NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 1642

STATE OF LOUISIANA

VERSUS

MICHAEL LOUDING

Judgment rendered JUN 05 2015

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 06-10-0234
Honorable Trudy White, Judge

* * * * * *

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* * * * * *

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

PETTIGREW, J.

Defendant, Michael Louding, was charged by grand jury indictment with one count of first degree murder, a violation of La. R.S. 14:30. He pled not guilty. Following a jury trial, defendant was found guilty as charged. Subsequently, in light of **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the trial court conducted a sentencing hearing. Following that hearing, the trial court sentenced defendant to life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. Thereafter, the trial court granted defendant's motion to reconsider sentence and set a date for an additional sentencing hearing. Following the second sentencing hearing, the trial court reaffirmed defendant's sentence of life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence.

Defendant now appeals, alleging five assignments of error. The first two assignments relate to defendant's sentencing hearing and the sentence itself; these assigned errors will be addressed together. Defendant's third assignment of error argues that the trial court erred in denying his motion for a mistrial. The fourth assignment of error alleges that the trial court erred in allowing the State to introduce other crimes evidence. The final assignment of error contends that the trial court erred in taking judicial notice of another court's ruling that defendant's inculpatory statements were freely and voluntarily given. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On October 21, 2009, Terry Boyd was shot and killed as he sat inside of a home at 16837 Vermillion Drive in Baton Rouge, Louisiana. Detectives who were investigating a string of unsolved homicides in the Baton Rouge area received tips that led to defendant being identified as a suspect in the Boyd homicide, as well as several others.

Defendant was arrested on a warrant issued as the result of unrelated aggravated assault and terrorizing charges. Following his arrest, defendant gave a

series of videotaped statements to investigators wherein he admitted to his participation in the Boyd shooting, along with other homicides.

Defendant described that in the hours leading up to the Boyd shooting, he, Torrance "Lil Boosie" Hatch, Adrian Pittman, and Michael "Ghost" Judson were discussing a letter written to Pittman from an Angola inmate, Lee Lucas. Lucas's letter purportedly stated that prior to Boyd's recent release from prison, he had been making threats about what he was going to do to Hatch upon his release. Hatch told the others that he would pay $25,000.00 to have Boyd killed.

Later that night, Pittman drove defendant and Judson to North Stevendale Road, in the area of Vermillion Drive. Pittman waited nearby in his van while defendant and Judson attempted to find Boyd. Once Judson identified Boyd inside a house, defendant began to shoot through the window, ultimately striking Boyd and killing him. Pittman picked up defendant and Judson, and drove them back to Hatch's residence. There, Hatch gave defendant $2,800.00 for his participation in the shooting. Pittman testified at trial, confirming his, Judson's, and defendant's involvement in the Boyd shooting. At trial, the State also introduced other crimes evidence, which demonstrated defendant's involvement in four other ambush-type shootings.

DENIAL OF MITIGATION EXPERT AND IMPROPER SENTENCE

In his first assignment of error, defendant argues that the trial court erred in barring him from presenting mitigation evidence from a mitigation specialist at either the original sentencing hearing or at the rehearing. In his second assignment of error, defendant contends that his sentence of life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence is improper because the record demonstrates that he has the capacity for rehabilitation.

Generalized Sentencing Considerations under Miller

At the time of Boyd's murder, defendant was seventeen years old. In **Miller**, the United States Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders convicted of homicide offenses. **Miller** does not, however, establish a

categorical prohibition against life imprisonment without the possibility of parole for juvenile homicide offenders, but rather requires a sentencing court to consider the offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the harshest possible penalty for juveniles. See **Miller**, ___ U.S. ___, 132 S.Ct. at 2467-2469; see also **State v. Graham**, 2011-2260, p. 2 (La. 10/12/12), 99 So.3d 28, 29 (per curiam). Citing **Graham v. Florida**, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), ("A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation"), the **Miller** Court stated that too great a risk of disproportionate punishment is created by making youth irrelevant to imposition of the harshest prison sentence. **Miller**, ___ U.S. ___, 132 S.Ct. at 2469. The Court further indicated that the **Graham** decision was sufficient to decide the case, and it did not consider the alternative argument that a categorical bar on life without parole for juveniles was required. **Miller**, ___ U.S. ___, 132 S.Ct. at 2469. The Court further stated that although it was not foreclosing the sentencer's ability to make that determination in homicide cases, it did require sentencing courts to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. **Miller**, ___ U.S. at ___, 132 S.Ct. at 2469.

Following **Miller**, the Louisiana legislature enacted La. Code Crim. P. art. 878.1 and La. R.S. 15:574.4(E), both of which provide procedural guidelines for parole eligibility regarding offenders who commit first or second degree murder when they are under the age of eighteen years. Article 878.1 provides for a sentencing hearing for juvenile homicide offenders. At such a hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and other factors as the court may deem relevant. See La. Code Crim. P. art. 878.1(B). Louisiana Revised Statutes 15:574.4(E) sets forth those criteria that should be met in order for an offender who has been given the

opportunity of parole to actually qualify for parole. Although Article 878.1 had not yet taken effect at the time of defendant's initial sentencing on July 9, 2013, the trial court stated that it would conduct the sentencing hearing in accordance with this provision, as it had been set forth in House Bill No. 152 (later 2013 La. Acts No. 239, § 2).

