NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0560

STATE OF LOUISIANA

VERSUS

RICKY DANE BROWN

On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, Louisiana
Docket No. 587,251, Division "B"
Honorable John R. Walker, Judge Presiding

Joseph L. Waitz, Jr. District Attorney Ellen Daigle Doskey Assistant District Attorney Houma, LA	Attorneys for Appellee State of Louisiana
Holli Herrle-Castillo Louisiana Appellate Project Marrero, LA	Attorney for Defendant-Appellant Ricky Dane Brown
Ricky Dane Brown Angola, LA	Defendant-Appellant In Proper Person

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered APR 30 2014

PARRO, J.

The defendant, Ricky Dane Brown, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty. Following a jury trial, defendant was found guilty as charged. Thereafter, the trial court denied defendant's motions for new trial and post-verdict judgment of acquittal, and defendant was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court also denied defendant's motion for reconsideration of sentence. Defendant now appeals, alleging one counseled assignment of error and four pro se assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On September 27, 1980, near Houma, Louisiana, two fishermen spotted the naked body of a female in Sweetwater Pond, near Bayou Sale Road in Terrebonne Parish. Upon recovering the body, the police discovered that the female's hands had been tied behind her back, that a white handkerchief or scarf had been tied around her neck, and that a nylon cord connected to a cinder block had also been tied around her neck. The victim was subsequently identified as Edith West. An autopsy revealed that the victim had likely died from asphyxia.

In investigating the victim's death, the police initially developed four suspects: James Hines, Randy Bucaloo, Mike Burnett, and the defendant. These four men lived together in a trailer on Edward Street in Houma. Following interviews with Hines and Burnett, the police narrowed their suspect list to Burnett and the defendant. However, due to a lack of evidence, no arrests were made.

No further substantial progress was made in the case until approximately 2000. At that time, Captain Darryl Stewart of the Terrebonne Parish Sheriff's Office (TPSO) was informed that a Detective Wolfe had received two statements from out-of-state individuals who wished to give information regarding Edith West's death. However, it is unclear

exactly what information these individuals provided and whether any action was taken as a result of this information.

In June 2001, Captain Stewart was contacted by telephone and advised that a person in New Iberia, Mike Brown,[1] wished to give information pertaining to Edith West's murder. Mike Brown had been arrested on narcotics-related charges and apparently believed that he could reduce his possible prison sentence by trading information with the police. In two interviews, Mike Brown gave Captain Stewart information that implicated both the defendant and Burnett in the victim's murder. He also told Captain Stewart about Vickie Brown, defendant's ex-girlfriend/ex-wife,[2] who also might have further information. However, Captain Stewart was unable to locate Vickie Brown, Burnett, or the defendant, so he was unable to make an arrest at that time.

In 2010, TPSO Detective Kody Voisin received a call from someone with information about an old homicide case. After comparing the information from the phone call with facts from old case files, Detective Voisin began to focus on the murder of Edith West. Throughout the course of his subsequent investigation, Detective Voisin was able to speak with James Hines, Mike Brown, and Vickie Brown. Vickie Brown provided Detective Voisin with details that were consistent with those provided by Mike Brown. Based upon that evidence, Detective Voisin secured an arrest warrant for the defendant. Defendant was located in Alabama and subsequently transported to Louisiana, where he was indicted with the second degree murder of Edith West.[3]

ASSIGNMENTS OF ERROR

In his sole counseled assignment of error and his third pro se assignment of error, defendant alleges that the evidence presented at trial was insufficient to support his conviction for second degree murder. Specifically, he argues that the state's case lacked

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[1] Mike Brown is of no relation to the defendant.

[2] Vickie Brown is of no relation to Mike Brown. The record reflects that she dated the defendant beginning in 1980 and married him in Oklahoma sometime thereafter. However, she was still legally married to someone else at the time she married the defendant. Vickie Brown and the defendant separated around 1983, but they never formally divorced, because Vickie Brown regarded their marriage as illegal. She has since remarried another man with the surname of Brown.

[3] The record appears to indicate that Burnett might have died before he could be arrested in connection with this offense.

physical evidence and that his guilt was only supported by the testimonies of incredible witnesses who were not actual eyewitnesses to any crime.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 01-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the state is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the fact finder who weighs the respective credibility of each witness, and this court will generally not second-guess those determinations. **State v. Hughes**, 05-0992 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 01-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

In the instant case, defendant does not challenge the fact that Edith West was the victim of a second degree murder. Therefore, we need only determine whether the state presented evidence sufficient to implicate the defendant as a principal to that murder. All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or

directly or indirectly counsel or procure another to commit the crime, are principals. LSA-R.S. 14:24.

