

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

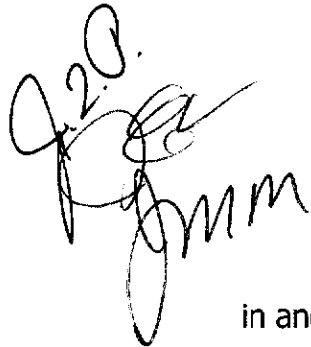
FIRST CIRCUIT

NO. 2012 KA 0702

STATE OF LOUISIANA

VERSUS

JEFFERY GUILLORY



Judgment rendered

DEC 21 2012

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Appealed from the  
19<sup>th</sup> Judicial District Court  
in and for the Parish of East Baton Rouge, Louisiana  
Trial Court No. 05-10-0796  
Honorable Anthony Marabella, Judge

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**BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.**

**PETTIGREW, J.**

The defendant, Jeffery Guillory, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1, and entered a plea of not guilty. The trial court granted the State's motion to introduce other crimes evidence. This court and the Louisiana Supreme Court denied the defendant's writ applications seeking review of the trial court's ruling on the State's motion to introduce other crimes evidence. **State v. Guillory**, 2011-0412 (La. App. 1 Cir. 4/27/11) (unpublished action), writ denied, 2011-1090 (La. 9/2/11), 68 So.3d 519. This court also denied the defendant's writ application seeking review of the trial court's ruling granting the State's motions in limine to exclude evidence concerning the prosecution and incarceration of Sean Gillis and to exclude an excerpt from the police statement of Sean Gillis. **State v. Guillory**, 2011-1762 (La. App. 1 Cir. 9/23/11) (unpublished action).

After a trial by jury, the defendant was found guilty as charged and subsequently sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error to the trial court's granting of the State's motions in limine. Further, the defendant filed a pro se brief challenging the admissibility of other crimes evidence and the sufficiency of the evidence to support the conviction. For the following reasons, we affirm the conviction and sentence.

**STATEMENT OF FACTS**

On April 11, 2002, the body of Renee Newman, the victim herein, was discovered in a flower bed located on the side of a building that formerly housed a department store on Laurel Street in Baton Rouge, Louisiana.<sup>1</sup> The victim's face and upper body were covered with insects, and her shirt had visible indentions where it had been

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<sup>1</sup> The victim's body was discovered by John Ferguson while walking in the area. Although the State seemingly inadvertently referred to the date of discovery as May 11, 2002, and Ferguson confirmed said date, further testimony and other evidence in the record indicate that Ferguson actually discovered the victim's body on April 11.

pulled up and wrapped tightly around her neck, exposing her bra and abdomen. There were signs of a struggle in the flower bed, and the victim's body appeared to have been "posed" with her legs separated on opposite sides of a small tree. The cause of death was strangulation, with injuries consistent with the use of the shirt as a ligature.

A rape examination was conducted, and the kit was sent to the Louisiana State Police Crime Lab for testing. A consistent, foreign DNA profile was obtained from the testing of the victim's breast swab, right hand fingernails, and bra. Further, this same foreign DNA profile was obtained from the victim's shirt where it had been bunched. The report released by the crime lab in 2005 indicated that the foreign DNA profile belonged to an unknown male donor. The profile was entered into the local and state combined DNA index system (CODIS), and at some point the homicide was designated a cold case.

In 2008, the defendant was arrested for the attack on J.M.<sup>2</sup> in Lafayette, Louisiana. As a result of the defendant's arrest in the J.M. case, his DNA profile was placed in CODIS, and a match confirmation report indicated that the defendant's profile matched the unknown male donor in this case. The crime lab performed a supplementary analysis and confirmed that the CODIS hit was accurate.

### **SUFFICIENCY OF THE EVIDENCE**

In pro se assignment of error number two, the defendant contends that the trial court erred in denying his motion for postverdict judgment of acquittal. The defendant argues that the evidence presented at the trial was insufficient to support the conviction and failed to exclude every reasonable hypothesis of innocence.<sup>3</sup> The defendant specifically asserts that the coroner and his staff did not support the detectives' theory that the victim was strangled with the shirt she was wearing. The defendant notes that in

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<sup>2</sup> Based on the record before us, the December 29, 2007 attack of J.M., introduced in the instant case as other crimes evidence, included a sex offense. Thus the victim, who testified at the instant trial, will be identified by initials herein to protect her identity. See La. R.S. 46:1844(W).

<sup>3</sup> When a defendant raises sufficiency of evidence as well as other assignments of error, a reviewing court should first determine if the evidence adduced at trial is sufficient. Although the defendant contends in another assignment of error that inadmissible other crimes evidence was presented during the trial, this court must consider all evidence, whether deemed to be admissible or not, when determining whether the evidence was sufficient to support the jury's verdict. See State v. Hearold, 603 So.2d 731, 734 (La. 1992).

this case, the coroner's opinion varied as to the weapon used in the commission of the offense. The defendant further notes that even though he denied any association with the victim, he was cooperative in allowing the police to interrogate him and collect a reference sample of his DNA without a search warrant. The defendant contends that the State was not relieved of its duty to prove that he had the specific intent to kill or inflict great bodily harm upon the victim. The defendant argues that testimony presented by the expert witness in DNA analysis, Julia Naylor Kirk, the expert witness in death investigation, Dr. Louis Cataldie, and the expert witness in impression comparisons, Patrick Lane, was ambiguous, skeptical, and inconclusive.<sup>4</sup> Citing Article 403 of the Louisiana Code of Evidence, the defendant adds that Lane's testimony was confusing, frivolous, and prejudicial, noting that his shoes were not submitted for comparison in this case. The defendant concludes that the evidence presented during the trial was insufficient to prove that he committed the crime in question.

