NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 KA 0746

STATE OF LOUISIANA

VERSUS

MARCUS RICHARDSON

Judgment Rendered: NOV 0 9 2015

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Appeal from the
Eighteenth Judicial District Court
In and for the Parish of West Baton Rouge
State of Louisiana
Docket Number 121002
Honorable J. Robin Free, Judge Presiding

* * * * * *

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ

Holdridge J., concurs in the result

GUIDRY, J.

The defendant, Marcus Richardson, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. He filed a motion for post-verdict judgment of acquittal/new trial, which was denied. He was sentenced to life imprisonment at hard labor. The defendant now appeals, designating two counseled assignments of error and eight pro se assignments of error. We affirm the conviction and sentence.

FACTS

On May 13, 2012, between 10:30 p.m. and 11:00 p.m., the defendant was at the BP gas station at the La. Hwy. 1 Truck Plaza in Port Allen, Louisiana. The defendant, who was with his cousin, Ronderick Freeman, had parked at pump six. Several other people arrived at the gas station and parked at different pumps. Kietrick Spriggs and Devin Picou got out of a red Impala parked at pump three and walked toward the gas station convenience store. The defendant, who was standing somewhere between the fourth and fifth pumps, exchanged words with Spriggs. Spriggs, not wanting any trouble, walked back to the car. Picou continued to walk inside the store. When Picou left the store and walked past the defendant, he and the defendant exchanged words, then began fist-fighting. At the same time, Freeman confronted Dexter Allen. Allen had earlier parked his tan Camry at the second pump and gotten out of his car. Freeman swung at Allen and missed. Allen countered and knocked Freeman to the ground. Freeman appeared to be unconscious and remained on the ground throughout the defendant's fight (and the shooting). Part of the defendant's fight with Picou and Allen striking Freeman were captured by several surveillance cameras at the gas station.

As the defendant and Picou fought, they moved toward the air pump on the south side of the convenience store (away from any camera angle). Either from

being hit or tripping on the curb by the air pump, the defendant fell down. Because the defendant was down, Picou stopped fighting and walked away. At this point, Jamel Askins approached the prostrate defendant and began punching him. Askins was in the gray (or silver) Impala, driven by John Lee, who had parked at pump one. D'Sean Williams and Justin Warner were also passengers in the gray Impala and were standing near the vehicle at the time the fights started. Williams and Warner were cousins.

As Askins was hitting the defendant, the defendant was reaching for his gun in his left pocket. Askins began wrestling with the defendant to prevent him from obtaining the gun. The defendant managed to retrieve a .40 caliber Glock 23 handgun from his front left pocket and fire two shots at who he perceived to be his attackers. No one was struck. Askins ran from the defendant toward the highway (in the direction of the gas pumps), and told everyone else to run. Most people in the parking lot scattered toward the highway. Warner ran to the side of the gray Impala and crouched down. The defendant walked across the parking lot to the side of the Impala where Warner was hiding and shot him five times. Warner was struck in the chest and abdomen and died from his injuries shortly thereafter.

The defendant lifted Freeman off the ground and walked him to his (the defendant's) car. The defendant left the gas station parking lot with his cousin and was stopped by the police on the service road, before getting to the interstate.

The defendant provided two videotaped statements to the police, one to Detective Tommy Schiro and one to Detective Kevin Cyrus, both with the West Baton Rouge Parish Sheriff's Office.[1] The defendant admitted in both statements that he shot Warner. The defendant stated that as he approached Warner, Warner

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[1] The defendant gave a statement to Detective Schiro. The defendant then gave a statement to Detective Cyrus. During this statement, Detective Cyrus stopped questioning and brought the defendant to the crime scene to better explain what happened. This crime scene walk through was recorded. Detective Cyrus then took the defendant back to the police station and continued the interview.

was on the ground, crawling (in a sitting position) away from him, telling the defendant that it was not him. The defendant said he shot Warner because he "knew" that the person on the ground was the person who had just attacked him (presumedly Askins). The defendant also insisted in his statements that he shot his victim one time. The defense at trial established that Askins and Warner were both wearing green shirts.

