NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0439

STATE OF LOUISIANA

VERSUS

RICHARD VERDIN, JR.

Judgment rendered OCT 31 2016

* * * * *

On Appeal from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 642610

The Honorable Randall L. Bethancourt, Judge Presiding

* * * * *

Joe Waitz
District Attorney
James C. Erny
Assistant District Attorney
Ellen D. Doskey
Houma, LA

Attorneys for Plaintiff/Appellee
State of Louisiana

Bertha M. Hillman
LA Appellate Project
Covington, LA

Attorney for Defendant/Appellant
Richard Verdin, Jr.

Thomas M. Calogero
Metairie, LA

Attorney for Defendant/Appellant
Richard Verdin, Jr.

* * * * *

BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

The defendant, Richard Verdin, Jr., was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1.[1] The defendant pled not guilty and, following a jury trial, he was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one assignment of error through Louisiana Appellate Project (LAP) counsel and three supplemental assignments of error through private counsel (Thomas M. Calogero). We affirm the conviction and sentence.

FACTS

On June 24, 2012, at the Jensen's Seafood dock in Dulac, Terrebonne Parish, the defendant and Vo Hung became involved in an argument, the origins of which are unknown. The defendant left the scene, then returned several minutes later with a shotgun. Vo was on the deck of the Blue Angel, a docked shrimp boat. The defendant approached Vo and shot and killed him with a single gunshot blast to the chest. It appears the defendant fired the shot from the dock. The defendant fled the scene. The police quickly developed the defendant as a suspect, but could not find the defendant that day at his house or the house of his girlfriend, Patrice Leboeuf, who lived at her parents' home in Theriot (Bayou du Large). Patrice had picked up the defendant that same evening at the Carriage Cove trailer park near Prospect, and she and the defendant slept at the Lake Houmas Inn Hotel. The following morning, on June 26, the police found the defendant at Patrice's house and arrested him.

The defendant did not testify at trial.

---

[1] The State nol-prossed a count of attempted second degree murder involving a different victim.

SUFFICIENCY OF THE EVIDENCE
SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 1

In his sole assignment of error through LAP, the defendant argues that the evidence was insufficient to support the conviction of second degree murder. Specifically, the defendant contends that he is guilty of manslaughter because he established that the killing of Vo Hung was the result of provocation and heat of passion.

In his first supplemental assignment of error by different counsel, the defendant argues the evidence was insufficient to prove he shot and killed Vo. Specifically, the defendant argues that in this "purely circumstantial" case, the State failed to prove his identity as the shooter.

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 also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, 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**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of

misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

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. See La. R.S. 14:30.1(A)(1). Guilty of manslaughter is a proper responsive verdict for a charge of second degree murder. See La. Code Crim. 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. *Id.* 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 (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). 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).

LAP Brief

In his LAP brief, the defendant does not deny that he shot and killed Vo. He instead argues the State did not prove he committed second degree murder because "he established provocation and heat of passion sufficient for manslaughter." According to the defendant, he was "provoked by being cut, shouted at, chased around a dock and having something thrown at him." The defendant contends that several of his recorded phone calls while he was in jail (before trial) indicated that at the time of the shooting, he had been provoked and acted in the "heat of passion because he had been threatened with a knife." According to the defendant, someone tried to cut him for no reason. The defendant concludes in brief that the evidence established that he "acted in sudden passion and is guilty of manslaughter."

According to Lieutenant Edgar Authement, Jr., and Detective Kody Voisin, both with the Terrebonne Parish Sheriff's Office, and Dr. Patrick Walker, the defendant shot Vo in the left side of his chest with a shotgun. BBs from the shotgun blast and the wadding that is used to pack a shotgun shell were found inside of Vo's chest and stomach. Also, the entry wound in Vo's chest was small. Detective Voisin testified that, based on this evidence, the defendant was very close to Vo when he shot him. Deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill. See **State v. Robinson**, 2002-1869 (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); **State v. Ducre**, 596 So.2d 1372, 1382 (La. App. 1st Cir. 1992), writ denied, 600 So.2d 637 (La. 1992). Accordingly, there was sufficient

evidence to find that the defendant possessed the specific intent to kill in order to convict him of the second degree murder of Vo.

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**, 2006-0153 (La. App. 1st Cir. 9/15/06), 943 So.2d 1134, 1138, writ denied, 2006-2621 (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.

The testimony adduced at trial established that the defendant and Vo had been engaged in a heated argument prior to the shooting. Jimmy Dauzet was a deckhand on a boat on the Houma Navigational Canal. The boat that Dauzet was working on was docked at a fuel dock not too far from the Blue Angel, the boat Vo was on. Dauzet testified at trial that he heard an altercation coming from across the slip at the seafood dock. According to Dauzet, one man was Vietnamese and the other man was white, and "they was being real loud." The white man was not wearing a shirt. Dauzet could not make out what they were saying, but he saw the Vietnamese man chase the white man off. The Vietnamese man also threw something at the white man that Dauzet could not identify. Dauzet then heard the white man yell, "All right, you can go ahead and stay. I'll be back. I got something for your ass." After the white man ran off, Dauzet went back to work on the boat. According to Dauzet, about ten to fifteen minutes later, he heard a "pop," then two more "pops" in quick succession. Dauzet saw a man duck under a

conveyor belt, then "run out this way" with a shotgun. Dauzet did not get a good view of the person's face with the shotgun. Dauzet could not say with certainty if the man with the shotgun was the same person who had threatened the Vietnamese man minutes before, but he indicated they appeared to be the same size. Dauzet lost sight of the man with the shotgun and could not say where he ran off to.