Sentencing Procedure Used in this Case

Following defendant's conviction on April 26, 2013, the trial court initially set a sentencing date of September 12, 2013. Subsequently, the trial court decided *sua sponte* to move defendant's sentencing hearing to July 9, 2013. On June 6, 2013, at a status hearing, defense counsel argued against this accelerated time frame for sentencing. Particularly, defense counsel stated that the mitigation specialist retained to assist in this case had been working on a timeline centered around a September 12 sentencing date, so an earlier sentencing date would compromise defendant's ability to present mitigation evidence. Defense counsel expressed a concern that expert psychological evaluations could not be secured before the accelerated sentencing date. In response, the State argued that a mitigation specialist was not required in defendant's case because the trial court was an expert in sentencing considerations. Further, the State pointed out that defendant's mitigation specialist, Ms. Juliet Yackel, was not an expert in the sense that she was qualified to evaluate defendant. Rather, she was a defense attorney with capital experience who was retained to assist defendant's appointed counsel. At this time, the State also introduced defendant's school records and memoranda from defense counsel that stated defendant had previously been evaluated by two mental health professionals, Dr. Joy Terrell and Dr. Andrew Morson.

In deciding to maintain the July 9 sentencing hearing, the trial court noted that it had ordered a presentence investigation report ("PSI") and stated that it needed "nothing from a mitigation expert." The trial court stated that each side would be allowed to offer mitigating evidence as outlined in House Bill 152 (future Article 878.1), noting its willingness to sign any orders necessary to secure additional school, medical, or criminal records for consideration. As a compromise for defense counsel, the trial

court stated it would extend the window to file a motion to reconsider sentence so that defendant could continue to pursue relevant mitigation evidence.

On July 3, 2013, defense counsel again appeared before the court to request a delay of sentencing. At that time, defense counsel argued that defendant's PSI was deficient because it addressed the issue of rehabilitation only through a probation and parole officer's perspective, not that of a psychologist. Accordingly, defense counsel requested that the sentencing hearing be delayed to have defendant examined by a psychologist. The trial court ultimately denied this request.

On July 9, 2013, the trial court held defendant's sentencing hearing. The State called Major Michael Vaughn, an Investigative Services Officer at Louisiana State Penitentiary. Through Major Vaughn's testimony, the State introduced a letter that defendant mailed to Torrance Hatch on April 9, 2013. In the letter, defendant wrote that he missed "them good old day's, f*** ho's, smokin purp, clubin [sic]."

In mitigation, defense counsel sought to call their mitigation specialist, Ms. Yackel. The State objected, noting the trial court's earlier statement that it needed nothing from a mitigation specialist. Defense counsel argued that this statement merely meant that the trial court needed nothing from a mitigation specialist to justify an extension of the sentencing date from July 9 back to September 12. Defense counsel contended that to keep the mitigation specialist from testifying would bar defendant from introducing relevant mitigating evidence under House Bill 152/Article 878.1. The State countered that defense counsel was simply trying to elicit hearsay testimony (such as information from defendant's family members) through a purported expert, or "mitigation investigator." Defense counsel responded that Ms. Yackel's qualifications would make her an expert authorized to give an opinion about the mitigating factors in defendant's case. Alternatively, defense counsel argued that Ms. Yackel should be allowed to testify as a lay witness.

The trial court stated it was not interested in covering Ms. Yackel's resume or what work she had done in defendant's case, but instead wanted to hear "from witnesses who know things about Michael Louding." To the extent that Ms. Yackel had

any first-hand knowledge about defendant, she would be allowed to testify. However, the trial court would not allow Ms. Yackel to testify to her opinion "as to what the law of the land is with respect to this situation." Ms. Yackel ultimately testified to little, other than some of the steps she had taken to investigate defendant's history. The State successfully objected to most of her conclusions as hearsay from a non-expert witness.

Following Ms. Yackel's testimony, defense counsel called defendant's mother, Sharon Louding; his aunt, Peggy Palmer; his sister, Lakandra Louding; and a Baton Rouge public defender, Jack Harrison. Defendant's family members all testified that defendant had a difficult childhood, including growing up in an overcrowded, impoverished household located in a high-crime area. As a child growing up in this neighborhood, defendant witnessed a man being shot and killed. He performed poorly in school, except for a period of time when he attended a more structured, military-style program. After he completed that program, defendant returned to a traditional school environment, from which he was eventually expelled. Defendant's sister noted that he had some anger issues, but she stated that he was never violent toward anyone. At age fourteen, defendant began to live with Hatch. Because of defendant's lifestyle change, his mother began to worry about Hatch's influence over him. When defendant once intimated to his mother that he heard voices, she attempted to get him help. However, he refused, believing he would be locked away. All members of defendant's family called to testify at his sentencing hearing said that he would be able to live with them in the event he was paroled in the future.

Jack Harrison testified and briefly detailed defendant's history within the juvenile justice system. Defendant had committed juvenile offenses of possession of a handgun and careless operation. He also had some drug charges that were deferred. Mr. Harrison noted that when he visited defendant's home, it was clean, but sparsely furnished. He was struck by the family's poverty. Mr. Harrison also noted that defendant had never been found to be a child in need of care, nor had his family been found to be in need of services.

