that. And what I'm saying to you is I do recognize that as to West, I recall the answer that he gave, Mr. Washington.
>
> ...For Miss Ballard I do recall the answers that she gave and Miss Ballard's body language.[17] But I will ask the State specifically as to Miss Carter - - Miss Carter and Miss - - Mr. Jackson...[18]
>
> Prosecutor:
>
> With regards to Miss Carter... [Defense counsel] was asking for ratings of the New Orleans Police Department. Mr. West responded that he would give 'em a zero and started laughing about it. And Miss Carter was who he was talking to.
>
> She was laughing along with Mr. West, as well. During the actual voir dire of this panel, she appeared disinterested and kind of had a - - you know, slouched down in the chair, as if she didn't want to be asked any questions....
>
> . . . Mr. Jackson has a prior arrest...

17 Although defense counsel requested the State's reasons for rejecting [**41] West, Washington and Ballard, the trial court denied the *Batson* challenge, stating it recalled the responses of those jurors. (West said he did not approve of police lying to a suspect. Washington said police have been known to "trick" defendants into confessing. Ballard said he served on a jury but

could not recall any details.)

18 *La. C.Cr.P. art. 795(C)* permits a trial judge to note a race-neutral reason for a peremptory challenge based upon the voir dire examination of a juror. *See* n.16, *supra*.

[Pg 25] A neutral explanation for use of peremptory strikes must be clear, reasonably specific, legitimate, and related to the case at bar. *Purkett, 514 U.S. at 768-69, 115 S.Ct. at 1771*. A neutral explanation is an explanation based on something other than race. *Hernandez v. New York, 500 U.S. 352, 374, 111 S.Ct. 1859, 1874, 114 L.Ed.2d 395 (1991)*. A prospective juror's inattentiveness and body language have been held to be valid race-neutral reasons for exercising a peremptory challenge. *State v. Jacobs, 09-1304, p. 10 (La. 4/5/10), 32 So.3d 227, 234*. Further, prospective jurors who have potential ill will toward police may be peremptorily challenged. *State v. Jones, 42,531, p. 6 (La. App. 2 Cir. 11/7/07), 968 So.2d 1247, 1252*.

Here, [**42] none of the reasons offered by the State are inherently based on race. Butler was excused because he returned a not guilty verdict in a recent criminal matter. Villavaso and Marshall expressed doubt about a defendant's cognitive ability, possibly undermining the State's contention that the defendant voluntarily confessed. Sansom said he would hold the State to a standard of proof higher than beyond a reasonable doubt. Davis, [*852] Carter and Jackson displayed bad body language. West and Washington indicated they did not trust the police. Ballard appeared disinterested. The State found Jackson unfit because of his arrest record and stated that he did not engage in conversation with the State or the defense.[19]

19 This case is distinguishable from *State v. Bender, 12-1682, p. 1 (La. App. 4 Cir. 7/17/13), 120 So.3d 867, 868, writ granted, 13-1794 (La. 3/14/14), 134 So. 3d 1184, 2014 La. LEXIS 683*, in which this court reversed the defendant's conviction finding the district court erred in accepting the State's use of a juror's prior convictions as a race-neutral reason for a peremptory strike during a *Batson* challenge. In this case, the prosecutor referenced Mr. Jackson's arrest record as a reason for the peremptory strike; however, [**43] the prosecutor also stated that Mr. Jackson did not engage in conversation with the State or the defense, thus providing another race-neutral reason for the peremptory strike.

A reviewing court owes the trial court's evaluations of discriminatory intent great deference and should not reverse unless the evaluations are clearly erroneous. [Pg 26] *Hernandez, 500 U.S. at 364-65, 111 S.Ct. at 1868-69*. The trial judge heard and saw the potential jurors and concluded that the State articulated race neutral reasons as to each potential juror excluded. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER VII

Mr. Williams argues reversible error in the trial court's failure to grant a mistrial after the prosecutor made improper arguments in its rebuttal closing argument. Mr. Williams asserts that the arguments violated his rights to counsel, due process, fair trial, and against self-incrimination. Further, he argues that some of the State's arguments were prejudicial to the defense in that they amounted to personal attacks on defense counsel, impugned defense counsel's integrity in the eyes of the jury, or both.

Under *La. C.Cr.P. art. 774*, the scope of the argument is limited to evidence [**44] introduced, the lack of evidence, and conclusions that may be drawn therefrom. It specifically warns that "[t]he argument shall not appeal to prejudice." Additionally, *La. C.Cr.P. art. 775* provides for a mistrial in a jury case when prejudicial conduct has made it impossible for the defendant to obtain a fair trial.

"Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the ... district attorney ... in argument, refers directly or indirectly to ... [t]he failure of the defendant to testify in his own defense [.]" *La. C.Cr.P. art. 770(3)*. "To warrant a mistrial, the inference must be plain that the remark was intended to bring to the jury's attention the failure of the defendant to testify." *State v. Allen, 03-2418, p. 37 (La. 6/29/05), 913 So.2d 788, 812* (citing *State v. Stephenson, 412 So.2d 553, 557 (La. 1982))*.

In closing argument, defense counsel argued that Detective Packer tricked Mr. Williams into making a false confession. Defense counsel further argued that [Pg 27] the evidence shows that the victim was actually shot during a drive-by shooting, contrary to Mr. Sabillion's description. Lastly, during both his [**45] opening

statement and closing argument, defense counsel stated that Mr. Williams knew who committed the murders, but he could not reveal the identity of the true killer(s) because Mr. Williams and his family would be in danger.

The defense lodged eleven contemporaneous objections to the prosecutor's remarks during its rebuttal closing argument, which were as follows:

> . . . [defense counsel's] job is to manufacture doubt, . . . And so what the defense [*853] attorney has as a benefit is that when the case begins he doesn't necessarily have to have a defense then. . . . And as the evidence unfolds, he doesn't necessarily have to have a defense then. When his defendant goes in and gives a confession, he doesn't necessarily have to have his story together then. The trial begins. You hear opening statement. He doesn't necessarily have to lay out a story then. And as everything unfolds, you arrive at the end, at closing arguments. And then that's when they give you the story that they want you to believe.
>
> . . .
>
> We took evidence. The investigator went out. He investigated everything. Was compiled into a police report. It's been the same story, over and over again. You heard [defense counsel] talk to [**46] you about a preliminary hearing and then a motions hearing. And every time it was the same evidence, the same evidence, the same testimony. And every time [defense counsel] has tried to find different ways to say this wasn't right, that wasn't right.
>
> . . .
>
> Now we know that was a lie, right. That changes relatively quick. You hear about his second defense. And his second defense essentially turns into what it has to turn into in the moment; which is, yeah; I was out there and yeah I was with 'em. Stuff just went bad. Somebody else shot him. That was the second defense that you heard about. Then there was the third defense. He establishes. Yes, I was out there. Yes, everything went bad. And yes it was me who shot him. Then his lawyers get involved. Now, when his lawyers get involved, they realize now he has confessed to this crime . . . Not only did the defendant confess to this crime; but another hurdle that they had to jump was the fact that he had been identified; identified by an eyewitness, the lone eyewitness; who was out there that night. . . . Now, at that time no name was known, right.
>
> . . .
>
> So that was the next effort at a defense, right. Then he refused that. So then what do they [**47] do? The next best thing. They wrote out a [Pg 28] statement for [Carlos Sabillion]. They wrote out a statement for him and got him to put his name on it; a statement that he said he never even read. And I want you to look at something on that statement. I mean, the last time I checked when I was listening to the testimony, the witness said his name was Carlos Sabillion. Now, if you look at this -- the bottom is signed -- it says Carlos Gonzales.
>
> . . .
>
> This brilliant narration that you heard from the defense attorney. He put up this big video for you and gave you this whole alternate -- this whole alternate universe, this whole alternate world about how everything took place. No evidence; no testimony. He narrated a video.
>
> . . .
>
> Now, [defense counsel] wants to tell you about lies, lies, lies. But that's his job. I mean, he's not going to point out to you inconsistencies.
>
> . . .
>
> Don't be mistaken. When there's a

hearing called a motion to suppress hearing, the judge listens to the evidence -- the judge listens to the testimony. That statement would not have come to you if it was not admissible.

. . .

So you gotta ask yourself; why did we spend three hours listening to questions [*854] to Detective Vappie [**48] about all these portions in the investigation that he wasn't involved in? It's a tactic to obscure the truth.

. . .

Why would the victim in that matter point out a random guy on the video if the guy wasn't responsible? And at that point nobody knew his name; nobody knew if he was ever going to turn himself in. If they never got any Crimestopper tips, the investigation would have ended there. So to act as if Detective Packer had something -- some axe to grind or just wanted to get this guy and end this case -- there's tons of open homicide cases. That doesn't even make sense. That story does not fly.

. . .

