No. 18-9025

In the Supreme Court of the United States

PHILLIP NEWTON,
Petitioner

vs.

THE STATE OF LOUISIANA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

RESPONDENT'S APPENDIX

JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL
Solicitor General
MICHELLE WARD GHETTI
Deputy Solicitor General,
Counsel of Record
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6028

SAMUEL C. D'AQUILLA
District Attorney
20th Judicial District
East Feliciana Parish
P.O. Box 8428
Clinton, LA 70722
(225) 683-3117

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING. NOT DESIGNATED FOR PUBLICATION

Court of Appeal of Louisiana, First Circuit.

STATE of Louisiana
v.
Phillip NEWTON, Jr.

2014 KA 1301
2015 WL 996250
March 6, 2015

Appealed From The Twentieth Judicial District Court, In And For The Parish Of East Feliciana, State Of Louisiana, Docket Number 13,346, Honorable William G. Carmichael, Judge.

Attorneys and Law Firms

Samuel C. D'Aquilla, District Attorney, St. Francisville, Louisiana, and Stewart B. Hughes, Special Assistant District Attorney, St. Francisville, Louisiana, Attorneys for Appellee State of Louisiana.

Cynthia Kliebert Meyer, New Orleans, Louisiana, Attorney for Defendant/Appellant Phillip Newton, Jr.

Before McDONALD, CRAIN, and HOLDRIDGE, JJ.

Opinion

McDONALD, J.

*1 The defendant, Phillip Newton, Jr., was charged by bill of information with attempted second degree murder, a violation of LSA–R.S. 14:27 and 14:30.1. The defendant entered a plea of not guilty. The State filed notice of intent to use other crimes evidence pursuant to LSA–C. E. art. 404(B), and after a hearing, the trial court found the evidence admissible. After a trial by jury, the defendant was found guilty of the responsive offense of attempted manslaughter, in violation of LSA–R.S. 14:27 and 14:31. He was adjudicated a second-felony habitual offender pursuant to LSA–R.S. 15:529.1(A)(1), and sentenced to thirty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.[1] The defendant now appeals, assigning error to the sufficiency of the evidence, the trial court's admission of other crimes evidence, the trial court's denial of his motion for mistrial, and the trial court's second-felony habitual offender adjudication. For the following reasons, we affirm the conviction and habitual offender adjudication, vacate the sentence, and remand for resentencing.

[1] The predicate offense was set forth as the defendant's 2008 conviction of illegal use of a weapon, a violation of LSA–R.S. 14:94.

STATEMENT OF FACTS

On May 12, 2013, the police were dispatched to the scene of a shooting that occurred around midnight at a residence on Bourbon Street in Jackson, Louisiana. Upon his arrival on the scene, Officer Rick Martin of

Jackson's Marshall Office noted that Tianne McCray, the defendant's wife, was lying on the ground with a bloody shirt and several bloody towels surrounding her. The victim had an apparent bullet wound below her breast area. Officer Martin followed the victim as she was transported by ambulance to Our Lady of the Lake Regional Medical Center (OLOLRMC) emergency room where she underwent surgery for a gunshot wound to the abdomen and a follow-up surgery. The victim identified the defendant as the shooter.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant argues that the evidence is insufficient because the State failed to prove that he had the specific intent to kill the victim. The defendant notes that his relationship with the victim included a history of physical violence on the part of both parties. The defendant contends trial testimony indicated that, at the time of the shooting, the victim was surprised that he had a gun, and that he had not realized the gun had discharged. The defendant claims that he called for emergency assistance after the shooting, which he argues shows that he had no intention of killing the victim. Thus, the defendant argues that, if he had the intent to kill the victim, he would have left her there to die instead of calling for assistance. Finally, the defendant argues the State failed to exclude the reasonable hypothesis that the gun discharged as he was trying to evade an attack by the victim, who had a machete at the time of the shooting and had stabbed the defendant on prior occasions.

