NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0566

STATE OF LOUISIANA

VERSUS

FRANKLIN MEREDITH, JR.

Judgment Rendered: NOV 01 2013

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 07-10-0442

Honorable Richard D. Anderson, Judge

* * * * * * *

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

Defendant, Franklin Meredith, Jr., was charged by an amended grand jury indictment with aggravated rape, a violation of La. R.S. 14:42 (count one), and second degree murder, a violation of La. R.S. 14:30.1(A)(1) (count two). He pled not guilty. Following a jury trial, defendant was found guilty as charged on both counts. For both offenses, the trial court sentenced defendant to the mandatory terms of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence.[1] Defendant now appeals, alleging two counseled and two pro se assignments of error. For the following reasons, we affirm defendant's convictions and sentences.

FACTS

On the afternoon of April 14, 2010, Carlton Walker went to Monte Sano Bayou Park in Baton Rouge to go fishing. Upon exiting his vehicle, he approached a canal and spotted what appeared to be a human body floating in it. Walker notified a nearby sheriff's officer, who confirmed the presence of a body and alerted an officer with the Baton Rouge Police Department ("BRPD").

Crime scene technicians arrived on the scene and removed the victim's body from the water. During a subsequent autopsy, BRPD Sergeant David Fauntleroy fingerprinted the victim, and she was later identified as J.G.[2] Dr. Paul McGarry, the forensic pathologist who conducted the victim's autopsy, concluded that the victim's cause of death was asphyxia due to drowning. Dr. McGarry also noted extensive bruising to the victim's face and scalp, including severe mouth injuries, a broken nose, lacerated eyelids, and a fractured larynx. He opined that these

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[1] The trial court did not state whether these sentences would be imposed concurrently or consecutively. However, as described below, defendant's offenses appear to be part of the same act or transaction, so they should be served concurrently because of the lack of an express direction for consecutive sentences by the trial court. See La. Code Crim. P. art. 883.

[2] In accordance with La. R.S. 46:1844(W)(1)(a), we reference a victim of a sex offense only by her initials.

injuries were caused by multiple forceful blows and strangulation. Dr. McGarry further pointed out what appeared to be defensive wounds on the victim's hands and abrasive wounds on the victim's back and shoulders which appeared to be consistent with the victim being held down on her back on a rough surface.

Beyond noting the victim's apparent physical injuries, Dr. McGarry also collected a series of swabs and smears from the victim's vagina, anus, and mouth to check for signs of sexual assault. Tammy Rash, a DNA analyst for the Baton Rouge Police Department who works at the Louisiana State Police ("LSP") crime lab, performed the initial testing on these specimens. Finding that the vaginal smear (and neither of the others) was presumptively positive for the presence of spermatozoa, Rash conducted further testing on the vaginal swab. Testing on the sperm fraction of DNA taken from the vaginal swab indicated a mixture of two individuals' DNA, with the victim being the major contributor and a male being the minor contributor. The DNA sample was run through CODIS, a database containing DNA of convicted offenders. On April 22, 2010, BRPD Detective Bryan Ballard, who investigated the homicide, received a call from the LSP crime lab identifying the defendant as a preliminary DNA match. Police investigators eventually contacted defendant to interview him and to take a buccal swab for comparison. Further testing on that buccal reference sample performed by Glenn Fahrig, a DNA and statistical analyst with the LSP crime lab, indicated it was 696 billion times more likely that the DNA mixture contained the victim's and defendant's DNA than the victim's and another random individual's DNA. Based upon these results, the police arrested defendant for the aggravated rape and second degree murder of J.G.

COUNSELED ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant argues that the evidence was insufficient to support his convictions for aggravated rape and second degree murder. Specifically, he contends that the evidence presented by the state at trial merely established that he had consensual sexual intercourse with the victim at some point prior to her murder and that there was no showing of his involvement in her murder.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after 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. See **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statutes 14:42 provides, in pertinent part:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> (1) When the victim resists the act to the utmost, but whose resistance is overcome by force.

Louisiana Revised Statutes 14:41 provides, in pertinent part:

> A. Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent.
>
> B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.

Defendant did not testify at trial, but he argues in his appellate brief that his only sexual contact with the victim was consensual.

Louisiana Revised Statutes 14:30.1 provides, in pertinent part:

> A. Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm[.]