And he's basically creating a video of himself, telling lies over and over and over again. And one lie begets another lie. So we get to the end of that pre-interview. Defense attorney wants to say that we showed you the end of that interview because we wanted you to think less of this young man because he was in there rapping. Now I happen to know the song that he was rapping. So I don't want you to think less of him, simply because of the lyrics of the song. But I want you to take note of what song he was rapping.

. . .

So [defense counsel's] going to have to be like repeating him. He's [**49] going to have to make something up that sounds really, really good and really, really believable. And he made something up. I submit to you it's not believable. It shouldn't even be considered. [Pg 29] Cause he told you -- what did he say when he said? He said; it's not in evidence; but I bet you that he knew the real shooter carried a .38. What? What? How do we--how do we -- so is he a witness to this? Was he there? Does he know who did it? Does he not know who did it? I still don't know that. I still can't tell. Cause in the opening statement, they made it sound as if he was going to be a witness. They made it sound as if he was on the scene.

Louisiana jurisprudence allows prosecutors wide latitude in choosing closing argument tactics. *See, e.g., State v. Martin, 539 So.2d 1235, 1240 (La.1989).* Even assuming that remarks are inappropriate, a conviction will not be reversed due to an improper remark during closing argument unless the court is thoroughly convinced that the remark influenced the jury and contributed to the verdict. Further, much credit should be accorded to the good sense and fair-mindedness of jurors who have seen the evidence and heard the arguments, and have been instructed [**50] by the trial judge that arguments of counsel are not evidence. *State v. Martin, 93-0285, p. 18 (La. 10/17/94), 645 So. 2d 190, 200.*

Here, none of the remarks of the prosecutor appear to be so egregious to warrant a mistrial. The bulk of the State's arguments were fair statements of the evidence admitted and the lack of evidence to corroborate the defense's theory of the case. The comments about defense counsel were not personal attacks but references to defense counsel's job performance.

There is no indication in the record that the prosecutor's remarks so inflamed the jury that it influenced their verdict. Additionally, the record indicates that the jury was specifically instructed that opening statements and closing arguments were not to be considered as evidence and that anything the prosecutor and defense counsel said was simply argument.

[*855] As to Mr. Williams' argument that the State improperly highlighted his failure to testify, an indirect reference to a defendant's failure to take the stand [Pg 30]

warrants a mistrial only when it is clear that the remark was intended to focus the jury's attention on the defendant's failure to testify. *State v. Mitchell, 00-1399, p. 5 (La. 2/21/01), 779 So.2d 698, 701*. [**51] The jurors were informed of Mr. Williams' constitutional privilege against self-incrimination and reminded of that privilege by the judge during jury instructions. Mr. Williams has failed to show any prejudice from the State's rebuttal arguments.

Nevertheless, a trial court's erroneous denial of a motion for mistrial based on one of the provisions of *La. C.Cr.P. art. 770* is subject to the harmless error analysis. *State v. Whins, 96-0699, p. 8 (La. App. 4 Cir. 4/9/97), 692 So.2d 1350, 1355*. Here, the testimony of an eyewitness, Mr. Sabillion, that he will never be able to forget Mr. Williams' face because he was the man who killed his friend, even in the absence of Mr. Williams' confession, proves his guilt. The State's closing argument did not contribute to the verdict. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER VIII

Mr. Williams argues that the trial court violated *La. C.Cr.P. art. 793* by allowing the jury to view Mr. Williams' videotaped statement during deliberations.

During deliberations, the jurors sent a note to the judge asking to review Mr. Williams' videotaped confession, the surveillance video, and the 911 call. The judge determined that the law allows the [**52] jury to view the confession and surveillance video in the jury room, subject to prohibitions against freeze framing, zooming, or manipulating the videos in any manner. However, defense counsel objected because he was concerned about the potential for manipulation. Thus, the judge decided to play the videos in the courtroom. At this juncture, the following colloquy occurred:

> [Pg 31] Judge: Well, those are the only options, [defense counsel]. So either you're going to sit here and we're going to play it with them for the next hour and half or the only other option is to allow a deputy to go in [the jury room] with those instructions [no freeze framing, zooming or manipulation]. . . So what is your choice? Those are the only two options. . . I have to let them see it. I think that the code article allows them to view it.
>
> Defense Counsel: Right.
>
> Judge: So if you have an objection -- and I think it allows them to view it in the jury room.
>
> Defense Counsel: Why don't you do that and just note my objection.
>
> Judge: No. It is my position if you have an objection, then I'm not doing it.
>
> * * *
>
> Judge: So I was going to play the 911 as they sit out here. They have to come out. So I need to put it on the [**53] record. . . . But as far as the video, I know that it was lengthy. So I was going to let it go in the back, as well. Have any objections?
>
> Defense Counsel: I do, judge, I do think that we do object.
>
> Judge: All right. So we'll do it in open court?
>
> Defense Counsel: Yeah.