A conviction based on insufficient evidence cannot stand as it violates Due Process. *See* U.S. Const. amend. XIV; LSA–Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, 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 also* LSA–C.Cr.P. art. 821(B); *State v. Ordodi,* 06–0207 (La. 11/29/06), 946 So.2d 654, 660. The *Jackson* standard of review, incorporated in LSA–C .Cr. P. art. 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA–R.S. 15:438 provides that the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. *See State v. Patorno,* 01–2585 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

***2** Under LSA–R.S. 14:31(A)(1), manslaughter is a first or second degree murder that is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury

finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed. LSA–R.S. 14:31(A)(1). "Sudden passion" and "heat of blood" are not elements of the offense of manslaughter; rather they are mitigating factors in the nature of a defense that tend to lessen the culpability. *State v. Rodriguez,* 01–2182 (La.App. 1 Cir. 6/21/02), 822 So.2d 121, 134, *writ denied,* 02–2049 (La.2/14/03), 836 So.2d 131. Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. *Id.* Although specific intent to kill is not necessary for a conviction of manslaughter, a specific intent to kill is required for a conviction of attempted manslaughter. Specific intent may be inferred from a defendant's actions and the circumstances. *State v. Templet,* 05–2623 (La.App. 1 Cir. 8/16/06), 943 So.2d 412, 421–22, *writ denied,* 06–2203 (La.4/20/07), 954 So.2d 158. Moreover, specific intent to kill can be inferred from the intentional use of a deadly weapon such as a knife or a gun. *State v. Butler,* 322 So.2d 189, 194 (La.1975); *Templet,* 943 So.2d at 421. To support a conviction for attempted manslaughter, the State must prove that the defendant specifically intended to kill the victim and committed an overt act in furtherance of that goal.

Officer Martin testified that he had previously gone to the victim's residence on August 23, 2009, when she reported that she had been attacked by the defendant and that she stabbed him. Regarding that case, Officer Martin testified that the victim's bruises were observed and photographed, two bloody knives were recovered, and the defendant was transported to the hospital.

Officer Martin further testified that when he arrived at the scene on the day in question, May 12, 2013, the victim was lying on her back approximately two feet from the house's concrete steps. At the time, Ruth Newton was standing next to the victim and Phillip Newton, Sr. was kneeling down talking to her. According to Officer Martin, Mr. Newton became irate when he advised him to step away from the victim. Officer Martin took two photographs of the victim and recovered a machete several feet to the left of the victim. The defendant was not at the scene. Officer Martin attempted to question the victim, first at the scene and again at the hospital just before she was rushed into surgery, but she refused to answer any questions.

The day after the shooting, May 13, 2013, Marshall Fred Allen, Louisiana State Police Officer Hamp Guillory, and Officer Martin went back to the scene during daylight hours to look for shell casings but only found blood stains on the ground where the victim had been found. Officer Guillory went to the hospital that day to speak to the victim. Although she was on a ventilator and unable to speak, she was able to communicate nonverbally.

Officer Guillory asked her if the defendant shot her, and she nodded a positive response. Officer Guillory testified that when he searched the home on May 14, 2013, there were no signs of forced entry. Officer Guillory obtained cell phone records for the victim and the Newtons for the time period including the shooting, and based on the records, the victim and Ruth Newton called 911 to report the shooting but the defendant did not.

*3 Dr. Michael Fahr, a trauma surgeon at OLOLRMC, testified that the victim suffered severe injuries to her liver, stomach, colon, small bowel, and the back of her abdomen. On cross-examination, he confirmed that the victim was still on narcotics (most likely morphine) on May 15, 2013, which was after her second surgery. He further indicated that the possible effects of the medication included sedation or hallucinations. He stated that the effects for a particular patient would depend on their mental status and reaction to the medication. On redirect examination, Dr. Fahr confirmed that the victim did not complain of any effects.