The defendant notes that while Dr. Cataldie reviewed the autopsy report and photographs, he did not perform the autopsy in this case. The defendant further notes that the defense attorney objected to the lack of an opportunity to confront and cross-examine the physician who participated in the autopsy of the victim. The defendant argues that the trial witnesses did not present any facts surrounding the autopsy protocols.

Regarding other crimes evidence that the defendant murdered Florida Edwards, a homicide victim whose body was discovered in Baton Rouge on September 3, 1999, the defendant argues that the State improperly influenced the testimony of the lead detective in that case and challenges testimony concerning the fingerprint evidence in that case. Regarding the other crimes evidence in the J.M. case, the defendant contends that the

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<sup>4</sup> We note that the defendant did not object to Lane's testimony. A contemporaneous objection is necessary to preserve the issue for appellate review. La. Code Crim. P. art. 841(A); La. Code Evid. art. 103(A)(1). To the extent that the defendant is attempting to challenge the admissibility of Lane's testimony for the first time on appeal, he is precluded from doing so. Further, we disagree with the defendant's assessment that Lane's testimony could have confused the jury or had a prejudicial effect. Lane clearly testified as to the minimal evidentiary value of the cast of a shoe impression discovered at the scene and indicated that a shoe comparison had not been conducted in this case.

testimony of Detective Cliff Rhodes of the Lafayette Police Department showed that the victim's identification therein was coercive, suggestive, and insufficient to sustain his convictions of attempted second degree murder and second degree robbery beyond a reasonable doubt in that case.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that 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. 821; **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Wright**, 98-0601, p. 2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 and 2000-0895 (La. 11/17/00), 773 So.2d 732.

When analyzing circumstantial evidence, La. R.S. 15:438 provides: "[A]ssuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1855, pp. 3-4 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 159. The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. **State v. Fisher**, 628 So.2d 1136, 1141 (La. App. 1 Cir. 1993), writs denied, 94-0226 & 94-0321 (La. 5/20/94), 637 So.2d 474 & 476. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 98-1407, p. 6 (La. App. 1 Cir. 4/1/99), 734 So.2d 800, 805, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439.

Louisiana Revised Statutes 14:30.1(A) provides, in pertinent part, that second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. Specific intent is "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). Where the key issue in a case is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. However, positive identification by only one witness may be sufficient to support a defendant's conviction. **State v. Millien**, 2002-1006, pp. 2-3 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 509.

There were no eyewitnesses to directly connect defendant with the instant murder, and the evidence presented at trial was circumstantial. The evidence showed that when the victim's body was discovered in the flower bed on the side of a building, her shirt was wrapped tightly around her neck, exposing her chest. Corporal Mindy Stewart and Sergeant Christopher Johnson, Baton Rouge Police Department crime scene investigators, testified that in their opinion, the victim was strangled with the shirt she was wearing. Corporal Stewart specifically testified, "When we arrived on scene, it was obvious that the shirt was -- it appeared to be pulled up around her neck; and I specifically remember in -- vividly it appeared that the shirt had been possibly used to strangle her. You could literally see indentions where possibly hands had been placed on that shirt to keep her from breathing." In further describing the condition of the victim's shirt, Corporal Stewart noted that the shirt had been "scrunched up" for quite some time. Corporal Stewart specifically instructed Julia Naylor Kirk, the Louisiana State Police Crime Laboratory analyst, to search for DNA evidence on the bottom portion of the victim's shirt that appeared to have been held against her neck. Corporal Stewart also photographed signs of a struggle at the scene, specifically noting that there was an area of disturbed dirt in the landscape.

Sergeant Johnson testified that the victim had no purse or identification near her body. He noted that there was no indication at the crime scene that the victim was raped. The victim's shirt, socks, and shoes were taken from her body at the scene to avoid contamination, and her hands were bagged. The police used photographs and fingerprints to ultimately identify the victim as Renee Newman and determined that she had a high-risk lifestyle that included prostitution and drugs.

Dr. Cataldie, an expert witness in death investigation, was called to the scene where the victim's body was discovered to assure the proper collection of the evidence to avoid contamination. Dr. Cataldie also reviewed the autopsy photographs and report conducted by another doctor and concluded that the victim's injuries were consistent with the use of her shirt to strangle her to death.<sup>5</sup> He noted that it was not probable that a zip tie was used to strangle the victim in this case, since a zip tie would generally go all the way around the neck if it were locked, the effects of which would be inconsistent with the ligature marks on the victim's neck in the instant case. He further noted the absence of contact burns or an abrasion that would have been consistent with the use of a rope.