Defendant made a brief statement to the trial court in which he stated that he was sorry to his victims' families. Defendant also said that had he known then what he knew now, he would not have committed the offenses. The State also read to the court a brief impact statement from Terrica Boyd, the victim's sister.

The PSI considered by the trial court contained a further statement from the victim's sister, who noted that she felt threatened by defendant. The PSI also detailed other pending charges against defendant, including four pending first degree murder charges, one pending second degree murder charge, and a pending attempted first degree murder charge. The PSI noted that defendant admitted only to the instant offense when he was interviewed in connection with this report. The PSI also addressed defendant's extensive juvenile history. The report indicated numerous arrests and juvenile petitions for offenses such as simple battery, criminal mischief, entry/remaining after being forbidden, simple criminal damage to property, simple robbery, resisting an officer, possession of schedule I and II controlled dangerous substances, unauthorized use of a motor vehicle, first degree robbery, illegal possession of a handgun by a juvenile, hit and run, reckless operation of a vehicle, and speeding. In most instances, defendant was placed under an Informal Adjustment Agreement, or prosecution was deferred.

The PSI also detailed defendant's social and familial history. It detailed how defendant last attended school at Westdale Middle in Baton Rouge, until he was expelled in the seventh grade for carrying a gun on campus. Defendant told the probation and parole officer that he had never had a legitimate job and that when he needed income, he would commit crimes to obtain money to purchase drugs. Defendant reported that his drugs of choice were marijuana and "sizzurp," a concoction of promethazine and codeine mixed with a carbonated beverage. He admitted to selling other drugs and committing robberies in order to afford his drug habit. Defendant also admitted to killing Boyd for $25,000.00 so that he could purchase more narcotics. Defendant reported that although he was on lockdown in the East Baton Rouge Parish

Prison, he still smoked marijuana. He declined to describe how he obtained drugs in prison.

Ultimately, the PSI concluded that defendant's prior and present actions indicate that he cannot be rehabilitated. Accordingly, it recommended a sentence of life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence.

In sentencing defendant to life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence, the trial court cited extensive reasons, noting it was complying with the legislature's pronouncement regarding the procedures to be used for a juvenile homicide offender's individualized sentencing hearing. The trial court stated that defendant may in fact find "redemption" in prison and that defendant's letter to Hatch was encouraging in that it indicated defendant would "stay in the Bible." The trial court noted it had an opportunity to review and consider the PSI, especially the details concerning defendant's extensive criminal history, and that the **Miller** factors had been taken into consideration. The trial court opined that defendant had "common sense" and was "very street wise, notwithstanding the fact that [he was] 17 at the time of the homicide." The trial court added that it had considered defendant's "personal and familial pressures, including the gangsta lifestyle that [he] may have been lured into by Boosie." The trial court also noted the leadership role that defendant played in Boyd's murder. While the trial court noted its belief that every offender has the potential for rehabilitation, it found defendant to be "the worst of the worst" and sentenced him to life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence.

After sentencing, defendant filed a motion to reconsider sentence coupled with a motion for leave to complete defendant's mitigation investigation. In this motion, defendant argued that the trial court failed to take into account all relevant mitigating factors under **Miller**. Defense counsel cited with particularity records that had been subpoenaed to show defendant's capacity for rehabilitation. Among these records were SSI records, special education records, juvenile court records, child protective services

records, psychiatric records, and medical records. However, most of these records pertained to those in defendant's childhood household, and not necessarily to defendant himself.

On October 17, 2013, the trial court held a hearing on defendant's motions. After hearing argument from the State and defense, the trial court granted defendant's motions for reconsideration of sentence and for leave to complete the mitigation investigation. The trial court noted its opinion that defendant was "the poster child for the case of a juvenile who deserves life without benefit of parole." The trial court also stated that it had considered whether defendant could be rehabilitated and concluded that he could not. However, the trial court recognized that an expert might be able to make an argument in favor of defendant's ability to be rehabilitated.

Defendant's resentencing hearing took place on February 7, 2014. Dr. Frederic Sautter, a clinical psychologist, testified on behalf of the defense. The trial court accepted Dr. Sautter as an expert in clinical psychology and in diagnosing posttraumatic stress disorder ("PTSD") in veterans. Dr. Sautter interviewed defendant on December 27, 2013, in preparation for the resentencing hearing. He found defendant to have experienced a number of traumatic events that meet the criteria for being considered traumatic stressors. Among these events were an instance where defendant witnessed someone being murdered, an incident where one of defendant's childhood friends was murdered, an alleged instance of sexual assault against his sister (committed by another family member), and allegations that defendant himself was abused as a child.

Dr. Sautter testified that in situations where individuals experience traumatic events, their vulnerability to PTSD is decreased when they have social support. From his interview, Dr. Sautter believed that defendant might not have had that support coming from his biological family. He also noted that people who suffer from PTSD might turn to substance abuse as a way of avoiding their past traumas. Dr. Sautter opined that defendant's extremely impoverished home would not be a traumatic stressor in itself, but the overall context in which any trauma occurred would be an

important factor to consider. He characterized defendant's expulsion from school in seventh grade as "an adversity."