At trial, James Hines provided some background information of the events immediately preceding Edith West's murder. Hines knew the victim's estranged husband, Archie West, from his hometown of Cullman, Alabama, and he had stayed with Archie in Westwego for a short time after moving to Louisiana. At some point in September 1980, Archie was arrested and sent back to prison in Alabama. Hines testified that after Archie's arrest, Burnett went to the Westwego apartment to retrieve Archie's automobile and other belongings. Burnett brought everything back to the Edward Street trailer in Houma. In late September, Edith West showed up at the trailer, wanting to retrieve some objects from Archie's car. Hines testified that Burnett would not allow the victim to access the car until he spoke to Archie. Edith West spent the night at the trailer, and Hines testified that she was still there when he and Randy Bucaloo left for work around 6:00 a.m. the next morning. However, when they arrived home at 5:30 p.m., she was not present at the trailer. Hines never saw the victim again. He testified that Burnett later told him, "We killed her." Hines understood "we" to mean Burnett and the defendant.

At trial, Mike Brown and Vickie Brown testified regarding the confessions that defendant made to each of them. Mike Brown testified that he knew defendant from working with him at a motorcycle shop in Houma around the time of the murder. He remained friendly with the defendant throughout the 1980s and 1990s. On a trip he took through Cullman, Alabama, sometime in the 1990s, Mike Brown stopped to visit the defendant, who was living there at the time.

During their visit together, defendant revealed to Mike Brown that he had been having nightmares and that he was having trouble dealing with "what had happened." Defendant told Mike Brown that he and Burnett had taken the victim down to "the canal," intending to scare her. Defendant stated that he threw the victim into the canal, but that he panicked when she did not surface, so he jumped in and pulled her back onto the bank. Defendant told Mike Brown that Burnett stated that they were not "having this,"

and that they had come to "finish this." At that point, defendant stopped talking about the incident.

Mike Brown testified that when he contacted Captain Stewart in 2001, he was facing significant jail time on a charge of possession of marijuana with intent to distribute. However, he was not offered a plea deal or any other consideration as a result of the information he provided to Captain Stewart. He eventually pled guilty and was sentenced to fifteen years of imprisonment, with ten of those years suspended, so he had already completed his incarceration at the time of defendant's trial.

Vickie Brown testified at trial and detailed her relationship with the defendant. She recalled meeting defendant for the first time about a week after Edith West's murder.[4] She testified that defendant told her about the incident several times throughout their relationship. According to Vickie Brown, defendant stated that he believed Edith West had snitched on his friend "Possum,"[5] causing him to be sent to jail in Alabama. When the victim came to Houma, defendant and Burnett lured her to a trailer, where they beat her, stripped her naked, bound her hands behind her back, and threw her into the trunk of a car. Defendant told Vickie Brown that the victim made noise while she was in the trunk of the car and that she continually moved her hands to the front of her body, despite having her hands tied behind her. When they got to the "bayou," defendant got the victim out of the trunk and threw her into the water with a cement block tied behind her. Defendant told Vickie Brown that every time they would get the victim into the water, she would manage to somehow stand up with her arms in front of her. Defendant said that he eventually decided he could not kill Edith West, so he grabbed hold of her and pulled her onto the bank. Defendant said at this point, Burnett dragged the victim back into the bayou and held her head under water until she died.

On appeal, defendant contends that the evidence introduced by the state at trial was insufficient, because nothing physically linked him to the murder of Edith West and because the witnesses detailing his confessions were not credible.

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[4] Vickie Brown testified that she met the defendant about a week after her September 29, 1980 birthday.

[5] "Possum" was a nickname the defendant and his friends used for Archie West.

The term "confession" is applied only to an admission of guilt, not to an acknowledgment of facts merely tending to establish guilt. LSA-R.S. 15:449. Confessions are considered to be direct evidence. See **State v. Marr**, 626 So.2d 40, 45 (La. App. 1st Cir. 1993), writ denied, 93-2806 (La. 1/7/94), 631 So.2d 455. In the instant case, defendant's statements to Mike Brown and Vickie Brown were clearly confessions to his participation as a principal in the second degree murder of Edith West. Although defendant's versions of the incident would indicate he did not complete the act himself, he participated in its planning and execution, and he aided and abetted any act by Burnett that ultimately resulted in the victim's death. Clearly, defendant's statements to Mike Brown and Vickie Brown were both acknowledgments of guilt from which no inferences need be drawn. Thus, they are direct evidence of his guilt. See **Marr**, 626 So.2d at 46. Viewing the evidence in the light most favorable to the prosecution and despite a lack of physical evidence, we conclude that the state clearly presented sufficient evidence, through his confessions, for the jury to convict defendant of the second degree murder of Edith West.

Defendant also argues that Mike Brown and Vickie Brown were not credible witnesses. He claims that at the time Mike Brown gave his initial statement to Captain Stewart in 2001, he was facing a lengthy prison sentence and, therefore, had motivation to lie. However, Mike Brown testified that he received no consideration, in sentencing or otherwise, for the information that he provided in 2001. Further, the jury was clearly presented with the facts surrounding Mike Brown's criminal history. Defendant also claims that Vickie Brown had motivation to lie in her testimony because of the fact that defendant had ended their relationship. However, Vickie Brown did not testify specifically to the reasons for her split from defendant. She merely testified that she and defendant separated and that she eventually began to date someone else while she was still "married" to him.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject

to appellate review. An appellate court will not reweigh evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. Here, the jury clearly gave weight to either or both of the testimonies of Mike Brown and Vickie Brown. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. After a thorough review of the record, we cannot say that the jury's determination of defendant's guilt was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662.

