IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2020-KA-00025-COA

J'VAR VONTOU POPE AND ROBERT EMIL HART — **APPELLANTS**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	01/08/2020
TRIAL JUDGE:	HON. LAWRENCE PAUL BOURGEOIS JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEYS FOR APPELLANTS:	OFFICE OF STATE PUBLIC DEFENDER BY: GEORGE T. HOLMES FRANK PHILLIP WITTMANN IV JIM L. DAVIS III
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALLISON ELIZABETH HORNE
DISTRICT ATTORNEY:	JOEL SMITH
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 06/29/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE McDONALD, P.J., McCARTY AND EMFINGER, JJ.

McCARTY, J., FOR THE COURT:

¶1. Two co-defendants were accused and convicted of robbing a trio of men—shooting two and killing another. Finding no reversible error, we affirm.

FACTS

¶2. Three men sat outside playing dominos one Spring evening. As the sky grew dim, and it became too dark to continue, Jerry Lee Lewis, Eugene Weathersby, and Mitchell Weathersby packed up their game. The trio then stood around Mitchell's car, talking and

drinking beer, when two men approached them with a shotgun.

¶3. One of the men said, "You know what this is" and "give it up." Understanding that they were being robbed, Mitchell and Eugene threw their hands in the air. Eugene tossed all of the cash he had—around forty to fifty dollars—on the ground. The robbers collected the money and turned to Jerry. After rifling through Jerry's pockets and stealing his wallet and cash, one of the men said "f - - - it" and shot him. Jerry then fled, the sounds of gunshots continuing as he hid in a ditch around the corner.

¶4. Eugene also heard the gunshots and jumped into Mitchell's car. As he was getting in, Eugene saw Mitchell running and falling as though he had been shot. Eugene was unsure if he had been shot himself, but he could feel something "hanging" out of him. He tried to drive to the hospital but crashed into a pole only half a block away. He remained there until paramedics arrived.

¶5. Eugene was taken to the hospital where he realized that he had indeed been shot. What he had felt "hanging" out of him was the "tissue from his abdomen protruding." Eugene sustained injuries to his stomach, spleen, diaphragm, colon, and pancreas. He survived but was hospitalized for over five weeks.

¶6. Jerry and Mitchell had also been shot. Jerry sustained a "fist-sized" hole in his chest. His lung and "the air blowing out of the cavity" were clearly visible from the wound. Jerry remained hospitalized for two weeks. Mitchell was not as fortunate. Officers found him lying still with his pockets pulled out of his pants. He had bled to death.

¶7. During the investigation, police officers found one unfired shotgun shell and three fired shotgun shells at the scene. The investigators began to receive tips about suspects. The first tip led them to J'Var Pope. As police investigate Pope, they learned his grandmother's home was near the scene of the crime. During a search of the house, shell casings were found that matched those found at the crime scene.

¶8. Police also received a tip directing them to Robert Hart. They soon learned that Hart had been fitted with a GPS ankle monitor by the Mississippi Department of Corrections. The ankle monitor pinned Hart near the scene at the time of the crime.

¶9. The surviving witnesses, Jerry and Eugene, were separately interviewed by the police. During each interview, the witnesses were shown photo lineups containing pictures of Pope and Hart. Neither witness identified Pope or Hart. They said it had been too dark to properly identify their assailants.

COURSE OF PROCEEDINGS

¶10. Eventually, Pope and Hart were arrested and charged with one count of capital murder, two counts of aggravated assault, and two counts of armed robbery. The State originally sought the death penalty, and so separate trials were ordered.[1] Later on, the State waived the death penalty and filed a motion to consolidate the two trials. The trial court granted the motion. Pope and Hart each subsequently filed a motion to sever, but their

[1] "The court shall order a severance of defendants in cases in which the State seeks the death penalty." MRCrP 14.3(a)(1).

requests were denied.

¶11. The State later moved to amend the indictment to charge Pope and Hart as habitual offenders. A separate hearing was held on the motion where the State submitted certified copies of their previous convictions to justify the habitual charge. The trial court granted the motion, and the indictment was amended.

¶12. The initial sixty-eight member jury venire consisted of thirteen black potential jurors and fifty-five white potential jurors. During the peremptory-challenge phase, the defense raised two *Batson* allegations against the State. Both times the trial court determined that the defense had failed to show a prima facie case of discrimination and overruled the objections.

¶13. Marcus Peterson, Pope's cousin, testified that the day after the shooting, Pope "wanted to hide a gun down by my mom's under the trailer, and I told him, no, he couldn't do it because of the simple fact that she don't like guns around her house and I was a convicted felon." Pope told him that the gun was located "down at his grandmother's house behind the house."

¶14. Peterson's sister, Regina Addison, also testified. She overheard Pope tell another witness "we just need Marcus to be quiet because he telling on his people." Later in the same conversation, Pope reiterated that "Marcus just need to be quiet" and added "we got the gun put up, and nobody going to find it."