In sum, Dr. Sautter testified that defendant experienced extreme trauma at a young age and that this trauma had a marked effect on his development as he progressed into adulthood. At this stage, he could not say that defendant was irretrievably broken or incorrigible. Dr. Sautter noted that if defendant did indeed have PTSD, this condition was treatable, with about seventy to eighty percent of treated patients showing significant reductions in symptoms. Nonetheless, Dr. Sautter suggested that even further evaluation of defendant was likely required, including family interviews and a biologically-oriented psychoanalysis.

In resentencing defendant to life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence, the trial court again set forth extensive reasons. First, the trial court noted the evidence presented at trial regarding defendant's involvement in the instant homicide, as well as several others. The trial court stated that in preparation for the resentencing hearing, it had reviewed records subpoenaed by the defense, the transcript of defendant's interrogation, the letter defendant sent to Hatch, and some of the items entered into evidence throughout defendant's trial. The trial court pointed out that Dr. Sautter, Mr. Harrison, and Ms. Yackel did not sit through any portion of defendant's trial. The trial court recognized Dr. Sautter's conclusion that defendant's participation in the homicides may have been strongly influenced by PTSD and depression, characterizing them as potential mitigating factors. However, the trial court stated that these conditions were not justifications or excuses for defendant's behavior. The trial court found nothing about the particular circumstances of the Boyd homicide that tied to any of the potential stressors listed by Dr. Sautter. The trial court further indicated it could not find a nexus between Dr. Sautter's diagnosis and the crime defendant committed.

With respect to Dr. Sautter's finding that defendant is capable of rehabilitation, the trial court noted that defendant's teachers thought he was capable of learning. Though defendant was provided with appropriate educational models, the trial court

found that he failed to take advantage of those educational opportunities. Rather, defendant took advantage of many opportunities to engage in antisocial behavior. Considering all the evidence presented by the defense, the trial court found that defendant had failed to prove that he had the capacity to be rehabilitated.

Continuing in its reasoning, the trial court found no evidence that defendant's decision-making ability at the time of the offense was diminished because of mental illness, depression, alcohol, or drug use to the extent that it would be a mitigating factor. The trial court stated that despite the evidence defendant lived in overcrowded and substandard housing, his and his siblings' basic needs were met in a loving environment. The trial court found that defendant's chronological age and any incompetency that may be associated with youth were not significant enough to warrant serious consideration as a factor in mitigation. Lastly, the trial court detailed the circumstances of Boyd's murder, noting that defendant committed the act with pride, out of a loyalty to Hatch. Considering all of these factors, the trial court stated that the odds of defendant embracing redemptive behavior were slim because the "root of [his] personhood has become incorrigible." For those reasons, the trial court characterized defendant as "the worst of the worst" and "the rare[st] of the rare of juvenile offenders" and reaffirmed defendant's sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence.

Denial of Opportunity to Present Mitigation Evidence

In his first assignment of error, defendant asserts that the trial court erred by denying him the opportunity of presenting mitigation evidence through the testimony of Ms. Yackel. Defendant asserts that the need for testimony from a mitigation specialist was critical because a PSI, prepared by the Department of Corrections – Office of Probation and Parole, does not contain the information necessary to support the concept of the individualized sentencing hearing required by **Miller**.

Because the trial court did not allow Ms. Yackel to testify in mitigation, defense counsel submitted a proffer of her testimony in the form of an affidavit, with attached exhibits, including Ms. Yackel's curriculum vitae ("CV"). Ms. Yackel's CV indicates that

she graduated from Purdue University in 1989 with a B.A. in political science. She subsequently received her J.D. from Tulane University in 1992. Ms. Yackel's professional experience is as a mitigation specialist, "serving clients charged with capital murder nationwide." Her CV states that she is an "[e]xperienced psycho-social investigator," with special expertise screening for trauma, sexual abuse, mental illness, and intellectual disability. Her responsibilities include identifying, selecting, and consulting with appropriate experts; interviewing witnesses; obtaining, reviewing, and evaluating multigenerational family history records; and performing studies of neighborhoods, school systems, correctional facilities, and other social agencies which impacted the life of her client.

Ms. Yackel's affidavit includes a summary of her **Miller** investigation into defendant. It concludes that the changes in defendant's behavior coincide with exposure to trauma in the home and his community. However, Ms. Yackel's conclusions are based largely upon documentation that was subpoenaed by defense counsel and considered by the trial court.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. See La. Code Evid. art. 702.[1] All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of

[1] The version of La. Code Evid. art. 702 that was in effect at the time of defendant's sentencing hearing read: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." That provision was amended to its present form by 2014 La. Acts No. 630, § 1. However, Section 2 of that act indicates that no change in the law or result in a ruling on evidence admissibility shall be presumed or is intended by the Legislature by this amendment.

Louisiana, the Code of Evidence, or other legislation. Evidence that is not relevant is not admissible. See La. Code Evid. art. 402.

The State vehemently opposed Ms. Yackel being allowed to testify. The prosecutors characterized Ms. Yackel as a defense attorney and her potential testimony as an attempt to introduce hearsay testimony through an expert. While the trial court did allow defense counsel to call Ms. Yackel at defendant's initial sentencing hearing, it limited her testimony to describing her involvement in the case (i.e., what interviews she had conducted and with whom). However, the trial court sustained the State's objections when Ms. Yackel attempted to talk about the results of her interviews. The trial court stated it would rather hear from the subjects of the interviews themselves, rather than Ms. Yackel's impressions of them, noting that Ms. Yackel was a lawyer with no specialized training in psychology.