Char'Laycia McCray, the victim's twelve year-old daughter, testified at the trial. Char'Laycia testified that the defendant was her mother's husband, and lived at the residence, but was not staying at the house on the night of the incident. Janet Rose, the victim's aunt, testified that she saw the victim while she was at the hospital on May 12, 2012, the day of the shooting. Although the victim could not speak due to the tubes in her mouth, she was alert and nodded her head up and down to indicate a positive response when Ms. Rose asked if the defendant was the person who shot her.

The victim's sister, Kenesha Westmore, testified regarding the January 24, 2009 incident. She testified that she was at her sister's home when the defendant entered the home, grabbed the victim, and began "tussling" with her. She stated that the victim slipped and the defendant began punching her and threatened to kill her. She further stated that the defendant choked the victim and confirmed that the victim chased the defendant out of the house with a knife. She did not see any physical injuries on the victim. Ms. Westmore testified she also visited the victim at the hospital after the instant shooting, and further testified that the victim had also told her that the defendant was the person who shot her.

The defendant's brother, Jamar Newton, testified that on the day in question he picked the defendant up as he was walking down the street near the scene of the shooting. Mr. Newton gave a recorded statement to the police wherein he denied having personal knowledge regarding the shooting.

The victim was the final witness to testify. She stated that she and the defendant had been married for three years by the time of the trial and had been romantically involved for about eight years. She testified that when the defendant arrived at her house on

January 24, 2009, the door was open because she was bringing groceries into the house. She and the defendant began arguing which then escalated into a physical encounter wherein he was pushing and choking her, resulting in bruises and scars on her neck. She and the defendant reconciled after that incident.

On August 23, 2009, upon seeing the victim enter the house after taking out the trash, the defendant kicked the door to the house open and a physical altercation ensued during which the defendant choked the victim and the victim was able to grab a knife and stab the defendant. As to the status of their relationship, the victim confirmed that by March 4, 2012, she and the defendant were reconciled. After attending separate parties that night, they met at home and began arguing, and had another physical altercation. They both received minor injuries during the physical altercation after which the victim called 911. The victim admitted to being the aggressor during some of the physical altercations with the defendant, but indicated that she was not being aggressive when she stabbed the defendant in August of 2009, and that she only stabbed him because he was choking her and she could not breathe. She further testified that she and the defendant would routinely reconcile after physical altercations and that she would sometimes minimize his behavior to the police in attempt to keep him out of trouble.

*4 The victim testified that she and the defendant were living together at the time of the instant offense, and the defendant had been coming in and out of the house that day. After the victim went to sleep, the defendant came home around 11:00 p.m., awakened her, and they began arguing. The victim grabbed a machete that was next to her bed at the time and left the bedroom. She also had her cell phone with her. She tried to alleviate the situation by going into the living room and turning on the television. She then went outside, sat on the porch, and briefly sat in her car. The defendant followed her outside and pulled out a black gun with a white handle as they argued. According to the victim, she asked the defendant if he was going to shoot her and he responded, "Yeah, because you playing with me." As they continued arguing, the defendant shot her. The victim further testified that after she was shot, she told the defendant that he shot her and he denied it, stating in part, "I ain't shoot you." The victim then pulled her hand back and showed the defendant the blood on her shirt. When the victim attempted to call 911, the defendant took her cell phone. The victim was still bleeding and ultimately fell to the ground as she asked the defendant to call 911. She heard the defendant during a phone conversation say, "Ma and Dad," before stating that he had just shot the victim. When the defendant's mother and father arrived, the victim heard the defendant tell them to call 911 and his mother indicated that she had already called. The defendant finally returned the victim's cell phone after she told him that she would not tell the police that he shot her.