¶15. Dewayne Bowie testified that he had a conversation with Pope and Hart the day before the crime. During the conversation, Hart told Bowie about his plans to "hit a lick" (i.e.,

commit a robbery) at "the blowhouse." Bowie testified that Hart did most of the talking during the conversation, but Pope said he knew where to get a gun.

¶16. The surviving victims also testified at trial. Both Jerry and Eugene stated that they were unable to identify their assailants. Eugene testified that he was unable to identify Pope or Hart from the photo lineups he was shown during his interview with the police.

¶17. At this time the defense objected. They argued that this information had not previously been disclosed and that such a discovery violation warranted a mistrial. The trial court determined that the audio recordings of the police interviews, copies of the photo lineups, and the police narratives had been turned over to the defense during discovery. The defendants' motion for a mistrial was overruled.

¶18. During the objection to jury instructions, the defense opposed the elements instructions submitted by the State. Because the State conceded the evidence was circumstantial, the defense argued each elements instruction should include the words "and to the exclusion of all reasonable hypotheses consistent with innocence." The trial court overruled the objection because the circumstantial nature of the case would be addressed elsewhere in the instructions. However, the court granted a general circumstantial-evidence instruction, a two-theory instruction, and a one-continuous-transaction instruction.

¶19. A unanimous jury found both Pope and Hart guilty of all counts. Pope was sentenced as a habitual offender to life for Count I, the capital murder of Mitchell Weathersby, and 49 years each for Counts II-V, the aggravated assaults and armed robberies of Eugene

Weathersby and Jerry Lee Lewis, with all sentences to run concurrently. Hart was also sentenced as a habitual offender. He received life for Count I, the capital murder of Mitchell Weathersby, 20 years each for Counts II and IV, the aggravated assaults of Eugene Weathersby and Jerry Lee Lewis, and 49 years each for Counts III and V, the armed robberies of Eugene Weathersby and Jerry Lee Lewis, with all sentences to run concurrently.

ANALYSIS

¶20. Pope and Hart raise eight assignments of error. Each will be addressed in turn.

I. The defendants failed to make a prima facie showing of discrimination.

¶21. Pope and Hart argue that the State violated their Constitutional rights when it used three of its peremptory challenges to exclude black jurors from the jury panel. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Specifically, they contend the trial court erred by failing to proceed to the second and third steps of a *Batson* analysis. This failure, they argue, warrants remand for an in-depth *Batson* hearing.

¶22. The Equal Protection Clause protects criminal defendants from purposeful racial discrimination in the jury selection process during a State's use of peremptory challenges against prospective jurors. *Batson*, 476 U.S. at 79-80. "The [*Batson*] Court stressed a basic equal protection point: In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241 (2019). "A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." *Batson*, 476 U.S. at 95. "For

evidentiary requirements to dictate that several must suffer discrimination before one could object, would be inconsistent with the promise of equal protection to all." *Id*. at 95-96 (citations and internal quotation marks omitted).

¶23. There is a three-step process to safeguard this constitutional protection. *Id*. First, the party challenging a peremptory strike must make a prima facie showing of purposeful discrimination. *Id*. at 93-94. Second, if "the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id*. at 97. Finally, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id*. at 98. Only the first step is applicable in the case at hand.

A. The burden to make a prima facie showing.

¶24. Our Supreme Court has explained that "the pivotal inquiry to determine a prima facie case . . . is whether the opponent of the strike has met the burden of showing that the proponent has engaged in a pattern of strikes based on race or gender, or in other words the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Henley v. State*, 729 So. 2d 232, 239 (¶¶33-34) (Miss. 1998) (citing *Batson*, 476 U.S. at 94).

¶25. "[A] defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case." *Batson*, 476 U.S. at 95. "For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Id*. at 97. However,

"a consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause." *Id*. at 95 (internal quotation marks omitted).

B. The composition of the venire and strikes used.

¶26. The initial sixty-eight member venire consisted of thirteen black potential jurors and fifty-five white potential jurors.[2] Neither Pope nor Hart objected to the racial composition of the initial venire.

¶27. By agreement, the State and the defense struck three black jurors for cause. The State also struck for cause one black juror and eight white jurors. After challenges for cause were made, the venire consisted of nine black panelists and forty-seven white panelists.

¶28. During the peremptory-challenge phase, the State used its first challenge on a black juror. The defense did not object at that time but noted that it was "the first black [juror] they've reached on the venire." The State then accepted a black juror and exercised its second peremptory challenge on a white juror.

¶29. The defense raised a *Batson* challenge when the State used its third challenge on a black juror. Counsel for the defense only relied upon a statistical argument in its challenge.