The trial court is vested with wide discretion in determining the competency of an expert witness, and its ruling on the qualification of the witness will not be disturbed absent an abuse of discretion. **State v. Trahan**, 576 So.2d 1, 8 (La. 1990). In the instant case, the trial court did not abuse its discretion in declining to qualify Ms. Yackel as an expert witness. Although Ms. Yackel has demonstrated expertise in the area of mitigation planning, as is evidenced by her extensive CV, the trial court correctly concluded that Ms. Yackel's experience is more as a lawyer than any other type of expert. Defendant argues that Ms. Yackel's testimony was necessary to give the court insight into defendant's capacity for rehabilitation. However, this contention is undermined by defendant's own statement that "the determination of whether a juvenile demonstrates the capacity for rehabilitation is based upon the result of an *expert clinical psychological evaluation* of the juvenile." (Emphasis added; defense brief, p. 13). While we refrain from adopting defendant's unsourced statement as the sole procedure by which a juvenile's capacity for rehabilitation can be determined, we note that Ms. Yackel has no clinical expertise that could have assisted in this determination.

As a final note, though the trial court did not allow Ms. Yackel to testify to the opinions she gleaned as a result of her work, it did not categorically bar Ms. Yackel from participating in defendant's mitigation investigation. Ms. Yackel's proffered affidavit indicates that she had participated in defendant's case since June 2013. She was still involved at the time of defendant's resentencing in February 2014. Therefore, to the extent that Ms. Yackel's expertise was needed to allow defendant to compile mitigation evidence, the trial court did not foreclose that assistance.

The trial court did not abuse its discretion in disallowing Ms. Yackel's testimony regarding the mitigating factors in defendant's case. While she had expertise in the procedures relating to a mitigation investigation, she was not qualified to render an opinion about defendant's mental state or capacity for rehabilitation.

This assignment is without merit.

Improper Sentence

In his second assignment of error, defendant contends that the evidence does not warrant life imprisonment without the possibility of parole. He argues that the evidence shows that he is not incorrigible and is susceptible of rehabilitation. As a result, he prays that this court amend his sentence to include parole eligibility under La. Code Crim. P. art. 878.1 and La. R.S. 15:574.4(E)(1).

On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144, pp. 1-2 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

As detailed above, the trial court held essentially two sentencing hearings in the instant case. In each instance, the trial court offered extensive justification for its decision to impose defendant's life sentence without the benefit of parole. At each hearing, the trial court painstakingly detailed those factors that it considered with respect to the circumstances of defendant's crime, his criminal history, his level of family support, his social history, and other relevant factors, as is required by **Miller** and La. Code Crim. P. art. 878.1(B). Both times, the trial court concluded that

defendant was "the worst of the worst" and that he could not be rehabilitated. The trial court made this determination in light of both aggravating and mitigating factors. Considering the facts of the case as a whole, defendant's history of repeated criminality, and the detailed reasons for imposing the sentence, we cannot say that the trial court abused its broad sentencing discretion in imposing a sentence of life imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence.

This assignment of error is without merit.

MOTION FOR MISTRIAL

In his third assignment of error, defendant contends that the trial court erred in allowing a detective to identify him in a surveillance video with Chris Jackson, the victim of one of the other crimes introduced as evidence at trial. He argues that this testimony was impermissible opinion testimony that should have been reserved for the jury's factual determination.

At trial, Baton Rouge Police Department ("BRPD") Detective John Dauthier testified that he was the lead investigator in the homicide of Chris Jackson, one of the individuals whose murder was introduced as other crimes evidence. During Detective Dauthier's testimony, the State introduced a surveillance video and still photographs from a convenience store that Jackson visited shortly before his death. Detective Dauthier identified one of the subjects seen in the video and photographs as defendant.

Prior to Detective Dauthier's identification, defense counsel objected on the ground that the witness could not make an identification of defendant from a video taken when he was unfamiliar with defendant. She also later argued that the identification was irrelevant. In a conference outside of the presence of the jury, Detective Dauthier explained to the trial court that he did not know who defendant was at the time the video was actually taken, but he came to know defendant following his arrest. The trial court overruled defendant's objection and noted that it would allow Detective Dauthier to identify the individual on the video. Defense counsel stated that she intended to ask for a mistrial at the time of identification, but that she would do so in a manner that did not use the word "mistrial." When the State began its line of

questioning about the video, defense counsel made her motion, which the trial court denied.

On appeal, defendant argues that he was entitled to a discretionary mistrial under La. Code Crim. P. art. 775 because Detective Dauthier made an irrelevant comment that might have prejudiced defendant. Defendant also contends in his brief that Detective Dauthier had testified at an earlier hearing that he could not identify the individual in the video as defendant.