The victim testified that she did not threaten the defendant with the machete, attempt to hurt him with it, or point or raise it towards him. On cross-examination, the victim reiterated that in August of 2009 she stabbed him with a knife, that the defendant sustained scratches and cuts during other altercations, and that she was charged with domestic abuse battery as a result of one of the incidents. The victim also confirmed that she had been charged in the past with criminal mischief as a result of giving false information to the police regarding the circumstances of a past incident with the defendant. She again denied swinging or using the machete in any manner toward the defendant as to the instant incident. During redirect examination, the victim reiterated that during the past incidents involving a knife, she only grabbed a knife after the defendant began choking or attacking her.

In a non-homicide situation, a claim of self-defense requires a dual inquiry: (1) an objective inquiry into whether the force used was reasonable under the circumstances; and, (2) a subjective inquiry into whether the force used was apparently necessary. *See* LSA–R.S. 14:19(A) (prior to amendment by 2014 La. Acts No. 163, § 1). Self-defense is not available to "[a] person who is the aggressor or who brings on a difficulty ... unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict." LSA–R.S. 14:21. In a homicide case, the State must prove, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. Louisiana law is unclear as to who has the burden of proving self-defense in a non-homicide case. In previous cases dealing with this issue, this Court has analyzed the evidence under both standards of review, that is, whether the defendant proved self-defense by a preponderance of the evidence or whether the State proved beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Taylor,* 97–2261 (La.App. 1 Cir. 9/25/98), 721 So.2d 929, 931. Similarly, we need not decide in this case who has the burden of proving or disproving self-defense, because under either standard the evidence sufficiently established that the defendant did not act in self-defense.

***5** The guilty verdict in this case indicates the jury rejected the defendant's claim that he shot the victim in self-defense. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. 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 fact finder's determination of guilt. *Taylor,* 721 So.2d at 932. We are constitutionally precluded from

acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. 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. Further, the testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Clouatre,* 12–0407 (La.App. 1 Cir. 11/14/12), 110 So.3d 1094, 1100.

On the day in question, although the victim armed herself, she testified that she did not attempt to attack the defendant or threaten him physically in any manner. Further, based on the testimony, the defendant could have left at any time as opposed to shooting the victim as he verbally indicated he would do before the weapon was discharged. Thus, we find no error in the jury's rejection of the defendant's claim of self-defense. The jury could have reasonably concluded that the victim did not pose an imminent threat to the defendant before the shooting and further that the shooting was not accidental.

When a case involves circumstantial evidence and the trier of fact reasonably rejects a 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. 1 Cir.), *writ denied,* 514 So.2d 126 (La. 1987). We find no such hypothesis exists in the instant case. The verdict rendered in this case indicates that the jury accepted the victim's testimony and rejected the hypotheses of innocence that the shooting was accidental or committed in self-defense. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. *See Ordodi,* 946 So.2d at 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected, by the jury. *State v. Calloway,* 07–2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Based on our careful review of the record, we are convinced that any rational trier of fact, viewing the evidence presented at trial in the light most favorable to the State, could find the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted manslaughter. Assignment of error number one is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

***6** In the second assignment of error, the defendant argues that the other crimes evidence presented during the trial was unduly prejudicial and that the trial court erred in finding the

evidence admissible. The defendant argues that the introduction of the extensive other crimes evidence destroyed any chance for a fair and dispassionate consideration of the instant charge. The defendant notes that the trial court admitted the evidence on the basis that it would show motive or intent. In that regard, he argues that motive and intent were not at issue in this case, and that the other crimes evidence did not demonstrate that he had the motive or intent to commit the instant offense. The defendant further argues that the other crimes evidence was introduced to portray him in the worst possible light, to prove that he was a man of bad character, and to show that he acted in conformity with that bad character in this case. The defendant concludes that because of its abundance and prejudicial effect, the admission of the evidence was not harmless and his conviction should be reversed.