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[2] We take judicial notice that according to the most recent census count, the "Black or African American" population of Harrison County is 25.9%. *Quick Facts*, https://www.census.gov/quickfacts/fact/table/harrisoncountymississippi/PST040219#PST040219 (last visited June 29, 2021). The Court may take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." MRE 201(b)(2); *see Martin v. Weatherford*, 31 So. 3d 1252, 1263 (¶33) (Miss. Ct. App. 2009) (taking judicial notice of life expectancy tables from the United States Department of Vital Statistics).

They argued that she was "the third black [juror] we've reached on the venire. They have struck two out of the three [black jurors]. We feel that clearly shows a race pattern, and we request a *Batson* reason for the strikes at this time." The trial court ruled the defense had not yet made a prima facie case of discrimination and did not require the State to offer a reason for the strike.

¶30. The State then accepted two black jurors and exercised its fourth peremptory strike on a white juror. When the State exercised its fifth peremptory strike against a black juror, the defense re-deployed the same objection—that closer scrutiny was required due to the statistics of the jury composition. The defense argued that three of the State's peremptory strikes had been used against black jurors, showing a "potential pattern." At that point, the State had accepted three black jurors and struck five jurors—three black and two white. As previously noted, the trial court ruled that the defense had not established a prima facie case, and did not require the State to justify the reason for the strike.

¶31. The State used its sixth peremptory strike on Juror 40, a white juror, and accepted Juror 41, a black juror. The State had eight remaining peremptory strikes but did not use them. Ultimately, the empaneled jury was composed of four black jurors and eight white jurors.

C. A statistical pattern can meet the prima facie showing required under the first step of Batson.

¶32. As both Pope and Hart point out, our Mississippi Supreme Court has previously remanded for an in-depth *Batson* hearing based on a statistical challenge. In the case relied

on by the defendants, the State used seven of its nine peremptory strikes to exclude black jurors. *Walker v. State*, 740 So. 2d 873, 880 (¶23) (Miss. 1999). The resulting panel consisted of ten white jurors and two black jurors, although black citizens made up 50% of the county's population. *Id*.

¶33. The trial court ruled that there was no prima facie case of discrimination "based on the State's seating of two [black jurors] on the jury." *Id*. The trial court further reasoned that "if the State's purpose was to excuse based on race, it could have used all twelve strikes against [black jurors]." *Id*. However, the Supreme Court ruled on appeal that "the mere acceptance of other" black jurors "is no defense to a *Batson* claim." *Id*.

¶34. The Court concluded "that an inference of racial discrimination was presented by [the defendant] and that the lower court erred in failing to conduct a *Batson* hearing." *Id*. at (¶24). The case was remanded for a *Batson* hearing to determine whether *Batson* was violated. *Id*.

¶35. Similarly, the Fifth Circuit Court of Appeals has also reversed for a *Batson* hearing after a truncated *Batson* analysis that stopped at the first step. *Price v. Cain*, 560 F.3d 284, 287 (5th Cir. 2009). In that case, the empaneled jury was entirely composed of white jurors. *Id*. at 285. The jury was selected from an initial 54-member venire that included sixteen potential black jurors. *Id*. During the peremptory-challenge phase, the State used six of its twelve peremptory challenges against black jurors. *Id*. In response to the defense's *Batson* challenge, the "trial court concluded that the mere statement that the jury was all-white was

insufficient to make a prima facie showing to support a *Batson* challenge." *Id*. at 286.

¶36. In the opinion authored by Judge Grady Jolly, the Court held that "[t]o make a prima facie case [the defendant] needed to show only that the facts and circumstances of his case gave rise to an inference that the State exercised peremptory challenges on the basis of race." *Id*. at 287. "This was a light burden, and [the defendant] carried it." *Id*. The fact that the State used six of its twelve peremptory challenges to strike black jurors from the venire, and that the resulting jury was all-white, was "sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id*. Ultimately, the federal court remanded the case for a hearing to determine whether a *Batson* violation occurred. *Id*.

D. Under our standard of review, the defense did not meet the prima facie threshold.

¶37. "The trial judge acts as finder of fact when a *Batson* issue arises." *Miskell v. State*, 270 So. 3d 23, 29 (¶13) (Miss. Ct. App. 2018). "On review, a trial court's determinations under *Batson* are afforded great deference because they are largely based on credibility." *Johnson v. State*, 875 So. 2d 208, 210 (¶4) (Miss. 2004). "We will not overrule a trial court on a *Batson* ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence." *Miskell*, 270 So. 3d at 29 (¶13).

¶38. Here, the State used three of its six peremptory challenges against black jurors. In contrast, the *Walker* Court found a prima facie case had been met when seven of the State's nine peremptory strikes were used against black jurors. *Walker*, 740 So. 2d at 880 (¶23). Likewise, the Fifth Circuit concluded a *Batson* hearing was justified when the State used six

of its twelve strikes against black jurors, resulting in an all white jury. *Price*, 560 F.3d at 286.