As for the foregoing colloquy indicates, defense counsel did not articulate an objection to the jurors viewing the videos. Rather, the defense counsel objected to the jurors viewing the videos out of the presence of the court because of his fear [*856] the jurors might manipulate the video. This exchange indicates that defense counsel acquiesced to the jury viewing the videos in open court.

In this case, the defense counsel failed to file a contemporaneous objection to the jury viewing the video in open court. The contemporaneous objection rule of *La. C.Cr.P. art. 841(A)* provides that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of the occurrence," and the party stated the grounds for the objection. *State v. Richards, 99-0067, p. 4 (La. 9/17/99), 750 So.2d 940, 942*. The two purposes behind the contemporaneous objection rule [Pg 32] are as follows: (1) to put the trial court [**54] on notice of the alleged irregularity or error, so that the court can cure the error; and (2) to prevent a party from

gambling for a favorable outcome and then appealing on errors that could have been addressed by an objection if the outcome is not as hoped. *State v. Knott, 05-2252, p. 2 (La. 5/5/06), 928 So.2d 534, 535*. Thus, this issue has not been preserved for appellate review.

Regardless, if the error had been preserved for review, Mr. Williams has failed to show how he was prejudiced by the jury re-viewing the confession during deliberations. The jury saw the confession video numerous times during trial, a few times at the request of defense counsel. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER IX

Mr. Williams argues that his life sentence without benefit of parole, probation, or suspension of sentence equates to cruel and unusual punishment.

The *Eighth Amendment of the United States Constitution* prohibits the infliction of "cruel and unusual punishments." The *Cruel and Unusual Punishment Clause* circumscribes the criminal process in three ways: (1) it limits the kinds of punishment that can be imposed on those convicted of crimes; (2) it proscribes punishment [**55] grossly disproportionate to the severity of the crime; and (3) it imposes substantive limits on what can be made criminal and punished as such. *Ingraham v. Wright, 430 U.S. 651, 667, 97 S.Ct. 1401, 1410, 51 L.Ed.2d 711 (1977)*.

The Louisiana Constitution likewise declares that no law shall subject any person to cruel, excessive, or unusual punishment. *La. Const. Art. I, § 20*. A sentence violates *La. Const. Art. I, § 20* if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless infliction of pain and suffering. *State v. Smith, 01-2574, p. 4 (La. 1/14/03), 839 So.2d 1, 4*. A sentence [Pg 33] is grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice. *State v. Weaver, 01-0467, p. 11 (La. 1/15/02), 805 So.2d 166, 174*.

Mr. Williams argues that because he was a juvenile with mental retardation at the time of the shooting, his culpability for the crime is dramatically reduced.

However, Mr. Williams' documented age was nineteen at the time he murdered the victim. He has no history of mental illness; he attended school without special education classes; he is not receiving [**56] government income (disability benefits); and he claims to have supported his children. The State's experts found him competent to stand trial and capable of assisting counsel in his defense. The crime was perpetrated in a heinous and cruel manner. The defendant robbed the victim and in the process shot the unarmed victim, leaving him to bleed to death in the street.

[*857] Mr. Williams was convicted of second degree murder, a violation of *La. R.S. 14:30.1*, which carries a mandatory sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The Legislature determines the length of the sentence imposed for crimes classified as felonies, and the courts are charged with applying these punishments unless they are found to be unconstitutional. *State v. Armstrong, 32,279, p. 15 (La. App. 2 Cir. 9/22/99), 743 So.2d 284, 294*. The assertion that the mandatory life sentence for second degree murder is a violation of the prohibition against excessive punishment in the Louisiana Constitution has been rejected. *See State v. Bunley, 00-0405, pp. 24-25 (La. App. 4 Cir. 12/12/01), 805 So. 2d 292, 308*; *State v. Jenkins, 98-2772, p. 6 (La. App. 4 Cir. 3/15/00), 759 So. 2d 861, 865*. [**57] Further, a life sentence for an offender younger than Mr. Williams has been declared constitutional. *See State v. [Pg 34] Jacobs, 07-0887, p. 87 (La. App. 5 Cir. 5/24/11), 67 So.3d 535, 594* (life sentence for sixteen-year old defendant convicted of second degree murder was not excessive). Therefore, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER X

Mr. Williams argues that because the record is incomplete and has no perceived order, his rights to effective assistance of counsel, due process, and appellate review have been curtailed.