The defendant did not testify at trial.

COUNSELED AND PRO SE ASSIGNMENTS OF ERROR NOS. 1 and 2

In the related counseled assignments of error, the defendant argues, respectively, the trial court erred in denying the motion for postverdict judgment of acquittal/new trial, and the evidence was insufficient to support the conviction for second degree murder. Specifically, the defendant contends he is guilty of manslaughter because of the presence of the mitigating factors of sudden passion or heat of blood at the time of the killing. In his pro se assignments of error, the defendant argues, respectively, that he killed Warner in self-defense, and alternatively, the State proved he committed only manslaughter or negligent homicide.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. C. Cr. P. art. 821(B); State v. Ordodi, 06-0207, p. 10 (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, is an objective standard for testing the overall evidence, both direct and circumstantial,

for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 01-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). Guilty of manslaughter is a proper responsive verdict for a charge of second degree murder. La. C. Cr. P. art. 814(A)(3). Louisiana Revised Statutes 14:31(A)(1) defines manslaughter as a homicide which would be either first degree murder or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the factfinder finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed. The existence of "sudden passion" and "heat of blood" are not elements of the offense but, rather, are factors in the nature of mitigating circumstances that may reduce the grade of homicide. State v. Maddox, 522 So. 2d 579, 582 (La. App. 1st Cir. 1988). Manslaughter requires the presence of specific intent to kill or inflict great bodily harm. See State v. Hilburn, 512 So. 2d 497, 504 (La. App. 1st Cir.), writ denied, 515 So. 2d 444 (La. 1987).

Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Such state of mind can be formed in an instant. State v. Cousan, 94-2503, p. 13 (La. 11/25/96), 684 So. 2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. State v. Graham, 420 So. 2d 1126, 1127 (La. 1982). Deliberately pointing and firing a deadly

weapon at close range are circumstances that support a finding of specific intent to kill. State v. Broaden, 99-2124, p. 18 (La. 2/21/01), 780 So. 2d 349, 362, cert. denied, 534 U.S. 884, 122 S.Ct. 192, 151 L.Ed.2d 135 (2001). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. State v. McCue, 484 So. 2d 889, 892 (La. App. 1st Cir. 1986).

In his counseled brief, the defendant does not deny that he shot Warner; nor does he contest that he had the specific intent to kill. Instead, according to the defendant, believing that Warner was the person who attacked him, he "lost it" and shot Warner multiple times "in the heat of blood." The defendant suggests that "emotions were heightened" for him after having been attacked by Askins; thus, given Warner's and Askins's similar builds and that they were wearing similar green shirts and jeans, the defendant in "a fit of rage after being attacked," retrieved his gun and immediately went after the individual who attacked him.

It is the defendant who must establish by a preponderance of the evidence the mitigating factors of sudden passion or heat of blood to reduce a homicide to manslaughter. See State ex rel. Lawrence v. Smith, 571 So. 2d 133, 136 (La. 1990); State v. LeBoeuf, 06-0153, p. 5 (La. App. 1st Cir. 9/15/06), 943 So. 2d 1134, 1138, writ denied, 06-2621 (La. 8/15/07), 961 So. 2d 1158. See also Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Further, the killing committed in sudden passion or heat of blood must be immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Thus, the evidence at trial had to establish that the provocation was such that it would have deprived an average person of his self-control and cool reflection.