¶39. The reality of this case is a far cry from the scenarios in *Walker* and *Price*. Here, the State only used three out of six peremptory strikes against black jurors. The empaneled jury included four black jurors and eight white jurors. In other words, black jurors made up 33% of the final jury panel, exceeding Harrison County's black population of 25%. Given the deference accorded to the trial court, we cannot say it was an abuse of discretion for the trial court to decline to require the State to provide race-neutral reasons for the strikes.

¶40. Critically, the *only* argument made by Pope and Hart in support of their *Batson* challenge was that the statistical usage of strikes justified proceeding to the second step in the *Batson* analysis. Neither defendant presented any other theory of why the strikes were unfounded, such as disparate treatment of jurors based on race or thinly disguised reasons for the exclusion of black citizens. As the United States Supreme Court ruled in *Flowers*, evidence of a pattern is not needed to make a prima facie showing of racial discrimination. *Flowers*, 139 S. Ct. at 2244 (reaffirming that "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose").

¶41. While statistical challenges can certainly establish a prima facie showing, as reiterated in *Flowers* and as shown in *Walker* and *Price*, a challenge based solely on statistics may be difficult since "the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." *People v. Harvey*, 163 Cal. App. 3d 90, 111 (Cal. Ct. App. 1984)

(holding that while "[i]n theory[,] at least, even the exclusion of a single prospective juror may be the product of an improper group bias," a challenge of only one juror based on statistics is difficult). There are certainly cases where a statistical pattern might be shown, such as where the only black jurors on the venire are excluded via peremptory strikes, but the record before us does not show such a situation. On appeal, the defendants attempt to muster other *Batson*-related challenges, but because these were not presented to the trial court, they are procedurally barred.[3] *Corrothers v. State*, 148 So. 3d 278, 305-06 (¶65) (Miss. 2014) (holding that "when a defendant fails to raise the *Batson* claim during the course of the trial, the defendant is procedurally barred from raising this claim on direct appeal").

¶42. Given the unique facts in the record before us, and under our deferential standard of review, we find no reversible error in the trial court's ruling that Pope and Hart failed to make a prima facie showing of discrimination. We therefore deny the request by the defendants for remand for a *Batson* hearing.

II. No discovery violation occurred.

¶43. Pope and Hart argue that the State committed a discovery violation by withholding exculpatory evidence.

¶44. Discovery in criminal cases is governed in part by Mississippi Rule of Criminal Procedure 17. This rule requires the State to disclose "[a]ny exculpatory material concerning

[3] At oral argument, counsel for Pope also acknowledged that the juror questionnaire cards were not present in the record, and therefore challenges could not be based on these grounds.

the defendant." MRCrP 17.2(6). The duty to disclose is ongoing and requires either party to promptly notify the other of any newly discovered material or information that is subject to disclosure. MRCrP 17.8.

¶45. "When faced with previously undisclosed evidence to which the defendant has objected, the trial court should give the defendant a reasonable opportunity to familiarize himself with the evidence." *Brown v. State*, 306 So. 3d 719, 741 (¶80) (Miss. 2020). Next, "[i]f the defendant thereafter believes he may be prejudiced by admission of the evidence because of his lack of opportunity to prepare to meet it, he must request a continuance." *Id*. "Should the defendant fail to request a continuance, he has waived the issue." *Id*. Finally, "[i]f he indeed requests a continuance, the state may opt to proceed without the undisclosed evidence, [or] else the trial court must grant the continuance." *Id*. Failure to follow these guidelines "is prejudicial error, requiring reversal and remand." *Id*.

¶46. Pope and Hart argue the prosecution had a duty to disclose that Jerry Lee Lewis and Eugene Weathersby were unable to identify them from photos the victims were shown during the police interviews. Specifically, the defendants claim they were unaware of *what* photo lineups were shown to the victims.

¶47. An omnibus hearing was held over a year before trial. There, it was agreed that "[f]ull discovery has been obtained by the Defense." This discovery included audio recordings of the witnesses' interviews, photo lineups that included the defendants, and police narratives of the interviews.

¶48. At trial, Jerry testified that he was unable to identify either Pope or Hart. Next, Eugene testified that he was shown photo lineups during his interview with the police, but was unable to identify the defendants. Counsel for the defense objected, arguing the State never disclosed that the victims were shown photos of, and unable to identify, Pope and Hart.

¶49. The State countered, "it is clear on disk number 22, Eugene Weathersby was shown photos." The State also confirmed that the defense was provided the photo lineups: "They are Bates stamp page numbers 518 which is the key for Robert Hart, Bates stamp page 515 which is the key for J'Var Pope[.]"

¶50. Counsel for Pope and Hart conceded they received this evidence but argued it was unclear what photos were shown to the victims. The defense alleged the police should have included in their narratives that the victims were unable to identify Pope or Hart from the photo lineups they were shown.

¶51. This is simply not a discovery violation. The evidence had been provided to the defense before trial. The defense admitted that they received the audio recordings, photo lineups, and police narratives. They also conceded that the recordings clearly indicated the witnesses were unable to identify the person or persons in the photos they were being shown. There was no undisclosed *evidence* at all. As the trial court stated, "[I]t is not a big leap when the defense is given copies of photo arrays and in the video it says, we showed you the photographs."