Among other items in the first submittal for testing in this case, Julia Naylor Kirk, the expert witness in DNA analysis, received a blood alcohol kit, the rape examination kit, the victim's under and outer garments, and a swab from the victim's neck. Kirk also had three reference samples from persons of interest, including John Ferguson, who discovered the victim's body. The swabs from the rape kit specifically consisted of a breast swab, two vaginal, two anal, two oral, a larynx, and two hand swabs. Only the victim's DNA was obtained from the vaginal, oral, and anal swabs. Kirk encountered a foreign, distinctive DNA profile on the victim's breast swab and from the skin and/or

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<sup>5</sup> On appeal the defendant notes that Dr. Cataldie did not perform the autopsy. After the defendant initially objected below on this basis, the State noted that the coroner investigator who was present at the time of the autopsy and collected the evidence, Jason Doyle, would also be testifying and subject to cross-examination. At that point the defense attorney clearly withdrew the objection, specifically noting that the defense was "certainly satisfied" as to the issue. As contended by the State, Doyle testified during the trial and was subjected to cross-examination. A contemporaneous objection is necessary to preserve this issue for appellate review. La. Code Crim. P. art. 841(A); La. Code Evid. art. 103(A)(1). By acquiescing and failing to make a contemporaneous objection to Dr. Cataldie's testimony, the defendant is precluded from raising this issue on appeal.

underneath the fingernails of the victim's right hand along with DNA mixtures from at least three contributors. Kirk noted that she observed the bunching on the bottom of the victim's shirt and requested crime scene photographs at the time of the evidence analysis. Bloodstains on the shirt were consistent with the victim's DNA profile. DNA mixtures from two different people were found on the front of the victim's shirt in the bunched up area, and at the bottom of the shirt, the foreign DNA profile was found. DNA mixtures from two different people were also encountered on the victim's bra. The DNA profiles of all persons of interest submitted at that time were excluded from the foreign DNA encountered. While she did not have a reference profile at the time, Kirk confirmed that the foreign, unknown, male DNA profile encountered while testing the victim's breast swab (used as a reference exemplar), matched the foreign profile from the bra swab, right hand swabs, and the bunched up area of the victim's shirt. Upon administrative and technical review, the evidence was found eligible for CODIS placement (local and national).

In 2006, the defendant was interviewed in connection with the police officers' investigation of the homicides of the victim herein and Florida Edwards. Sergeant Johnson specifically testified that the unrecorded interview of the defendant was conducted on September 26, 2006, and his DNA sample was collected. During the interview, the defendant stated that he did not kill, did not know, and never touched the victims. The defendant was not arrested at that time.

J.M. testified in the instant case regarding the defendant's convictions of attempted second degree murder and second degree robbery. On December 29, 2007, after 5:00 p.m., J.M. was walking towards a Wal-Mart on a trail in a wooded area frequented by homeless people in Lafayette when she was approached by a black male who she later identified as the defendant. The defendant asked J.M. for spare change, and when she gave him the change, he grabbed her wrist, and they struggled as he pulled her deeper into the wooded area, fondled her chest area, punched her in the face, and began choking her. In an effort to save her life, J.M. told the defendant that she was dying from the AIDS virus. As the defendant continued to choke J.M., she discontinued the struggle



by dropping her head and closing her eyes, in an attempt to "play dead." When she reopened her eyes, the defendant was gone and her purse and bag were missing. J.M. was admitted to the hospital for treatment, and one of her bank accounts was depleted by the time she reported her cards stolen. J.M. positively identified the defendant as the attacker from a photograph of him using her ATM card and from a photographic lineup.<sup>6</sup> J.M.'s jacket was recovered from the scene and submitted for testing.

The defendant was arrested by the Lafayette Police Department and, during a subsequent police interview, he acknowledged using the credit card, but stated that he found the purse in a dumpster. The defendant denied committing the attack. The defendant's DNA was collected at the time of his arrest. Mixed DNA profiles from the right and left cuffs of the J.M.'s jacket and the J.M.'s shirt were contributed to by the J.M. and the defendant.<sup>7</sup>

The defendant's DNA profile was placed in the CODIS database after his felony arrest for the J.M. attack. Subsequently, the CODIS unit notified the crime lab that the defendant's DNA profile matched the DNA evidence in this case and instructed the lab to perform a supplemental report. Kirk confirmed the match of the defendant's profile to the foreign DNA profile collected in this case, noting that the chance of the profile occurring in a random individual in the population was 1 in 9.6 quadrillion.

Further, according to Kirk's testimony, the defendant's DNA profile was determined to be a match in the DNA evidence collected in another previously unsolved Baton Rouge case, the murder of Florida Edwards. On September 3, 1999, Edwards's body was discovered, mainly nude (except for a shirt pulled over her head), and posed across a box, in the middle of an abandoned building that formerly housed a lounge, located on North Boulevard in Baton Rouge. There were signs of a struggle at the scene, and the victim's non-fatal injuries included facial trauma, abrasions to her neck, subscapular

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<sup>6</sup> During the instant trial, J.M. again positively identified the defendant as the attacker.

<sup>7</sup> Acadiana Criminalistics Laboratory forensic chemist Winnie Kurowski performed the DNA analysis and, in part, testified that while the victim and the defendant could not be excluded from the mixed DNA profiles, 99.3% to 99.9% of the African-American population and 99.8% of the Caucasian population could be excluded.

hematoma, and a small laceration to the right index finger. The cause of death in the Edwards case was asphyxia by manual strangulation. There was no determination as to what was used to strangle Edwards. Louisiana State Police Crime Lab forensic DNA examiner and expert in serology, Alejandro Vara, performed the rape kit testing and testified that no semen was found. Kirk conducted the DNA testing in the Edwards case in 2009. Kirk testified that the defendant's DNA matched the foreign profile from the victim's left hand fingernail clippings, noting that the chance of the profile occurring in a random individual in the population was 1 in 9.76 quadrillion. Further, though 99.5 percent of the population could be excluded as the major contributor of the DNA profile from the vaginal swab, the defendant could not be excluded. Though she could not determine when the DNA contact was made, Kirk noted that acid phosphatase, an enzyme found in seminal fluid, breaks down in the vaginal cavity of a living victim within seventy-two hours post-coitus. Noting that the body breaks down after the discontinuance of the heart and blood flow, Kirk concluded that the limit of detection in a deceased victim would be less than that of a living victim.

