NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 2150

STATE OF LOUISIANA

VERSUS

ROBAE EARVON AUSTIN

Judgment Rendered: June 8, 2012

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On Appeal from the
21st Judicial District Court,
In and for the Parish of Livingston,
State of Louisiana
Trial Court No. 24666

Honorable Zorraine M. Waguespack, Judge Presiding

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Robae Earvon Austin Angola, LA	Defendant-Appellant Pro Se
Bertha M. Hillman Thibodaux, LA	Attorney for Defendant-Appellant, Robae Earvon Austin
Scott M. Perrilloux District Attorney	Attorneys for Appellee, State of Louisiana
Patricia Parker Amos Assistant District Attorney Amite, LA	

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Robae Earvon Austin, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed motions for new trial and postverdict judgment of acquittal, which were denied. The defendant was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two counseled assignments of error and three pro se assignments of error. We affirm the conviction amend the sentence, and affirm the sentence as amended.

FACTS

On July 23, 2009 at about 11:00 p.m., Gregory Brumfield, while standing on Drake Road in Livingston Parish, was shot and killed. Eyewitnesses testified that they saw a small red truck drive away from Brumfield immediately after he was shot. Cedric McClain testified at trial that he lived on Drake Road. He was outside between 10:00 p.m. and 11:00 p.m. washing his car on the night Brumfield was shot. According to McClain, a red truck with two black people in it passed by his house. The truck had a white stripe at the bottom and one of the hubcaps was different. The driver in the truck was wearing a red bandana on his face like a ski mask. The bandana also had black and white colors in it. When the truck got to the end of the street, McClain heard gunshots.

Jockel Hilliard testified at trial that he lived on Ed Brown Road, which meets Drake Road. On the night of the shooting around 11:00 p.m., Hilliard was outside. Hilliard saw Brumfield, greeted him, then sat down in his (Hilliard's) yard. Hilliard heard gunshots. He ran toward Brumfield and saw a little red truck at a stop sign at the end of Drake Road. The truck turned left. Hilliard went to Brumfield, who was lying on the ground, shot, but still alive. Brumfield told

Hilliard, "I can't believe he shot me." Hilliard went back to his house to tell his mother, who called 911.

John Lamonte testified at trial that he and his girlfriend, Jennifer Stewart (now his wife), went to Tillman Park on the afternoon of the shooting to purchase crack cocaine from the defendant. Lamonte and Stewart had bought crack from the defendant in the past. The defendant was always in the same location when he sold the crack to them - in front of an abandoned house. The house had the numeral 700 on the side of it, spray-painted in very large digits. Later that same evening, sometime between 9:00 p.m. and 10:30 p.m., Lamonte and Stewart went back to the defendant to buy more crack. They did not have any money, so they asked the defendant to "front" them the crack. The defendant told them no, but said he would get crack for them if Lamonte let him use his truck. Lamonte had a small red 1994 Mazda truck with a white stripe along the bottom. Lamonte agreed to let the defendant use his truck. Lamonte saw that the defendant had a gun and told him he could not get in his truck with the gun. The defendant handed the gun to someone. Lamonte and the defendant then drove to Lamonte's house (his parents' house), which was a few minutes away from Tillman Park. Lamonte got out of his truck and the defendant left in the vehicle.

According to Lamonte, the defendant kept his truck for about an hour. The defendant gave Lamonte his cell phone number before he left. Lamonte called the defendant a couple of times inquiring of his whereabouts. The defendant brought the truck back to Lamonte, but did not have any crack cocaine for them. There was a black man in the passenger seat whom Lamonte did not recognize. Lamonte brought the defendant and the unknown person back to Tillman Park Road and returned home.

