NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0742

STATE OF LOUISIANA

VERSUS

KEVIN SMITH

BJC by TMH
RHP by TMH
TMH

Judgment Rendered: DEC 2 1 2011

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On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne,
State of Louisiana
Trial Court No. 522,244

Honorable Timothy C. Ellender, Judge Presiding

* * * * *

Joseph L. Waitz Jr.,
District Attorney
Mark Rhodes,
Assistant District Attorney
Ellen Daigle Doskey,
Assistant District Attorney
Houma, LA

Attorneys for Plaintiff-Appellee
State of Louisiana

Martin E. Regan, Jr.
Nisha Sandhu
New Orleans, LA

Attorneys for Defendant-Appellant
Kevin Smith

* * * * *

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

HIGGINBOTHAM, J.

Defendant, Kevin Smith, was charged by grand jury indictment with two counts of second degree murder, violations of La. R.S. 14:30.1. He pled not guilty and, after a trial by jury, was unanimously found guilty as charged on both counts. The trial court sentenced him to two concurrent terms of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant now appeals, raising six assignments of error. For the following reasons, we affirm defendant's convictions and sentences.

ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support defendant's convictions.

2. The trial court erred in denying defendant's motion to suppress oral statements.

3. The trial court erred in admitting a scientific analysis report into evidence in the absence of the analyst who performed the testing or comparison, thereby violating defendant's right to confrontation.

4. The trial court erred in determining that the requirements of **Daubert** were met and allowing a state witness to testify as an expert.

5. The trial court erred in denying defendant's **Batson** challenge.

6. The trial court erred in denying a motion for mistrial after the prosecutor made prejudicial remarks during rebuttal argument.

FACTS

On the evening of March 15, 2006, defendant, Yuri Johnson (Johnson), and Kelly Noble (Noble), Kneani Reed, and Taniesha Stallworth arrived by bus in Lafayette, Louisiana. Defendant had travelled from San Antonio, Texas, and the others from California to visit Khari LeBlanc, who is defendant's first cousin. Defendant and Johnson had known each other for years and reportedly were extremely close friends. At one time, they had lived together in California.

LeBlanc and his brother, Pat Stewart, picked the group up at the Lafayette bus station and drove them to LeBlanc's trailer in Gibson, Louisiana, where the visitors planned to stay for several days. LeBlanc's girlfriend, Nicole Johnson,

arrived at the trailer later that evening. She and LeBlanc went to bed, while the others stayed up late visiting. At least some of them also smoked marijuana.

The next morning, LeBlanc drove the two women, Reed and Stallworth, to Wal-Mart and on several other errands. Nicole also left the trailer, leaving defendant, Johnson, and Noble alone. While the others were gone, the three men smoked marijuana.

As LeBlanc and the others were returning to the trailer, they saw Stewart driving down the road. They stopped to visit together at the home of their grandmother, Myrtle Seymore, whose house was located across the bayou and less than a mile from LeBlanc's trailer. While they were there, a friend, Corey Sims, also stopped to visit. When LeBlanc told him that defendant and Johnson, both of whom Sims knew, were in town, Sims proceeded to the trailer to see them.

When Sims arrived at the trailer several minutes later, he observed that the back door was open. When he knocked on the front door and got no response, he opened the door and discovered Noble's body lying in a pool of blood in the living room. He jumped back and walked around to the back of the trailer where he found Johnson lying on the ground bleeding. Sims attempted to call 911, but the call did not go through. He then telephoned LeBlanc and told him he needed to come home, but LeBlanc thought he was joking and hung up on him. Sims then called Stewart and told him what had occurred.

At that point, LeBlanc, Stewart, and the two women drove toward the trailer in LeBlanc's vehicle. As they turned onto the Jarvis Bridge to cross over the bayou, they saw defendant running toward them, out of breath. Defendant got into the vehicle and returned to the trailer with them. When LeBlanc asked what happened, defendant said that "some guys" had come into the trailer and started shooting. Defendant further stated that he was in the rear bedroom sleeping at the time, but "hit the door" and got out when he heard shooting.

Upon the group arriving at the trailer, Sims pointed out where Johnson was lying covered with blood, continuing to bleed, and unsuccessfully attempting to speak. LeBlanc looked through the back door and observed Noble's body. With defendant's help, LeBlanc put Johnson into his car to take him to the hospital in Houma. However, LeBlanc first stopped by Seymore's house to pick up his mother. Defendant remained at Seymore's house when LeBlanc departed for the hospital.

Defendant appeared nervous and agitated. He borrowed a car and briefly returned to the trailer, purportedly to take Noble to the hospital. However, he claimed that no one there would help him put Noble into the car, so he returned to the Seymore house.

In the meantime, as LeBlanc and his mother were driving toward the hospital, they saw a police car that was responding to a report of the shooting. They flagged the officer down, and Johnson subsequently was taken to the hospital by air ambulance. However, he died before reaching the hospital from multiple gunshot wounds, including a close-range wound to the head. Noble, who had sustained a single gunshot wound to the head, remained on life support for two months before he also died.

In searching the trailer for evidence, the police discovered 1.7 pounds of marijuana located inside a box on the top shelf of the closet in LeBlanc's bedroom. They also found a bloody palm print that was later found to match defendant's palm print, as well as multiple bloody footprints. Two bloodstained t-shirts and a pair of tennis shoes were recovered from the front bedroom of the trailer. The police also recovered a bullet, three jacketed bullets, and a bullet fragment, all of which were determined to have come from the same unidentified firearm. No firearm was ever recovered in connection with the offenses.