La. Const. art. I, § 19. provides that "[n]o person shall be subjected to imprisonment ... without the right of judicial review based upon a complete record of all evidence upon which the judgment is based."

In felony cases, the recording of "all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel" is statutorily required. *La. C.Cr.P. art. 843*.

A slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal would not [**58] cause a reversal of a defendant's conviction. *State v. Allen, 95-1754, p. 11 (La. 9/5/96), 682 So.2d 713, 722*. Indeed, an incomplete record may nonetheless be adequate for appellate review. *State v. Hawkins, 96-0766, p. 8 (La. 1/14/97), 688 So.2d 473, 480*; *State v. Campbell, 06-0286, p. 99 (La. 5/21/08), 983 So.2d 810, 872-73*. A defendant will not be entitled to relief on the basis of an incomplete record absent a showing that he was prejudiced by the missing portions of the record. *Campbell, supra.*

Here, Mr. Williams has not identified the missing portion or portions of the record. The record contains opening and closing arguments, court minutes, all witness testimony and evidence introduced during the trial, including the [Pg 35] surveillance video, Mr. Williams' confession, and the recording of the 911 call, as well as the transcription of the voir dire and objections lodged therein. Although, the record was not assembled in chronological or sequential order, it is complete for purposes of appellate review. Mr. Williams has failed to show that there are any material omissions from the trial transcript, or that he has suffered any prejudice because of the record's lack of chronological [**59] order. *Campbell, supra.* Thus, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER XI

Lastly, Mr. Williams argues that "the combination of errors, arguably harmless in the singular instance, resulted in the [*858] deprivation of due process of law, a fair trial, and a reliable sentencing determination."

As discussed above, none of the alleged errors raised by Mr. Williams individually constitutes reversible error. The cumulative effect of alleged errors complained of by a defendant on appeal, none of which constitutes reversible error individually, does not deprive the defendant of his right to a fair trial, and thus does not constitute reversible error. *See State v. Draughn, 05-1825, p. 70 (La. 1/17/07), 950 So.2d 583, 629* (citing *State v. Copeland, 530 So.2d 526, 544-545 (La. 1988))*. Further, the cumulative effect of harmless errors does not warrant reversal of a conviction or a sentence. *State v. Tart, 93-0772, pp. 55 (La. 2/9/96), 672 So.2d 116, 154*. This assignment of error lacks merit.

MOTION TO DESIGNATE ATTACHED EXHIBITS

On September 9, 2013, Mr. Williams filed with this court a Motion to Designate Attached Exhibits as Part of the Record on Appeal. The exhibits are a single [**60] disc of Mr. Williams' entire recorded statement, a transcript of that [Pg 36] statement, and a statement from Carlos Sabillion[20] setting forth the terms of the deal he allegedly struck with the State in exchange for his cooperation in this case.

20 Although the defense asserts the statement is from Carlos Sabillion, the statement is signed "Carlos Gonzales M."

A court of appeal is a court of record, which must limit its review to evidence in the record before it. *Board of Directors of Industrial Development Bd. of City of New Orleans v. All Taxpayers, Property Owners, Citizens of the City of New Orleans, 03-0826, p. 4 (La. App. 4 Cir. 5/29/03), 848 So.2d 740, 744* (citing *La. C.C.P. art. 2164*). An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. *Littlejohn v. Quiram, 01-0075, p. 2 (La. App. 4 Cir. 10/24/01), 800 So. 2d 73, 74.*

The disc of Mr. Williams' videotaped confession is already in the record on appeal in the form of three separate discs, broken down into pre-interview, main interview, and final statement. Thus, additional copies of the videotaped confession need not be attached. The transcription of the confession was not [**61] introduced at trial or shown to the jury, and thus this exhibit cannot be attached on appeal. Mr. Sabillion's statement was not introduced at trial or made part of the formal record on appeal, and thus the transcription also cannot be attached on appeal. Thus, Mr. Williams' Motion to Designate Attached Exhibits as part of the Record on Appeal is denied.

DECREE

For the foregoing reasons, Mr. Williams' conviction and sentence for second degree murder of Selvin Gonzales is affirmed. Mr. Williams' Motion to Designate Attached Exhibits as Part of the Record on Appeal is denied.