Lamonte picked up Stewart and they headed to Stewart's cousin's house in Lamonte's truck. On the way, they were stopped by Detective Jimmy Speyer, with

the Livingston Parish Sheriff's Office. Detective Speyer had been informed earlier that there had been a drive-by shooting involving a small red truck. Lamonte and Stewart were white, while the suspects the police were looking for were black males. The detective therefore let Lamonte and Stewart go and continued patrolling. The following day, Lamonte and Stewart were asked by the police to come to the police station in Albany to give statements, which they did. After they explained how the defendant came to be in possession of Lamonte's truck and that he was driving it during the time Brumfield was shot and killed, the police had Stewart show them the place where the defendant sold drugs. When they arrived at the same abandoned house that Lamonte and Stewart were at the day before, the police observed the defendant standing near the house with a red bandana in his pocket. The defendant was arrested. The defendant briefly spoke to Detective Ben Bourgeois, the Livingston Parish Sheriff's Office's lead detective on the case. The defendant denied any involvement in the shooting and denied ever having been in Lamonte's truck.

The defendant did not testify at trial. Lamonte's truck was examined for DNA and fingerprints. The defendant's DNA and fingerprints were not found in the truck. No gun was recovered.

COUNSELED ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to support the conviction. Specifically, the defendant contends that his identity as the shooter was not established. He further contends that the State did not establish that Lamonte's truck was used in the shooting.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that in order to convict the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to

be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1st Cir. 1986). Deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill. See **State v. Robinson**, 2002-1869 (La. 4/14/04), 874 So.2d 66, 74, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004).

The parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. See **State v. Pierre**, 93-0893 (La. 2/3/94), 631 So.2d 427, 428 (per curiam). The State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another. **State v. Arnold**, 2007-0362 (La. App. 1st Cir. 9/19/07), 970 So.2d 1067, 1072, writ denied, 2007-2088 (La. 3/7/08), 977 So.2d 904. Thus, a general principle of accessorial liability is that when two or more persons embark on a concerted course of action, each person becomes responsible for not only his own acts but also for the acts of the other. **State v. Smith**, 2007-2028 (La. 10/20/09), 23 So.3d 291, 296 (per curiam).

The defendant contends the State's evidence was insufficient to establish his identity as the shooter. The defendant also contends that the evidence did not establish that John Lamonte's truck was the one the shooter was driving (or riding) in. According to the defendant, a "reasonable hypothesis of innocence is that someone else driving a red truck and wearing a red bandana shot Gregory

Brumfield. Red trucks and red bandanas are very common in rural areas such as Albany."

Testimony and physical evidence introduced at the trial established that Brumfield was shot several times around 11:00 p.m. while standing on Drake Road. Brumfield died from gunshot wounds to his chest and abdomen. Lamonte testified that on the night Brumfield was killed, he and his girlfriend (now wife), Stewart, drove to Tillman Park to purchase crack cocaine from the defendant sometime between 9:00 p.m. and 10:30 p.m. Lamonte and Stewart had both purchased cocaine from the defendant in the past in the same location. Lamonte was driving a red 1994 Mazda truck with a white, or off-white, stripe running the length of the bottom of the doors and truck bed. The right front hubcap was missing. The defendant had on a white T-shirt and a bandana, possibly red, on his person. The defendant had a "700" tattoo on his neck. Lamonte did not have any bandanas in his truck. Stewart testified that she had been dealing with the defendant for two years and that he always had a red bandana in his back pocket. According to Lamonte, he gave the defendant use of his truck in exchange for cocaine. Before the defendant took the truck, Lamonte took Stewart home, then went back to the same location to pick up the defendant. Stewart's home was about a three or four-minute drive from Tillman Park. According to Detective Bourgeois, the distance between Lamonte's house and Tillman Park Road was about three miles. Lamonte saw the defendant with a handgun and told him he could not bring a gun in the truck. The defendant handed the gun to someone nearby. Lamonte and the defendant then drove to Lamonte's house (the same house as Stewart's), where Lamonte got out of the truck. The defendant then took the truck and drove back toward Tillman Park. Shortly thereafter, the defendant drove past Lamonte's house. Lamonte called the defendant on his cell phone and asked him why he was running back and forth instead of buying cocaine. Over the

next hour, Lamonte called the defendant at least two more times. According to Lamonte, the defendant returned the truck to him between 10:30 p.m. and midnight. The defendant had an unknown black male with him in the truck. The defendant told Lamonte that he could not get any cocaine. Lamonte dropped off the defendant and the unknown person at Tillman Park.