Initially, defendant was interviewed by the police as an eyewitness. However, due to inconsistencies in statements he made to the police and to various other individuals, he became a suspect and eventually was arrested for the murders of Johnson and Noble.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues the evidence was insufficient to sustain his convictions for second degree murder. Specifically, he contends that the state failed to exclude the reasonable hypothesis of innocence that someone else committed the murders. He asserts that there was no direct evidence linking him to the murders and that the state's case was based wholly on unreliable circumstantial evidence.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier-of-fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821B; **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. The **Jackson v. Virginia** standard of review incorporated in La. Code Crim. P. art. 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Furthermore, when analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the trier-of-fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **Patorno**, 822 So.2d at 144. However, La. R.S. 15:438 does not establish a stricter standard of review than the more general rational juror's reasonable doubt standard; it is merely an evidentiary guide for the jury when considering circumstantial evidence. **State v.**

Manning, 2003-1982 (La. 10/19/04), 885 So.2d 1044, 1088, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). When a case involves circumstantial evidence and the trier-of-fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

At the time of the instant offenses, La. R.S. 14:30.1 provided, in pertinent part, that:

> 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; or
>
> (2)(a) When the offender is engaged in the perpetration or attempted perpetration of … aggravated burglary ... armed robbery, first degree robbery, or simple robbery … even though he has no intent to kill or to inflict great bodily harm.

Defendant argues that the state presented no direct evidence and insufficient circumstantial evidence to prove that he was the person who shot and killed Johnson and Noble. Based on our careful review of the record, we find this contention to be meritless. Other than defendant's own statements, there was no evidence that anyone other than defendant and the victims was present at the time the murders occurred. Defendant admitted being inside the trailer at the time of the shootings. At trial, the state presented evidence that defendant gave several inconsistent accounts of what occurred. Originally, he gave the following account to the police. He was lying down in the back bedroom when he first heard someone enter the trailer and then a gunshot. He proceeded into the hallway and saw a single assailant struggling with Johnson. The assailant extended his arm and fired a shot at defendant. At that point, defendant fled through the back door and hid under a nearby trailer for approximately five to ten minutes, during which time

he heard several additional gunshots. The assailant then came out of the trailer and ran toward a wooded area behind the trailer park. Defendant described the assailant as a black male dressed all in black, wearing a sweatshirt, pants, and a ski mask; defendant could not recall whether the assailant was wearing gloves. However, when a detective asked how defendant knew the assailant was black, given the clothing described and the fact that defendant could not recall whether he was wearing gloves, defendant became very defensive and insisted he had never said the assailant was black.

Defendant stated that he ran back to the trailer when he saw the assailant flee, and he found Johnson lying on the ground outside the back door. Johnson was bleeding heavily and gasping for air. Defendant held Johnson and asked what had happened. However, Johnson was unable to answer and spit up blood on defendant. Defendant then entered the trailer to check on Noble, whom he found just inside the front door with an apparent gunshot wound to the head. He walked around the trailer in shock and then went into the front bedroom to clean up and change clothes, because he was bloody from holding Johnson. Next, he left the trailer and started walking toward the road. However, he saw Sims arriving and returned to the trailer and told him what had happened. LeBlanc arrived at the trailer shortly thereafter, and defendant helped him put Johnson in the car.

Although defendant told the police that there was only one assailant, he told other individuals that there were two to three. Additionally, as the police continued to interview defendant at intervals over the course of several hours, other aspects of his account changed. Significantly, he went from claiming that he went back inside the trailer to check on Noble to admitting that he went inside to look for the marijuana, because he knew the police were coming. He also went from saying that he stopped to attend to Johnson before going inside the trailer to saying that he went straight inside to look for the marijuana. In one interview, defendant

stated that he went into the trailer alone three times to search for the marijuana, but in another interview, he claimed that he and LeBlanc entered the trailer together to search for the marijuana after they put Johnson into the car.

Additionally, defendant initially denied leaving the trailer park before LeBlanc's arrival and said it was not true that LeBlanc had picked him up on the bridge. However, this claim did not match the testimony of witnesses, who testified that they met defendant running down the road near the Jarvis Bridge, which was .38 miles from the trailer park. When the police confronted defendant with the contrary statements of other witnesses, he finally admitted that he did leave the trailer park on foot and reached the Jarvis Bridge, where he was picked up by LeBlanc.

Further, the state presented evidence that a bloody palm print that was found on the hallway wall matched defendant's prints. There also was testimony that the police recovered clothing in the trailer's front bedroom, including two bloody t-shirts and shoes that matched the description of the clothes defendant said he was wearing when he cleaned up and changed his clothes after the shootings. The clothes were found in the area of the bedroom that defendant marked with an "X" on a diagram of the trailer drawn by a detective. An examination of the shoes indicated they could not be excluded as the source of several bloody footprints found inside the trailer. Moreover, the state presented testimony from Ross Gardner, an expert in crime scene and blood stain pattern analysis, who testified that the transfer pattern of the bloody shoe prints overlaid with small spatters indicated that the wearer of the shoes was present at the time that Johnson was injured and his blood spattered.

The state also established that samples taken from bloodstains on the white t-shirts found in the area of the front bedroom where defendant left his bloody clothes were consistent with Johnson's DNA. Based on his analysis of the crime

scene and the numerous bloodstain patterns on the t-shirts, Gardner concluded that the wearer of the t-shirts was exposed to Johnson's blood as it spattered and gushed on multiple occasions in at least eight different orientations in immediate proximity to the attack upon Johnson.

Finally, defendant told the police that he bloodied his clothes by holding Johnson when he found him lying outside the trailer. However, Gardner testified that he saw nothing on the t-shirts that was consistent with the wearer being in immediate, direct contact with Johnson's body as it lay outside the trailer. Gardner also concluded that the condition of the t-shirts could not be wholly explained by defendant having helped LeBlanc move Johnson's bloody body to the car.

