NOT DESIGNATED FOR PUBLICAION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0596

STATE OF LOUISIANA

VERSUS

TYARI KWAN SMITH

Judgment Rendered: November 1, 2013

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 571511

The Honorable Randall L. Bethancourt, Judge Presiding

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* * * * * * * *

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

The defendant, Tyari Kwan Smith, was charged by grand jury indictment with two counts of first degree murder, violations of Louisiana Revised Statutes 14:30.[1] He pled not guilty and, following a jury trial, was found guilty as charged. He filed a motion for post-verdict judgment of acquittal and a motion for new trial, both of which were denied. The defendant was then sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on both counts. The district court ordered that the sentences run consecutively. The defendant filed a motion to reconsider sentence, which was denied. He now appeals, alleging three assignments of error. For the following reasons, we affirm the defendant's convictions and sentences.

FACTS

On January 7, 2010, officers and detectives with the Terrebonne Parish Sheriff's Office responded to a report of a murder at a house on Louisiana Highway 56 near Chauvin, Louisiana. The bodies of the victims, Maria Elizabeth Chavez and Tyari Smith, Jr., were found in a bedroom inside the house. Maria was the defendant's girlfriend of many years, and Tyari, Jr., the couple's youngest child, was two years old at the time of the murders. The house belonged to the defendant's grandmother, and the defendant lived there with his grandmother, mother, sister, brother, two older children, and the victims.

The defendant's great uncle, Lee Roy Outley, who was working outside far behind the Highway 56 house, reported the incident to authorities. He testified the defendant stood outside the side of the house and hollered to Outley. In response, Outley got into his truck and drove

[1] The State did not seek the death penalty. See La. R.S. 14:30C(2).

back to the house. Standing on the porch, the defendant told Outley "Unc, I just killed [Maria]" and "[m]y baby, too." The defendant stated that he left the gun in the house, and Outley advised him to remove it. Outley also advised him to get in his vehicle and leave the scene. As soon as the defendant left, Outley drove to his house and called the police.

The defendant was named as the suspect and was located at a house on St. Matt Street. When officers found the defendant, he was sitting in a bedroom looking at a television that was turned off and was unresponsive. He looked up at the officers, sighed deeply, and put his head down. He would not answer any questions or tell the officers his name. Officers were able to determine his identity after seeing Tyari, Jr.'s name tattooed on his arm. He was then handcuffed and taken into custody.

Officers were unable to find the murder weapon during their investigations; however, there were multiple bullet casings found and collected by detectives near the victims' bodies. Detectives also located a Terrebonne Parish Sheriff's Office evidence bag in a closet in the Highway 56 house that had been released to the defendant in connection with a 2008 conviction. The property report inside the evidence bag listed the items that it contained at the time it was returned to the defendant. According to the property report, the evidence bag contained a .40 caliber semi-automatic pistol, five .40 caliber rounds, and two .40 caliber casings. When detectives recovered the bag, it contained two .40 caliber bullet casings. The casings were tested and determined to have been fired from the same gun as those found near the bodies of the victims.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that he was denied the right to confront his accusers because he did not have the

opportunity to cross-examine the analyst who performed a forensic firearms test, the results of which were introduced by the State and linked the bullet casings found near the victims' bodies to those found in the evidence bag from the defendant's 2008 conviction. At trial, Terrebonne Parish Sheriff's Office Detective Jason Kibodeaux, who did not prepare the scientific analysis report, testified as to its results. The defendant objected, arguing that although he did not make a demand for testimony of the analyst who performed the test, requiring him to do so was in violation of his due process rights.

The Confrontation Clause of the Sixth Amendment acts as an absolute bar to the admission of all out-of-court testimonial evidence unless (1) the witness who made the statement is unavailable to testify in court, and (2) the defendant had a prior opportunity to cross-examine the witness. See *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). An analyst's report and certification regarding forensic evidence is considered a testimonial statement and is subject to Confrontation Clause requirements. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009); *Bullcoming v. New Mexico*, __U.S.__, 131 S.Ct. 2705, 2717, 180 L.Ed.2d 610 (2011).