The shooting occurred only minutes from where Lamonte lived. Detective Bourgeois testified that the distance between Lamonte's house and the place where Brumfield was shot (Drake Road) was 4.5 miles. Cedric McClain, who lived on Drake Road, testified at trial that he was outside when he saw a red truck pass with the driver wearing a red bandana like a ski mask. There were two black people in the truck, but McClain could not identify their gender. When the truck got to the end of the road, McClain heard gunshots. McClain testified that he remembered the truck had a white stripe at the bottom and one of the hubcaps was different. Jockel Hilliard, who lived on Ed Brown Road, which runs into Drake Road, testified at trial that he saw Brumfield at about 11:00 p.m. Hilliard walked past Brumfield, greeted him, then sat down in his (Hilliard's) yard. Brumfield was behind the house next door to Hilliard's house when Hilliard heard gunshots. Hilliard ran toward Brumfield and saw a little red truck at the stop sign. The truck turned left (eastbound) on Illinois Jones Road.

Deputy Alex Petho, with the Livingston Parish Sheriff's Office, testified that he arrived at the scene shortly after Brumfield had been shot. The deputy asked Brumfield what happened, and Brumfield said that two guys in a vehicle pulled up and shot him. People who had gathered around the scene told Deputy Petho that two guys in a red truck with a gray or white stripe shot Brumfield, then fled the area eastbound on Illinois Jones Road. Detective Bourgeois testified that Hilliard stated that he saw Brumfield standing close to the stop sign on Drake Road speaking to some people in a red truck with a white stripe. Hilliard was not

looking at Brumfield exactly when the shots were fired, but when he looked back he saw Brumfield lying on the ground. Detective Bourgeois further testified that McClain told him (the detective) that he was outside when he saw a small red truck with a white or gray stripe pass in front of his residence. There were two black males in the truck pulling red bandanas over their faces. One of the males had short hair, and the other male had curls or twists in his hair. Stewart testified that on the night the defendant took Lamonte's truck, the defendant was wearing a white muscle shirt, blue jean shorts, and a red handkerchief. She described his hair as "curls" down the side of his face and on the back, and "[t]hey were in just little ringlets-like." She also stated the defendant had a "700" tattoo on his neck.

A red bandana was found in Lamonte's truck. When the defendant was arrested the next day, he was standing in front of the same abandoned house on Tillman Park Road with a red bandana in his pocket. Stewart testified that when the defendant was arrested, he was dressed the same way as the previous day. The pictures taken of the defendant on the day of his arrest reveal that he has a "700" tattoo on his neck, he was wearing a white T-shirt, or muscle-type undershirt, and his hair was curly or in twists. Detective Bourgeois stated that the defendant told him that he did not participate in any homicide, he did not know Lamonte or Stewart, and that he had never been in Lamonte's truck. However, the evidence clearly shows the defendant, Lamonte, and Stewart all knew each other. Lamonte and Stewart identified the defendant with particularity. Further, after Lamonte and Stewart gave statements to the police, Stewart took the police straight to the defendant, who was standing in front of the same abandoned, gutted house that he was standing in front of the night before, when Lamonte and Stewart approached him again for some crack cocaine.

Further, based on the testimony of Lamonte, Stewart, and eyewitnesses, and the testimony regarding phone usage, the evidence clearly established that the

defendant was in Lamonte's truck the night Brumfield was shot and killed. According to the testimony of Lamonte, Stewart, and Detective Bourgeois, who corroborated their story by obtaining phone records, at the time Lamonte indicated the defendant took his truck, there were three phone calls between Lamonte and the defendant. The first call was from the defendant's cell to Lamonte's cell. The second call, which was for one minute, was from a landline in Lamonte's house to the defendant's cell at 10:38 p.m. The third call, which was for one minute, was from a landline in Lamonte's house to the defendant's cell at 10:50 p.m.