In arguing that the state's evidence was insufficient, defendant notes that the gun residue test the police performed on him was negative. However, in making this argument, defendant ignores the fact that he admitted he washed up when he changed his clothes after the shooting. The detective who administered the test indicated that the results of a gunshot residue test are compromised by a subject washing his hands before taking the test. Moreover, in light of defendant's admission that he washed his hands when he changed his clothes before leaving the trailer, we also fail to see the significance of defendant's assertion that it is undisputed that he had no blood on his person when he encountered LeBlanc and the others on the Jarvis Bridge.

Defendant further contends that the state failed to exclude the reasonable hypothesis of innocence that the victims were murdered by someone who knew that Johnson was a drug dealer, heard he was in town, and attempted to rob him for drugs and/or money. This argument is based on the fact that there was some testimony at trial indicating that Johnson was generally known to sell drugs when he visited Gibson several times a year, as well as the fact that a large quantity of marijuana was found inside the trailer by the police. However, we note that there

was no evidence that anyone was seen going into the trailer immediately prior to the shootings. Moreover, Gardner noted in his testimony that there was only one series of shoe prints found at the very bloody scene, and those were consistent with the tennis shoes found in the front bedroom.

Defendant further suggests it is possible that Javonne Mosely, who formerly dated Nicole Johnson (LeBlanc's girlfriend), could have killed the victims in a jealous rage. At trial, there was testimony that a witness saw Mosely in the trailer park and spoke to him shortly before the murders. There was also testimony that Mosely previously had exhibited violent behavior toward Ms. Johnson, including shooting out the windows of her truck. However, that incident was not provoked by jealousy of LeBlanc, since Ms. Johnson testified it occurred before she was even dating LeBlanc. Nor is there any suggestion as to why Mosely would have killed Johnson and Noble when LeBlanc was not even present at the trailer. In any event, the witness who testified to seeing Mosely in the trailer park before the shootings admitted that she was on crack cocaine "real bad," as well as marijuana, at the time that she purportedly saw him. Accordingly, the jury may have concluded her testimony was unreliable.

Following our thorough review of the record, we are convinced the evidence supports the unanimous guilty verdicts. After hearing all of the testimony and viewing the evidence, including testimony as to the numerous inconsistent statements made by defendant, the jury found defendant guilty of the instant offenses. See **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984) (noting that "lying" has been recognized as indicative of an awareness of wrongdoing). In finding defendant guilty, the jury clearly rejected his hypotheses that either the jealous ex-boyfriend of LeBlanc's girlfriend or someone seeking illegal drugs or money committed the murders, and accepted the state's evidence establishing that defendant was the person who shot and killed Johnson and Noble.

The jury is free to accept or reject, in whole or in part, the testimony of any witness. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368-69, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. As previously noted, the guilty verdicts returned in this case indicate that the jury accepted the testimony of the state witnesses and rejected the defense hypotheses that someone other than defendant killed the victims. See **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453. 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. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by the jury. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418, 422-23 (per curiam). Thus, we are convinced that, viewing all of the evidence in the light most favorable to the state, any rational juror could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant was guilty of two counts of second degree murder.

This assignment of error lacks merit.

MOTION TO SUPPRESS

In his second assignment of error, defendant contends the trial court erred in denying his motion to suppress his initial oral statements to the police, because he had not been advised of his **Miranda** rights at the time the statements were made. Specifically, defendant complains that the trial court erred in finding that he was not in custody when he made the statements. Additionally, he argues that the videotaped statement he subsequently made should also be suppressed because it

was not given freely and voluntarily, in view of the lengthy interrogation he was subjected to under coercive circumstances.

On the trial of a motion to suppress, the burden is on the state to prove the admissibility of a purported confession or statement by the defendant. La. Code Crim. P. art. 703D. Before a purported confession or inculpatory statement can be introduced into evidence, La. R.S. 15:451 provides it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. Further, the state must show that an accused who makes a statement or confession during custodial interrogation was first advised of his **Miranda** rights. **State v. Plain**, 99-1112 (La. App. 1st Cir. 2/18/00), 752 So.2d 337, 342. See also La. Const. art. I, § 13; La. Code Crim. P. art. 218.1.

Miranda warnings are not required when the police perform general questioning of citizens during the fact-finding process following a crime. **Miranda v. Arizona**, 384 U.S. 436, 477, 86 S.Ct. 1602, 1629, 16 L.Ed.2d 694 (1966); **State v. Ned**, 326 So.2d 477, 479 (La. 1976). The obligation to provide **Miranda** warnings attaches only when a person is questioned by the police after he "has been taken into custody or otherwise deprived of his freedom of action in any significant way." **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612; **Manning**, 885 So.2d at 1073. Whether a person is "in custody" is decided by two distinct inquiries: first, an objective assessment of the circumstances surrounding the interrogation to determine whether there is a formal arrest or restraint on freedom of the degree associated with formal arrest; and second, an evaluation of how a reasonable person in the position of the interviewee would gauge the breadth of his freedom of action. **Manning**, 885 So.2d at 1073.

The admissibility of a confession is, in the first instance, a question for the trial court, which must consider the totality of the circumstances in deciding

whether or not a defendant's statements are admissible. See **State v. Hebert**, 2008-0003 (La. App. 1st Cir. 5/2/08), 991 So.2d 40, 45, writs denied, 2008-1526, 2008-1687 (La. 4/13/09), 5 So.3d 157 & 161. When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

In the instant case, the testimony presented at the motion to suppress hearing established the following facts. After defendant was identified as a potential witness, he was transported to the Terrebonne Parish Sheriff's Office by a detective. Although one witness testified at trial that defendant was handcuffed when he was put in the car, no other evidence was presented on this point. In any event, defendant arrived at the sheriff's office at 2:15 p.m. and was questioned by Detectives Terry Daigre and Joey Quinn in an interview room. Defendant was not considered a suspect at that time and was not advised of his **Miranda** rights prior to the interview, which lasted approximately one hour.

