**NOT DEDICATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NO. 2013 KA 1107**

**STATE OF LOUISIANA**

**VERSUS**

**JOHN ODOWD**

*Judgment Rendered:* MAR 2 4 2014

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**Appealed from the**
**22nd Judicial District Court**
**In and for the Parish of St. Tammany**
**State of Louisiana**
**Case No. 506284**

**The Honorable Raymond S. Childress, Judge Presiding**

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**Powell Miller**
**New Orleans, Louisiana**

**Counsel for Defendant/Appellant**
**John Odowd**

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**Counsel for Plaintiff/Appellee**
**State of Louisiana**

**Kathryn W. Landry**
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Higginbotham, J. Concurs in the result.

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**BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.**

**THERIOT, J.**

The defendant, John Odowd,[1] was charged by felony bill of information with two counts of aggravated incest, violations of Louisiana Revised Statutes section 14:78.1.[2] He pled not guilty and, following a jury trial, was found guilty as charged. He filed motions for new trial and postverdict judgment of acquittal, both of which were denied. The defendant was sentenced to twenty-five years at hard labor without the benefit of parole on both counts. The district court ordered the sentences to be served concurrently. He now appeals, alleging three assignments of error. For the following reasons, we affirm his convictions and sentences.

## FACTS

On November 21, 2008, eight-year-old twin sisters K.O. and L.O. reported to their school counselor that their father, the defendant, touched them inappropriately.[3] The counselor reported the matter to the Department of Children and Family Services ("DCFS") for St. Tammany Parish. However, because it did not meet the criteria for an allegation, the case was closed out. The girls later disclosed the inappropriate touching to their mother. On November 14, 2010, K.O., L.O., and their mother went to the Slidell Police Department and spoke with Officer Joel Hoskins. The girls told Officer Hoskins that the defendant would lie on top of them and try to

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[1] The record contains the spelling of the defendant's name as "O'Dowd," but we will use the spelling as set forth on the indictment.

[2] The bill of information states that the dates of the offenses were June 3, 2008, through October 30, 2010. Prior to its 2008 amendment, aggravated incest of a victim under the age of thirteen was punishable by life imprisonment. See 2008 La. Acts No. 33, § 1. Thus, the prosecution should have been instituted by grand jury indictment rather than a bill of information. See *State v. Smith*, 542 So.2d 175 (La. App. 1st Cir. 1989). However, the testimony established that the abuse actually began after the August 15, 2008, effective date of the amendment. Therefore, institution of the prosecution by bill of information is not reversible error under Louisiana Code of Criminal Procedure article 921.

[3] The minor victims herein are referenced only by their initials. See La. R.S. 46:1844(W).

kiss them. After the disclosure, interviews for both K.O. and L.O. were conducted at the Children's Advocacy Center for St. Tammany and Washington Parishes.

K.O. was ten years old and in the fifth grade at the time of her interview. She stated that the defendant would get in the bed with her, try to kiss her, and grab her breast area. She stated that the first time this happened was while she was in the third grade, and the most recent occurrence was three weeks or a month prior to the interview. She also stated that the abuse did not "really" happen while her mother was in Iraq.[4] At trial, K.O. testified that the inappropriate behavior went on from the time she was in the third grade until 2010. When asked whether she remembered stating in her interview that no abuse occurred while her mother was in Iraq, K.O. stated that she did not remember saying that, but that her memory would have been better at the time of the interview than at the time of trial.

L.O. was also ten years old and in the fifth grade at the time of her interview. She stated that the first time something happened that made her feel uncomfortable was after her mother returned from Iraq. L.O. stated that the defendant would get into the bed with her, try to kiss her, and would put his hand inside her underwear. The defendant would also put his hand underneath her shirt and touch her breast area. On one occasion, the defendant put his hands inside L.O.'s pants and touched her vagina. L.O. testified that the touching went on for two years.

## ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends that the district court erred in not allowing him to question his ex-wife (the victims' mother)

[4] The victims' mother returned home from Iraq in June 2009.

as to the actual circumstances surrounding their separation and divorce. Specifically, he claims that he was unable to establish the "clear probability of false accusations" and that he was the "victim of his ex-wife's schemes." According to the defendant, his ex-wife "brainwashed and coached" the victims in an effort to gain custody which he alleges was previously denied to her due to her "sexual identity issues." The defendant argues that the jury should have been informed why his ex-wife was denied custody in order to "understand the improbability that, absent some significant event, she would be awarded custody in the future." He asserts that the district court's exclusion of this evidence hampered his ability to present a defense.

Prior to trial, the defendant filed a motion in limine seeking to allow him to reference the reason he and his ex-wife divorced and why he was awarded custody and child support. At the hearing on the motion, the defendant argued that his ex-wife left him because she wanted to undergo a sex change operation and that she was denied custody due to her gender identity disorder. The defendant claimed that the only way his ex-wife could get custody of the children was to manipulate them into making false allegations of sexual abuse. Thus, the defendant argued that testimony regarding the circumstances surrounding the divorce was necessary in order to prove his ex-wife's underlying motive.

The court ruled that the prejudicial nature of the defendant's ex-wife's gender identification issues was greatly outweighed by any probative value. It pointed out that the defense could argue the defendant's ex-wife manipulated the children, but did not feel that it was necessary to allow testimony regarding the transgender issue because it was such a "hot-button" issue. The court also opined that if that information were presented to the jury, "that's the only thing they hear. They don't hear anything else at that

point. It's so prejudicial, and it's not probative of anything." Thereafter, the defendant filed writ applications seeking review of the ruling, which this court, and the Louisiana Supreme Court, denied. *State v. O'Dowd*, 2012-1465 (La. App. 1st Cir. 9/11/12) (unpublished), writ denied, 2012-2013 (La. 9/12/12), 97 So.3d 1005.

The credibility of a witness may be attacked by any party, including the party calling him. La. Code Evid. art. 607(A). Credibility of a witness may be attacked or supported by evidence in the form of general reputation only, subject to limitations. La. Code Evid. art. 608(A).[5] Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crimes as provided in Articles 609 and 609.1 or as constitutionally required. La. Code Evid. art. 608(B).

A criminal defendant has the constitutional right to present a defense pursuant to United States Constitution amendments VI and XIV and Louisiana Constitution article 1, section 16. A defendant should therefore be allowed to present evidence on any relevant matter. *State v. Blank*, 2004-0204 (La. 4/11/07), 955 So.2d 90, 130, cert. denied, 552 U.S. 994, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007). Relevant evidence is evidence having 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 it would be without the evidence. La. Code Evid. art. 401. All relevant evidence is

[5] The limitations in Article 608(A) are:

(1) The evidence may refer only to character for truthfulness or untruthfulness.
(2) A foundation must first be established that the character witness is familiar with the reputation of the witness whose credibility is in issue. The character witness shall not express his personal opinion as to the character of the witness whose credibility is in issue.
(3) Inquiry into specific acts on direct examination while qualifying the character witness or otherwise is prohibited.

admissible, except as otherwise provided by positive law. Evidence which is not relevant is not admissible. La. Code Evid. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, 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 district court and its determination should not be overturned absent a clear abuse of discretion. *State v. Duncan*, 98-1730 (La. App. 1st Cir. 6/25/99), 738 So.2d 706, 712-13.

Defense counsel questioned the defendant's ex-wife regarding their divorce and custody dispute. She testified that she and the defendant separated in June 2004 when she moved to Iraq, and were divorced in November 2004. She further stated that the defendant was awarded custody and that she was ordered to pay child support. She returned from Iraq in October 2005 and worked in Houston until she moved back to Iraq in December 2006. She did not move back permanently from Iraq until 2009. The defendant's ex-wife testified that she attempted to get custody in July 2009. In her petition, she alleged that the defendant was physically abusive to the victims.