The defendant's cell phone was registered to Joshua Cook. Cook testified at trial that he and the defendant were good friends and that he gave the defendant a cell phone (the phone at issue in this case). According to Cook, he gave the defendant the phone at the end of April or early May, 2009, and the phone was deactivated in August of 2009. Cook said he had the phone deactivated because it "came up missing" in June (of 2009). He said he knew the phone was missing in June because the defendant told him it "went missing" in June. Cook testified that since the defendant had been incarcerated, Cook had visited him twice. His last visit to the defendant in jail had been three weeks to a month before trial. Cook also testified that he put money in the defendant's commissary at jail.

Cook's testimony suggests the defendant did not have the cell phone in July when Brumfield was shot, since, according to the defendant as told by Cook, the defendant lost the phone in June. However, Detective Bourgeois testified at trial that he questioned Cook about the defendant's phone. Cook told the detective he gave the defendant the phone about two months prior to the defendant being arrested. Cook never told the detective that the defendant told him that he had lost the phone.

According to Detective Bourgeois's call report, an early BOLO on the night of the shooting (2:09 a.m.) was for a red Dodge truck. But Detective Bourgeois

explained at trial that Hilliard had described what he saw as a small, red truck with gray stripes, which possibly could have been a Dodge. Thus, the investigation was in its preliminary stages and the detective suggested the make of the truck only as a possibility. After more was learned, the misinformation over the make of the truck was cleared up. The photographic evidence introduced at trial of Lamonte's Mazda truck clearly matched the testimony of the two eyewitnesses who identified the truck they saw at the time of the shooting as small, red, and with a white or grey stripe across it.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that based on the physical evidence and the eyewitness testimony, the defendant shot and killed Brumfield. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. Further, the jury clearly rejected the theory it was not Lamonte's truck that the shooter was in when Brumfield was shot. See **Moten**, 510 So.2d at 61. See also **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453. On appeal, the reviewing court does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events. **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. See **State v. Juluke**, 98-0341 (La. 1/8/99), 725 So.2d 1291, 1293 (per curiam).

Whether the jury believed some or all of the testimony of Lamonte and Stewart, or whether it believed some or all of what each witness told the police (or some combination thereof) cannot be ascertained from the verdict. Regardless, in the absence of internal contradiction or irreconcilable conflict with the physical

evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **Mitchell**, 772 So.2d at 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

The jury's verdict reflected the reasonable conclusion that the defendant used Lamonte's truck to shoot Brumfield, knowing that using another person's vehicle would make it more difficult to identify him as the shooter. After Lamonte was dropped off at his house, the defendant took the truck back toward Tillman Park. The defendant may have gone back to get his gun after Lamonte told the defendant he could not bring a gun in his truck. The defendant carried a red bandana and had curly or twisted-up hair. The black male in the red truck, which was clearly Lamonte's truck, at the time of the shooting had curls or twists in his hair and a red bandana over his face. While it does not appear to have been established beyond a reasonable doubt that the defendant was the actual shooter, the defendant was nevertheless clearly a principal in the second degree murder of Brumfield. The defendant procured the truck and both the defendant and the unknown person in the truck pulled bandanas over their faces as they approached Brumfield. Clearly the defendant knowingly participated in the planning or

execution of the shooting. See **State v. Sonnier**, 380 So.2d 1, 4 (La. 1979) (where the Court found there was evidence of each essential element of first degree murder since Sonnier could properly be considered a principal to the offense even if he did not perform the actual shooting). See also **State v. Mitchell**, 39,305 (La. App. 2d Cir. 2/17/05), 894 So.2d 1240, 1251-52, writ denied, 2005-0741 (La. 6/3/05), 903 So.2d 457.

We note as well that a finding of purposeful misrepresentation reasonably raises the inference of a "guilty mind," as in the case of material misrepresentation of facts provided by the defendant following an offense. Lying has been recognized as indicative of an awareness of wrongdoing. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). The evidence at trial clearly indicated the defendant lied about knowing Lamonte and Stewart, and about being in Lamonte's truck.

After a thorough review of the record, we find that the evidence negates any reasonable probability of misidentification and supports the jury's unanimous verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of the hypotheses of innocence suggested by the defense at trial, that the defendant was guilty of the second degree murder of Gregory Brumfield. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This counseled assignment of error is without merit.

COUNSELED ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in denying his motion for new trial. Specifically, the defendant contends there were impermissible communications among jurors during deliberations in the jury room, and that the trial court erred in not allowing two jurors to testify at the motion for new trial hearing.