In his brief, defendant does not challenge the fact that J.G. was a victim of second degree murder. He argues only that the state failed to prove beyond a reasonable doubt his identity as the perpetrator of that offense.

At trial, the victim's parents and several of her friends testified about her mental state in the years leading up to her death. A few years before her death, the victim was diagnosed with schizophrenia and prescribed Seroquel to manage her condition. Witnesses testified that the victim loved to walk. She had a habit of leaving her mother's residence and simply wandering off and disappearing for a couple of days at a time. The victim was described as being cautious and careful and not the type of person who would hitchhike. David Gonzales, the victim's father, had specific knowledge that the victim enjoyed walking in Monte Sano Bayou Park. The state also presented the testimony of Officer Derek Burns, who had ticketed the victim on November 7, 2009, for trespassing and possessing alcohol in Monte Sano Bayou Park. The victim's mother last saw her around 10:00 p.m. on the evening before her body was discovered.

The state also played for the jury two videotaped interviews of defendant conducted by BRPD detectives. In the first, conducted prior to Glenn Fahrig's

DNA and statistical analysis of defendant's buccal swab, BRPD detectives showed defendant two pictures of the victim. Three times, defendant denied ever having seen or met her. Defendant also told the detectives that in April and May 2010, he lived at 2578 Farrar Street, which was only seven-tenths of a mile from where the victim's body was recovered.

In the second interview, conducted after Glenn Fahrig's analysis, BRPD detectives again showed defendant both pictures of the victim. In this approximately forty-minute interview, defendant also repeatedly denied ever having any contact of any kind with the victim. When the detectives specifically asked defendant how his semen might have ended up inside of her, defendant stated that he did not know because the last time he had sex was on October 9, 2007.

Additionally, the state presented testimony from D.W. Defendant pled guilty on May 6, 1993, to the sexual battery of D.W., as well as to related offenses of unauthorized entry of an inhabited dwelling and false imprisonment with a dangerous weapon. The trial court had previously found this testimony admissible at defendant's trial under La. Code Evid. art. 412.2.

D.W. testified that in 1990 or 1991, she worked at a Baton Rouge Shoney's Restaurant with defendant before ultimately developing a romantic relationship with him. They lived together briefly before D.W. ended their relationship. On September 23, 1992, defendant went to D.W.'s house and demanded to be let inside. When D.W. refused, defendant kicked in her glass door and retrieved D.W.'s .38 caliber handgun from her purse. He then tackled D.W. to the ground and raped her. After the first assault, defendant ordered D.W. to bathe in hot water. Defendant raped D.W. again at gunpoint. In addition to raping D.W., defendant beat her with his fists, causing D.W. to sustain a broken jaw and other injuries. He also threatened to kill D.W. and to "put [her] in the canal [where]

nobody would ever find [her]." D.W. was eventually able to escape through her kitchen window while defendant was distracted by a repairman he called to fix the glass door.

With respect to the instant aggravated rape offense, the state presented evidence at trial that there was a 1-in-696 billion chance of the DNA mixture found in the victim's vagina coming from persons other than the victim and defendant himself. While defendant did not testify at trial, his counsel advanced the theory of consensual sex to the jury during his closing arguments. However, the state introduced evidence to contradict that claim, including Dr. McGarry's testimony about the victim's defensive wounds and about the abrasions on the victim's back, which he opined could have been caused by subtle – and under the state's theory, sexual – movement on top of a concrete slab located near the victim's body. In addition, the state introduced D.W.'s testimony in an effort to show defendant's previous, similar sexually assaultive behavior. Finally, in his videotaped interviews with the police, defendant clearly lied about not having ever come into contact with the victim and about the extent of his recent sexual history. Despite being confronted with the DNA evidence against him, defendant stated in his second interview that he had never seen or met the victim and that he had not had sex for over two years. A finding of purposeful misrepresentation reasonably raises the inference of a "guilty mind," as in the case of flight following an offense or the case of material misrepresentation of facts following an offense. Lying has been recognized as indicative of an awareness of wrongdoing. **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984).