Addressing defendant's latter contention first, we find that defendant has mischaracterized Detective Dauthier's prior testimony. This testimony, given at defendant's **Prieur**[2] hearing on cross-examination, proceeded as follows:

> Defense counsel: I have some questions for you. You said you didn't have any suspects, you didn't have any eyewitnesses and that this Shell trip for snacks happened within 30 minutes prior to the shooting. Those shots with a hoodie over that person's face, could you identify that person in the video?
>
> Detective Dauthier: At the time?
>
> Defense counsel: Yes.
>
> Detective Dauthier: In 2009 when we obtained that video, no ma'am. I had never seen that person before.

On the State's rebuttal, the prosecutor clarified that Detective Dauthier could not identify the individual on the video at the time he received it in 2009.

The only potentially applicable section of the discretionary mistrial provision is Article 775(3), which allows the declaration of a mistrial when there is a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law. Mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. **State v. Berry**, 95-1610, p. 7 (La. App. 1 Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. The determination of whether a mistrial should be granted is within the sound

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

discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal absent an abuse of that discretion. **State v. Lynch**, 94-0543, p. 10 (La. App. 1 Cir. 5/5/95), 655 So.2d 470, 477, writ denied, 95-1441 (La. 11/13/95), 662 So.2d 466.

Here, defendant argues that a mistrial was warranted because Detective Dauthier's identification was both irrelevant and a determination for the jury. However, the identification was relevant to the State's theory that defendant stalked Jackson, like Boyd, prior to shooting him through the window of a residence. Furthermore, witnesses routinely make in-court identifications of suspects. The mere fact that Detective Dauthier was not aware of defendant's identity *at the time he received the video* is not grounds to foreclose his subsequent identification after he became familiar with defendant. Considering the facts and circumstances, the trial court did not err or abuse its discretion in denying defendant's motion for a mistrial.

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In his fourth assignment of error, defendant argues that the trial court erred in admitting other crimes evidence at trial. He contends that these other crimes were not so distinctively similar to the charged offense that one may reasonably infer the same person was the perpetrator. Defendant also avers that his confession to these other crimes is not alone sufficient to support their admission.

Before trial, the State filed a notice of intent to use evidence of other crimes pursuant to La. Code Evid. art. 404(B) and **Prieur**. 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. Day**, 2012-1749, pp. 3-4 (La. App. 1 Cir. 6/7/13), 119 So.3d 810, 813. Thus, 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. **Day**, 2012-1749 at 4, 119 So.3d at 813; see La. Code Evid. arts. 403 and 404(B). 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).

The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by **Prieur**. Under **Prieur**, the State was required to prove by clear and convincing evidence that the defendant committed the other crimes. **Prieur**, 277 So.2d at 129. However, 1994 La. Acts 3d Ex. Sess., No. 51 added La. Code Evid. art. 1104 and amended La. Code Evid. art. 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." **State v. Millien**, 2002-1006, p. 11 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 514; see also **State v. Williams**, 99-2576, p. 7 n.4 (La. App.

1 Cir. 9/22/00), 769 So.2d 730, 734 n.4. A trial court's ruling on the admissibility of evidence of other crimes will not be overturned absent an abuse of discretion. **Day**, 2012-1749 at 4, 119 So.3d at 813.

At the **Prieur** hearing, the following facts were presented. BRPD Detective Matt Johnson testified regarding his investigation of the instant offense against Terry Boyd, which took place on October 21, 2009. Detective Johnson's investigation revealed that Boyd had been shot while sitting inside the Vermillion Drive residence. The shots that killed Boyd appeared to have been fired from outside the residence, through a window. Another victim had also been shot in the foot. No one was able to identify the shooter.

Detective Dauthier testified that he investigated the February 9, 2009 homicide of Chris Jackson. Jackson had been shot twice in his head as he sat on a couch in a home on America Street. As in Boyd's homicide, another victim had also been shot. Also, as in Boyd's homicide, the shots that struck the victims appeared to have been fired from outside the residence, through a window.

BRPD Detective Brian Watson testified that he investigated the April 25, 2009 homicide of Marcus Thomas. Thomas was shot and killed while in his truck on West McKinley Street, near Nicholson Drive, in Baton Rouge. Detective Watson's investigation revealed that at least three firearms were used to shoot into Thomas's truck as he drove down West McKinley. An unharmed individual who was inside Thomas's vehicle was unable or unwilling to provide Detective Watson with further information.

East Baton Rouge Sheriff's Office Captain Todd Morris testified that he investigated the February 22, 2010 shooting of Malaeka Hulbert. The shooting occurred at 5725 Tioga Street in Baton Rouge, just prior to midnight. Hulbert was sitting in the kitchen of her residence when several rounds were fired through a window, striking her in the back. Hulbert ultimately survived. Her boyfriend, Charles Matthews, was also present at the time of the shooting. Another attempted shooting occurred at the same residence on March 6, 2010. Nine-millimeter shell casings from the February 22, 2010 shooting were eventually matched to shell casings from a double homicide that took

place on April 1, 2010. When Captain Morris eventually interviewed defendant following his arrest, he stated that he had been contacted by Reginald Youngblood in reference to a "hit" placed on Charles Matthews.

Finally, BRPD Detective Elvin Howard testified regarding the April 1, 2010 double homicide of Charles Matthews and Darryl Milton that took place on Monte Sano Avenue. From witnesses, Detective Howard learned that three males walked up to the car in which Matthews and Milton were sitting, pointed their guns, shot into the vehicle, and fled the scene. Nine-millimeter shell casings from this double homicide were matched to the February 22, 2010 shooting of Malaeka Hulbert.