There was no testimony or physical evidence that Warner physically provoked the defendant in any way. The defendant did not testify at trial, and there were no witnesses for the defense. Thus, the defense did not establish the

mitigating factors of sudden passion or heat of blood during the night of the shooting. Our review of the gas station videotape that captured some of the fighting and the shooting revealed that Warner was not near the defendant when either of the fights with the defendant occurred. When the defendant fired the first two shots while he was next to the air pump, anyone who was within proximity of the defendant ran away. In his statement, the defendant said that he saw Warner (who the defendant ostensibly thought was Askins) pass through the inside of the Impala at pump one. Thus, according to the defendant, Warner may have armed himself by grabbing a weapon from the car. It appeared from our review of the gas station videotape, however, that Warner simply ran around the Impala and ducked down on the side of it, apparently to avoid getting shot, as well as to avoid being seen. Detective Cyrus, the lead detective with the West Baton Rouge Sheriff's Office, indicated on cross-examination that since the camera lost sight of Warner, it was possible that Warner got into the silver (gray) Impala and went out the other side. On redirect examination, however, the prosecutor looked at the relevant footage with Detective Cyrus and suggested that Warner could be seen on the camera and that he never went inside of a car before being shot. Detective Cyrus agreed with the prosecutor.

The defendant also said in his statement that, as Warner was on the ground moving away, he (Warner) was reaching behind him in his back pocket. In any event, the jury could have chosen to disregard both of these self-serving remarks (as to Warner passing through the inside of the car and reaching for something while on the ground) of the defendant. Moreover, even had Warner been reaching for something, perhaps a weapon, it would have been a move (by Warner) in self-defense. The defendant tracked down Warner and pointed his gun at him, while Warner repeatedly insisted that he was not the one. According to the defendant in his pro se brief, when he repeatedly shot a retreating, defenseless Warner at this

moment, he did so out of self-defense.

When self-defense is raised as an issue by the defendant, the State has the burden of proving, beyond a reasonable doubt, that the homicide was not perpetrated in self-defense. State v. Spears, 504 So. 2d 974, 978 (La. App. 1st Cir.), writ denied, 507 So. 2d 225 (La. 1987). A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict. La. R.S. 14:21. The guilty verdict of second degree murder indicates the jury accepted the testimony of the prosecution witnesses insofar as such testimony established that the defendant did not kill Warner in self-defense. See Spears, 504 So. 2d at 978.

The jurors clearly did not believe the defendant's claim of self-defense. They may have determined the aggressor doctrine applied, since the defendant escalated the conflict by arming himself. See State v. Loston, 03-0977, p. 10 (La. App. 1st Cir. 2/23/04), 874 So. 2d 197, 205, writ denied, 04-0792 (La. 9/24/04), 882 So. 2d 1167. He then chose to walk across the parking lot and shoot Warner, who was unarmed, at point-blank range. The jury may have determined the defendant did not reasonably believe he was in imminent danger of losing his life or receiving great bodily harm when he shot Warner, and did not act reasonably under the circumstances. See Loston, 03-0977 at p. 11, 874 So. 2d at 205. With his gun in hand and having caused everyone near him to scatter by firing twice, the defendant could have simply walked away and called the police. In any event, a rational trier of fact could have reasonably concluded that the killing was not necessary to save the defendant from the danger envisioned by La. R.S. 14:20(1) and/or that the defendant had abandoned the role of defender and taken on the role of an aggressor and, as such, was not entitled to claim self-defense. See La. R.S.

14:21; State v. Bates, 95-1513, p. 13 (La. App. 1st Cir. 11/8/96), 683 So. 2d 1370, 1377.

Moreover, the defendant's actions of leaving the scene after shooting and killing Warner is inconsistent with a theory of self-defense. See State v. Emanuel-Dunn, 03-0550, p. 7 (La. App. 1st Cir. 11/7/03), 868 So. 2d 75, 80, writ denied, 04-0339 (La. 6/25/04), 876 So. 2d 829; State v. Wallace, 612 So. 2d 183, 191 (La. App. 1st Cir. 1992), writ denied, 614 So. 2d 1253 (La. 1993). Flight following an offense reasonably raises the inference of a "guilty mind." State v. Captville, 448 So. 2d 676, 680 n.4 (La. 1984). In finding the defendant guilty, it is clear the jury rejected the claim of self-defense, and concluded that the use of deadly force under the particular facts of this case was neither reasonable nor necessary.