Defendant was then moved into the detective bureau while Detective Daigre interviewed other witnesses. Detective Daigre testified that, while he did not specifically tell defendant he was free to leave, defendant was free to walk away and would not have been stopped from doing so. Defendant was not restrained in any way. Further, although there were detectives present in the detective bureau, there is no indication that anyone was guarding defendant or preventing him from leaving. Detective Daigre explained that defendant was moved into the detective bureau, which was a large room, to give him a break from the atmosphere of the interview room.

After Detective Daigre talked to detectives who had interviewed other witnesses, inconsistencies were noted between defendant's statements and those of the other witnesses. According to Detective Daigre, these inconsistencies, as well as inconsistencies within defendant's own statement, caused the police to regard him for the first time as a suspect, and a decision was made to advise him of his **Miranda** rights before further questioning. Defendant was advised of those rights and signed a waiver form at 4:30 p.m. He was interviewed again for approximately one hour and was then moved back to the detective bureau.

Over the course of the next several hours, defendant was interviewed several times by Detectives Daigre and Thomas Cope, the lead detective on the case. None of the interviews lasted more than an hour. At 12:19 a.m. on March 17, 2006, defendant gave a videotaped statement. The detectives spent the intervals between interviewing defendant by questioning additional witnesses and comparing notes with other detectives who also were interviewing witnesses.

The trial court denied defendant's motion to suppress both his **pre-Miranda** oral statements and his **post-Miranda** videotaped statement. With respect to the **pre-Miranda** statements, defendant argues the trial court erred, because the objective circumstances surrounding the statements indicate he was in custody at the time, requiring that he be advised of his **Miranda** rights before being questioned. In particular, he notes that he was interrogated by two detectives at the sheriff's office, which he alleges is an inherently coercive environment. He further alleges he was interrogated for over two hours, without being advised of his rights or the reasons for his detention, and was never advised he could leave. Under such circumstances, he asserts, no reasonable person would have believed he was free to go.

We find no error or abuse of discretion in the trial court's conclusion that defendant's initial oral statements were admissible, since the state rebutted

defendant's claim that he was in custody at the time of the statements. At the motion to suppress hearing, Detective Daigre testified that defendant was not a suspect at the time of the initial interview. At that point, defendant was only one of several witnesses who were being interviewed by the police, who were then in the preliminary stages of their homicide investigation. Given the nature and scope of the investigation, it was reasonable for the police to interview the numerous witnesses at the sheriff's office, rather than attempting to interview them on the scene. There is no requirement that **Miranda** warnings be given merely because a person is questioned at a police station. See **State v. Thompson**, 399 So.2d 1161, 1166 (La. 1981).

Further, the record does not support defendant's claim that he was interrogated for two hours before being advised of his **Miranda** rights. Although defendant arrived at the sheriff's office at 2:15 p.m. and was not advised of his **Miranda** rights until 4:30 p.m., he was not questioned throughout this entire period. Detective Daigre testified that the initial interview lasted for approximately one hour. Moreover, there was no indication that defendant requested that the questioning cease.

In sum, the objective circumstances do not indicate that defendant was under arrest or that his freedom was under any significant restraint at the time of the initial interview. He was not physically restrained, nor was there any indication that he was being guarded. No one told him that he was under arrest or being detained, nor was there any indication that he requested that he be allowed to leave. Defendant was one of numerous witnesses being questioned at the sheriff's office regarding the shooting of Johnson and Noble. Detective Daigre testified that he would have allowed defendant to walk away at that point. Considering the totality of the circumstances, we find no error in the trial court's conclusion that defendant was not in custody at the time that he made his initial statement. Hence,

the state met its burden of showing that defendant's oral statements were not given in violation of **Miranda** and were admissible.

We also find no error or abuse of discretion in the trial court's conclusion that defendant's videotaped statement, which was given after he was advised of his **Miranda** rights, was admissible. Defendant argues this statement was not freely, voluntarily, and intelligently made in view of the coercive conditions under which it was given. Specifically, he alleges he was subjected to interrogation over the course of eleven hours and was not advised of the reason for his detention. In addition, he claims it was unclear whether he was offered food during this lengthy period of time.

At the hearing on the motion to suppress, Detective Daigre testified that he observed no threats or badgering of defendant during his videotaped interview. He further testified that defendant did not appear tired or blurry eyed and never stated that he was hungry or tired. Defendant also never requested a lawyer. Moreover, Detective Daigre indicated that defendant was offered food and drink, as well as the opportunity to take bathroom breaks, during the period that he was being questioned by the police. Although Detective Daigre never specifically told defendant he was a suspect in the shootings of Johnson and Noble, he believed that defendant knew he was being questioned with regard to these crimes.

Additionally, Detective Cope testified at the suppression hearing that he advised defendant at some point that he was a suspect in the shootings of Johnson and Noble. He also indicated that it was normal practice in the sheriff's office to offer sandwiches to a person being questioned over such a lengthy period of time. Regarding the delay in taking defendant's videotaped statement, Detective Cope explained that some of the delay was attributable to video equipment problems they were experiencing.

In denying the motion to suppress this statement, the trial court stated:

> I don't think the fact that it took so long was a planned event to try to break this individual. They just had so many witnesses, they spoke to him for a while; put him back somewhere. There is nothing to contradict the fact that the normal procedure of the Terrebonne Parish [Sheriff's Office] is to offer them food and drink. Your client could have gotten up and testified, specifically about that point only; and he chose not to. So, the Court finds that the interview – the audio interview of March 17th at 12:19 a.m. is admissible.