Both Edwards and the murder victim in the instant case had lifestyles that were considered "high-risk," including drug use and/or prostitution. When Sergeant Johnson was informed of the CODIS matches, he recorded a second interview of the defendant on December 16, 2009. During the second interview, the defendant again denied knowing the victims and failed to explain the presence of his DNA. However, the defendant confirmed that he was a drug user and seller. The defendant did not testify at the instant trial, and no defense witnesses were presented.

In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 2006-0207 at 14-17, 946 So.2d at 662-664. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by the jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). The verdict rendered in this case indicates the

jury rejected both the defendant's version of events and his hypothesis that someone else murdered Renee Newman. The defendant's DNA profile was found on the victim's breast, bra, and right hand. Much of the testimony presented in this case indicated that the victim herein was strangled with the bottom portion of her shirt, where the defendant's DNA was also located. When questioned by the police, the defendant repeatedly denied knowing the victim and failed to explain the presence of his DNA. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987). We find no such hypothesis exists in the instant case. We are convinced that any rational trier of fact, viewing the evidence presented at trial in the light most favorable to the State, could find the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and the defendant's identity as the perpetrator. Pro se assignment of error number two lacks merit.

#### **THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE**

In the sole counseled assignment of error, the defendant argues that the trial court erred in granting the State's motions in limine to exclude evidence concerning the prosecution and incarceration of Sean Gillis and any portion of Gillis's police statement. The defendant argues that he should have been allowed to present to the jury the defense theory that Gillis may have been the person who killed the victim herein. The defendant contends that evidence presented at the hearing on the State's motions showed that Gillis was associated with the victim, committed other crimes, wrongs, or acts that showed that he murdered the victim, and that he denied knowing the victim in portions of his interrogation. The defendant additionally contends that Gillis had a unique knowledge of the crime scene, specifically, that Gillis somehow knew that the victim's body was covered in ants. The defendant contends that the testimony at the hearing indicated that Gillis killed others in the same manner as the victim was killed

herein, strangulation with a ligature. The defendant further claims that Gillis was a suspect in the murder of the victim in this case. The defendant argues that the evidence against Gillis would not have confused the jury, but instead would have caused them to have reasonable doubt as to his identity as the perpetrator herein. Finally, the defendant notes that this court's denial of his writ application seeking review of the trial court's ruling is not binding on appeal.

A criminal defendant's right to present a defense is guaranteed by the Sixth Amendment of the United States Constitution and Article I, § 16 of the Louisiana Constitution. However, constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value. **State v. Governor**, 331 So.2d 443, 449 (La. 1976). "Relevant evidence" is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than without the evidence. La. Code Evid. art. 401. The trial judge, in deciding the issue of relevancy, must determine whether the evidence bears a "rational" connection to the fact in issue in the case. **State v. Williams**, 341 So.2d 370, 374 (La. 1976); **State v. Harris**, 2011-0779, p. 14 (La. App. 1 Cir. 11/9/11), 79 So.3d 1037, 1046. Except as limited by the Code of Evidence and other laws, all relevant evidence is admissible and all irrelevant evidence is inadmissible. La. Code Evid. art. 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, risk of misleading the jury, or by considerations of undue delay, or waste of time. La. Code Evid. art. 403. Ultimately, questions of relevancy and admissibility are discretion calls for the trial court, and its determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. **State v. Duncan**, 98-1730, p. 10 (La. App. 1 Cir. 6/25/99), 738 So.2d 706, 712-713.

As noted, after the defendant gave notice of his intent to present evidence regarding the investigation and prosecution of Gillis, the State filed two motions in limine to prevent the defendant from presenting any third-party statements or portions

of Gillis's police statement in that regard, arguing that such evidence was irrelevant and might tend to confuse the jury. In its motion to exclude the excerpt from the interview of Gillis, the State noted that the defense counsel indicated that they intended to call witnesses that would testify that Gillis knew the victim herein and further intended to use the following interview excerpt to prove that Gillis lied about knowing the victim:

EXAMINATION BY UNIDENTIFIED OFFICER:

Q: Sean.

A: Yeah.

Q: You ever heard the name Rene (inaudible)? Black girl. She was born in '55, so that would make her - -

A: 47. Eight years.

Q: 47, 48. I wouldn't know. I'm trying to get a picture of her. The name doesn't strike a bell?

A: Doesn't strike a bell. Where was she found and what was done to her?

Q: Well, her abduction, I guess, occurred on North somewhere, North Street, somewhere in that vicinity, and I guess her final resting place, as they said, was over around the old Godcheaux's [sic].

A: Is this the one that was found with ants covering the body and stuff?

Q: I don't know.

A: The man was walking a dog or something?

UNIDENTIFIED OFFICER:

Q: It may have been.

EXAMINATION BY UNIDENTIFIED OFFICER:

Q: It may have been. By the old Godcheaux's [sic] there.

A: But, no, that was not one of mine.

Q: Okay.

A: Just like there's also one where, as the news reports, partially clad body in a park off of 14th Street or something. Again, not me.

Q: Right. Well, let me go (inaudible).

A: That's what I'm saying, yeah. Along with a name, if you don't have a picture - -

At the hearing on the motions in limine, it was stipulated that for purposes of the hearing, the defense would not have to put on live testimony and that Gillis was not available as a witness. Sergeant Chris Johnson of the Baton Rouge City Police Department testified that Gillis was not a suspect in this case. Sergeant Johnson specified that while Gillis was not fully investigated in this matter, at one point in time he was a person of interest and his name was given to the crime lab to eliminate him as a possible suspect in the investigation.