¶52. Further, the defendants received the evidence more than fourteen months before trial.

The defense could have raised the alleged discovery issue at any point before trial by inquiring as to which photos the witnesses were being shown under MRCrP 17.8.[4]

¶53. This issue is without merit.

III. Additional circumstantial-evidence instructions were not required.

¶54. For their third issue, Pope and Hart argue the trial court erred by refusing to include circumstantial-evidence language in the elements instructions. Because Pope and Hart have not pointed to any case that requires this, and the jury was properly instructed, we affirm.

¶55. The giving or refusal of jury instructions is generally within the trial court's discretion and reviewed under an abuse-of-discretion standard. *Kivinen v. State*, 314 So. 3d 167, 170 (¶14) (Miss. Ct. App. 2021). "When considering a challenge to a jury instruction on appeal, appellate courts do not review jury instructions in isolation; rather, we read them as a whole to determine if the jury was properly instructed." *Kendrick v. State*, 21 So. 3d 1186, 1192 (¶18) (Miss. Ct. App. 2009) (cleaned up). "[I]f the instructions [taken as a whole] fairly announce the law of the case and create no injustice, no reversible error will be found." *Id.* at 1192 (¶18).

¶56. Here, the trial court granted two circumstantial-evidence instructions for the defense. The court granted a general circumstantial-evidence instruction modeled directly after the Mississippi Model Jury Instructions. In addition to the general circumstantial-evidence

[4] When questioned at oral argument, counsel for Hart stated that he did not further inquire into who was in the photos because when he asks officers or the district attorney about his clients, they usually have "bad things" to say.

instruction, the court also granted a two-theory instruction. During the objection to jury instructions, counsel for both Pope and Hart objected to the State's proposed elements instructions because they did not include circumstantial-evidence language. Defense counsel requested the trial court modify the instructions to include the words "and to the exclusion of all reasonable hypotheses consistent with innocence." The court denied the request, concluding the circumstantial nature of the proof was covered in the other given instructions.

¶57. It is uncontested that this was a circumstantial-evidence case and that circumstantial-evidence instructions were given. At oral argument, counsel for Pope admitted that he could not cite a case that stands for the proposition that an elements instruction must contain a circumstantial-evidence burden of proof. We find that when read together as a whole, the jury was properly instructed. Further, we find that the trial court did not abuse its discretion in denying an altered elements instruction because the two circumstantial-evidence instructions fairly instructed the jury as to the law.

¶58. Pope and Hart also argue that they were "greatly prejudiced" when the State allegedly stated an incorrect burden during closing arguments. They point to a series of argument where the State declared:

> Ladies and Gentlemen, the burden of proof never changes. It doesn't matter if it is a case of direct evidence or circumstantial evidence. The burden of proof is always the same. It's always beyond a reasonable doubt. It never gets heightened. And when you read those instructions, it is going to specifically tell you, the law makes no distinction between the weight to be given either direct or circumstantial evidence.

¶59. We first point out that neither Pope nor Hart objected at trial, and we will not hold a

trial court in error for issues not brought before it. *Booker v. State*, 716 So. 2d 1064, 1069 (¶18) (Miss. 1998) (failure to object to prosecution's closing argument bars the issue from being raised on appeal). Furthermore, the jury was correctly instructed, and Pope and Hart have shown no prejudice from the statement.

¶60. This issue is without merit.

IV. The one-continuous-transaction instruction was proper.

¶61. Pope and Hart allege the trial court erred by granting a one-continuous-transaction jury instruction.[5] They argue the instruction was "unnecessary," "cumulative," and "not a correct statement of the law."

¶62. "Mississippi follows the 'one-continuous-transaction' rationale in capital cases." *Gillett v. State*, 56 So. 3d 469, 492 (¶50) (Miss. 2010). The doctrine "defines the causal nexus between the killing and the underlying felony." *Evans v. State*, 226 So. 3d 1, 35 (¶91) (Miss. 2017). "In other words, where the two crimes [e.g., murder and robbery] are connected in a chain of events and occur as part of the res gestae, the crime of capital murder is sustained." *Gillett*, 56 So. 3d at 492 (¶50) (internal quotation mark omitted). "An indictment charging a killing occurring 'while engaged in the commission of' one of the

[5] Instruction No. 19, the one-continuous-transaction instruction, provided:

> The Court instructs the jury that a killing occurring while engaged in the commission of a armed robbery includes the actions of the defendants leading up to the armed robbery, the occurrence of the armed robbery, and the aftermath of the armed robbery.

enumerated felonies includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony." *Id*.