The defendant asserts there was juror misconduct. According to the defendant, he discovered after trial that Nona Karpinski, the jury foreperson, had close relationships with two people who had been murdered. Karpinski did not disclose these relationships when the trial court asked the panel, "Have any of you, or a close friend, or a relative been the victim of a crime? If you have, please just raise your hand." Further, the defendant asserts that he discovered the jury discussed two teardrop tattoos under the defendant's eye and concluded that the teardrops represented two murders the defendant had committed. The defendant points out that Karpinski and another juror, Sandra Grant, were present at the motion for new trial hearing to testify about what they had discussed in the jury room. Without allowing the jurors to testify, the trial court denied the motion.

The denial of a motion for a new trial is not subject to appellate or supervisory review except for error of law. La. Code Crim. P. art. 858. The decision on a motion for new trial rests within the sound discretion of the trial judge. We will not disturb this ruling on appeal absent a clear showing of abuse. The merits of such a motion must be viewed with extreme caution in the interest of preserving the finality of judgments. Generally, a motion for new trial will be denied unless injustice has been done. See La. Code Crim. P. art. 851; **State v. Horne**, 28,327 (La. App. 2d Cir. 8/21/96), 679 So.2d 953, 956, writ denied, 96-2345 (La. 2/21/97), 688 So.2d 521.

We note initially that this statement - "Have any of you, or a close friend, or a relative been the victim of a crime? If you have, please just raise your hand" - attributed to the trial court by the defendant is incorrect. What the trial court actually asked the panel was the following: "Have any of you, or a close friend, or a relative been the victim in *a criminal case*? Have *you* been the victim of a crime? If you have, please just raise your hand." (Our emphasis). The trial court did not ask, as the defendant would suggest, if a close friend had been the victim of

a crime. It asked if "you," the individual prospective juror, had been the victim of a crime. The trial court asked if a close friend had been the victim in a criminal case, which, arguably, suggests the victim (or relatives of the victim) had been involved in a trial. If Karpinski had not personally been the victim of a crime, and if she knew two people who were murdered, but knew nothing of a "criminal case" involving those murdered, then there was no misconduct whatsoever on the part of Karpinski. Regardless, as discussed below, the trial court's ruling on the motion for new trial was correct.

At the motion for new trial hearing, defense counsel stated that Karpinski had two close friends who were murdered. Defense counsel sought to have Karpinski and Grant testify at the hearing to "indicate exactly what went on in that jury room while they were deliberating." According to defense counsel, if Karpinski had mentioned during deliberations that she was good friends with two people who were murdered, then that would be grounds for a new trial. Defense counsel made no mention of teardrop tattoos or that the jurors discussed tattoos. Thus, the trial court's denial of the motion for new trial was not based on anything regarding tattoos on the defendant. This court has nothing to review regarding this issue.

In any event, testimony by the two jurors would have been improper under La. Code Evid. art. 606(B), which provides:

> Upon an inquiry into the validity of a verdict ... a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict ... or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

This Article clarifies the previous jury shield law but does not change the requirements for overcoming the prohibition against juror testimony. The prohibition contained in Article 606(B), and previously set forth in La. R.S. 15:470 (repealed by 1988 La. Acts, No. 515, § 8), is intended to preserve the finality of jury verdicts and the confidentiality of discussions among jurors. However, the jurisprudence has established that the prohibition against juror testimony is not absolute and must yield to a substantial showing that the defendant was deprived of his constitutional rights. Well-pleaded allegations of prejudicial juror misconduct violating a defendant's constitutional rights will require an evidentiary hearing at which jurors shall testify. Unless such pleadings are made with particularity, jury members are not competent to testify. **State v. Emanuel-Dunn**, 2003-0550 (La. App. 1st Cir. 11/7/03), 868 So.2d 75, 80-81, writ denied, 2004-0339 (La. 6/25/04), 876 So.2d 829.