The defendant (in the alternative) claims that he shot Warner in "a fit of rage" because he thought Warner was the person who had just attacked him. The defendant, however, said in his first statement (and his second statement) that he had no idea who he was shooting when he shot Warner, and suggested he shot at Warner because he was the closest one. The defendant also admitted in his first statement that when he pointed his gun at Warner, Warner "was trying to get away." Further, while the defendant indicated in his statements that he did not know Picou or Askins, Askins testified that he knew the defendant.

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987). It is clear from the guilty verdict that the jury rejected the theory that the defendant was so angry when he shot Warner that he was deprived of his self-control and cool reflection. Questions of provocation and time for cooling are for the jury to determine under the standard of the average or

ordinary person with ordinary self-control. If a man unreasonably permits his impulse and passion to obscure his judgment, he will be fully responsible for the consequences of his act. State v. Leger, 05-0011, pp. 92-93 (La. 7/10/06), 936 So. 2d 108, 171, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007).

Regardless of his reasons, the defendant was clearly out of danger of any further harm as everyone had run when he fired two shots. The only person left anywhere near the scene was Warner (and an unconscious Freeman). The defendant could have stayed where he was, gone to his cousin, gone inside the store, driven off in his car, or done any number of things. Evidence introduced at trial indicated, however, that instead of extricating himself from the scene, the defendant walked about eighty feet to get to where Warner was hiding. As the gun-toting defendant bore down on Warner, who was crawling away and pleading not to be shot, the defendant repeatedly shot him. While the defendant likely shot Warner out of retaliation for getting beaten up, the defendant's actions in approaching and shooting a defenseless victim were calculated; and the lack of immediacy from the time Askins stopped hitting the defendant to the moment the defendant shot Warner clearly suggested the defendant was in control of his faculties and knew exactly what he was doing. Thus, even if it was true that the defendant thought he was shooting and killing Askins, under the transferred intent doctrine, the shooting and killing of Warner constituted second degree murder.[2]

The defendant also suggests in his pro se brief that, alternatively, the State proved only that he committed manslaughter or negligent homicide. The manslaughter issue has been addressed. Moreover, the jury's guilty verdict of

[2] The doctrine of transferred intent provides that when a person shoots at an intended victim with the specific intent to kill or inflict great bodily harm and accidentally kills or inflicts great bodily harm upon another person, if the killing or inflicting of great bodily harm would have been unlawful against the intended victim actually intended to be shot, then it would be unlawful against the person actually shot, even though that person was not the intended victim. State v. Henderson, 99-1945, p. 3 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 750, writ denied, 00-2223 (La. 6/15/01), 793 So. 2d 1235.

second degree murder is necessarily a rejection of any of the responsive verdicts, including manslaughter and negligent homicide. See La. C. Cr. P. art. 814(A)(3); State v. Leon, 93-2511 (La. 6/3/94), 638 So. 2d 220, 222 (per curiam).

The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. As noted, the defendant did not testify. See Moten, 510 So. 2d at 61-62. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. State v. Higgins, 03-1980, p. 6 (La. 4/1/05), 898 So. 2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Moreover, 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 the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261, p. 6 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. 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, p. 8 (La. 10/17/00), 772 So. 2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985). The guilty verdict indicates the reasonable determination by the jury that, for whatever reason the defendant had, he shot Warner multiple times with the specific intent to kill him and in the absence of the mitigating factors of manslaughter. See State v. Delco, 06-0504, pp. 9-13 (La. App. 1st Cir. 9/15/06), 943 So. 2d 1143, 1149-51, writ denied, 06-2636 (La. 8/15/07), 961 So. 2d 1160. See also State v. Robinson, 02-1869, p. 8 (La. 4/14/04), 874 So. 2d 66, 74, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004).

After a thorough review of the record, we find that the evidence supports the jury's unanimous guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the second degree murder of Justin Warner. See State v. Calloway, 07-2306, pp. 1-2 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

Accordingly, the trial court did not err in denying the motion for postverdict judgment of acquittal/new trial. These counseled and pro se assignments of error are without merit.