¶63. The actions of Pope and Hart were entirely related to the robbery of Mitchell Weathersby, Eugene Weathersby, and Jerry Lee Lewis. Mitchell's murder occurred while in the commission of armed robbery. The one-continuous-transaction doctrine properly applied to the facts of this case, and the instruction tracked the law. Moreover, both defendants have failed to provide any support for the contention that the jury instruction was improper or "misstated the law." For that reason, the trial court did not abuse its discretion in granting the instruction.

V. Neither defendant was entitled to severance.

¶64. For their fifth assignment of error, Pope and Hart argue that the trial court erred by denying their motions for severance.

¶65. Two or more defendants may be charged in a single indictment when each defendant is charged with accountability for each offense charged. MRCrP 14.2(b)(1). "The court may, on motion of the state or a defendant, grant a severance of defendants or offenses if it is deemed appropriate to promote the fair determination of a defendant's guilt or innocence of each offense." MRCrP 14.3(a)(2); *accord* Miss. Code Ann. § 99-15-47 (Rev. 2020). However, "[d]efendants jointly indicted for a felony are not entitled to separate trials as a matter of right." *Hayes v. State*, 168 So. 3d 1065, 1074 (¶34) (Miss. Ct. App. 2013). "[W]hether a severance should be granted is addressed to the sound discretion of the trial

judge." *Price v. State*, 336 So. 2d 1311, 1312 (Miss. 1976).

¶66. When considering a motion to sever, a trial court must analyze the factors provided by our Supreme Court in *Duckworth v. State*, 477 So. 2d 935, 937 (Miss. 1985). First, the court must look to whether a co-defendant's testimony tends to exculpate himself at the expense of his co-defendant. *Id*. In other words, the court looks to whether there "appear[s] to be a conflict of interest among the co-defendants." *Id*. Next, the court determines whether "the balance of the evidence introduced at trial go[es] more to the guilt of one defendant than the others." *Id*. The denial of a severance only becomes error when the defenses of the co-defendants are adverse to one another. *Rigby v. State*, 485 So. 2d 1060, 1061 (Miss. 1986).

A. Pope was not prejudiced by consolidation of the trials.

¶67. Pope argues he was entitled to severance because he was greatly prejudiced by testimony introduced against Hart. First, he claims that Hart's statements admitted through Dewayne Bowie's testimony were unduly prejudicial against him. Bowie testified that during a conversation he had with Pope and Hart before the crime, Hart told him about his plan to "hit[] a lick," i.e., commit a robbery. According to Bowie, Hart did most of the talking, but Pope said he could get a gun.

¶68. Looking at Bowie's testimony, we cannot find that Hart's statements exonerate himself at all, much less at the expense of inculpating Pope. Rather, the statements inculpate Hart and Pope equally.

¶69. Next, Pope challenges the evidence about Hart's GPS monitor. At the time of the

offense, Hart was wearing an ankle monitor issued by the Mississippi Department of Corrections. It revealed that Hart was in the area when the crimes were committed. This evidence does not tend to exculpate Hart at the expense of Pope. Pope may not like that the ankle monitor placed Hart at the scene or that other testimony put the two men together, but it does not trigger the requirement of severance.

B. Hart was not prejudiced by consolidation of the trials.

¶70. Hart argues that the balance of the evidence "favored the guilt of Pope and prejudiced him." Specifically, the evidence he complains of includes: (1) Pope's grandmother's house was located near the crime scene; (2) matching shotgun shells were found at Pope's home; and (3) the testimony of Marcus Peterson and Regina Addison.

¶71. Yet the fact that Pope's grandmother's house was located near the crime scene does not weigh more heavily in favor of Pope's guilt than Hart's own GPS monitor placing him at the scene. If anything, those two facts showed the proof was not unbalanced.

¶72. Nor can we find any undue prejudice to Hart in the testimony he complains of. Peterson testified that the day after the shooting, Pope "wanted to hide a gun down by my mom's under the trailer." Pope told him the gun was "down at his grandmother's house behind the house." Peterson denied Pope's request "because of the simple fact that" his mother "don't like guns around her house and [he] was a convicted felon."

¶73. Regina Addison testified that she overheard Pope tell another witness "we just need Marcus to be quiet because he telling on his people." Later in the same conversation, Pope

reiterated that "Marcus just need to be quiet" and added "we got the gun put up, and nobody going to find it."

¶74. We first note that the above testimony does not concern Hart and only relates to Pope. There was no mention of Hart, and both witnesses testified that Hart was not present when the statements were made.

¶75. We find that the evidence introduced at trial did not weigh more heavily in favor of one defendant than the other or that any prejudice occurred by consolidation of the trials. This issue is without merit.

VI. Hart's rights under the Confrontation Clause were not violated.

¶76. Hart claims that the admission of Pope's out-of-court statements through witness testimony violated his Sixth Amendment right to confrontation. "This Court reviews de novo a Confrontation Clause objection." *Montson v. State*, No. 2019-KA-00030-COA, 2020 WL 6281190, at *4 (¶29) (Miss. Ct. App. Oct. 27, 2020) (cleaned up).