Evidence of another homicide was introduced at defendant's **Prieur** hearing, but not presented at defendant's trial. Also at the **Prieur** hearing, Detective Howard testified about his interview with defendant following his arrest. Defendant admitted to shooting Chris Jackson through a high window while standing on Michael Judson's shoulders. Defendant described that Torrance Hatch had told Judson to kill Jackson after he made some disparaging remarks about Hatch.

Defendant also admitted his involvement in the Marcus Thomas shooting. He told Detective Howard that he was in a vehicle with Judson and Jared Williams when they saw Thomas in a vehicle. They pulled up next to Thomas's vehicle, and defendant and his companions opened fire. Defendant admitted to driving the vehicle and to shooting at Thomas's vehicle. He described to Detective Howard that Hatch had hired Judson to kill Thomas because Thomas had previously snatched a chain from Hatch's neck while he was in front of his daughter.

Defendant also admitted his involvement in the Boyd homicide. He told Detective Howard that Hatch had asked him to take care of Boyd as a result of Boyd's bragging that he planned to slap and rob Hatch the next time he saw him. Defendant admitted that he was offered money to kill Boyd.

With respect to the double homicide of Charles Matthews and Darryl Milton, defendant admitted to driving three men to the area of the shooting and to picking

them up thereafter. He admitted that Reginald Youngblood paid him money to kill Matthews and that this shooting was the third attempt on Matthews's life.

Following the presentation of the evidence at the **Prieur** hearing, the State argued that all of the offenses involved the act of ambushing victims and shooting them. The State contended that defendant's identity was the material fact to be proven in the instant case. However, the State also argued that this other crimes evidence should be admissible as proof of motive, opportunity, system, and plan. In contrast, defense counsel stated that the State was attempting to "backdoor" other unadjudicated homicides in an effort to present bad character evidence to the jury. Ultimately, the trial court used the clear and convincing standard in granting the State's request to introduce evidence of these other crimes.

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 5-7, 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 that 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.[3] The plan exception 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

[3] **McArthur** 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 (La. 12/6/11), 79 So.3d 309, 316-17.

by defendant as a coherent whole, in which he achieves an ultimate goal through a series of related crimes (such as acquiring a title by killing everyone with a superior claim). **McArthur**, 97-2918 at 3, 719 So.2d at 1042.

Two of the crimes offered as other crimes evidence are remarkably similar to the facts from the instant offense. The Chris Jackson homicide and the Malaeka Hulbert shooting both involve victims who were shot through the window of their respective residences. The Marcus Thomas homicide and the Charles Matthews/Darryl Milton double homicide differ from the instant case in that they occurred as the victims sat in their vehicles. However, all the shootings share the similarity that the victims were ambushed by defendant or his accomplices. Moreover, all the shootings have some connection to a murder-for-hire plot.

Therefore, the evidence of prior crimes was relevant, not because it revealed defendant's criminal propensities or bad character, but because when considered together, the crimes revealed sufficient similarities that tended to identify defendant as the perpetrator of Boyd's murder. Thus, the other crimes evidence was extremely probative with respect to defendant's identity. While this other crimes evidence was, by its nature, prejudicial, it was not so unduly prejudicial as to be outweighed by its probative value. Furthermore, via the extensive witness testimony regarding these offenses, the State carried its burden of proving defendant's participation in these other crimes by use of clear and convincing evidence. The trial court did not err or abuse its discretion in allowing the State to present defendant's other crimes evidence.

This assignment of error is without merit.

JUDICIAL NOTICE OF MOTION TO SUPPRESS

In his final assignment of error, defendant argues that the trial court erred in taking judicial notice of the admissibility of defendant's confession, which had been found admissible in another proceeding before another court.

Prior to trial, the State filed a motion in limine asking that the trial court recognize the previous admissibility determination of defendant's confession. This motion indicated that Nineteenth Judicial District Court Judge Donald R. Johnson

presided over a previous suppression hearing involving the same statements that the State sought to introduce at trial. The State noted that it intended to use the same confession in defendant's instant trial before Judge Trudy White, and asked that she recognize Judge Johnson's ruling. The State wrote that Judge Johnson "heard testimony from all witnesses that were involved in the arrest and the interview. The factual and legal issues as well as the attorneys involved are identical." The State attached to its motion a certified copy of the minute entry from Judge Johnson's ruling.

Subsequent to the State's filing, defense counsel filed a motion to suppress and a motion in opposition to the State's motion in limine. In the former, defense counsel argued that defendant's confession should be suppressed because the reading of his **Miranda**[4] rights was not recorded for any of his interviews. In the latter filing, defense counsel argued that it was improper for Judge White to take judicial notice of Judge Johnson's ruling because defendant was entitled to a separate determination of his statement's admissibility in the instant case and because there is no authority for a court to take judicial notice of another court's ruling.

The initial version of the appellate record did not contain a transcript of any suppression hearing or of the trial court's ruling with respect to the state or defense motions regarding defendant's statements. However, it contained a minute entry indicating that the trial court had heard testimony on defendant's motion to suppress and denied that motion.