PRO SE ASSIGNMENT OF ERROR NO. 3

In his third pro se assignment of error, the defendant argues there is not a complete appellate record because some of the bench discussions were not transcribed; accordingly, he was prejudiced.

The defendant cites to about a dozen instances throughout trial where the counselors and trial court discussed matters off record. Such instances were indicated in the record as "(OFF RECORD DISCUSSION AT THE BENCH)" OR "(BENCH DISCUSSION OFF THE RECORD)." Most of these involved ministerial issues, discussion of stipulations, or setting up equipment. In any event, none of these discussions was followed with any objections by defense counsel or any comments that he felt needed to be preserved for the record.

Louisiana Constitution article I, section 19 guarantees defendants a right of appeal "based upon a complete record of all evidence upon which the judgment is based." See also La. C. Cr. P. art. 843. Article I, Section 19's command, however, to record "evidence" does not encompass bench conferences, at least, not ones that do not satisfy the materiality requirements of La. C. Cr. P. art. 843. State v. Hoffman, 98-3118, p. 50 (La. 4/11/00), 768 So. 2d 542, 587, cert. denied, 531 U.S.

946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000). Moreover, there is nothing in the record that suggests the unrecorded conferences had a discernible impact on the proceedings nor does the defendant point to any specific prejudice. See Hoffman, 768 So. 2d at 587; State v. Castleberry, 98-1388, p. 29 (La. 4/13/99), 758 So. 2d 749, 773, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999).

This pro se assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 4

In his fourth pro se assignment of error, the defendant argues he was denied his right to a fair trial. Specifically, the defendant contends the trial judge prejudiced the jury when he got up and moved to better view the videotaped statement of the defendant.

Part of the videotaped statement of the defendant was played for the jury. The video was paused, however, and the following exchange at the bench took place:

> Mr. Damico [defense counsel]: I need to object, and I have to do this to protect my client.
>
> The Court: I understand.
>
> Mr. Damico: First, I'm going to object for the record because it appeared the judge walked out of the courtroom into the jury room while the trial was going on. Your Honor, I think you were saying that you were standing in the doorway.
>
> The Court: There's a chair right there, look at it. There is a chair sitting in the door. I was sitting there watching.
>
> Mr. Damico: I just need to put it on the record.
>
> The Court: I got you. Okay. But, I want you to look and see that there's a chair in that doorway.
>
> Mr. Damico: I'm just saying -
>
> Mr. Clayton: Let me put this on the record, that the jury is in the jury box, the door to this courtroom, the bathroom to it is in the jury room, but there's a chair and you can't see the judge from standing up from where I was when I said, stop the tape - as soon as I said, stop the tape, the judge stood up -

The Court: I stood up.

Mr. Clayton: He was sitting there so he could see the TV and the jury could see it.

The Court: Yeah.

Mr. Clayton: It's relatively - I understood what was going -

The Court: I understand. I'm just trying to stay out of the way, that's all.

Mr. Damico: And, I mean, I don't know, assuming the judge was in fact sitting in the chair -

The Court: Yeah.

Mr. Damico: - and you were, you would be able to, you can see the defense and the prosecution table and you can see the witness -

The Court: Uh-huh (Affirmative).

Mr. Damico: The only people you can't observe is the jurors, but you're sitting right next to them.

Mr. Clayton: The jury is not in the jury room. There is no -

Mr. Damico: Oh, no, absolutely not.

The Court: You do agree with this, I didn't have any contact with any of them.

Mr. Damico: Oh, absolutely not, absolutely not.

The Court: At least we're straight on that.

Mr. Clayton: I want to make sure of this too then, the door to the jury room is open -

The Court: Yeah.

Mr. Clayton: And, the chair is sitting there. You're inside the courtroom.

Mr. Damico: And, I absolutely agree with that.