The record supports the trial court's determinations. Though defendant was questioned several times over an eleven-hour period, he was never questioned for more than approximately one hour at a time. During the breaks between interviews, defendant was taken out of the interview room and allowed to wait in the larger detective bureau. Additionally, as noted by the trial court, the state established a reasonable basis for the duration of defendant's questioning, other than attempted coercion. Moreover, defendant was offered food, drink, and bathroom breaks during this period. There was no indication that he appeared tired or hungry, or requested that the questioning halt. Thus, the state met its burden of proving that defendant's videotaped statement was free and voluntary.

This assignment of error is without merit.

RIGHT TO CONFRONTATION

In his third assignment of error, defendant argues his constitutional right to confrontation was violated when the trial court admitted a scientific analysis report into evidence, over his objection, when the analyst who performed the analysis/comparison was not called as a witness at trial by the state. Defendant's complaint is directed at the scientific analysis report in which the analyst concluded that the pair of tennis shoes that was found in the front bedroom of the trailer could not be eliminated as a possible source of the multiple shoe impressions found at the crime scene.

The record reveals that the state filed a notice of intent to introduce a scientific analysis report regarding the comparison of the tennis shoes to the shoe impressions in November 2008 and attached a copy of the report to the notice, as

required by La. R.S. 15:501A[1]. Defendant did not request a subpoena of the analyst who made the comparison. However, when the state attempted to introduce the report at trial on November 9, 2009, defendant objected on the grounds that: (1) there was no direct evidence linking defendant to the tennis shoes; and (2) admission of the report when the analyst was not present for cross-examination violated the holding of **Melendez-Diaz v. Massachusetts**, ____ U.S. ____, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). The trial court overruled the objection and allowed the report to be admitted.

In a criminal prosecution, the accused has a constitutional right to be confronted with the witnesses against him. U.S. Const. amend. VI. Hence, 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).

In **Melendez-Diaz**, a case involving review of convictions for distribution of cocaine and trafficking in cocaine, the prosecution relied upon "certificates of analysis" to establish that the substance hidden in the police car used to transport the defendant and two other men contained cocaine. As required under Massachusetts law, the certificates were sworn to before a notary public by analysts at a state laboratory. **Melendez-Diaz**, ____ U.S. at ____, 129 S.Ct. at 2530-31. The Court held that the certificates were affidavits falling within the core class of testimonial statements subject to the Confrontation Clause and that the analysts were "witnesses" for purposes of the Sixth Amendment. **Melendez–Diaz**, ____ U.S. at ____, 129 S.Ct. at 2532.

[1] Louisiana Revised Statutes 15:501 was amended by 2010 La. Acts No. 693, § 1, effective August 15, 2010. All references herein are to the statute as it existed prior to its amendment by Act 693.

However, the **Melendez-Diaz** Court specifically contrasted the statutory scheme in Massachusetts with the schemes created in other states by "notice-and-demand statutes," which require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial and give a defendant a period of time in which to object to the admission of the report absent the analyst's live appearance at trial. **Melendez-Diaz,** ____ U.S. at ____, 129 S.Ct. at 2541. The Court reasoned that notice-and-demand statutes do not shift the burden because "[t]he defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so." **Melendez-Diaz,** ____ U.S. at ____, 129 S.Ct. at 2541. Additionally, the Court noted that it is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial and that there was no reason why a defendant could not similarly be compelled to exercise his Confrontation Clause rights before trial. **Melendez-Diaz,** ____ U.S. at ____, 129 S.Ct. at 2541.

In Louisiana, La. R.S. 15:499A provides, in pertinent part, that:

> All criminalistics laboratories established by laws of this state or by laws of the United States, and all coroners, forensic pathologists, and other persons, partnerships, corporations, and other legal entities practicing in fields of knowledge and expertise in the gathering, examination, and analysis of evidence by scientific means are authorized to make proof of examination and analysis of physical evidence by the certificate of the person in charge of the facility in which such examination and analysis is made.

Louisiana Revised Statutes 15:500 provides, in pertinent part, that:

> In all criminal cases ... the courts of this state shall receive as evidence any certificate made in accordance with R.S. 15:499 subject to the conditions contained in this Section and R.S. 15:501. The certificate shall be received in evidence as prima facie proof of the facts shown thereon ....

At the time in question, La. R.S. 15:501 provided that:

> A. The party seeking to introduce a certificate made in accordance with R.S. 15:499 shall, not less than ten days prior to the

> commencement of the trial, give written notice of intent to offer proof by certificate. Such notice shall include a copy of the certificate.
>
> B. (1) The party against whom such certificate is offered shall be permitted to subpoena on cross-examination, the person who performed the examination or analysis of the evidence. If the subpoena is requested at least five days prior to the commencement of trial or the person subpoenaed responds to the subpoena, the certificate shall not be prima facie proof of its contents or of proper custody.
>
> (2) When the attorney for the defendant, or the defendant acting in his own defense, requests that a subpoena issue to the person who performed the examination or analysis, the request shall be in writing and shall contain a certification that the attorney or the defendant intends in good faith to conduct the cross-examination.

In **State v. Cunningham**, 2004-2200 (La. 6/13/05), 903 So.2d 1110, 1122, the Louisiana Supreme Court upheld the constitutionality of the "notice and demand" scheme set forth in La. R.S. 15:499 - 501 against claims that it violated a defendant's right to confrontation and impermissibly shifted the burden of proof to the defendant. In reaching this conclusion, the Supreme Court noted, in particular, that if a defendant requests a subpoena at least five days prior to trial for the person who performed the analysis of the evidence, or if the person responds to the subpoena, the certificate is not prima facie proof of its contents or proper custody, has no evidentiary value, and the state is required to call the relevant witness to prove its case. **Cunningham**, 903 So.2d at 1121.