Sergeant Johnson further denied questioning Gillis about the murder of the victim in the instant case when he questioned Gillis in the midst of a long police interrogation, spanning several days beginning on April 29, 2004, regarding other unrelated murders. Sergeant Johnson was unable to fully recall the extent of his questioning of Gillis at that time, noting that he was not one of the investigators who conducted the interview and only entered the interview room to question Gillis apart from the lead investigators' interview. Further, the defense elicited testimony from Sergeant Johnson regarding his telephone interview of two individuals, purportedly John and Elsie Cook, to show that Gillis knew the victim and had been observed in the same vehicle with the victim on more than one occasion. Sergeant Johnson testified that there was no indication that anyone saw Gillis kill the victim herein or saw them together on the date of her murder, that the method of operation used in this case was dissimilar from the murders that Gillis committed, and that he never attempted to question Gillis again after April 2004. Sergeant Johnson specifically stated:

I talked to the investigators investigating the death of the women in which [Gillis] was accused of killing and I looked at the M.O. and similarities to the homicide I worked with [the victim]. It was not close. It was no similarity to both homicides and that's -- that's why - - uh -- it halt at that point until I sent the D.N.A. - - until the D.N.A. was compared with the ones off her body.

As to the dissimilarities between this case and Gillis's murders, Sergeant Johnson further specified that Gillis was mobile in that he used a vehicle one or two times to transport the victims he murdered and that Gillis used zip ties or a cable to strangle his

victims and a knife to injure or dismember his victims. Sergeant Johnson specifically stated:

I think what -- what was striking about -- what was different was the fact that I learned from Detective Norwood and, also, Detective Colter, maybe one or two of the bodies in which he's accused of -- victims he's accused of killing had body parts cut away -- I mean, taken body parts and, also, souvenirs taken. I'm not sure. I think a breast was taken from one of the victims and [the victim in this case] was -- sustained no kind of injuries like that.

He noted that the victim herein had no knife injuries and the evidence showed that the victim's shirt was used as a ligature. Sergeant Johnson further noted that the victim in this case was fully clothed when her body was discovered, though her shirt was pulled up to her neck. Further, no zip ties were discovered at the scene. Sergeant Johnson further testified that the investigators concluded that the instant murder took place at the location of the body, specifically noting that there were signs of a struggle at the scene, that the ground near the victim's body was disturbed, and that dirt was transferred from the flower bed where her body was located to the concrete in front of the building. The DNA evidence was found on the victim's shirt, bra, and hand. There was no evidence of a rape, though there was an indication that the victim had been sexually assaulted.

According to the testimony of Elsie Jarrett (whose former last names include Cook and her maiden name, Fleming) and her ex-husband John Cook, the victim used to frequent the apartment of her brother, Isaac Fleming (deceased at the time of the hearing). Fleming lived two doors down from them in an apartment complex at the time. According to Jarrett, Fleming was a drug abuser and would allow his friends to come to his residence and smoke crack cocaine and use other illegal drugs. Jarrett and Cook saw Gillis at Fleming's apartment on at least one occasion although Jarrett, during cross-examination, denied ever seeing Gillis and the victim together. Cook could not recall when Gillis was at Fleming's apartment and stated that it was in 2001 or 2002.

Detective Bryan White of the East Baton Rouge Parish Sheriff's Office was assigned in 2004 to a multi-agency task force to investigate unsolved homicides in and around the Baton Rouge area. Detective White participated in the interrogation of Gillis,

concentrating on three homicide victims, Katherine Hall, Johnnie Williams, and Donna Johnston. Their investigation of Gillis resulted in the trial for one of the East Baton Rouge Parish murder victims, Johnston, while the other two murders were introduced in the trial of Johnston as other crimes evidence. Gillis's DNA was found on all three victims. Detective White testified that all three of Gillis's victims had postmortem cuttings or dismemberment and were killed in the same manner, strangulation with nylon zip ties. Two of the victims, Hall and Johnston, had visible grooves from the zip ties on their necks. Williams' body was near decomposition, and the grooves were no longer visible, but the trauma to her neck was consistent with the use of such a device. Hall had significant cuts on her body, and Williams' hands had been severed. One of Johnston's arms had been severed at the elbow, and her breast nipples and a square-shaped piece of her thigh that included a butterfly tattoo had been cut off. Detective White testified that all three of the victims' bodies were found nude in remote areas where they had been transported and dumped, and indicated that Gillis had postmortem sex with the victims. Outside of the three named victims that his investigation focused on, Detective White could not recall whether Gillis had other victims who were not cut or dismembered. Detective White noted that some of the homicides that Gillis confessed to were worked by other agencies, noting that he killed a woman in Lafayette Parish. Detective White confirmed that Gillis knew at least one of his victims, and that the women led high-risk lifestyles, including prostitution and drug abuse. While Gillis confessed to the murder of eight women, he denied killing the victim herein.

After reviewing a portion of the transcript of the interrogation of Gillis, Detective White confirmed that Gillis was questioned about the murder of the victim herein, although the task force was not investigating the instant murder and he had no independent recollection of the line of questioning regarding her murder. Detective White specifically stated:

I'm going to be honest with you. We -- we had a -- a list of a lot of unsolved homicides ... and, since [Gillis] was cooperating, we did ask him about others ... that he didn't confess to us to and -- because at that point



he -- he was being extremely cooperative ... and detailed about the ones he was involved in.