Before the trial, the State filed notice of intent to use evidence of other crimes pursuant to LSA–C. E. art. 404(B) and *State v. Prieur,* 277 So.2d 126 (La. 1973). Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. *State v. Hills,* 99–1750 (La. 5/16/00), 761 So.2d 516, 520. Under LSA–C. E. art. 404(B)(1), other crimes evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. LSA–C. E. art. 404(B)(1). At least one of the enumerated purposes in LSA–C. E. art. 404(B) must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible under LSA–C. E. art. 404. *State v. Day,* 12–1749 (La.App. 1 Cir. 6/7/13), 119 So.3d 810, 813. Thus, to be admissible under LSA–C. E. art. 404(B), evidence of the defendant's prior bad acts must meet two criteria: (1) it must be relevant to some issue other than the defendant's character, and (2) its probative value must be greater than its potential to unfairly prejudice the jury. *See* LSA–C. E. arts. 403 and 404(B). The underlying policy is not to prevent prejudice, since evidence of other crimes is always prejudicial, but to protect against unfair prejudice when the evidence is only marginally relevant to the determination of guilt of the charged crime. *State v. Humphrey,* 412 So.2d 507, 520 (La .1982) (on rehearing). Generally, a lapse in time between the commission of the instant offense and the other crimes evidence will go to the weight of the evidence, rather than to its admissibility. *State v. Jackson,* 625 So.2d 146, 149 (La. 1993).

***7** At the pretrial *Prieur* hearing in this case and consistent with subsequent trial testimony, the victim's testimony established the following facts. On January 24, 2009, the defendant arrived at and entered the victim's residence without

permission. They started arguing and she told him to leave, but he refused and began choking her. She tried to call the police, but he took the phone. The victim's sister was present at the time and called 911, and the police responded to the scene. The victim indicated that she almost lost consciousness during the attack. She further testified that the defendant threatened her as follows, "stuff like he gonna have somebody blow my house up or something." She further testified that she filed for a protective order after the incident.

The victim further testified that on August 23, 2009, while she was returning from putting out the trash, the defendant kicked in the door. At that time, the victim had a protective order against the defendant and did not give him permission to enter the house. The defendant told her that he wanted to talk to her, but she indicated that she did not want to talk. The defendant proceeded to choke her while she was on the couch, and dragged her from the couch to her bedroom where she used a knife from under her pillow to stab him. She then called the police. She testified that the defendant had threatened to kill her on that occasion.

On March 4, 2012, the victim and the defendant were living together. On one night, after they had gone out to separate parties, they met at a Waffle House in Zachary and went home together where an argument ensued. The victim left the bedroom to avoid a confrontation, but the defendant followed her, and as the altercation escalated, and the defendant began pushing her. She also called the police on this occasion.

On March 19, 2013, the defendant came to the victim's residence and they began shouting back and forth and she went inside. As she tried to lock the door, the defendant kicked it down. As he entered through the front door, she went out the side door and started running down the street toward her cousin's house and called the police. The defendant realized she was outside, followed her across the street, grabbed her hair, pulled her down in the ditch, and started hitting her multiple times with a closed fist. She requested that the charges be dropped after the multiple incidents and regularly reconciled with the defendant. In granting the State's motion, the trial court stated that motive and intent may be an issue during the trial although identity would not.

The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by *Prieur*. Under *Prieur*, the State was required to prove by clear and convincing evidence that the defendant committed the other crimes. *Prieur*, 277 So.2d at 129. However, 1994 La. Acts 3d Ex. Sess. No. 51 added LSA–C. E. art. 1104 and amended LSA–C. E. art. 404(B). Louisiana Code of Evidence article 1104 provides that the burden of proof in pretrial *Prieur* hearings, "shall be identical to the burden of proof required by Fed. R. Evid. Art. IV, Rule 404." The burden of proof required by

Fed. R. Evid. Art. IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. *See Huddleston v. U.S.,* 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of LSA–C. E. art. 1103 and the addition of LSA–C. E. art. 1104. However, numerous Louisiana appellate courts, including this Court, have held that burden of proof to now be less than "clear and convincing." *State v. Millien,* 02–1006 (La.App. 1 Cir. 2/14/03), 845 So.2d 506, 514; *see also State v. Williams,* 99–2576 (La.App. 1 Cir. 9/22/00), 769 So.2d 730, 734 n. 4. A trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. *State v. Galliano,* 02–2849 (La. 1/10/03), 839 So.2d 932, 934 (per curiam); *Day,* 119 So.3d at 813. Herein, the defendant does not contest the fact that the initial requirement of establishing the commission of the other acts was clearly met in this case considering the evidence regarding his actions and statement.