The Court: Yeah, I didn't leave the courtroom. I'm sitting there watching.

Mr. Damico: And, I agree.

In his pro se brief, the defendant concedes that the jury was not deliberating

when the trial judge moved, and that the trial judge never actually said anything to the jury. The defendant suggests, however, that "actions speaks way louder than words[,]" and that the trial judge's moving deprived him of a fair trial because "the jury could have inferred by the judge's actions that he was saying the defendant was guilty, or the judge saw something, and it was gruesome, or he didn't need to see or hear anything further it was over for defendant[.]"

The trial judge did nothing improper. He moved to a different location in the court room so that he could better view the video being shown to the jury. The defendant has asserted wholly unfounded allegations and has not shown in any way how his right to a fair trial was prejudiced. Shortly after the above-mentioned exchange, the trial judge further addressed the issue regarding his movement in the courtroom:

> The Court: Okay. We'll have a little quick sidebar. I understood your concern about not being able to see me, but I want the record clear that I could see the whole time. I had no issue with seeing this courtroom and seeing what was going on. The only reason I sat over there was to get a vantage point where I could see the screen. I can't see it from where I am on the bench, so I've got to get down to see it. I've got to be able to rule on it if anything comes up. I've got to be able to rule on it. Do you all have a monitor that we can set up on the bench where I won't have to get down? I don't like sitting in front of the jury because I don't want them to get any inferences from me if they see me. Facial expressions, I try to avoid all that kind of stuff.
>
> Mr. Damico: Let me for the record - since you're saying that, I will say for the record that when the judge walked over there and left the - left my sight, I was not in a position to see him sitting where he was sitting, but as Mr. Clayton has correctly said, as soon as he said something, the judge was right there, which certainly makes me believe - and, the chair was right there, which certainly makes me believe that he was in fact sitting there the entire time. I had no - I was just not in the vantage point to see it.
>
> The Court: I understand your concern.
>
> Mr. Damico: I just wanted to put that on the record.
>
> Mr. Clayton: Judge, let me put this on the record, standing up here at the bench, the door that's to the jury room, the way I have the TV and the only way I think we can situate it where everybody can see it -

The Court: Yeah.

Mr. Clayton: - it's right - it's about five feet in front of the jury. About ten feet from there is the jury door, and the judge had his chair right there where he would not be blocking the jurors' view of the TV or no one else -

Mr. Damico: Nor sitting right next to the jurors.

Mr. Clayton: Nor sitting right next to the jurors.

The Court: I don't want to make any kind of facial expression or something where they may say, oh, they [sic] judge is not - I don't want to have any kind of influence on them at all.

Mr. Clayton: You've got a good looking face, Judge. They ought to not be looking at your face, but you're not a bad looking man.

The Court: But, I thought about it when I went into chambers. I said, all I can think is if there's a way we can set up a monitor or something up here where I don't have to get down, I mean, but I've got to be able to kind of watch it.

Mr. Clayton: You've got to talk to the Parish. We don't have any money in this parish.

The Court: But, I think I need to be able to watch to see what's going on so if anything comes up I can rule on it.

Mr. Clayton: Maybe we can put a screen - you've just got to get some money.

The Court: I know, I know. I know that.

Mr. Clayton: Look, it's Baton Rouge lawyers raise these kinds of questions.

The Court: I've got no problem with that at all.

Mr. Clayton: (Laughing) That's off the record.

The Court: I have no problem with that at all. Do we have any more we're going to watch?

Mr. Clayton: Oh, yeah, he's making me play all these things.

The Court: I mean, if y'all want, y'all could sit with me if you want. (To the Defendant) Could you see me sitting in the doorway watching that thing?

The Defendant: Uh-huh (Affirmative).

The Court: Okay. I just wanted to make sure you could see me.

That's all.

Mr. Damico: For the record, the Court asked Marcus my client if from his vantage point if he could see the judge sitting in the doorway. He answered yes. I was sitting in front of the jury because I had to move to see the TV.