The defendant has not met the requirements of specificity. None of the complaints set forth by the defendant allege juror misconduct in the nature of constitutional violations with sufficient particularity to require or allow the two jurors at the motion for new trial hearing to testify. There has been nothing alleged to suggest that the jury based its verdict on prohibited factors, such as coercion by a party or inadmissible evidence of other crimes obtained from an out-of-court source. Moreover, communications among jurors, even when violative of the trial court's instructions, do not amount to "outside influences" or "extraneous prejudicial information." **Emanuel-Dunn**, 868 So.2d at 82. Because any intra-jury communications that may have taken place were not improper outside influences or extraneous prejudicial information, we find that the trial court properly denied the defendant's motion for new trial. See **Horne**, 679 So.2d at 958.

This counseled assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 1

In his first pro se assignment of error, the defendant argues that the trial court erred in denying his motion for new trial based on juror misconduct.

This assignment of error, and the issues therein, have already been addressed in the second counseled assignment of error.

This pro se assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 2

In his second pro se assignment of error, the defendant argues that the trial court erred in denying his **Batson** challenges during voir dire. Specifically, the defendant contends that the prosecutor's peremptory strikes of two prospective black jurors were based on race, and the race-neutral reasons offered were "entirely pretextual and inadequate."

In **Georgia v. McCollum**, 505 U.S. 42, 46-55, 112 S.Ct. 2348, 2352-57, 120 L.Ed.2d 33 (1992), the Supreme Court clarified the nature of a **Batson** challenge as an equal protection claim based upon an infringement of a prospective juror's rights, which a party to the suit has third-party standing to raise, and not some aspect of a criminal defendant's Sixth Amendment right to a fair and impartial jury. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 287 n.18.

In **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court adopted a three-step analysis to determine whether the constitutional rights of a defendant or prospective jurors have been infringed by impermissible discriminatory practices: First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. The second step of this process

does not demand an explanation that is persuasive, or even plausible. At this second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. **Purkett v. Elem**, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam).

During voir dire, the State peremptorily struck two black jurors. The defendant argues these strikes were "entirely pretextual" and based on race. Gloria Peters was the first black juror the prosecutor peremptorily struck. Peters indicated during voir dire that several years earlier, she had served on a very difficult criminal case that resulted in a hung jury. During that trial, Peters was sequestered. When asked by the trial court if her prior experience as a juror would keep her from giving the defendant and the State a fair and impartial trial, Peters responded, "I'm not sure." At a sidebar conference, the following colloquy took place regarding striking Peters as a juror:

> Ms. Suir [prosecutor]: State will challenge Ms. Peters.
>
> Ms. Ponthieu [defense counsel]: **Batson** challenge.
>
> The Court: Well, we don't have any others on this –
>
> Ms. Ponthieu: I know. That's what I'm saying.
>
> The Court: Well, but there's been no other ones that –
>
> Ms. Suir: Judge, Ms. Peters was a juror in the *Skinner* case, and we all know that was very hard. And –
>
> The Court: The State has a right to use one of their *pre-emps*.
>
> Ms. Ponthieu: Just note my objection.

Van Johnson was the second black juror the prosecutor peremptorily struck. Johnson indicated during voir dire that he had a son currently in jail in Texas for selling drugs. When asked by the trial court if having a relative serving time in jail would keep him from giving the defendant or the State a fair and impartial trial,

Johnson responded, "No, it wouldn't." Later, the prosecutor followed up with questioning about Johnson's son:

> Ms. Suir: And do you go visit him?
>
> Mr. Johnson: No, ma'am.
>
> Ms. Suir: Okay. You kind of teared up a little bit. Is this -- and I'm sorry. I'm really putting you on the spot. This has to be a difficult thing for you?
>
> Mr. Johnson: Yes, it is.
>
> Ms. Suir: For him to be in jail?
>
> Mr. Johnson: Yes, ma'am.