These assignments of error are without merit.

RIGHT TO TRIAL BY FAIR AND IMPARTIAL JURY

In his first pro se assignment of error, defendant asserts that his right to trial by a fair and impartial jury was violated. Specifically, he alleges that the trial court erred by seating certain jurors who had read about his case in the newspaper.

During voir dire of the second panel of prospective jurors, defense counsel asked if anyone had read the newspaper article, published that morning, about defendant's case. Three prospective jurors responded that they had -- Virginia Sumrall, Jamie Bouquet, and Annette Matherne. The state, the defense, and the trial court subsequently questioned these three prospective jurors individually and out of the presence of the other prospective jurors regarding what they had read and whether it would affect their ability to decide defendant's case fairly. All three answered that they had merely skimmed the article and that they would be able to decide defendant's case on the evidence presented to them. In the subsequent selection of jurors to be seated for defendant's case, Ms. Sumrall and Ms. Bouquet were accepted without objection or argument from either the state or the defense. Ms. Matherne was ultimately excused because a full jury, including two alternates, had been seated before her name was called.

Although defendant raises on appeal the issue of juror prejudice as a result of the newspaper article, this issue was not raised in the trial court by means of a proper contemporaneous objection. While defense counsel certainly took the opportunity to

question three prospective jurors about their reading of the article, she clearly did not object to or challenge for cause Ms. Sumrall's or Ms. Bouquet's seating on defendant's jury. To preserve the right to appellate review of an alleged trial court error, a party must state a contemporaneous objection with the occurrence of the alleged error, as well as the grounds for the objection. See LSA-C.E. art. 103(A)(1); LSA-C.Cr.P. art. 841. In this case, defendant did neither.

This assignment of error is unreviewable on appeal.

PROSECUTORIAL MISCONDUCT

In his second pro se assignment of error, defendant contends that the assistant district attorney who tried his case committed prosecutorial misconduct. Specifically, defendant alleges that the prosecutor, in his opening statement, erred by offering his personal opinion as to defendant's guilt and by implying that the victim had been sexually assaulted when no evidence of sexual assault was presented at trial.

During his opening statement, the prosecutor set forth for the jury the facts he intended to prove at trial – that defendant and another man stripped the victim naked, beat her, strangled her, tied her to a cinder block, and threw her into a pond. In stating that the prosecutor implied the victim had been sexually assaulted, defendant appears to seize on one statement the prosecutor made after he told the jury that the victim had been stripped naked: "Who knows what they did once they did that." However, after that statement, the prosecutor quickly moved away from any supposition and informed the jury what facts he believed the evidence would show at trial. The prosecutor concluded his statement by telling the jury that the evidence presented at trial would support a guilty verdict for second degree murder.

Once again, defendant did not object to any of the statements the prosecutor made during his opening statement. Therefore, this assignment of error is not properly before this court on appeal. See LSA-C.Cr.P. art. 841.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his final pro se assignment of error, defendant argues that his trial counsel was ineffective. Specifically, he contends that his trial counsel failed to communicate with him, to properly investigate his case, to subpoena certain witnesses, and to allow him to testify on his own behalf.

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the trial court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438. See **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

In the instant matter, the first three allegations of ineffective assistance of counsel clearly cannot be sufficiently investigated from an inspection of the record alone. To the extent that the defendant is attacking decisions relating to investigation, preparation, and strategy, such decisions cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated.[6] Accordingly, these allegations are not subject to appellate review. See **State v. Albert**, 96-1991 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-64. See also **State v. Johnson**, 06-1235 (La. App. 1st Cir. 12/28/06), 951 So.2d 294, 304.

Defendant's fourth claim of ineffective assistance of counsel alleges that his trial counsel prohibited him from testifying on his own behalf. Nothing in the record itself supports this claim. Instead, as support, defendant attached to his pro se brief a letter from his trial counsel, Kathryn Lirette, and an affidavit from his sister. In Ms. Lirette's letter to defendant, she stated that while she advised him against testifying on his own behalf at trial, she never told him that he absolutely could not testify. In the affidavit by

[6] Defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 et seq. in order to receive such a hearing.

defendant's sister, she stated that Ms. Lirette told her, "I cannot allow [defendant] to testify in his own behalf." Ms. Lirette's letter referenced her conversation with defendant's sister, admitting that she had told defendant's sister she "could" not put him on the stand because of her prior discussions with defendant. The letter seems to imply that defendant had informed Ms. Lirette that he would not be truthful if he testified.

In any event, none of the above evidence is part of the actual appellate record. For that reason, it would be more appropriately presented to a trial court in an application for post-conviction relief. Again, however, we note that defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 et seq. in order to be entitled to an evidentiary hearing on any post-conviction relief claim.

This assignment of error is unreviewable on appeal.

CONVICTION AND SENTENCE AFFIRMED.