*8 Before other crimes evidence can be admitted as proof of intent, three prerequisites must be satisfied: (1) the prior acts must be similar; (2) there must be a real and genuine contested issue of intent at trial; and (3) the probative value of the evidence must outweigh its prejudicial effect. *See* LSA–C. E. arts. 403 and 404(B); *State v. Kahey,* 436 So.2d 475, 488 (La. 1983). Motive evidence reveals the state of mind or emotion that influenced the defendant to desire the result of the charged crime. To have independent relevance, the motive established by the other crimes evidence must be more than a general one, such as gaining wealth, which could be the underlying basis for almost any crime; it must be a motive factually peculiar to the victim and the charged crime. *State v. McArthur,* 97–2918 (La. 10/20/98), 719 So.2d 1037, 1041.[2] The plan exception to the prohibition against the use of other crimes evidence can refer to a plan conceived by the defendant in which the commission of the uncharged crime is a means by which the defendant prepares for the commission of another crime (such as stealing a key in order to rob a safe), or it may refer to a pattern of crime, envisioned by defendant as a coherent whole, in which he achieves an ultimate goal through a series of related crimes (such as acquiring a title to property by killing everyone with a superior claim). *McArthur,* 719 So.2d at 1042.

[2] *McArthur* is superseded by LSA–C. E. art. 412.2 only with respect to other crimes evidence of sexually assaultive behavior. *See State v. Wright,* 11–0141 (La. 12/6/11), 79 So.3d 309, 316–17.

In the instant case, we find that the evidence regarding the defendant's past threats and physical actions was independently relevant to show intent and absence of mistake or accident. Because the defendant claimed he was acting in self-defense and/or

accidentally shot the victim, the evidence of the older threats and physical attacks were relevant to show he in fact intended to kill the victim and did not commit the offense in self-defense. *See Jackson,* 625 So.2d at 150 ("[When] the element of intent is regarded as an essential ingredient of the crime charged, it is proper to admit proof of similar but disconnected crimes to show the intent with which the act was committed."). The defendant's propensity to make serious threats and take actions such as choking the victim were also relevant to show motive, pattern, and plan. When the probative value of the other crimes evidence is balanced against its prejudicial effect, we find the evidence was properly admitted because it was not unduly or unfairly prejudicial.

Moreover, even if we were to determine that the other crimes evidence was improperly admitted in this case, that would not end our inquiry since the erroneous admission of other crimes evidence is a trial error subject to harmless error analysis. The standard applied in making this determination is whether the verdict rendered was surely unattributable to the error. *Day,* 119 So.3d at 816. We note that the trial court gave a limiting instruction to the jury regarding the other crimes evidence, including a specific reminder to the jury that the defendant should not be found guilty merely because he may have committed other offenses. (R. 579). We further note that the other crimes evidence in part presented potentially negative implications for the victim as well as the defendant since she was admittedly aggressive during some incidents and had previously stabbed the defendant. The jury made a credibility determination and obviously accepted the victim's testimony that she did not pose a threat to the defendant in the instant incident. Based on our review of the record, we find that the guilty verdict returned in the instant case surely was unattributable to any error in the admission of the extraneous other crimes evidence. Thus, if the admission of the evidence was erroneous, the error was harmless beyond a reasonable doubt. *See* LSA–C.Cr.P. art. 921. We find that the trial court did not abuse its discretion in admitting the other crimes evidence at issue and assignment of error number two is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

***9** In his third assignment of error, the defendant argues that the trial court erred in denying his motion for mistrial when Officer Guillory testified that the defendant declined to answer questions after being advised of his rights. The defendant argues that the admonishment to disregard the remark was insufficient to remedy the unfavorable inference that was created by the reference to his post-arrest silence.