In his appellate brief, defendant argues that Judge White erroneously took judicial notice of Judge Johnson's prior ruling concerning the admissibility of defendant's statements. However, a supplement to the initial appellate record demonstrates that Judge White held a full, independent suppression hearing and denied defendant's motion to suppress on its merits. The source of appellate counsel's confusion likely stems from the fact that the initial appellate record contained only a partial transcript from defendant's March 11, 2013 motion hearing. The record supplement corrects this

[4] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

error and contains a complete transcript of the suppression hearing, including the trial court's ruling. Therefore, to the extent that defendant argues on appeal that the trial court erred in taking judicial notice of Judge Johnson's previous ruling from another proceeding, this assignment of error is without merit.

To the extent that defendant's fifth assignment of error indicates a desire to raise any issues regarding the denial of his motion to suppress, we elect to address those issues herein out of concerns of fairness and judicial economy. In doing so, we note that defendant's written motion to suppress argued solely that the videotaped recordings of his custodial interrogation failed to indicate that he was informed of his **Miranda** rights prior to questioning.

A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 2001-0908, p. 4 (La. App. 1 Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Correspondingly, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-281. However, a trial court's legal findings are subject to a de novo standard of review. **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751. In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. See **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

The State bears the burden of proving the admissibility of a purported confession. La. Code Crim. P. art. 703(D). Louisiana Revised Statutes 15:451 provides that, before a purported confession can be introduced in evidence, it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. It must also be established that an accused who makes a confession during custodial interrogation was

first advised of his/her **Miranda** rights. **State v. Plain**, 99-1112, p. 5 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 342. The State must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. **State v. Thomas**, 461 So.2d 1253, 1256 (La. App. 1 Cir. 1984), writ denied, 464 So.2d 1375 (La. 1985).

Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. **State v. Benoit**, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983). Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Maten**, 2004-1718, p. 12 (La. App. 1 Cir. 3/24/05), 899 So.2d 711, 721, writ denied, 2005-1570 (La. 1/27/06), 922 So.2d 544.

Again, the sole issue raised by defendant in his motion to suppress is that the videotaped recordings failed to produce any proof that his **Miranda** rights were read at any time connected to his interrogations. At the time of his interrogations, defendant was undoubtedly in custody. At the suppression hearing and at trial, Detective Howard testified that defendant was advised of his **Miranda** rights every time detectives spoke with him. A review of defendant's videotaped confessions indicates that with respect to his May 14, 2010 and May 17, 2010 interrogations, defendant was clearly informed of his **Miranda** rights. In fact, during his first interrogation, defendant began to explain his **Miranda** rights to the officers before they began to read them to him. At no point throughout his recorded interviews with the police officers did defendant request an attorney or any other type of break in questioning. Defendant appeared fully cognizant and able to comprehend his rights, and he waived these rights and decided to speak with police. In sum, the totality of the circumstances reveals that defendant's May 14 and May 17 statements were made following proper **Miranda** warnings by the interrogating detectives.

Contrary to Detective Howard's testimony, the videotapes of defendant's May 18, 2010 and May 19, 2010 interrogations do not reveal that defendant was **Mirandized**

prior to his interactions with the police on those dates. While those interactions consisted mostly of defendant identifying individuals from various photographic lineups, he did make some inculpatory statements concerning a few homicides. Nonetheless, we note that defendant had previously been informed of his **Miranda** rights at the time of his arrest, prior to his May 14 statement, and prior to his May 17 statement. Except where the circumstances indicate coercion, there is no necessity to reiterate the **Miranda** warnings at each phase of an interrogation. **State v. Kimble**, 546 So.2d 834, 840 (La. App. 1 Cir. 1989). In the instant case, Detective Howard testified that defendant was never resistant to questioning, nor did he ever request counsel. Further, he stated that no threats, promises, inducements, or other attempts at coercion were made toward defendant, and defendant was made as comfortable as possible with food, drinks, and breaks. At the time of his May 18 and May 19 statements, defendant had previously been thoroughly informed of his **Miranda** rights. The record demonstrates that he understood and intelligently waived these rights, both explicitly and implicitly, through his actions and words. See **State v. Brown**, 384 So.2d 425, 427-428 (La. 1980).

Considering the above, we find that the trial court did not err or abuse its discretion in denying defendant's motion to suppress. Defendant was informed of his **Miranda** rights on multiple occasions, including on videotape prior to his May 14 and May 17 statements, and he demonstrated an understanding for those rights prior to intelligently waiving them. The gap between the last recorded administration of those rights and the last interaction defendant had with police (two days) is not itself sufficient to negate the free and voluntary nature of the May 18 and May 19 statements. See **State v. McKinnie**, 36,997, p. 13 (La. App. 2 Cir. 6/25/03), 850 So.2d 959, 966 (finding a four-day gap between advice of rights and a subsequent confession did not render the confession inadmissible). Similarly, the one-day and two-day gaps were not attributable to any special circumstances that required the police to readminister the **Miranda** rights to defendant. Further, defendant's own actions at the time of the May 18 and May 19 statements indicate a willingness to speak with the

police. Taken as a whole, the facts and circumstances indicate that all of defendant's statements were freely and voluntarily made.

This assignment of error is without merit.

CONCLUSION

For the above cited reasons, we affirm defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.