The defendant, his ex-wife, and their children attended a court-ordered evaluation session for custody on November 23, 2009. However, no mention of sexual abuse was made by the defendant's ex-wife or the victims during the course of the interview. The forensic psychologist conducting the interview opined that the children thrived under the care of the defendant and saw no compelling reason to recommend a change in domiciliary custody. On November 24, 2010, the defendant's ex-wife filed a petition for protection from abuse against the defendant on behalf of herself, the two

victims, and a third minor child belonging to the defendant and her. Defense counsel pointed out that at the time the protective order was filed, the defendant's ex-wife was $25,000.00 in arrears for child support payments. During examination of the defendant's ex-wife, defense counsel made it clear that she "really wanted to get custody of [her] children."

Defense counsel's examination of the defendant's ex-wife established her strong desire to be awarded custody of her children as well as the potential that she manipulated the children in order to get custody. The district court acted well within its discretion when it concluded that the probative value of testimony that the defendant sought to present regarding his ex-wife's transgender issue was outweighed by the risk of diverting the jury's attention and confusing the issues. Accordingly, we do not find a substantial denial of the defendant's right to present a defense.

**ASSIGNMENT OF ERROR NUMBER 2**

In his second assignment of error, the defendant argues that Louisiana Constitution article I, § 17(A), which allows for nonunanimous jury verdicts, violates equal protection under the Fourteenth Amendment of the United States Constitution and Louisiana Constitution article I, § 3. Specifically, the defendant contends that racial discrimination was a substantial and motivating factor behind the enactment of Article I, § 17(A). The defendant also complains that the nonunanimous jury verdicts violate his right to a jury trial under the Sixth and Fourteenth Amendments of the United States Constitution.

It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the court below. First, a party must raise the unconstitutionality in the court below; second, the unconstitutionality of the statute must be specially pleaded; and

third, the grounds outlining the basis of unconstitutionality must be particularized. *State v. Hatton*, 2007-2377 (La. 7/1/08), 985 So.2d 709, 718-19. The defendant failed to properly raise his constitutional challenge in the district court. The failure to preserve the issue notwithstanding, we address the defendant's argument.

Whoever commits the crime of aggravated incest on a victim under the age of thirteen when the offender is seventeen years of age or older shall be punished by imprisonment at hard labor for not less than twenty-five years nor more than ninety-nine years. At least twenty-five years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence. La. R.S. 14:78.1(D)(2). Article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); *State v. Belgard*, 410 So.2d 720, 726-27 (La. 1982); *State v. Shanks*, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

This court and the Louisiana Supreme Court have previously rejected the argument that Article I, § 17(A) violates the right to equal protection. *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, 742-43; *State v. Smith*, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352. In *Bertrand*, the Louisiana Supreme Court specifically found that a nonunanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth,

and Fourteenth Amendments.[6] Moreover, the *Bertrand* court rejected the argument that nonunanimous jury verdicts have an insidious racial component and pointed out that a majority of the United States Supreme Court also rejected that argument in *Apodaca*.[7] Although *Apodaca* was a plurality rather than a majority decision, the United States Supreme Court has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to nonunanimous jury verdicts represents well-settled law. *Bertrand*, 6 So.3d at 742-43. Thus, Louisiana Constitution article I, § 17A and Louisiana Code of Criminal Procedure article 782A are not unconstitutional and, therefore, not in violation of the defendant's federal constitutional rights. See *State v. Hammond*, 2012-1559 (La. App. 1st Cir. 3/25/13), 115 So.3d 513, 514-15. Accordingly, this assignment of error is without merit.

**SUPPLEMENTAL ASSIGNMENT OF ERROR**

In a supplemental assignment of error, the defendant argues that the district court erred in denying his motion to quash based on the grounds of double jeopardy. The defendant contends that the State went beyond the scope of permissible closing argument by continually referencing his prior bad acts for the sole purpose of causing a mistrial. Specifically, the defendant complains that the State repeatedly made improper references to conduct in Oklahoma involving the defendant and his children from a previous marriage. The defendant also complains that the State went beyond

[6] In *Bertrand*, the court only considered Article 782, while the defendant in the instant case attacks Article I, § 17(A) itself. We find this approach to be a distinction without a difference because Article 782 closely tracks the language of Article I, § 17(A).