Detective White confirmed that Gillis was questioned about several homicides though there was no evidence of his involvement in those murders.

The trial court granted the State's motions in limine. In doing so, the trial court noted that it was very mindful of the defendant's right to present a defense. In reviewing the evidence, the court noted several dissimilarities between the murders committed by Gillis and the instant murder. While noting the high-risk lifestyle and strangulation of the victims as similarities, the court further found it significant that Gillis's modus operandi included the use of zip ties to strangle his victims, markings on his victims' bodies, and the apparent sexual molestation of his victims. The trial court further noted that Gillis's victims were nude and were taken from one site to another and dumped. The trial court concluded that there were not significant similarities among Gillis's cases and the instant case. The trial court noted that a significant risk of jury confusion would be associated with the admission of the evidence in question. Thus, the court found inadmissible any evidence regarding the murders committed by Gillis.

The trial court judge filed a per curiam opinion in this matter. The court noted that the testimony presented at the hearing on the State's motions in limine showed that Gillis may have spent time in the same house with the victim sometime in 2001 or 2002. The trial court reiterated that there was, however, no showing of an actual link between Gillis and the murder of the victim, or a showing that the murders committed by Gillis were distinctly similar to the murder of the victim herein. The trial court specifically noted that while the victim herein was killed by strangulation, there were no apparent zip tie marks, cuts on her body, or dismemberment. The court also noted that the victim's body was fully clothed and was apparently discovered at the scene of her murder. The court noted that the evidence at issue would be irrelevant and serve to confuse or mislead the jury. The trial court further noted that the portion of Gillis's police statement at issue consisted of inadmissible hearsay.

As noted above, constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value. In this case the evidence sought to be introduced by the defendant established very little connection between the victim herein and Gillis and did not tend to show that Gillis committed the murder in this case. The modus operandi in this case and Gillis's murders were not so similar as to establish any significant level of relevancy in the evidence the defendant sought to introduce. While Gillis used zip ties to murder his victims, the evidence showed that the victim in this case was strangled with her shirt. Further the victim herein was not transported after the murder or mutilated as were Gillis's victims.

As the Louisiana Supreme Court stated in **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992), application of Article 403 requires a weighing and balancing of the probative value of the evidence against the "legitimate considerations of judicial administration" enumerated in that article. In **Mosby**, the defendant, a young, slim-built African-American male, was being prosecuted for robbing a white male of his bank bag while the male was in a bank line to deposit the money. The supreme court held that other crimes evidence that another young, slim-built African-American male had been arrested and charged with two similar robberies, involving the taking of bank deposit bags from white males at two nearby banks within the same four-month period, was properly excluded because its probative value was outweighed by the danger of unfair prejudice.<sup>8</sup> The supreme court noted that in assessing the probative value of evidence, a judge should consider factors such as whether there is some connection between the perpetrator of the extraneous crime(s) and the crime at issue and whether the other crimes are of a distinctly similar character, such as a "signature" crime. As noted by the supreme court, while there were similarities between the **Mosby** robbery

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<sup>8</sup> See also **State v. Mosby**, 581 So.2d 1060, 1065 (La. App. 1 Cir. 1991), for a complete rendition of the facts therein in comparison to the evidence of the similar offenses. While this court found the exclusion of the evidence at issue in **Mosby** constituted harmless error, as discussed above, the Louisiana Supreme Court subsequently found that the evidence of similar offenses at issue therein was properly excluded.

and the robberies committed by the other black male, "they do not bear the strikingly similar characteristics of 'signature' crimes." **Mosby**, 595 So.2d at 1139-1140.

Similarly, we find that the instant murder of the victim herein does not bear strikingly similar characteristics to the "signature" crime murders committed by Gillis. Although the defendant now contends otherwise, based on the testimony presented at the hearing, Gillis was not a suspect in the instant murder. We conclude that the trial judge properly excluded the evidence related to the offenses of Gillis and did not thereby curtail the defendant's right to present a defense. Not only is the evidence at issue irrelevant, the probative value of the evidence was substantially outweighed by the danger of confusing and misleading the jury. Accordingly, we find no clear abuse of discretion in the trial court's relevancy and admissibility rulings on the State's motions in limine. The counseled assignment of error lacks merit.

#### **OTHER CRIMES EVIDENCE**

In pro se assignment of error number one, the defendant argues that the trial court erred in finding admissible evidence of other crimes, including the murder of Florida Edwards and the attempted second degree murder and second degree robbery in the J.M. case. The defendant argues that the testimony presented at the hearing on the other crimes evidence revealed several significant dissimilarities, particularly in time, place, and manner of commission, such that one could not conclude that the offenses were committed by the same person. As to the dissimilarities in time and place, the defendant notes that the victim herein was found outside of an abandoned store, whereas Edwards's body was discovered inside an abandoned building; J.M. was attacked in Lafayette as opposed to Baton Rouge; and the bodies were discovered and/or offenses were committed years apart.

Regarding the manner of commission, the defendant notes that while the victim herein was strangled with a ligature, Edwards and J.M. were not. The defendant also notes that there was no evidence that the victim herein was beaten, sexually assaulted, or robbed, though Edwards was beaten and J.M. was beaten, sexually assaulted, and robbed. The defendant further asserts that in the Edwards case, her body was

discovered nude, she had a former arrest, there was evidence of drug use and sex at the scene where the body was found, and she was a prostitute, while none of these factors exist in the instant case. The defendant contends that the instant case is based on theories and speculation, noting that there were no witnesses or details about when, where, what, and how the crime was committed.