Furthermore, in **State v. Beauchamp**, 2010-0451 (La. App. 1st Cir. 9/10/10), 49 So.3d 5, this Court rejected the same argument made in this case that the prosecution's use of a scientific analysis report at trial violated **Melendez-Diaz**. As in the instant case, the state in **Beauchamp** filed proper notice of its intent to use the report in accordance with La. R.S. 15:501A. The defense did not subpoena the analyst, but objected when the state moved to introduce the report at trial. The trial court allowed the admission of the report.

On appeal, this Court concluded that the defendant's right to confrontation was not violated, stating that:

> Admission of the scientific analysis report into evidence at trial did not violate *Melendez-Diaz,* and thus, the State presented sufficient evidence that the substance the defendant distributed was cocaine. Louisiana Revised Statutes 15:501 is precisely the kind of "notice-and-demand" statute that the court in *Melendez-Diaz* recognized to be permissible under the Confrontation Clause. The Louisiana statutory scheme, La. R.S. 15:499 *et seq.,* merely requires a defendant to exercise his Confrontation Clause rights prior to trial. If the defendant had made a timely request for the issuance of a subpoena for the person who performed the analysis, the certificate would not have been admissible into evidence in lieu of such testimony. It would have been incumbent upon the State to procure the attendance of the person making the certificate at trial and to offer that testimony to establish the results of the examination. *See State v. Landry,* 583 So.2d 911, 912-914 (La.App. 1st Cir.1991).

Beauchamp, 49 So.3d at 8.

Based on the rationale stated in **Cunningham** and **Beauchamp**, we find that defendant's right to confrontation was not violated in this case.[2] Defendant was given proper notice of the state's intent to introduce the report in question almost a year prior to trial. Nevertheless, defendant failed to properly exercise his Confrontation Clause rights by filing a timely request to subpoena the analyst who performed the comparison, as he was required to do by La. R.S. 15:501B. Under these circumstances, the report was properly admitted.

This assignment of error is without merit.

DAUBERT

In his fourth assignment of error, defendant asserts that the trial court erred in accepting Ross Gardner as an expert in the fields of crime scene analysis and bloodstain pattern analysis under the standard of **Daubert v. Merrell Dow**

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[2] In support of his argument that his right to confrontation was violated, defendant cites **State v. Simmons**, 2010-1508 (La. App. 4th Cir. 5/18/11), 67 So.3d 525, and **Bullcoming v. New Mexico**, ____ U.S. ____, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). In **Simmons**, the Fourth Circuit disagreed with the rationale expressed by this Court in **Beauchamp** and held that the Supreme Court's decision in **Melendez-Diaz** compelled a conclusion that the statutory notice-and-demand scheme of La. R.S. 15:499 - 501 violated the Confrontation Clause. For the reasons stated in **Beauchamp**, we disagree with this interpretation of **Melendez-Diaz**. We particularly note that the Supreme Court in **Melendez-Diaz** specifically distinguished notice-and-demand statutes, such as that provided by La. R.S. 15:499-501, from the Massachusetts statutory scheme that was found to be violative of the Confrontation Clause. Moreover, in **Bullcoming**, the Supreme Court again indicated that notice-and-demand statutes do not violate a defendant's right to confrontation because they typically render an otherwise hearsay forensic report admissible, while preserving a defendant's right to require the prosecution to call the analyst as a witness at trial. See **Bullcoming**, ____ U.S. ____, 131 S.Ct. at 2718.

Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Specifically, he complains that the reliability of the methodology employed by Gardner was not properly assessed and that Gardner failed to substantiate that the "testing" he undertook in arriving at his conclusions in this case was anything other than "junk science." Additionally, defendant contends that although an associate in Gardner's firm reviewed his conclusions, such review was not the peer review contemplated by **Daubert**.

The admissibility of expert testimony is governed by La. Code Evid. art. 702, which provides that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Since a determination regarding the competency of a witness is a question of fact, a trial court's ruling on the qualifications of an expert witness will not be disturbed on appeal absent an abuse of discretion. See **State v. Young**, 2009-1177 (La. 4/5/10), 35 So.3d 1042, 1046, cert. denied, ____ U.S. ____, 131 S.Ct. 597, 178 L.Ed.2d 434 (2010).

In **State v. Foret**, 628 So.2d 1116 (La. 1993), the Louisiana Supreme Court adopted the test set forth in **Daubert** for determining the admissibility of expert testimony under Article 702. Under the **Daubert** standard, the trial court acts in a gatekeeping function to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. **Young**, 35 So.3d at 1047. To assist trial courts in addressing the reliability issue, the **Daubert** court delineated the following non-exclusive factors to be considered in determining the admissibility of expert testimony: 1) whether the theory or technique can be and has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error; and 4) whether the

methodology is generally accepted by the relevant scientific community. **Daubert**, 509 U.S. at 592-94, 113 S.Ct. at 2796-97. Further, the **Daubert** analysis is applicable to all expert testimony, including that based on "technical" and "other specialized" knowledge, and not just to scientific testimony. **Kumho Tire Company, Ltd. v. Carmichael**, 526 U.S. 137, 141, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999); **Young**, 35 So.3d at 1047. While the trial court may consider one or more of the four **Daubert** factors in determining admissibility, the test for reliability is flexible and the specific factors listed neither necessarily nor exclusively apply to all experts or in every case. Rather, a trial court is accorded the same broad latitude in deciding how to determine reliability as it enjoys with respect to its ultimate reliability determination. **Kumho Tire**, 526 U.S. at 141-42, 119 S.Ct. at 1171.