[7] *Apodaca* involved a challenge to the nonunanimous jury verdict provision of Oregon's state constitution. *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), decided with *Apodaca*, also upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

the scope of permissible argument by speculating what might have happened to the victims had they not come forward.

The defendant and his parents testified at the original trial. The defendant stated that he had two daughters from a previous marriage. On direct examination, he was asked if he ever did anything inappropriate to those two daughters, and he responded that he did not. He testified that he did not live with them in Oklahoma and was never investigated for a charge of sexual abuse against either of them. On cross-examination, the defendant again stated that he was never investigated for sexual allegations against either child in Oklahoma.

Both of the defendant's parents testified on cross-examination that the defendant's children from his previous marriage were put into foster care in 1991. At the time the children were placed into foster care, the defendant was working in California. The defendant's parents were contacted by DCFS and went to Oklahoma to get the children, but did not bring the children back to Louisiana with them because the children's mother wanted them. They stated that the children were put into foster care because their mother, the defendant's first wife, abandoned them. On redirect, when the defendant's father was asked why the children were placed into foster care, he testified that the younger child, who was approximately three years old at the time, told someone at her school that the defendant touched her. The school employee reported the child's statement.

The defendant's mother testified that an agent from DCFS visited their home in November 2008 after the complaint was made by K.O. and L.O. to their school counselor. The DCFS agent told the defendant's parents that the children's mother had not reported the complaint to the police and proceeded to talk about the sexual abuse. The defendant's mother stated,

"[a]nd I said, describe to me what sexual abuse means to you. Because touching, to me, doesn't mean sexual abuse."

During the closing argument, the prosecutor stated that K.O. and L.O.'s "horrible memories" were "better than having even worse memories and worse things happen to them. Because, invariably, at some point in time, this conduct --." The defendant objected to the State's comment, and the district court sustained the objection. During the rebuttal closing argument, the prosecutor stated:

> Don't forget Oklahoma. Don't forget what happened in Oklahoma. Don't forget. He claims that the wife abandoned the kids. But when his parents went to go get the kids, they wouldn't give them to them.
>
> OCS in Oklahoma gave them to the wife because she wasn't the one that was accused of sexual abuse.
>
> They couldn't get the kids. The wife got the kids. That's why there's an open-door policy at the house.[8]
>
> * * *
>
> The OCS people went to the house where they lived. And when they got to the house, they found Grandmother.
>
> The grandmother talked to those people. They didn't talk to the kids. The kids were never consulted. Grandma is the same witness who said she does not consider sexual abuse as touching. That's her attitude.
>
> OCS couldn't get past her.

The defendant objected at this point on the grounds of speculation, and the district court sustained the objection. The prosecutor went on, "They didn't -- but she knew that she lost two grandkids because of his shenanigans in Oklahoma." The defendant objected again on the grounds of speculation, and the district court sustained the objection. The State responded, "Your Honor, they testified to that." At that point, the defendant moved for a mistrial. During a bench conference, the court stated, "[s]how me one shred of evidence that you submitted during this case that indicated

[8] The defendant and his three children from his second marriage lived with his parents for six years. There was a household rule that the bedroom doors stay open at all times.

that there was a sexual investigation in Oklahoma. Show it to me now." The court then sent the jury out of the courtroom and stated, "You've got nothing there. And you keep harping on it. And I think she might be right. Show it to me, please." Citing Louisiana Code of Criminal Procedure article 770(2) and finding that no evidence had been admitted relative to another allegation of sexual abuse in Oklahoma, the district court granted the motion for mistrial.[9]

Prior to his second trial, the defendant filed a motion to quash on the basis of double jeopardy. At the hearing on the motion, the district court opined that the prosecutor's remarks may have been the result of "over-zealousness" and explained that it denied the motion because it did not find that the prosecution "intentionally goaded the defendant into moving for this mistrial."[10] When a district court denies a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the district court's discretion. See *State v. Odom*, 2002-2698 (La. App. 1st Cir. 6/27/03), 861 So.2d 187, 191, writ denied, 2003-2142 (La. 10/17/03), 855 So.2d 765. However, a district court's legal findings are subject to a de novo standard of review. See *State v. Smith*, 99-2094, 99-2015, 99-2019, 99-0606 (La.7/6/00), 766 So.2d 501, 504.