The Court: Yeah.

Mr. Damico: You could see him sitting in that door.

The Defendant: Yeah.

Mr. Damico: Okay.

The Court: I mean, I don't know if you want - Elvis did not leave the building, I can tell you.

The initial (and only) objection by defense counsel was because he thought the trial judge may have left during trial. But the issue was cleared up during the second bench conference and the defendant himself conceded he saw the trial judge sitting in a chair during the playing of the video. There was no issue raised at trial regarding the defendant being prejudiced by the trial judge's proximity to the jury; this issue has been raised for the first time in this pro se brief. Thus, aside from the claim being groundless, it is also not properly before us, having been raised for the first time on appeal. See La. C. Cr. P. art. 841(A).

This pro se assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 5

In his fifth pro se assignment of error, the defendant argues the trial court erred in denying a motion for mistrial on two occasions.

Defense counsel moved for mistrial because of alleged discovery violations. The State had planned to introduce into evidence statements made by the defendant through two separate witnesses. Defense counsel claimed he had not received proper notice by the State pursuant to La. C. Cr. P. art. 716(B).

The State's failure to comply with discovery requests does not constitute reversible error unless actual prejudice results to the defendant. State v. Selvage,

93-1435, p. 6 (La. App. 1st Cir. 10/7/94), 644 So. 2d 745, 750, writ denied, 94-2744 (La. 3/10/95), 650 So. 2d 1174. Accordingly, a conviction should not be reversed because of an erroneous ruling on a discovery violation absent a showing of prejudice. State v. Gaudet, 93-1641, p. 6 (La. App. 1st Cir. 6/24/94), 638 So. 2d 1216, 1220, writ denied, 94-1926 (La. 12/16/94), 648 So. 2d 386. Louisiana Code of Criminal Procedure article 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial or when authorized by La. C. Cr. P. art. 770 or 771. Article 770 sets forth the mandatory grounds for a mistrial when certain prejudicial comments are made within the hearing of the jury by the judge, district attorney, or a court official during the trial or in argument. Under Article 771, an admonition may be an appropriate remedy rather than a mistrial. A mistrial under the provisions of Article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness or of the prosecutor make it impossible for the defendant to obtain a fair trial. See State v. Miles, 98-2396, p. 4 (La. App. 1st Cir. 6/25/99), 739 So. 2d 901, 904, writ denied, 99-2249 (La. 1/28/00), 753 So. 2d 231.

In the first instance, the State had provided defense counsel with notice under La. C. Cr. P. art. 716(B) that it was going to introduce a statement made by the defendant immediately following the shooting. In its notice, the State provided the name of the wrong witness it planned on calling to introduce the defendant's statement. Defense counsel moved for a mistrial because of lack of proper notice. The prosecutor countered that regardless of the name of the testifying witness, defense counsel had been put on notice of the content of the defendant's statement. Moreover, according to the prosecutor, the defendant's statement fell under *res gestae* and, as such, the State was not required to provide defense counsel with notice of such a statement. After further discussion, the trial court ruled that the

defendant's statement would not be allowed into evidence. Defense counsel then withdrew his motion for mistrial.

In the second instance, the State planned to introduce a statement the defendant had made in the past through its witness, Kietrick Spriggs. Defense counsel again objected on the grounds of lack of notice and informed the trial court that if Spriggs testified about what the defendant had said, he (defense counsel) would move for a mistrial. On direct examination, Spriggs did not repeat any statement made by the defendant; defense counsel, therefore, never moved for a mistrial.

Based on the foregoing, the defendant's claims are baseless. In the first instance, there was no ruling on defense counsel's motion for mistrial because he withdrew that motion; and in the second instance, defense counsel never actually moved for a mistrial. Moreover, no witness testified at trial about what the defendant said at the scene.

This pro se assignment of error is without merit.

PRO SE ASSIGNMENTS OF ERROR NOS. 6 and 7

In these pro se assignments of error, the defendant argues the trial court allowed the State to proceed with its opening statement and its closing argument.

