NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0518

STATE OF LOUISIANA

VERSUS

RICKY JOHNSON

Judgment Rendered: October 29, 2010

Appealed from the
Twenty-First Judicial District Court
in and for the Parish of Tangipahoa, State of Louisiana
Trial Court Number 803632

Honorable Ernest G. Drake, Jr., Judge Presiding

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Scott M. Perrilloux **Angel Monistere** **Patricia Parker** **Amite, LA**	**Counsel for Appellee,** **State of Louisiana**
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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

The defendant, Ricky Johnson, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

Around 3:00 a.m. on September 7, 2008, the defendant and his cousin, Nathaniel Brown, were walking in Lincoln Park in Hammond. The defendant, who was armed with a 9mm semi-automatic weapon, intended to rob someone. The victim, Stephen Reid, drove into Lincoln Park in a white SUV and stopped on Hardin Street. The defendant approached the SUV on the driver's side, and Brown approached on the passenger's side. After some discussion, the defendant sold Reid some crack cocaine. Brown noticed that Reid had a $100.00 bill in his center console and signaled to the defendant. The defendant drew his gun, placed the gun under Reid's chin, and told Reid to give him everything he had. Brown leaned in and grabbed the money from inside the SUV. Reid grabbed the defendant's arm and began to drive away. The defendant shot Reid once in his upper left side, killing him.

Dr. Fraser Mackenzie, a forensic pathologist, performed the autopsy on Reid. He testified at trial that Reid sustained a gunshot wound to the chest on the left side. The bullet traveled through the lungs and the heart and exited the right side of Reid's chest. Dr. Mackenzie stated Reid would have lived two to three minutes from this type of injury. The manner of death was indicated as homicide.

Detective Thomas Mushinsky, with the Hammond Police Department, testified at trial that he interviewed the defendant following his arrest. In the

recorded interview, the defendant admitted that he shot Reid.[1] The defendant also disclosed where he had hidden the gun used to kill Reid in Lincoln Park. Officers found the gun hidden as described by the defendant. Also, a 9mm bullet casing was found near the crime scene. A spent 9mm bullet was found in a laptop case on the front seat of Reid's SUV. Both the casing and the bullet matched the gun the defendant used to shoot and kill Reid.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant contends the trial court erred in allowing the State to introduce at trial evidence of other crimes by the defendant. Specifically, the defendant contends that evidence at trial showing that he committed uncharged crimes of armed robbery and attempted armed robbery was unduly prejudicial and lacked sufficient probative value.

Prior to trial, the State filed a notice of intent to use evidence of other crimes, wrongs or acts. In the State's notice, the other crimes, wrongs or acts were described as follows:

> Other crimes include the defendant's committing two armed robberies or attempts thereof on the same night as the murder. The purpose of using said crimes is to show the defendants' [sic] motive, intent, and plan[] to commit the offense in question.
>
> Furthermore, in the alternative, the State of Louisiana submits that these said crime[s] are res gestae and thereby form one continuous transaction.

At the pretrial Prieur hearing, according to the testimony of Detective Mushinsky and Officer Jason O'Quinn, also an officer with the Hammond Police Department, the defendant and his accomplice robbed a "crack-head" at gunpoint of two pieces of crack cocaine in Lincoln Park. The "crack-head" did not have any money. Shortly thereafter, the defendant and his accomplice chased another man with the intent to rob him. However, the man, in running away, avoided being

[1]The interview is an audio recording only.

robbed. According to Detective Mushinsky, who interviewed the defendant following his arrest, the defendant told him that the weapon he used to shoot Reid was the same weapon he used in the previous armed robbery and attempted armed robbery in Lincoln Park that same night. Also, according to Detective Mushinsky, the defendant's intention regarding all three victims was to rob them at gunpoint to get money.

In ruling this evidence admissible, the trial court stated in pertinent part:

> But the next statement [of LSA-C.E. art. 404(B)] says: It may; however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity. And then it's got one of all [sic] of those of which appear to the court to be appropriate and applicable to this situation. Only one that does not appear to be, perhaps, it goes on to read absence of mistake or accident, provided that upon request by the accused that prosecution in the criminal case provide reasonable notice, etc[.], etc.
>
> It appears that all perfunctory procedural matters have been complied with. The court hereby orders that said testimony concerning the prior armed robbery and the prior attempted armed robbery are admissible for those other purposes as stated in the statute.