The United States Constitution provides that no person shall be twice put in jeopardy of life or limb for the same offense. U.S. Const. amend. V. The Louisiana Constitution provides, "[n]o person shall be twice placed in jeopardy for the same offense, except on his application for a new trial,

[9]Article 770 provides, in pertinent part: "Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to: . . . (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible[.]"

[10] This court denied the defendant's writ application seeking review of the district court's denial of the motion to quash. See *State v. O'Dowd*, 2012-1299 (La. App. 1st Cir. 8/24/12) (unpublished).

when a mistrial is declared, or when a motion in arrest of judgment is sustained." La. Const. art. 1 § 15. Thus, under this provision, when the defendant moves for a mistrial, as the defendant did in the present case, double jeopardy does not bar reprosecution. La. Code Crim. P. art. 591.

However, the United States Supreme Court, in a series of decisions, has provided an exception to that rule where the defendant is required to move for a mistrial due to conduct on the part of the government intended to provoke a mistrial request by a defendant. See *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976); *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971). The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where bad-faith conduct by the judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. *State v. Wesley*, 347 So.2d 217, 219 (La. 1977).

In *Oregon v. Kennedy*, 456 U.S. 667, 674-76, 102 S.Ct. 2083, 2089, 72 L.Ed.2d 416 (1982), the Supreme Court explained that the intent of the prosecutor must be examined to determine whether the double jeopardy clause has been violated because of prosecutorial misconduct:

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the

> course to be followed in the event of such error." Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

*Kennedy*, 456 U.S. at 675-76, 102 S.Ct. at 2089 (citations omitted).

The Court held that a defendant may invoke the bar of double jeopardy only in cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. *Kennedy*, 456 U.S. at 679, 102 S.Ct. at 2081. Moreover, the Court in *Kennedy* gave deference to the trial court's findings that the prosecutorial conduct resulting in the termination of the defendant's first trial was not intended by the prosecutor and elected not to disturb the ruling of the trial court. *Id.*

In the instant case, the record does not support the defendant's contention that he was provoked into moving for a mistrial. During a bench conference after the defendant moved for a mistrial, the prosecutor explained that he spoke with the DCFS agent from Oklahoma. He also stated that he asked the defendant's parents about the children being placed into foster care and whether there were any sexual abuse allegations, and that the defendant's father testified that there were some allegations of sexual abuse.

Based on his statements during the bench conference, it appears that the prosecutor believed this information was sufficient to justify mentioning the incident in Oklahoma. Because the record contains no indication of bad faith or deliberate provocation of the mistrial, we find no error or clear abuse of the district court's discretion in the denial of the defendant's motion to quash on grounds of double jeopardy. See *State v. Amato*, 96-0606 (La. App. 1st Cir. 6/30/97), 698 So.2d 972, 985, writs denied, 97-2626 & 97-

2644 (La. 2/20/98), 709 So.2d 772. This assignment of error is without merit.

## REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to Louisiana Code of Criminal Procedure article 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. Code Crim. P. art. 920(2).

The district court did not wait twenty-four hours after denying the motion for new trial before imposing sentence. See La. Code Crim. P. art. 873. However, the issue was neither assigned as error, nor were the sentences challenged, nor does the defendant cite any prejudice resulting from the court's failure to delay sentencing. Thus, any error which occurred is not reversible. See *State v. Augustine*, 555 So.2d 1331, 1334-35 (La. 1990).

**CONVICTIONS AND SENTENCES AFFIRMED.**