¶77. The Confrontation Clause guarantees criminal defendants the right "to be confronted with the witnesses against [them]." U.S. Const. amend. VI.; Miss. Const. art. 3, § 26. In *Crawford v. Washington*, the United States Supreme Court held that out-of-court "testimonial" statements of witnesses absent from trial are only admissible into evidence when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. 541 U.S. 36, 68 (2004). "[T]his bar only applies to statements that are 'testimonial.'" *Corbin v. State*, 74 So. 3d 333, 338 (¶13) (Miss. 2011). "Nontestimonial

hearsay does not trigger the need for confrontation to be admissible." *Chatman v. State*, 241 So. 3d 649, 653 (¶13) (Miss. Ct. App. 2017) (cleaned up).[6]

¶78. "Testimonial statements are those reasonably expected to be used 'prosecutorally,' such as confessions, affidavits, custodial police examinations, and depositions." *Armstead v. State*, 196 So. 3d 913, 917 (¶12) (Miss. 2016). The *Crawford* Court specifically noted that the term "testimonial" applies to "a formal statement to a government officer" in a way that "a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51.

¶79. For example, an unavailable co-defendant's out-of-court statements in a casual conversation with friends and acquaintances are not "testimonial" for purposes of the Confrontation Clause. *Polk v. State*, 205 So. 3d 1157, 1161-64 (¶¶12-20) (Miss. Ct. App. 2016). In that case, the trial court admitted a deceased co-defendant's out-of-court statements to a family friend, an acquaintance, and a fellow inmate through witness testimony. *Id*. at 1160 (¶8).

¶80. The family friend testified that both the defendant and the co-defendant visited her home the day after the crime. *Id*. at 1161 (¶11). During the visit, the co-defendant told her he had shot and killed the victim. *Id*. The fellow inmate also testified that the co-defendant

[6] We note that Pope's statements were statements by a co-conspirator and as such are excluded from the definition of hearsay. MRE 801(d)(2)(E) (A statement made by "the party's coconspirator during and in furtherance of the conspiracy" is not hearsay and therefore admissible); *see Pugh v. State*, 270 So. 3d 949, 960 (¶47) (Miss. Ct. App. 2018) (internal quotation mark omitted) (holding that "statements made after the completed act pertaining to a coverup of that act are admissible under Rule 801(d)(2)(E)").

told him he had shot and killed the victim. *Id*. at 1162 (¶15). The acquaintance testified that the co-defendant had shown him the gun used to kill the victim. *Id*. at (¶17).

¶81. We found none of these statements were testimonial but rather "causal remarks to acquaintances." *Id*. at 1161-63 (¶¶12,16,18). Further, the admitted testimony of the second and third witnesses only concerned the co-defendant, not the defendant whose rights were in question. *Id*. In other words, the co-defendant's statements to the fellow inmate and acquaintance inculpated the co-defendant and not the defendant. *Id*. at 1163 (¶20).

¶82. Here, Hart claims that his right to confrontation was violated when the trial court admitted Pope's out-of-court statements through the testimony of Marcus Peterson and Regina Addison. Hart argues that the statements were testimonial and used to inculpate Hart.

¶83. As we addressed in the previous issue, the complained-of testimony does not concern Hart and only relates to Pope. There was no mention of Hart, and both witnesses testified that Hart was not present when the statements were made. Furthermore, just like the witnesses' testimony in *Polk*, these statements bear no resemblance "to the core class of testimonial hearsay identified in *Crawford*. Rather, they were more akin to casual remarks to an acquaintance." *Id*. at 1161 (¶12) (internal quotation mark omitted).

¶84. This issue is without merit.

VII. Pope's indictment was valid.

¶85. Pope submitted a supplemental brief alleging two additional assignments of error. First, he alleges the indictment against him was void because the State omitted essential

elements of the crimes charged and failed to prove he was a habitual offender under the statute.

¶86. "The question of whether an indictment is fatally defective is an issue of law, and, therefore, is reviewed de novo[.]" *Gilmer v. State*, 955 So. 2d 829, 836 (¶24) (Miss. 2007).

A. The charges in the indictment properly tracked the language of the respective statutes.

¶87. "An indictment must contain (1) the essential elements of the offense charged, (2) sufficient facts to fairly inform the defendant of the charge against which he must defend, and (3) sufficient facts to enable him to plead double jeopardy in the event of a future prosecution for the same offense." *Id*. at 836-37 (¶24). Generally, "[a]n indictment is considered sufficient if it tracks the language of the statute under which it is drawn." *Winters v. State*, 52 So. 3d 1172, 1174 (¶7) (Miss. 2010).

¶88. Pope alleges the indictment was flawed because it did not include the words "malice" and "serious . . . indifference to the value of human life." However, he neglects to specify which count of the indictment contains the alleged omission.