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. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. State v. Lockett, 99-0917, p. 3 (La. App. 1st Cir. 2/18/00), 754 So. 2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So. 2d 115.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for

such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Regarding the defendant's confession to Detective Mushinsky, the detective testified at trial as follows:

> [The defendant] started off explaining w[h]ere they were at, which was inside Lincoln Park. He stated that they were doing a lick. A lick referred to a[n] armed robbery. . . . He said it was early in the morning. He said they had walked around and robbed a crackhead that evening. . . . The crackhead didn't have any money, but they were able to rob two pieces of crack cocaine from him which was in a plastic bag. They stated on [sic], another male came up to them that they tried to rob. The male fled on foot and apparently tripped and broke his leg.
>
> They said shortly after that, a white SUV . . . pulled into Lincoln Park. . . . They made contact with a white male driver, which [sic] was later identified as Steven [sic] Reid. . . . Mr. Johnson was on the driver's side of the vehicle. A brief conversation took place. Mr. Johnson was going to sell him the crack cocaine that they had robbed from the crackhead. During the transaction, he sold it to him. Mr. Johnson he [sic] told me that he upset [sic] because he only got $6 for the crack cocaine.
>
> At that time, the other subject who was on the other side of the vehicle saw more money inside of the vehicle inside the glove compartment, motioned to Mr. Johnson, who then drew his 9 millimeter pistol from his waist band. He graphically explained to me that he put the 9 millimeter to the subject's chin-neck area, right in here (indicating), told him give me everything. At that time, the other person on the other side jumped inside the vehicle, forcibly removed a hundred dollars out of the glove compartment. Johnson told him, give me everything. Give me everything you got. The subject inside the vehicle, Mr. Steven [sic] Reid, said no. Apparently reached up put his hand -- Mr. Johnson said he reached up and grabbed his hand. And he said he shouldn't of [sic] touched him and started to accelerate down the street. Said he sat back and fires one round inside the vehicle, which fatally wounded Mr. Steven [sic] Reid.

Regarding the gun the defendant used, Detective Mushinsky further testified at trial the defendant told him "that was the weapon that was used on Steven [sic] Reid and also the one that he pointed at the other male that he robbed, Greg Parker, and also the one that he had robbed the crackhead with."

The defendant contends that this other crimes evidence admitted at trial served no purpose other than to depict him as a bad person, and that such evidence was "exceptionally" prejudicial and not probative of any of the exceptions listed in

LSA-C.E. art. 404(B)(1). We do not agree. All three crimes - two armed robberies and one attempted armed robbery - occurred in a short time frame and in close proximity to each other. The defendant used the same gun on the same day to rob two different victims and to attempt to rob a third victim. Further, the defendant used the drugs that he robbed from his first victim to sell to Reid before the defendant robbed and killed Reid. Evidence of the two prior crimes was relevant to show the defendant's motive, opportunity, intent, and plan.

The trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. See State v. Galliano, 2002-2849, pp. 3-4 (La. 1/10/03), 839 So. 2d 932, 934 (per curiam). We find no abuse of discretion in the trial court's ruling. The evidence of the prior incidents had independent relevance to the issues of motive, opportunity, intent, and plan, and any prejudicial effect was outweighed by the probative value of such evidence.[2] See State v. Scales, 93-2003, pp. 4-5 (La. 5/22/95), 655 So. 2d 1326, 1330-31, cert. denied, 516 U.S. 1050, 116 S. Ct. 716, 133 L. Ed. 2d 670 (1996).

Moreover, we find that the defendant's armed robbery and attempted armed robbery of other victims were integral parts of the events immediately preceding the killing of Reid. The doctrine of res gestae is designed to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. Integral act (res gestae) evidence in Louisiana incorporates a rule of narrative completeness without which the State's case would lose its narrative momentum and cohesiveness. See State v. Taylor, 2001-1638, pp. 10-11 (La. 1/14/03), 838 So. 2d 729, 741-42, cert. denied, 540 U.S. 1103, 124 S. Ct. 1036, 157 L. Ed. 2d 886 (2004); LSA-C.E. art. 404(B)(1). See also State v. Brewington, 601 So. 2d 656 (La. 1992) (per curiam). To constitute res gestae, the

[2]Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403.

circumstances must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction. See State v. Addison, 551 So. 2d 687, 690-91 (La. App. 1st Cir. 1989), writ denied, 573 So. 2d 1116 (La. 1991).

As discussed above, all three crimes occurred within close proximity of each other within a short period of time. The defendant used the same gun in all three crimes. The defendant also retained and used the cocaine he stole from one victim to offer to Reid before shooting him. Accordingly, we find that the defendant's armed robbery and attempted armed robbery of different victims shortly before he robbed Reid were integral parts of the criminal act of the second degree murder of Reid. See Taylor, 2001-1638 at pp. 11-14, 838 So. 2d at 742-43 (where the Supreme Court found that evidence of crimes involving different victims in different states, over a seven-day span, was admissible under the res gestae doctrine). See also Brewington, 601 So. 2d at 657.

We find, further, that even had the other crimes evidence been inadmissible, the admission of such evidence would have been harmless error. See LSA-C.Cr.P. art. 921. The erroneous admission of other crimes evidence is a trial error subject to harmless-error analysis on appeal. State v. Johnson, 94-1379, p. 17 (La. 11/27/95), 664 So. 2d 94, 102. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993); Johnson, 94-1379 at p. 14, 664 So. 2d at 100.