Following a **Daubert** hearing, the trial court ruled that the criteria of **Daubert** were met in the instant case and that the methodology employed by Gardner was generally accepted by the scientific community. We find no error in this conclusion. Gardner testified at the **Daubert** hearing that the theories and methodologies utilized in crime scene analysis and bloodstain pattern analysis (sometimes referred to as blood spatter analysis) are well-established, have been subjected to testing and peer review, and are generally accepted in the scientific community. With respect to bloodstain pattern analysis, we note that the Louisiana Supreme Court, as well as other courts of this state, has specifically upheld the admissibility of expert testimony as to blood spatter analysis. <u>See</u> **Manning**, 885 So.2d at 1088-89; **State v. Allen**, 41,548 (La. App. 2d Cir. 11/15/06), 942 So.2d 1244, 1255-56, <u>writ denied</u>, 2007-0530 (La. 12/7/07), 969 So.2d 619; **State v. Young**, 95-402 (La. App. 3d Cir. 10/4/95), 663 So.2d 301, 302-03.

In the present case, Gardner testified that he has an associate degree in police science, a bachelor's degree in criminal justice, and a master's degree in

computer and information systems. As a member of the military police, he conducted, supervised, and/or evaluated felony criminal investigations for nineteen years. Upon his retirement from the military, he served as chief of police for a small suburban police department in Georgia for four years. He stated that over the years, he has attended numerous specialized seminars and courses related to crime scene investigations and bloodstain pattern analysis.

Further, Gardner is a member of several professional organizations germane to the fields of crime scene investigation and bloodstain pattern analysis and has written numerous journal articles relating to these areas. He also has either authored or co-authored three books related to crime scene investigation and bloodstain pattern analysis. For the past fifteen years, Gardner has taught crime scene investigation and bloodstain pattern analysis to police organizations throughout the United States, as well as to several foreign law enforcement agencies. He has also taught these subjects as an adjunct professor at the college level. Although Gardner has never previously been accepted as an expert by a Louisiana court, he has been accepted as an expert in crime scene analysis and bloodstain pattern analysis in the courts of approximately fifteen to twenty states, as well as in federal courts.

Defendant complains that the trial court erred in accepting Gardner as an expert, because he did not conduct any physical experiment, and his conclusions were not subjected to peer review other than by an associate at his own consulting firm. These arguments lack merit, as do defendant's remaining arguments regarding the reliability of Gardner's methodology. Gardner testified that he did not conduct any physical experiments, but explained that his analysis involved a mental process (which he referred to as a "thought experiment") that involved applying known concepts and principles to the crime scene. Moreover, as previously noted, not all of the factors listed in **Daubert** are applicable to every

type of expert in every case, and a trial court is accorded broad latitude in deciding how to determine reliability. See **Kumho Tire**, 526 U.S. at 141-42, 119 S.Ct. at 1171. Given the testimony presented, especially the testimony regarding Gardner's extensive training and experience, defendant failed to show that the trial court erred or abused its discretion when it qualified him as an expert in the fields of crime scene analysis and bloodstain pattern analysis.

Moreover, the trial court instructed the jury as follows regarding opinion evidence from an expert:

> You should consider any expert opinion received into evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Additionally, Gardner was subject to extensive cross-examination by the defense concerning both his qualifications and the conclusions he drew from his analysis of the crime scene and bloodstain patterns. Given the circumstances, defendant failed to show the likelihood of any prejudice resulting from the trial court's acceptance of Gardner as an expert witness. See **Manning**, 885 So.2d at 1089.

This assignment of error lacks merit.

BATSON CHALLENGE

In his fifth assignment of error, defendant contends the trial court erred in overruling his objection to the state's use of a peremptory strike to exclude a prospective juror, Bradley Lewis, on the basis of race.

Under **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. See also La. Code Crim. P. art. 795(C)-(E). If the defendant makes a *prima facie* showing of discriminatory strikes, the burden shifts to the state to offer racially-neutral

explanations for the challenged members. The race-neutral explanation must be one which is clear, reasonable, specific, legitimate, and related to the particular case at bar. If a race-neutral explanation is tendered, the trial court must decide, in step three of the **Batson** analysis, whether the defendant has proven purposeful discrimination. On appeal, the trial court's evaluation of discriminatory intent is entitled to great deference and will not be reversed unless clearly erroneous. **State v. Elie**, 2005-1569 (La. 7/10/06), 936 So.2d 791, 795.

Additionally, the **Batson** explanation offered by the state does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race neutral. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. **Elie**, 936 So.2d at 795-96.

In the instant case, the twelve-person jury and three alternate jurors were selected from two panels of prospective jurors.[3] Pursuant to questioning by defense counsel, the race of each member of the first panel was put on the record, but the record does not indicate the races of all the members of the second panel. During voir dire of the first panel, the prosecution exercised five peremptory challenges to exclude prospective jurors who were Caucasian (3), Indian (1), and bi-racial (one-half white and one-half Indian) (1). The only African-American prospective juror on the first panel, Monchel Rockward, was accepted by the prosecution without objection.

When the prosecution exercised its sixth peremptory challenge on Lewis, an African-American member of the second panel, the defense objected under **Batson**. The trial court requested a race-neutral explanation for the peremptory challenge of Lewis without first making a finding of whether defendant had made a *prima facie* showing of purposeful racial discrimination. Therefore, the issue of

[3] The record indicates the jury consisted of six Caucasians, two African-Americans, and one "Indian"; the record contains no indication of the races of the remaining three jurors.

whether the defense established a *prima facie* case of discrimination is moot. See **Green**, 655 So.2d at 288. Accordingly, our analysis begins with **Batson's** second step, in which any reason offered by the prosecution will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." **Elie**, 936 So.2d at 795.

In responding to defendant's **Batson** challenge, the prosecutor noted that the state had accepted both of the only other African-Americans proposed as jurors, Ms. Rochward and Melissa Scott, a member of the second panel. He then explained that he had excluded Lewis, because he had been unemployed for six months, and the prosecutor felt there must be a reason why, because he did not understand why an able-bodied young man could not find any form of employment. The trial court overruled the defense objection to the peremptory challenge of Lewis, apparently finding that the prosecutor had articulated a race-neutral reason for the challenge. The defense noted its objection to the trial court's ruling.