The defendant also challenges the fingerprint and DNA evidence in the Edwards case, and the trial court's reliance on **State v. Lee**, 2005-2098 (La. 1/16/08), 976 So.2d 109, cert. denied, 555 U.S. 824, 129 S.Ct. 143, 172 L.Ed.2d 39 (2008). The defendant argues that the evidence that he committed the murder in the Edwards case was not clear and convincing. The defendant contends that the other crimes evidence presented during the trial may have confused the jury, lured them to believe that he is a bad man, and prevented him from receiving a fair trial. The defendant concludes that the probative value of the other crimes evidence was outweighed by the danger of unfair prejudice.

As detailed above in this appeal, the State introduced at trial evidence pertaining to the defendant's murder of Edwards and his conviction of attempted second degree murder and second degree robbery in the J.M. case. Prior to the trial, the State filed a motion for determination of admissibility of evidence of other crimes pursuant to La. Code Evid. art. 404(B) and **State v. Prieur**, 277 So.2d 126 (La. 1973), to show identity, motive, opportunity, intent, preparation, plan and system, knowledge, and absence of mistake or accident at trial.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. **State v. Hills**, 99-1750, p. 5 (La. 5/16/00), 761 So.2d 516, 520. Under Article 404(B)(1), other crimes evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." La. Code Evid. art. 404(B)(1). At least one of the enumerated purposes in Article 404(B) must be at issue, have some independent relevance, or be an element of the crime

charged in order for the evidence to be admissible under Article 404. **State v. Kennedy**, 2000-1554, pp. 5-6 (La. 4/3/01), 803 So.2d 916, 920.<sup>9</sup> To be admissible under Article 404(B), evidence of the defendant's prior bad acts must meet two criteria: (1) it must be relevant to some issue other than the defendant's character, and (2) its probative value must be greater than its potential to unfairly prejudice the jury. See La. Code Evid. arts. 403 & 404(A). The underlying policy is not to prevent prejudice (since evidence of other crimes is always prejudicial), but to protect against unfair prejudice when the evidence is only marginally relevant to the determination of guilt of the charged crime. **State v. Humphrey**, 412 So.2d 507, 520 (La. 1982) (on rehearing).

Louisiana jurisprudence allows the use of other crimes evidence to show modus operandi (i.e., system) as it bears on the issue of identity, particularly when the modus operandi employed by the defendant in both the charged and the uncharged offenses is so peculiarly distinctive one must logically say they are the work of the same person. **Hills**, 99-1750 at 5-6, 761 So.2d at 520-521; see also **State v. Code**, 627 So.2d 1373, 1381 (La. 1993), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994). Motive evidence reveals the state of mind or emotion that influenced the defendant to desire the result of the charged crime. To have independent relevance, the motive established by the other crimes evidence must be more than a general one, such as gaining wealth, which could be the underlying basis for almost any crime; it must be a motive factually peculiar to the victim and the charged crime. **State v. McArthur**, 97-2918, p. 3 (La. 10/20/98), 719 So.2d 1037, 1041.<sup>10</sup> Plan can refer to a plan conceived by the defendant in which the commission of the uncharged crime is a means by which the defendant prepares for the commission of another crime (such as stealing a key in order to rob a safe), or it may refer to a pattern of crime, envisioned by defendant as a coherent whole, in which he achieves an ultimate goal through a series of related

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<sup>9</sup> **Kennedy** is superseded by La. Code Evid. art. 412.2 only with respect to other crimes evidence of sexually assaultive behavior. See **State v. Wright**, 2011-0141, p. 13 (La. 12/6/11), 79 So.3d 309, 317.

<sup>10</sup> **McArthur** is superseded by La. Code Evid. art. 412.2 only with respect to other crimes evidence of sexually assaultive behavior. See **Wright**, 2011-0141 at 13, 79 So.3d at 317.

crimes (such as acquiring a title by killing everyone with a superior claim). **McArthur**, 97-2918 at 3, 719 So.2d at 1042.

The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by **Prieur**. However, 1994 La. Acts 3d Ex. Sess. No. 51 added La. Code Evid. art. 1104 and amended Article 404(B). Article 1104 provides that the burden of proof in pretrial **Prieur** hearings, "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404."

The burden of proof required by Federal Rules of Evidence Article IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. See **Huddleston v. U.S.**, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of La. Code Evid. art. 1103 and the addition of Article 1104. However, numerous Louisiana appellate courts, including this court, have held that burden of proof to now be less than "clear and convincing." See **State v. Williams**, 99-2576, p. 7 (La. App. 1 Cir. 9/22/00), 769 So.2d 730, 734 n.4.

In the pretrial **Prieur** hearing, Kirk, the DNA analyst, presented testimony as to the DNA evidence against the defendant in this and the Edwards case that was consistent with her subsequent trial testimony. Consistent with his trial testimony, Sergeant Johnson noted that the body of the victim in this case was discovered in a flower bed on the side of a building on Main Street in Baton Rouge that had been vacant for a long period of time. Noting the presence of condoms and debris, Sergeant Johnson testified that homeless people and drug users frequently congregated in front of the vacant building. The victim's shirt was pulled upwards to her face, exposing her bra and abdomen, and her body was positioned on her back in front of a tree with one leg on each side of the tree. Regarding the victim's injuries, Sergeant Johnson testified that the victim had an abrasion on the side of her face along with the ligature marks on her neck, and Kirk noted that the victim had what she considered blunt force trauma on her head. Sergeant Johnson further noted the forensic pathologist's determination that the victim's cause of

death was manual strangulation with a ligature. Based on his investigation, Sergeant Johnson concluded that the victim had a high-risk lifestyle though she did not seem to be homeless and was employed.