Some states have "notice-and-demand statutes" that do not violate the Confrontation Clause because they do not shift to the defendant the burden to call the testing analyst to testify at trial. *Melendez-Diaz*, 557 U.S. at 326-27, 129 S.Ct. at 2541. Louisiana Revised Statutes 15:499-501 are such statutes. See *State v. Cunningham*, 2004-2200, pp. 15-18 (La. 6/13/05), 903 So.2d 1110, 1120-22.

Louisiana Revised Statutes 15:499 provides that criminal laboratories are authorized to provide proof of examination and analysis of physical

evidence by providing a certificate of the person in charge of the facility. A party introducing a certificate of analysis under La. R.S. 15:499 must provide written notice of intent to offer proof by certificate at least forty-five days prior to trial. The defendant may then demand that the person who conducted the examination and analysis testify by timely filing a written demand within thirty days of the notice of intent. La. R.S. 15:501. If the certificate and notice comply with La. R.S. 15:499 and 15:501, then the certificate is admissible and considered *prima facie* evidence of the facts provided. La. R.S. 15:500. However, if the defendant properly demands the testimony of the analyst who performed the tests, then the certificate is not *prima facie* evidence and the analyst must testify to establish the test results. La. R.S. 15:501. If the State complies with La. R.S. 15:499 et seq., then the certificate and report are admissible and the defendant must make a timely written demand that the analyst testify, or the defendant waives his Sixth Amendment right under the Confrontation Clause. *State v. Simmons*, 2011-1280 (La. 1/20/12), 78 So.3d 743, 747 (per curiam).

The record reveals that the State followed the proper procedure and filed notice of its intent to use a certificate of scientific analysis pursuant to La. R.S. 15:501. A copy of the scientific analysis report was attached to the notice. The defendant had an opportunity at that time to subpoena the appropriate analyst, but failed to make a timely demand for the analyst's testimony. Thus, he waived his Sixth Amendment right under the Confrontation Clause. Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant contends that the district court erred in allowing the State to introduce evidence of other crimes committed by the defendant.

Prior to trial, the State filed notice of intent to use evidence of other crimes. The notice indicated that the State planned to introduce the defendant's 2008 conviction for illegal use of a weapon and 2010 convictions for possession and distribution of controlled dangerous substances.[2] The court held a *Prieur* hearing to determine the admissibility of these other crimes pursuant to La. C.E. art. 404B(1).[3] At the hearing, the defendant argued that there were no grounds for introducing his drug convictions in his murder case other than to suggest that he was a bad person. The defendant also argued that there was no evidence that he was motivated by drugs. In response, the State argued that the drug convictions were relevant to the defendant's motive because of multiple statements from his family members that he believed he was going to jail for those charges and that Maria was moving to California with their three children to be with her family while he served time.

The State sought to introduce the defendant's weapon conviction because the bullet casings in the evidence bag that was returned to the defendant in relation to that conviction were tested and determined to have been fired from the same gun as those recovered from the murder scene. According to the State, introduction of the weapon conviction was necessary to show that the defendant had a gun in 2008 and that gun was the same one used in the murders. Convinced by the State's arguments, the district court allowed evidence of the weapon and drug convictions to be admitted.

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[2] In July 2008, the defendant pled guilty to illegal use of a weapon. In August 2009, the State filed a bill of information against the defendant charging him with possession with intent to distribute Schedule III and IV controlled dangerous substances and the distribution of Schedule II controlled dangerous substances. The defendant withdrew his previously entered plea of not guilty and entered a guilty plea to those drug charges in April 2010.

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

Generally, evidence of other crimes committed by the defendant is inadmissible due to the "substantial risk of grave prejudice to the defendant." To admit "other crimes" evidence, the State must establish that there is an independent and relevant reason for doing so, i.e., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act. Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Further, the other crimes evidence must tend to prove a material fact genuinely at issue and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *State v. Tilley*, 99-0569, p. 18 (La. 7/6/00), 767 So.2d 6, 22, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001).[4] Ultimately, questions regarding the admissibility of evidence are within the discretion of the district court and should not be disturbed absent a clear abuse of that discretion. *State v. Mosby*, 595 So.2d 1135, 1139 (La. 1992).