At a sidebar conference, the following colloquy took place regarding striking Johnson as a juror:

> The Court: Mr. Van Johnson?
>
> Ms. Suir: No, Judge.
>
> Ms. Ponthieu: Your Honor, I want to do a **Batson** challenge.
>
> The Court: All right. Go ahead.
>
> Ms. Ponthieu: Your Honor, he has a son serving time in prison for selling drugs. But he said he could be fair, and I –
>
> Ms. Suir: But when I asked him about his son he got up—
>
> Ms. Ponthieu: He doesn't visit his son. He doesn't even talk to his son. And he sounds like –
>
> The Court: She's not keeping him.
>
> Ms. Ponthieu: I know. But he –
>
> Ms. Suir: On a **Batson** –
>
> The Court: So, then why do –
>
> Ms. Ponthieu: Because he sounds like he'd -- he said he'd be fair.
>
> Ms. Suir: Judge, on a **Batson** challenge, she has to show a pattern of racial discrimination.
>
> The Court: Right.

Ms. Ponthieu: Well, she's already had two black people and she's passed them. This is –

Ms. Suir: I didn't *pass* them. I chose to exercise my right to use a peremptory challenge.

Ms. Ponthieu: I'm going to have to object for the record.

When the entire jury was picked, defense counsel objected to the all-white jury. The trial court acknowledged that the two prospective black jurors had been struck and asked the prosecutor to put her reasons on the record of why she challenged them. Following is the pertinent part of that colloquy:

Ms. Ponthieu: Your Honor, we do want to make an objection to this jury. We have an all-white jury. This is a black defendant. It was a black victim. And I believe that he's not going to get a very fair trial. The only two black people that we had in the jury pool that was called, the State challenged. And so we just want to object to the State's challenges.

The Court: And the State had challenged those two people for reasons, and I'd ask that you put your reasons on the record, please.

Ms. Suir: Yes Ma'am. As far as Ms. Peters is concerned----that was the first juror, and she was an African-American female ---- she had a prior jury service in the *James Skinner* case, in which I was the prosecutor. I know that after the case was held, speaking with the jurors, Your Honor, she was very afraid for her safety and it was an overriding concern with her. And that case ended with a *hung jury.* And I believe part of the reasons for that is because there became this sphere [sic] among the jurors as to what could possibly happen to them. The other thing, Your Honor, is that her brother[1] is a convicted killer. And I just have a little problem with someone sitting on the jury who is that closely connected, regardless if she talks to him, visits him, or not, that closely -- someone that closely connected to her who is incarcerated for the very kind of offense that we are prosecuting. The other one was Mr. Van Johnson. He was an African-American male, probably, I want to say, approximately in his sixties. Although, he had previously worked for L.P.S.O., it was many years ago. He currently has a son in jail doing federal time. While the jury selection was going on, Ms. Melissa Threeton, of our office, looked into our system and sees that his son has six felony arrests, most of them drug-related. Also I think there was a molest -- there were some other felony convictions. He teared up when I spoke to him about his son. Although, he does not have contact with his son, his wife does, and he continues to know about his son's whereabouts through her. The State would submit, Your Honor, there has to be a pattern of racial dis[c]rimination. This isn't a pattern. I also struck Mr. Rawls. His

[1] During voir dire, Ms. Peters referred to her cousin, not her brother. (R. p. 414).

> son was convict -- his grandson was convicted of D.W.I. Fourth. He puts money in his commissary. He didn't think his grandson was an alc[o]holic, although it's a D.W.I. Fourth. And so I struck him because he has someone closely connected to him that is doing time right now. So, this isn't a pattern of racial discrimination. This is based on a multitude of factors. But I also think, that the objection is supposed to be raised before the jury is sworn. I'm not positive about that. But I think once the jury is sworn, it's kind of moot. But, again, I am not positive.
>
> Ms. Ponthieu: And, once again, Your Honor, I did object while we were up at the bench. So, it was done contemporaneously with us selecting our jurors. Before the jury was sworn I did not have a chance to object. So, this was my first opportunity to object on the record, after being up at the bench. So, I do have to object to this jury.
>
> The Court: Your objection is noted for the record, and the **Batson** challenge is denied.