Here, the jury clearly rejected defendant's theory that he merely had consensual sex with the victim instead of raping her. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless

there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). Furthermore, an appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the factfinder. See **State v. Calloway**, 2007–2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Viewing the evidence in the light most favorable to the prosecution, we find that the state presented sufficient evidence for the jury to conclude that defendant engaged in the aggravated rape of J.G. Thus, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to it. See **Ordodi**, 946 So.2d at 662. Assignment of error number one is without merit as it relates to defendant's conviction for aggravated rape.

With respect to his conviction for second degree murder, defendant does not dispute that the victim was killed as the result of a homicide. Rather, he simply asserts that there is a lack of evidence establishing his identity as the person who killed J.G. When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the state is required to negate any reasonable probability of misidentification. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163. As a continuation of the hypothesis of innocence presented with respect to his aggravated rape charge, defendant argued at trial that he merely had consensual sex with the victim and took no part in her subsequent murder.

The state's evidence tending to establish defendant as the perpetrator of the victim's murder was entirely circumstantial. First, the state introduced evidence at trial that, at the time of J.G.'s death, defendant lived only seven-tenths of a mile

from the location where the victim's body was found. Next, through Dr. McGarry, the state introduced evidence of the victim's extensive injuries and compared them to those described by D.W. from defendant's previous sexual assault of her. The state also noted similarity between defendant's threat to D.W. – that he would kill her and throw her into a canal – and the victim's ultimate fate in the instant case. Finally, as with the aggravated rape charge, the jury viewed two interviews wherein defendant repeatedly denied ever coming into contact with the victim despite the detectives confronting him with her photographs and with the evidence of his semen being found inside her vagina. Such lies raise the inference of a "guilty mind." See **Captville**, 448 So.2d at 680 n.4. Once again, the jury clearly rejected defendant's theory that he simply had consensual sex with the victim without subsequently murdering her. See **Moten**, 510 So.2d at 61. We will not disturb that finding on appellate review. See **Calloway**, 1 So.3d at 418.

Viewing the evidence in the light most favorable to the prosecution, we find that the state presented sufficient evidence for the jury to conclude that defendant committed the second degree murder of J.G. Thus, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to it. See **Ordodi**, 946 So.2d at 662. Assignment of error number one is without merit as it relates to defendant's conviction for second degree murder.

COUNSELED ASSIGNMENT OF ERROR #2

In the discussion related to his first assignment of error, defendant seems to make the argument that the trial court erred in allowing the state to voir dire potential jurors about their receptiveness to evidence concerning defendant's prior sex convictions. He contends that this line of questioning caused the potential jurors to become biased against him before the trial even started.

During jury selection, the state and defense questioned three panels of

prospective jurors. Each time the state questioned a panel of prospective jurors, it informed them that they would be hearing evidence of defendant's commission of another crime involving sexually assaultive behavior. For instance, the state told prospective jurors:

> State: [Y]ou will in this case, because the defendant is, in fact, in this particular case charged with a count of aggravated rape, be hearing evidence of his commission of another crime involving sexually assaultive behavior, and it will be considered by you, and you will be given a limited instruction as to its purpose. That will be considered by you if it has bearing on any matter to which it is relevant. I'm going to ask you . . . will you be able to consider this, subject to the court's instruction and limitation?

The first two times the state asked this question, defense counsel objected and moved for a mistrial on the basis that the state referred to other crimes evidence during voir dire. In both instances, the trial court overruled the objection and denied the motion for a mistrial.

Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to another crime committed or alleged to have been committed by the defendant *as to which evidence is not admissible*. See La. Code Crim. P. art. 770(2). Mistrial is a drastic remedy and, except in instances in which mistrial is mandatory, is warranted only when trial error results in substantial prejudice to a defendant, depriving him of a reasonable expectation of a fair trial. **State v. Fisher**, 95-0430 (La. App. 1st Cir. 5/10/96), 673 So.2d 721, 725–26, writ denied, 96–1412 (La. 11/1/96), 681 So.2d 1259. Determination of the existence of unnecessary prejudice warranting a mistrial is within the sound discretion of the trial judge. See **State v. Manning**, 2003–1982 (La. 10/19/04), 885 So.2d 1044, 1109, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). The trial court has discretion over the scope of voir dire examination. **State v. Lewis**, 2008–1381 (La. App. 1st Cir. 2/13/09), 7

So.3d 782, 785, writ denied, 2009–0531 (La. 11/20/09), 25 So.3d 787.