We find that the district court did not err or abuse its discretion in allowing the introduction of the other crimes evidence presented by the

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[4] The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by *Prieur*. Prior to its repeal by 1995 La. Acts No. 1300, § 2, La. C.E. art. 1103 provided that the notice requirements and clear and convincing evidence standard of *Prieur* and its progeny were not overruled by the Code of Evidence. Under *Prieur*, the State was required to give a defendant notice, both that evidence of other crimes would be offered against him, and of which exception to the general exclusionary rule the State intended to rely upon. Additionally, the State had to prove by clear and convincing evidence that the defendant committed the other crimes. *Prieur*, 277 So.2d at 129-30.

However, 1994 La. Acts 3d Ex. Sess., No. 51, § 2 added La. C.E. art. 1104, which 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 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 Article 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. Millien*, 2002-1006 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 514.

State. The evidence related to the defendant's weapon conviction was highly relevant and necessary to show that the defendant had possession of and had fired the same gun that fired the bullets that killed Maria and Tyari, Jr. The evidence related to the defendant's drug convictions was also relevant and highlighted the defendant's motive for committing the instant offenses. Although the defendant had not yet been convicted for the drug offenses at the time of the murders, testimony presented at trial established that the defendant thought he was going to jail and was depressed about it. Testimony also established that prior to her murder, Maria planned to move to California with the couple's three children until the defendant was released from jail. While the introduction of this other crimes evidence was certainly prejudicial, the probative value of the evidence—to show the defendant's motive for shooting Maria and Tyari, Jr., and to provide the link connecting the defendant to the murder weapon—outweighed any prejudice.

Accordingly, this assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant claims that the district court erred in failing to grant his motion for a mistrial related to the admission of the testimony of Danny Verret. Specifically, he contends that a mistrial was warranted because he did not have the opportunity to prepare for Verret's testimony and a conflict existed because defense counsel had represented Verret in previous matters.

On the fourth day of trial, the State was informed by a detective that Verret, a trusty working in the motor pool, had information about the defendant's case. The prosecutor immediately informed defense counsel. The prosecutor and defense counsel then watched from a monitor as a

detective interviewed Verret. The interview was recorded and played for the district court outside of the jury's presence.

The district court pointed out that Verret only came forward with this new information by happenstance. According to Captain David LeBoeuf with the Terrebonne Parish Sheriff's Office, he was in the hall of the motor pool talking to a detective about the case. When Captain LeBoeuf entered the kitchen in the motor pool to get a cup of coffee, Verret, who had overheard the conversation between Captain LeBoeuf and the detective, asked if they were talking about the defendant. Verret told Captain LeBoeuf that he roomed with the defendant for two or three months.[5] Captain LeBoeuf asked if the defendant told him anything, and Verret stated that the defendant told him, "I shot her and the bullet went through and killed the baby[,]" and that the defendant said that he "didn't mean to kill the baby."

The district court ruled around noon on a Friday that the testimony would be allowed. The defendant had the rest of the weekend to prepare for Verret's testimony. The defendant objected to the court's ruling and moved for a mistrial. Finding no grounds for a mistrial, the district court denied the motion.

When the parties returned to court on Monday, defense counsel moved to withdraw, arguing that he had a conflict because he represented Verret in prior matters. Defense counsel stated that although he had notified the district court on Friday that Verret was his former client, he discovered over the weekend that he represented Verret in a domestic abuse matter and recalled disclosures made to him in confidence. According to defense counsel, he could not both zealously represent the defendant and protect the confidential information provided to him by Verret. The district court

[5] Verret later clarified that although he and the defendant were in the same dorm, they only shared the same cell for a couple of days.

denied the motion to withdraw after Verret was called to the stand, questioned by the district court, and waived his attorney-client privilege.