The following colloquy at issue took place during the State's direct examination of Officer Guillory:

Q. Was there any other actions that you took in connection with your investigation?
A. Uh—
Q. That I haven't asked you about?
A. Obtained an arrest warrant for the defendant for attempted second degree murder and we arrested him at the same time that we executed the search warrant at his parent's house. Attempted to interview him. He was advised of his rights and declined to answer any questions and we, we booked him in jail.

At this point, the defense attorney objected to the reference to the defendant's invocation of his right to remain silent. The trial judge sustained the objection and instructed the jury to disregard the remark about whether or not the defendant exercised his right not to make a statement as irrelevant and not to be used against him. The defense attorney moved for a mistrial. The trial court denied the motion for mistrial, and the State immediately ended the direct examination.

Under the authority of LSA–C.Cr.P. art. 771, where the prosecutor or a witness makes a reference to a defendant's post-arrest silence, the trial court is required, upon the request of the defendant or the State, to promptly admonish the jury. In such cases where the court is satisfied that an admonition is not sufficient to assure the defendant a fair trial, upon motion of the defendant, the court may grant a mistrial. *State v. Kersey,* 406 So.2d 555, 560 (La.1981). However, a mistrial is a drastic remedy, which should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. *State v. Berry,* 95–1610 (La.App. 1 Cir. 11/8/96), 684 So.2d 439, 449, *writ denied,* 97–0278 (La. 10/10/97), 703 So.2d 603.

In *Doyle v. Ohio,* 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the Supreme Court of the United States held that the use, for impeachment purposes, of the defendant's silence at the time of arrest and after receiving the *Miranda*[3] warnings, violates the Due Process Clause of the Fourteenth Amendment. *See also Portuondo v. Agard,* 529 U.S. 61, 74–75, 120 S.Ct. 1119, 1128, 146 L.Ed.2d 47 (2000). However, not every mention of the defendant's post-arrest silence is prohibited by *Doyle.* As emphasized by the Louisiana Supreme Court in *State v. George,* 95–0110 (La. 10/16/95), 661 So.2d 975, 980, *Doyle* prohibits only the use of the defendant's post-arrest silence **for impeachment purposes.**

[3] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

***10** A brief reference to post-arrest silence does not mandate a mistrial or reversal where the trial as a whole was fairly conducted, the proof of guilt is strong, and the State made no use of

the silence for impeachment. *See State v. Smith,* 336 So.2d 867, 868–70 (La. 1976) (per curiam); *see also State v. Stelly,* 93–1090 (La.App. 1 Cir. 4/8/94), 635 So.2d 725, 728–29, *writ denied,* 94–1211 (La. 9/23/94), 642 So.2d 1309. Further, the State is allowed reference to the defendant's post-arrest silence when the line of questioning is an attempt to summarize the extent of the police investigation and is not designed to exploit the defendant's failure to claim his innocence after his arrest in an effort to impeach his testimony or attack his defense. *See George,* 661 So .2d at 979–80.