Edwards's body was found in an abandoned building on Florida Boulevard in Baton Rouge, with her upper torso and hip area positioned over a box, her head leaning back outside of the box, and her legs extended at the end of the box. The victim had visible ligature marks on her neck. Sergeant Johnson noted the condition of the building and further testified that homeless people frequently used drugs and had sex in the building. Edwards also led a high-risk lifestyle, consisting of prostitution and at least one prior arrest, and was known to frequent locations such as the scene of the discovery of her body. Sergeant Johnson noted that Edwards also died by manual strangulation, was beaten, and possibly raped, based on the condition of her clothing, including a ripped shirt, panties around her ankle, and removed pants.

On September 26, 2006, the police received confirmation that the defendant's fingerprints were lifted from a beer can found at the scene of another Baton Rouge female murder victim, Sylvia Cobb.<sup>11</sup> At that time, the defendant was incarcerated in East Baton Rouge Parish Prison, and the police interviewed him. He ultimately admitted being familiar with Cobb and visiting her residence, but denied ever being present at the residence where Cobb's body was discovered. The defendant denied knowing either the victim herein or Edwards as he did in the subsequent recorded police interview.

Regarding his assessment of the similarities in the murder cases, Sergeant Johnson, in part, stated, "...we look at the body of these women to a detective -- a homicide detective we think their bodies are posed, which means that the body is positioned to where it give [sic] a shock effect when you walk up on a body. Even though one -- the two women had clothing, but their breast area was exposed." He testified that

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<sup>11</sup> This particular victim's last name is interchangeably spelled in the record as "Cobb" or "Cobbs," the former being used herein. The evidence related to the murder of Sylvia Cobb is not at issue on appeal in this case as it was not admitted during the trial.

there was evidence of some sexual assault though not necessarily rape in both cases and both women were strangled.

In detailing the facts of the J.M. case, also consistent with his trial testimony, Detective Rhodes noted that J.M. provided a complete description of her attacker, the details of the attack, and positively identified the defendant. He observed J.M.'s injuries including a broken ankle, a bruised and battered face, a closed eye, and bruising and abrasions around her neck consistent with her claim that she had been strangled. He also noted J.M.'s claim that the defendant fondled her breasts and asked her to lick his nipples. She believed that she temporarily lost consciousness.

In its statement of reasons for granting the State's motion as to the other crimes evidence from the Edwards and J.M. cases, the trial court discussed **State v. Lee**, 2005-2098 at 47-51, 976 So.2d at 141-142, where the defendant therein was charged with first degree murder and the State introduced evidence under Article 404(B) of four other uncharged homicides and one attempted homicide by the defendant therein. The other crimes evidence was introduced to show a common modus operandi. The victims were all attractive, successful women who led low-risk lifestyles and were attacked in their comfort zones. There were similarities in the physical injuries of each victim, though the injuries were not all alike. The defendant's DNA was found on or in each of the victims. The Louisiana Supreme Court held that the evidence was admissible to show identity because "of the genetic markers he left behind in a variety of similar circumstances over the course of a year." **Lee**, 2005-2098 at 51, 976 So.2d at 143.

In comparing the instant offenses to the other crimes evidence at issue herein, the trial court specifically noted that, as in the **Lee** case, there were similarities amongst the victims. As noted by the trial court, all of the victims were adult, African-American women. Edwards and the victim herein lived high-risk lifestyles, and all of the offenses, including the J.M. attack, took place in areas where transients and homeless people frequented. Like the **Lee** case, the victims were located in the Baton Rouge and Lafayette areas. As also noted by the trial court, all of the victims were strangled and it was apparent that the perpetrator had some contact with all of the victims' breast area.



The trial court specifically noted that the shirt of the victim herein was pulled above her chest, exposing her bra and the defendant's DNA was found on a breast swab taken from her. While Edwards was also believed to be raped, her shirt was torn down the middle, exposing her breasts. Finally, the trial court noted that after her attack, J.M. told the investigating detective that at one point the defendant reached in her shirt and grabbed her breast, ripping her shirt in the process. The trial court was convinced that the crimes in the Edwards and J.M. cases were so similar to the instant offense that the same person could be said to have committed the crimes. Thus, the trial court found the other crimes evidence probative and relevant to prove both identity and modus operandi, outweighing any prejudicial effect of its admissibility.

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, p. 4 (La. 1/10/03), 839 So.2d 932, 934 (per curiam). We find no abuse of discretion in the trial court's ruling in this case. All of the offenses took place in high-risk areas, the African-American adult female victims were each strangled, their breasts were exposed and/or fondled, and the bodies of the murder victims were conspicuously posed at the murder scene, adding shock effect to their discovery. The modus operandi is so similar in the cases that one can easily conclude the same person was the perpetrator in all instances. Also, the other crimes evidence is relevant to prove material facts in the instant case. Specifically, it was relevant to identity and method of selection of victims. In this case, the other crimes evidence is not marginally relevant but instead provides proof that the modus operandi is so similar that it is more likely than not the work of one individual. The probative value clearly outweighs the prejudicial effect. Further, the State sufficiently proved that the defendant committed the prior acts, specifically considering the DNA evidence, and the eyewitness testimony and convictions in the J.M. case. Thus, the trial court properly found the other crimes evidence admissible under Article 404(B). Pro se assignment of error number one is without merit.

**CONVICTION AND SENTENCE AFFIRMED.**