The defendant makes no specific references to the opening statement, but he cites several instances in closing argument where the State referred to the people at the scene as kids and to the victim as a "boy." The defendant contends that everyone at the scene was over eighteen years old and that the State prejudiced the jury against him by making it seem like he "killed a child for no reason[.]"

Prosecutors are allowed wide latitude in choosing closing argument tactics. Louisiana Code of Criminal Procedure article 774 confines the scope of argument to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The trial

judge has broad discretion in controlling the scope of closing argument. Even if the prosecutor exceeds these bounds, an appellate court will not reverse a conviction if not thoroughly convinced that the argument influenced the jury and contributed to the verdict. See State v. Frank, 99-0553, p. 26 (La. 5/22/07), 957 So. 2d 724, 741, cert. denied, 552 U.S. 1189, 128 S.Ct. 1220, 170 L.Ed.2d 75 (2008). We do not find that the State's use of language like "boy" or "kid" or "children" in closing argument influenced the jury and contributed to the verdict. Furthermore, the trial court instructed the jury that opening statements and closing arguments do not constitute evidence.

Moreover, defense counsel did not lodge any objections to the complained of language used by the State. Irregularities or errors cannot be availed of on appeal if they are not objected to at the time of occurrence. La. C. Cr. P. art. 841(A). This rule requiring contemporaneous objections is applicable to improper arguments by the State to the jury. State v. Gomez, 433 So. 2d 230, 240 (La. App. 1st Cir.), writs denied, 440 So. 2d 730, 441 So. 2d 747 (La. 1983).

These pro se assignments of error are without merit.

PRO SE ASSIGNMENT OF ERROR NO. 8

In his eighth pro se assignment of error, the defendant argues he was denied his right to a fair trial. Specifically, the defendant contends the trial judge did not make rulings on several objections made by defense counsel.

The defendant references the trial transcript where defense counsel suggested that counsel approach the bench and the trial court responded, "I don't need y'all to approach." This did not constitute an objection by defense counsel, and there was no ruling for the trial court to make.

The defendant also references the State's rebuttal closing argument where defense counsel interrupted the argument several times to argue it was improper. Following is the relevant exchange during closing argument:

> Mr. Clayton [prosecutor]: A slap in the face to the officers, who I've got to give it to them, they did a good job. You don't beat Kevin Cyrus when it comes to putting a case together. You don't beat Bryan Doucet. When those guys get on your butt, they're going to do their job. When they popped him with second degree, they've done their job. Y'all know these guys, you've seen them.
>
> Mr. Damico [defense counsel]: Your Honor, that's improper. I mean, he's trying to get them to feel for the officers. That's not evidence.
>
> Mr. Clayton: Now, he's trying to get into my argument. I sat myself down and kept quiet while you were up there with all that -
>
> Mr. Damico: Your Honor, that's improper - that's improper argument.
>
> Mr. Clayton: Me breathing is probably - because I'm from over here. It's improper to him, judge. Everything I do is improper to you.
>
> Mr. Damico: That also is improper. And, Mr. Clayton knows it.
>
> Mr. Clayton: Judge, can I do my argument?
>
> The Court: Just go ahead and wrap it up.

Arguably, the trial court impliedly overruled any objections made by defense counsel in not sustaining any objection. As already noted, however, the trial judge has broad discretion in controlling the scope of closing argument, and even if the prosecutor exceeds these bounds, an appellate court will not reverse a conviction if not thoroughly convinced that the argument influenced the jury and contributed to the verdict. See Frank, 99-0553 at p. 26, 957 So. 2d at 741. Whether the prosecutor exceeded the bounds of closing argument or not, we are firmly convinced that these few innocuous comments by the prosecutor did not influence the jury in any way or contributed to the guilty verdict. See State v. Sanders, 93-0001, pp. 16-17 (La. 11/30/94), 648 So. 2d 1272, 1285-86, cert. denied, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996).

This pro se assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.