In the instant matter, we find the defendant could not have been prejudiced by evidence of the armed robbery and attempted armed robbery perpetrated by the defendant prior to Reid's killing. Detective Mushinsky testified at trial that the defendant told the detective that he shot Reid while robbing him. The defendant's

taped confession was played for the jury. Also, the 9mm casing found at the crime scene and the spent bullet found in Reid's truck both came from the defendant's gun, which he had used on all three victims, including Reid. Accordingly, the State's evidence clearly established the defendant's guilt. As such, the guilty verdict rendered would surely have been unattributable to any evidence of an armed robbery and attempted armed robbery prior to the armed robbery and killing of Reid, and any error in allowing such other crimes evidence to be presented to the jury would have been harmless. See Sullivan, 508 U.S. at 279, 113 S. Ct. at 2081.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in allowing into evidence multiple photographs of the victim. Specifically, the defendant contends the photographs were gruesome, cumulative, highly prejudicial, and had no probative value.

The various photographs introduced into evidence showed the victim's dead body at the scene after being removed from the SUV, as well as how the body was found in the SUV before being moved. Several photographs showed the bullet holes in the victim. Many of the photographs were of various angles and distances of the victim. The defendant objected on two occasions to the photographs being introduced because they were gruesome and they had no probative value. The trial court overruled the objections.[3]

The admission of gruesome photographs and videotapes will not be overturned unless it is clear the prejudicial effect of the evidence outweighs its probative value. See LSA-C.E. art. 403. Admission of such evidence will not be

[3]The State also introduced into evidence autopsy photographs, which showed graphic, close-up shots of Reid's exit and entrance wounds. The defendant, however, did not object to these photographs being introduced into evidence.

found to constitute error unless the photographs and videotapes are so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence. Gruesomeness of photographs and videotapes does not, in and of itself, prevent admissibility. State v. Huls, 95-0541, pp. 23-24 (La. App. 1st Cir. 5/29/96), 676 So. 2d 160, 176, writ denied, 96-1734 (La. 1/6/97), 685 So. 2d 126. Generally, photographs of a victim's body which depict the fatal wounds are relevant to prove the *corpus delicti*, to establish the identity of the victim, to show the location, severity and number of wounds, and to corroborate other evidence of the manner in which the death occurred. State v. Eaton, 524 So. 2d 1194, 1201 (La. 1988), cert. denied, 488 U.S. 1019, 109 S. Ct. 818, 102 L. Ed. 2d 807 (1989). Moreover, the defendant cannot force the State to use drawings or other evidence instead of photographs. The defendant cannot deprive the State of the moral force of its case by offering to stipulate to what is shown in photographs. See State v. Perry, 502 So. 2d 543, 559 (La. 1986), cert. denied, 484 U.S. 872, 108 S. Ct. 205, 98 L. Ed. 2d 156 (1987).

We find the crime scene photographs were relevant and probative in establishing Reid's identity and that he had been shot and killed. They proved *corpus delicti*, and corroborated the cause of death, the place of death, the type of weapon used, and the location and severity of the wounds. See Perry, 502 So. 2d at 559.

When the autopsy photographs were introduced into evidence at trial, the trial court asked if there was any objection. Defense counsel replied, "[n]o objection, Your Honor." Our law requires that a defendant make a contemporaneous objection and state the reason therefor to allow the trial judge the opportunity to rule on it and prevent or cure error. LSA-C.Cr.P. art. 841. See LSA-C.E. art. 103(A)(1). A new basis for an objection cannot be raised for the first time on appeal. State v. Herrod, 412 So. 2d 564, 566 (La. 1982).

Notwithstanding the failure to lodge an objection, we find the autopsy photographs were highly relevant to establish the nature and extent of the wounds and to corroborate the testimony of Dr. Mackenzie as to the manner and cause of death, as well as the severity of the wounds caused by a single gunshot. See State v. Vernon, 385 So. 2d 200, 204 (La. 1980); State v. Craddock, 435 So. 2d 1110, 1116-17 (La. App. 1st Cir. 1983).

While the defendant also argues in this appeal the photographs were cumulative, he made no such objection at trial when the photographs were introduced into evidence. See LSA-C.E. art. 103(A)(1); LSA-C.Cr.P. art. 841. In any event, although some photographs may have been cumulative to a degree, they did show various angles of the victim and the wounds. Moreover, even if admission of some of the photographs was cumulative, there was no prejudice to the defendant. See State v. Howard, 98-0064, p. 16 (La. 4/23/99), 751 So. 2d 783, 802, cert. denied, 528 U.S. 974, 120 S. Ct. 420, 145 L. Ed. 2d 328 (1999); State v. Pooler, 96-1794, p. 43 (La. App. 1st Cir. 5/9/97), 696 So. 2d 22, 51, writ denied, 97-1470 (La. 11/14/97), 703 So. 2d 1288.

The probative value of the evidence outweighed the possible prejudicial effect. See State v. Hebert, 96-1884, p. 17 (La. App. 1st Cir. 6/20/97), 697 So. 2d 1040, 1050, writ denied, 97-1892 (La. 12/19/97), 706 So. 2d 450. Accordingly, the trial court did not err in allowing the photographs into evidence.

This assignment of error is without merit.

REVIEW FOR ERROR

The defendant asks this court to examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful

review of the record in these proceedings, we have found no reversible errors. See State v. Price, 2005-2514, p. 18 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277.

CONVICTION AND SENTENCE AFFIRMED.