Based on the foregoing, it is not clear if the defendant made a prima facie showing that the prosecutor had exercised peremptory challenges on the basis of race. However, once the prosecutor offered race-neutral explanations for the peremptory challenges and the trial court ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing became moot. See **Hernandez v. New York**, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991); **State v. Jacobs**, 99-0991 (La. 5/15/01), 803 So.2d 933, 941, cert. denied, 534 U.S. 1087, 122 S.Ct. 826, 151 L.Ed.2d 707 (2002). The inference of the trial court's denial of the **Batson** challenges was that the defendant did not meet his burden of proving purposeful discrimination. The inquiry, thus, is whether the trial court erred in determining there was no discriminatory intent when weighing the defendant's proof and prosecutor's race-neutral reasons. See **Jacobs**, 803 So.2d at 941.

A reviewing court owes the trial court's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. The **Batson** explanation does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral.

The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. See **State v. Elie**, 2005-1569 (La. 7/10/06), 936 So.2d 791, 795-96.

Our review of the State's explanations for the peremptory challenges against Peters and Johnson reveals no discriminatory intent. The explanations were reasonable and had some basis in trial strategy. See **State v. Handon**, 2006-0131 (La. App. 1st Cir. 12/28/06), 952 So.2d 53, 59. Peters had an apparently extremely stressful experience serving as a juror in the past and admitted she was not sure, given these circumstances, that she could be fair and impartial. Johnson, who had a son serving time in jail, became visibly upset during voir dire when discussing his son. While Johnson indicated that his son's situation would not prevent him from being fair and impartial, a prosecutor's continued wariness of a prospective juror, despite assurances the juror will remain impartial does not necessarily establish discriminatory purpose. See **Elie**, 936 So.2d at 797.

The defendant asserts in his pro se brief that Phyllis Saucier was chosen as a jury member even though she had the same situation as Johnson. Under **Batson**, the trial court is to consider all relevant circumstances in addressing the question of discriminatory intent which requires close scrutiny of the challenged strikes when compared with the treatment of panel members who expressed similar views or shared similar circumstances in their backgrounds. See **Miller-El v. Dretke**, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005); **Elie**, 936 So.2d at 796. Saucier indicated at voir dire that her sister-in-law's husband was in jail for making and using drugs. We find the similarity in backgrounds between Saucier and Johnson tenuous, at best. There was no consanguinity between Saucier and the husband of an in-law and, clearly, nothing in Saucier's statements during voir dire which would suggest that type of bond to be found between a father and son. Also, nothing in the record indicates Saucier became upset when discussing her in-law's

husband's being in jail. Finally, Saucier was picked as the second alternate and ultimately did not deliberate on the defendant's verdict. Moreover, even if Saucier had a similar background or gave similar responses, the fact that she was accepted by the State and the prospective jurors in question were excused by the State does not in itself show that the explanation for excusing the other prospective jurors was a pretext for discrimination. The accepted juror may have exhibited traits that the prosecutor reasonably could have believed would have made her desirable as a juror. See **State v. Collier**, 553 So.2d 815, 822 (La. 1989); **State v. Leagea**, 95-1210 (La. App. 1st Cir. 5/10/96), 673 So.2d 646, 650, writ denied, 96-1507 (La. 11/22/96), 683 So.2d 287.

The defendant offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Thus, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. See **Green**, 655 So.2d at 289-90. Moreover, a review of the entire voir dire transcript fails to reveal any evidence that the use of peremptory strikes by the prosecutor was motivated by impermissible considerations. See **Handon**, 952 So.2d at 59.

This pro se assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 3

In his third pro se assignment of error, the defendant argues that the evidence was insufficient to support the conviction for second degree murder.

This assignment of error, and the issues therein, have already been addressed in the first counseled assignment of error.

This pro se assignment of error is without merit.

SENTENCING ERROR

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension

of sentence. La. R.S. 14:30.1(B). In sentencing the defendant, the transcript shows that the trial court failed to provide that the sentence was to be served at hard labor. Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. Code Crim. P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. Code Crim. P. art. 882(A) authorizes correction by the appellate court.[2] We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentence. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, since a sentence at hard labor was the only sentence that could be imposed, we correct the sentence by providing that it be served at hard labor.

CONVICTION AFFIRMED. SENTENCE AMENDED TO PROVIDE THAT IT BE SERVED AT HARD LABOR AND AS AMENDED, AFFIRMED.

[2] An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A).