In the instant case, the trial court conducted a **Prieur**[3] hearing addressing the admissibility of other crimes evidence under La. Code Evid. arts. 404 and 412.2. After this hearing, the trial court granted the state's motion to use other crimes evidence involving D.W. and two other of defendant's previous victims.[4]

In his argument, defendant cites, and we know of, no cases holding that a district attorney may not refer to *admissible* prior crimes during voir dire, or otherwise at trial. Had the state, during voir dire, referred to other crimes evidence later ruled inadmissibile, the defendant, in light of La. Code Crim. P. art. 770(2), would seemingly have been entitled to a mistrial at that point. However, the state was careful during its questioning of prospective jurors to speak generally about the type of evidence it would introduce and to ask the potential jurors if they would be able to consider that type of evidence subject to the trial court's instructions and limitations. Consequently, we find that the trial court did not err or abuse its discretion in allowing the state to ask this simple, yes-or-no question to prospective jurors.

However, even if we were to find that the trial court abused its discretion in allowing the state to question prospective jurors about their ability to consider relevant other crimes evidence, we believe that any such error is harmless beyond a reasonable doubt. See La. Code Crim. P. art. 921. As discussed above, this error would not have fallen within the mandatory-mistrial provisions of La. Code Crim. P. art. 770. Defendant presented no evidence that this line of questioning caused any actual bias among the prospective jurors, and we think that any such bias would have been cured when the actual evidence concerning defendant's

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[3] **State v. Prieur**, 277 So.2d 126 (La. 1973).

[4] The state did not actually introduce the evidence of the other crimes evidence related to these two other victims at defendant's trial.

admissible other crime was presented at trial. Considering these circumstances, defendant's convictions were surely not attributable to any trial error that may have occurred as a result of the state's questioning prospective jurors about their ability to consider admissible other crimes evidence. See **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR #1

In his first pro se assignment of error, defendant alleges that the trial court abused its discretion in allowing Detective Ballard to testify to the content of Dr. McGarry's autopsy report, in violation of his right to confrontation.

In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. amend. VI. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear *at trial* unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." **Crawford v. Washington**, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004) (emphasis added).

Defendant complains that Detective Ballard was allowed to testify regarding the contents of Dr. McGarry's autopsy report. However, the testimony referenced by the defendant in this assignment of error was not given at trial, but at a pretrial hearing on other crimes evidence that the state sought to introduce at trial. At trial, Dr. McGarry testified extensively regarding his autopsy findings and the contents of his report. Detective Ballard's trial testimony focused exclusively upon his involvement in the investigation of the victim's death, including his involvement in defendant's interrogations. Only briefly did Detective Ballard testify to anything regarding the victim's autopsy. That testimony regarded Detective Ballard's own observations of the victim's body, and it was elicited by defense counsel on cross-examination.

Considering the above facts and circumstances, we disagree with defendant that his right to confrontation was violated. The only purpose of Detective Ballard's hearsay testimony at defendant's pretrial hearing was to inform him of precise facts from the instant crime that were similar to the other crimes evidence sought to be introduced by the state at trial. At the trial itself, Dr. McGarry appeared and was subject to full cross-examination regarding his autopsy findings. Therefore, defendant's right to confrontation was not violated.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR #2

In his second pro se assignment of error, defendant contends that his case should be remanded for resentencing because the trial court failed to give him correct advice on the time limitations for him to file an application for postconviction relief.

At the time of defendant's sentencing, the trial court informed him that he would have "two years to file for post-conviction relief." Defendant is correct that this instruction was technically deficient. Under La. Code Crim. P. art. 930.8(A), an application for postconviction relief shall be filed within two years after the judgment of conviction and sentence has become final under La. Code Crim. P. arts. 914 or 922.

Based on the arguments in this assignment of error, we note that defendant is clearly aware of these provisions relative to the time in which he may file an application for postconviction relief after his convictions and sentences have become final. Accordingly, we decline to remand defendant's case for resentencing. Out of an abundance of caution and in the interest of judicial economy, we note that La. Code Crim. P. art. 930.8(A) generally provides that no application for postconviction relief, including applications which seek an out-of-time appeal, shall be considered if filed more than two years after the judgment of

conviction and sentence have become final under the provisions of La. Code Crim. P. arts. 914 or 922, unless one of four circumstances are present.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.