AFFIRMED; **MOTION DENIED**

DISSENT BY: Roland L. Belsome

DISSENT

BELSOME, J., DISSENTS WITH REASONS

I respectfully dissent from the majority opinion on the *Batson*[1] issue. In particular, I find that the State was required to submit race-neutral explanations on all of the jurors during the second *Batson* challenge. Thus, the trial court erred in substituting [*859] its ***own*** race-neutral reasons for that of the State.

1 *Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).*

During the second round of voir dire, the State excused five African-American jurors: West, Carter, Washington, Jackson, and Ballard. The defense then noted its second *Batson* [**62] challenge. After acknowledging the alleged race-based strikes, the trial court required the State to offer explanations for Carter and Jackson; however, it did not require the State to offer any explanations for West, Washington, or Ballard, as it found these jurors' responses, and/or body language made the reasons apparent.

It is clear from the trial court's statements that it found a prima facie case of racial discrimination. The burden then shifted to the State to present race-neutral explanations for the strikes. *Batson, 476 U.S. at 97, 106 S.Ct. at 1723*; *State v. Green, 94-887, p. 25 (La. 5/22/95), 655 So.2d 272, 288*. As the Louisiana Supreme Court has repeatedly noted, "the ultimate focus of the *Batson* inquiry is on the prosecutor's intent at the time of the strike." *State v. Juniors, 03-2425, p. 32 (La. 6/29/05), 915 So.2d 291, 319 (Weimer, J., writing for the majority)* (citing *Green, 94-887 at 24, 655 So.2d at 287*. As discussed in *Johnson v. California, 545 U.S. 162, 171-72, 125 S.Ct. 2410, 2418, 162 L.Ed.2d 129 (2005)*, the most significant element of the analysis is the actual reason the State struck the potential juror, not the court's speculation. Furthermore, if the State's [**63] reason is superficial, the discriminatory implication is not overcome because a trial judge, or an appeals court, can formulate a legitimate reason. *Miller--El v. Dretke, 545 U.S. 231, 252, 125 S.Ct. 2317, 2332, 162 L.Ed.2d 196 (2005). See also State v. Elie, 05-1569 (La. 7/10/06), 936 So.2d 791, 804*, (Calogero, J., and Kimball, J., dissenting).

This writer appreciates the pressure a trial court is under to expedite congested dockets as quickly as possible. This undertaking may have caused the court to interject its observations or opinion for that of the prosecutor in an attempt to accelerate the trial. However, in doing so, it inadvertently assumed the State's burden to provide a race-neutral explanation, and sidestepped the most critical step of the *Batson* analysis.

Often times, in serious cases, such as this one, we find these reversible violations. The Louisiana Supreme Court, in *Elie, supra*, relied on *La. C.Cr.P. art. 795(C)*[2] in finding that the State is not required to articulate a race-neutral reason if "the court is satisfied that such reason is apparent from the voir dire examination of the juror." *Id., 05-1569 at pp. 7-8, 936 So.2d at 797*. However, the United States Supreme [**64] Court has made clear in *Batson, Johnson*, and *Miller El* that the State is obligated to offer a race-neutral reason. The judge is an arbiter not a participant in the judicial process. Allowing the court to provide race-neutral reasons for the State violates Due Process as well as Equal Protection. These Constitutional guarantees should be vigorously protected.

2 *See La. C.Cr.P. art. 795(C)*, which provides:

> No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory race or gender neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

[*860] Accordingly, I would reverse the defendant's conviction and sentence, and remand for a new trial.

STATE OF LOUISIANA VS. JABARI WILLIAMS

NO. 2014-K-1231

SUPREME COURT OF LOUISIANA

2014-1231 (La. 01/16/15); *2015 La. LEXIS 78*

January 16, 2015, Decided

NOTICE:

THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD. DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: [*1] IN RE: Williams, Jabari; - Defendant; Applying For Writ of Certiorari and/or Review, Parish of Orleans, Criminal District Court Div. E, No. 508-064; to the Court of Appeal, Fourth Circuit, No. 2013-KA-0283.

State v. Williams, 137 So. 3d 832, 2014 La. App. LEXIS 1108 (La.App. 4 Cir., 2014)

JUDGES: Marcus R. Clark, Bernette J. Johnson, Jeannette Theriot Knoll, John L. Weimer, Greg G. Guidry, Jefferson D. Hughes, III, Scott J. Crichton.

OPINION

Denied.