Mistrial is a drastic remedy and, except in instances in which mistrial is mandatory, is warranted only when trial error results in substantial prejudice to a defendant, depriving him of a reasonable expectation of a fair trial. *State v. Fisher*, 95-0403 (La. App. 1 Cir. 5/10/96), 673 So.2d 721, 725-26, writ denied, 96-1412 (La. 11/1/96), 681 So.2d 1259. Determination of the existence of unnecessary prejudice warranting a mistrial is within the sound discretion of the district court judge. See *State v. Manning*, 2003-1982 (La. 10/19/04), 885 So.2d 1044, 1109, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005).

Unless the defendant has been granted pretrial discovery, if the State intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning the State's opening statement. If it fails to do so, a confession or inculpatory statement shall not be admissible in evidence. La. C.Cr.P. art. 768. An "inculpatory statement" under Article 768 is one made out of court after a crime has been committed, admitting a fact, circumstance, or involvement which tends to establish guilt or from which guilt may be inferred. *State v. Thames*, 95-2105, p. 4 (La. App. 1 Cir. 9/27/96), 681 So.2d 480, 484, writ denied, 96-2563 (La. 3/21/97), 691 So.2d 80.

The State informed the defendant of the existence of the statement from Verret's information immediately upon coming into possession of it. It was not until this point that it could be said that the State intended to offer the statement into evidence. We find the State was in good faith and had no knowledge of the statement prior to the time it was fully disclosed to the defendant. The trial was recessed after the statement was ruled admissible

and the defendant had the weekend to prepare. See *State v. Shelton*, 490 So.2d 515, 517 (La.App. 4 Cir. 1986) (The purpose of the notification requirement of La. C.Cr.P. art. 768 is to avoid surprise and allow adequate time for the preparation of a defense. A defendant should be given a fair opportunity to plan or present his defense in light of the damaging statement. Absent a showing of either bad faith by the State in not informing the defense of the inculpatory statement sooner or substantial prejudice to the defendant, the ruling of the district court should be affirmed). Thus, we are unable to say that the district court abused its discretion in failing to grant the defendant's motion for mistrial.

The right to counsel secured under the Sixth Amendment includes the right to conflict-free representation. See *Holloway v. Arkansas*, 435 U.S. 475, 482-83, 98 S.Ct. 1173, 1177-78, 55 L.Ed.2d 426 (1978). An actual conflict of interest is established when the defendant proves that his attorney was placed in a situation inherently conducive to divided loyalties. *State v. Kahey*, 436 So.2d 475, 484 (La. 1983). Actual conflicts of interest that adversely affect counsel's performance must be established by specific instances in the record, and the mere possibility of divided loyalties is insufficient proof of actual conflict. *State v. Castaneda*, 94-1118 (La. App. 1 Cir. 6/23/95), 658 So.2d 297, 305. A defense attorney required to cross-examine a current or former client on behalf of a current defendant suffers from an actual conflict. *State v. Cisco*, 2001-2732, p. 18 (La. 12/3/03), 861 So.2d 118, 130, cert. denied, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004). The question of withdrawal or substitution of counsel largely rests within the discretion of the district court judge, and his ruling will not be disturbed in the absence of a clear showing of an abuse of discretion. See

State v. Leger, 2005-0011, p. 43 (La. 7/10/06), 936 So.2d 108, 142, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007).

Because defense counsel was required to cross-examine a former client on behalf of his current client, he argued that an actual conflict existed. Although defense counsel's representation of Verret occurred in an unrelated civil matter almost ten years prior to the instant trial, he claimed that he could not both zealously represent the defendant and protect the confidential information provided to him by Verret. However, once Verret waived the attorney-client privilege and voluntarily subjected himself to full cross-examination, including details of his prior convictions and reasons for testifying, the alleged conflict was removed. Thus, the defendant's rights were adequately protected, and the district court did not abuse its discretion in denying defense counsel's motion to withdraw. Therefore, this assignment of error has no merit.

CONCLUSION

For the reasons set forth herein, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.