¶89. Pope was charged with capital murder under Mississippi Code Annotated section 97-3-19(2)(3) (Supp. 2015), aggravated assault under Mississippi Code Annotated section 97-3-7(2)(a) (Supp. 2015), and armed robbery under Mississippi Code Annotated section 97-3-79 (Rev. 2014). A review of the statutes shows that "malice" and "serious . . . indifference to the value of human life" are not found anywhere within the statutory language.

¶90. A comparison of each charged offense to the respective statute shows that the

charging indictment tracked the statutory language and included each element of the offense. For this reason, we find no error in the language of the indictment. This issue is without merit.

B. Pope was properly indicted as a habitual offender.

¶91. Mississippi defines a violent-habitual offender as a person that has previously been convicted of two separate felonies for which they actually served one year or more, and one of the convictions was for a crime of violence. Miss. Code Ann. § 99-19-83 (Rev. 2020). All that is required for a defendant to be validly convicted as a habitual offender "is that the accused be properly indicted as an habitual offender, that prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof." *Keyes v. State*, 549 So. 2d 949, 951 (Miss. 1989) (citations omitted). "We have regularly upheld sentences under the habitual criminal statutes where the proof of prior convictions was made by certified copies of the judgments of conviction." *McIlwain v. State*, 700 So. 2d 586, 589 (¶13) (Miss. 1997). "This accords with the basic principle that the best evidence of a conviction is the judgment of conviction." *Id*.

¶92. Prior to trial, the court granted the State's motion to amend Pope's indictment. The indictment was amended to charge Pope as a violent-habitual offender charge pursuant to section 99-19-83. In support of the motion, the State presented certified copies of Pope's prior indictments and convictions from the Harrison County Circuit Clerk's office.

¶93. Pope had previously been convicted of and sentenced to four years for accessary after

the fact to a drive by shooting under Mississippi Code Annotated section 97-1-5 (Rev. 2020); and ten years for residential burglary under Mississippi Code Annotated section 97-17-23 (Rev. 2020). The sentences were originally ordered to be served concurrently, with six total years suspended. However, the suspended sentences were later reinstated after Pope's parole was revoked. Pope concurrently served over two years for the offenses from September 27, 2010, to January 7, 2013.

¶94. The State properly established that Pope was a habitual offender under the statute. The State provided Pope's conviction records which showed that he had been convicted of two prior felonies—one being a crime of violence. The records also showed that he had been sentenced to, and served, over one year for each conviction. This issue is without merit.

VIII. Pope's convictions did not violate his protection against double jeopardy.

¶95. Next, Pope argues for the first time on appeal that his convictions for armed robbery violated his right to be protected against double jeopardy. He alleges that because armed robbery served as the underlying felony satisfying his capital murder conviction, he could not also be charged with armed robbery in Counts III and V.

¶96. "Ordinarily, this Court will not entertain non-jurisdictional assignments of error not raised prior to appeal." *Boyd v. State*, 977 So. 2d 329, 334 (¶13) (Miss. 2008). "However, we have made exceptions for claims of significant violations of fundamental rights" such as the protection against double jeopardy. *Id.*; *see Moore v. State*, 112 So. 3d 1084, 1087 (¶6) (Miss. Ct. App. 2013) ("[T]he protection against double jeopardy is a fundamental right").

"When reviewing double-jeopardy claims, this Court applies a de novo standard of review." *Moore*, 112 So. 3d at 1087 (¶6).

¶97. "We employ the *Blockburger* test to determine whether a double-jeopardy violation has occurred; it asks whether each offense contains an element not present in the other." *McDonald v. State*, 204 So. 3d 780, 782 (¶6) (Miss. Ct. App. 2016) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Multiple convictions of the same felony do not violate the Double Jeopardy Clause where each charge was for a separate victim. *Id*. at 783 (¶7). In other words, each victim served as an element of one offense not present in the other.

¶98. Pope was convicted of capital murder for the unlawful killing of Mitchell Weathersby. The armed robbery of Mitchell Weathersby served as the underlying felony satisfying the capital murder statute.[7] The convictions Pope complains of, Count III and Count V, are for the armed robberies of Eugene and Jerry, respectively.

¶99. Each count of armed robbery contained an element not present in the other—a different victim. We find that Pope's right to be protected against double jeopardy was not violated by Counts III and V. This issue is without merit.

CONCLUSION

¶100. For the above stated reasons, we find no merit to Pope's and Hart's alleged

[7] Capital murder is defined by statute as the "killing of a human being without the authority of law . . . by any person engaged in the commission of the crime of . . . robbery[.]" Miss. Code Ann. § 97-3-19(2) (Rev. 2020).

assignments of error. Accordingly, we affirm.

¶101. **AFFIRMED.**

BARNES, C.J., CARLTON AND WILSON, P.JJ., GREENLEE, WESTBROOKS, McDONALD AND EMFINGER, JJ., CONCUR. LAWRENCE, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. SMITH, J., NOT PARTICIPATING.