In this case, we find that the reference to post-arrest silence herein did not warrant a mistrial. The reference to the defendant's post-arrest silence was brief, and the trial as a whole was conducted fairly. The passing reference by Officer Guillory was an unsolicited response to the State's question regarding the investigation. Further, it does not appear that the State pursued the above line of questioning for the purpose of calling the jury's attention to the defendant's post-arrest silence or having the jury make an inappropriate inference. *See Stelly,* 635 So.2d at 728. Moreover, the defendant did not testify at the trial, and thus, the testimony in question certainly was not used for impeachment purposes. Accordingly, the defendant's post-arrest silence was not used against him within the meaning of *Doyle.* Despite this brief reference to the defendant's post-arrest silence, we find that he did not suffer such substantial prejudice that he was deprived of any reasonable expectation of a fair trial. Thus, we find no abuse of discretion in the trial court's denial of the defendant's motion for mistrial. Assignment of error number three is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In his fourth assignment of error, the defendant argues that the trial court erred in adjudicating him a second-felony offender. Noting that he pled nolo contendere to the predicate offense of illegal use of a weapon in Twentieth Judicial District Court docket number 07–CR–658, the defendant argues that the trial court erred in relying on the conviction because the trial judge in that case ordered an acquittal under LSA–C.Cr.P. art. 893. The defendant contends that since the status of the predicate conviction is unclear, the State failed to prove the existence of a valid prior felony conviction.

If the defendant denies the allegations of the habitual offender bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that the defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its

burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between the judge and defendant wherein the defendant was informed of and specifically waived those constitutional rights required by *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), namely, his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary and made with an articulated waiver of the three *Boykin* rights. *State v. Shelton,* 621 So.2d 769, 779–80 (La. 1993).

***11** At the habitual offender hearing, the State introduced a certified copy of the bill of information charging the defendant with illegal use of a weapon under Twentieth Judicial District docket number 07–CR–658. (R. 608; S–1). The State further introduced a February 4, 2008 minute entry of the defendant's plea of nolo contendere to the charge and sentencing. (R. 609; S–2). Finally, the State introduced the transcript of the defendant's *Boykin* hearing. (R. 609; S–3). State witness Jason Hooge, was the defendant's probation supervisor as to the predicate offense from February 4, 2008 until February 4, 2011. (R. 610). On cross-examination, Mr. Hooge confirmed that a revocation hearing took place on February 22, 2011, and that Judge Ware ordered that the defendant's sentence be amended under the conditions of LSA–C. Cr .P. art. 893. When asked if the charges were dismissed, Mr. Hooge stated, "Yeah, acquittal would be entered." (R. 611). On redirect examination, Hooge confirmed that he was not aware of any contradictory hearing taking place on that same date regarding an expungement. (R. 612). No further evidence was presented and after hearing arguments, the trial court adjudicated the defendant a second-felony offender based on the predicate offense. (R. 614).

The documentary evidence presented by the State more than adequately satisfied the State's initial burden of proving the existence of the predicate guilty pleas and that the defendant was represented by counsel. It was the defendant's burden at that point to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. The defendant failed to carry his burden in this case. If a defendant completes his probation requirements, that defendant's charges are dismissed, and he is eligible for a first offender pardon. However, the charge may still be counted in a subsequent habitual offender proceeding. *See* LSA–C.Cr.P. art. 893(E)(2); *State v. Adams,* 355 So.2d 917, 922 (La. 1978). Accordingly, we find that Mr. Hooge's testimony on cross-examination did not consist of

affirmative evidence of an infringement of the defendant's rights or any procedural irregularity. The evidence introduced by the State clearly shows that the defendant was fully advised of his *Boykin* rights in pleading guilty to the predicate offense. Considering the foregoing, we find that the fourth assignment of error is without merit.

SENTENCING ERROR

As instructed by LSA–C.Cr.P. art. 920(2), a review has been made of the record in this case, and a sentencing error has been discovered. An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. LSA–C.Cr.P. art. 882(A). Herein, the trial court imposed the thirty-year sentence without benefit of parole. However, neither LSA–R.S. 14:31(B), nor LSA–R.S. 15:529.1(G) restrict parole eligibility. Thus, we vacate the sentence and amend it to allow for parole eligibility. The case is remanded for the clerk of court to amend the minutes to delete the prohibition against parole.

***12 CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED; REMANDED FOR CORRECTION OF MINUTES ON SENTENCING.**