On appeal, defendant argues that there was no clear difference between Lewis' unemployed status and that of Benji LeCompte, a Caucasian, who was selected for the jury. The record reveals that Lewis was a thirty-two-year-old male with an eleventh-grade education, who had been unemployed for six months. He previously had been employed for eighteen months with the Terrebonne Parish Drainage Department. He was not a homeowner. Lecompte was a twenty-eight-year-old man with four years of college, who was only recently unemployed. LeCompte previously had been employed for two and one-half years in the warehouse of an offshore company, and stated he planned on returning to college. He owned his own home.

Contrary to defendant's contention, the record establishes that a difference existed between the unemployment status of Lewis, who had been unemployed for

six months, and LeCompte, who was recently unemployed and planning to return to college. In any event, the fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination. The accepted juror may have exhibited other traits that the prosecutor could have reasonably believed would make him desirable as a juror, despite the characteristic shared with the excused person. **State v. Collier**, 553 So.2d 815, 822 (La. 1989).

Further, the trial court plays a unique role in the dynamics of a voir dire, since it observes firsthand the demeanor of the attorneys and venirepersons, the nuances of questions asked, the racial composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from a cold transcript. **State v. Myers**, 99-1803 (La. 4/11/00), 761 So.2d 498, 502. Based on our review, we conclude that the trial court's finding that the state did not possess discriminatory intent in exercising the peremptory challenge against Lewis was not clearly erroneous.

This assignment of error is without merit.

REBUTTAL ARGUMENT

In his sixth assignment of error, defendant argues the trial court erred in denying his motion for mistrial, based on prejudicial remarks made by the prosecutor during rebuttal argument.

During rebuttal argument, the prosecutor made the following remarks:

> Because if this defendant – if you think he is not guilty, what you are saying is you want a videotape. That's what you are saying.
>
> Between hidden camera shows and reality T.V., and C.S.I. and all of that, you know we are building a culture where we are saying – I got to see it. I want to see a videotape of that.
>
> Well if you want every crime videotaped, get ready – your taxes are about to go up. Okay? All right – because then we don't need jurors, we will just plug it in somewhere and we will have people that watch T.V. and be professional jurors. You are here for a reason. You wonder why you got picked on this jury? You wonder why we are

> scratching our heads and doing this and doing all of that. Because you are a cross-section of our community. Look at you.

Defense counsel objected and moved for a mistrial on the grounds that the prosecutor's remarks were inflammatory and highly prejudicial. He argued that the prosecutor's remarks suggested to the jurors that they should overlook the lack of evidence unless they were prepared to pay higher taxes in order to obtain better evidence. The trial court denied the motion for mistrial. Defense counsel did not request an admonition.

Under La. Code Crim. P. art. 771, a mistrial may be granted if prejudicial remarks are made by the prosecutor and the trial court is satisfied that an admonition not sufficient to assure the defendant a fair trial. See **State v. Miles**, 98-2396 (La. App. 1st Cir. 6/25/99), 739 So.2d 901, 904, writ denied, 99-2249 (La. 1/28/00), 753 So.2d 231. See also La. Code Crim. P. art. 775. However, a mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Further, the determination of whether a mistrial is warranted rests within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal absent an abuse of that discretion. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

Under La. Code Crim. P. art. 774, closing arguments in criminal cases are limited to the evidence admitted, the lack of evidence, and conclusions of fact that may be drawn therefrom. A prosecutor should refrain from argument that tends to divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused under the controlling law or by making predictions of the consequences of the jury's verdict. **State v. Messer**, 408 So.2d 1354, 1356 (La. 1982). The argument shall not appeal to prejudice. The

state's rebuttal shall be confined to answering the argument of the defendant. La. Code Crim. P. art. 774.

However, prosecutors have wide latitude in choosing closing argument tactics. **State v. Casey**, 99-0023 (La. 1/26/00), 775 So.2d 1022, 1036, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000). Moreover, even if the prosecutor exceeds the bounds of proper argument, a reviewing court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. **Casey**, 775 So.2d at 1036. Much credit should be accorded to the good sense and fair-mindedness of jurors who have seen the evidence, heard the argument, and been instructed by the trial court that arguments of counsel are not evidence, and that they should not be influenced by sympathy, passion, prejudice, or public opinion. See **State v. Bell**, 477 So.2d 759, 768 (La. App. 1st Cir. 1985), writ denied, 481 So.2d 629 (La. 1986).

A prosecutor's predictions as to the consequences of a not-guilty verdict, or the societal costs of such a result, are clearly improper and should be avoided. **State v. Barrow**, 410 So.2d 1070, 1075 (La.), cert. denied, 459 U.S. 852, 103 S.Ct. 115, 74 L.Ed.2d 101 (1982). However, in the instant case, the prosecutor was merely attempting on rebuttal to address the defense's argument that the evidence was insufficient by pointing out that the jurors should not have unrealistic expectations regarding the evidence presented as a result of watching criminal forensic programs popular in the media. The prosecutor did not suggest that the jurors' taxes would increase if they found defendant not guilty. Nor did he suggest that the burden of proof required of the state was less than proof beyond a reasonable doubt.

Considering the totality of the circumstances, we conclude that the prosecutor's remarks did not constitute improper argument. Further, even if the remarks were improper, they were not of such a prejudicial nature, especially

considered in light of the jury instructions given, as to have influenced the jury or contributed to the guilty verdicts. The trial court did not err in denying the motion for mistrial. See La. Code Crim. P. art. 921.

This assignment of error lacks merit.

CONVICTIONS AND SENTENCES AFFIRMED.