While the evidence overwhelmingly established that the defendant had the intent to kill Vo, given the shotgun blast at point-blank range to Vo's chest, it appears the killing was also done in the absence of the mitigating factors of sudden passion or heat of blood. Even if Vo had said something to the defendant that caused him to react or to become angry, the defendant would still be guilty of second degree murder. Mere words or gestures, no matter how insulting, will not reduce a homicide from murder to manslaughter. **State v. Mitchell**, 39,202 (La. App. 2d Cir. 12/15/04), 889 So.2d 1257, 1263, writ denied, 2005-0132 (La. 4/29/05), 901 So.2d 1063. See **State v. Charles**, 2000-1611 (La. App. 3d Cir. 5/9/01), 787 So.2d 516, 519, writ denied, 2001-1554 (La. 4/19/02), 813 So.2d 420 (an argument alone will not be sufficient provocation to reduce murder charge to manslaughter). See also **State v. Tran**, 98-2812 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1292, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101; **State v. Hamilton**, 99-523 (La. App. 3d Cir. 11/3/99), 747 So.2d 164, 169; **State v. Thorne**, 93-859 (La. App. 5th Cir. 2/23/94), 633 So.2d 773, 777-78; **State v. Quinn**, 526 So.2d 322, 323-24 (La. App. 4th Cir. 1988), writ denied, 538 So.2d 586 (La. 1989).

The defendant in brief references a jailhouse phone conversation he had with Heather Rodrigue, the mother of his children, wherein he tells her the "dude tried to cut me when I got out the truck to go use the bathroom"; and later in the same conversation, the defendant says he "cut me in the arm." Also in the defendant's brief, appellate counsel suggests the defendant had been provoked and acted in the

heat of passion "because he had been threatened with a knife."

None of this information was corroborated, much less established at trial. The defendant did not testify and no defense witnesses testified. No witness at trial established why the defendant was on or near the Blue Angel, what business he had with Vo, or why he and Vo became involved in an altercation. There was no physical evidence introduced or testimony adduced to establish what kind of weapon, if any, Vo may have used. Moreover, it was never established if Vo was the aggressor or if he was defending himself from the defendant. The intake booking information, introduced into evidence, indicated that when the defendant entered the Terrebonne Parish Criminal Justice Complex on June 26, 2012 (two days after the shooting), the defendant was five feet, eleven inches tall and weighed 159 pounds. Vo's driver's license indicated he was five feet, five inches tall and weighed 136 pounds. Several pictures were taken of the defendant at the police station (the Complex), shortly following his arrest. There is one picture of the defendant that shows what appears to be nothing more than a scratch across his upper left arm. Detective Voisin testified that, at his arrest, the defendant needed no medical attention. The above-referenced intake booking information indicated there were no open wounds on the defendant; the health screening form during intake indicated no "[o]bvious bleeding, injury, illness or pain." On question number 9 of the health screening form, the defendant was asked if he was "hurt or injured now?" The response is "NO."

The extent to which the defendant was provoked by Vo, and whether the defendant had calmed down, or should have calmed down, by the time he left the boat dock and returned with a shotgun, was for the factfinder to resolve. Provocation and time for cooling are questions for the jury to be determined under the standard of the average or ordinary person, one 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." See Reporter's Comment to La. R.S. 14:31; **State v. Leger**, 2005-0011 (La. 7/10/06), 936 So.2d 108, 171-72 (La. 2006), cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). Given the ten to fifteen minutes between the defendant's leaving the scene and returning with a shotgun, whatever provocation there may have been at the outset of the altercation, the defendant's killing of Vo was in no way caused by any *immediate* provocation by Vo. See La. R.S. 14:30.1(A)(1); **State v. Richardson**, 2008-2086 (La. App. 1st Cir. 3/27/09), 2009 WL 839519 (unpublished), writ denied, 2009-1109 (La. 1/8/10), 24 So.3d 861; **Maddox**, 522 So.2d at 579, 581-82 (the defendant who bought a gun, then drove to his wife and shot and killed her was guilty of second degree murder, not manslaughter); **State v. Lutcher**, 96-2378 (La. App. 1st Cir. 9/19/97), 700 So.2d 961, 974-75, writ denied, 97-2537 (La. 2/6/98), 709 So.2d 731.

Following the altercation with Vo, the defendant left the scene, retrieved a shotgun, and returned to the boat Vo was on. Considering these facts, a rational trier of fact could have concluded that, when the defendant returned to the scene and shot Vo, he acted with deliberation and reflection and not in the heat of passion. See **Ducre**, 596 So.2d at 1384. While the defendant suggests the presence of sudden passion at the time of the shooting, the facts seem to suggest the defendant was single-mindedly intent on shooting Vo to get even for having suffered some perceived indignity. While it was not clear what prompted the altercation, the guilty verdict indicates the jury concluded either: (1) the argument and/or scuffle was not sufficient provocation to deprive an average person of his self-control and cool reflection; or (2) that an average person's blood would have cooled before the defendant shot the victim. See **Id.**; **Maddox**, 522 So.2d at 582.

The jury heard all of the testimony and viewed all of the evidence presented to it at trial and found the defendant guilty as charged. The trier of fact is free to

accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. 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 (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 (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). Having called no witnesses to testify on his behalf, the defendant failed to establish by a preponderance of the evidence the mitigating factors of sudden passion or heat of blood to establish manslaughter. See **State ex rel. Lawrence v. Smith**, 571 So.2d at 135-36. The guilty verdict in this case indicates the jury concluded this was a case of second degree murder and rejected the possibility of a manslaughter verdict. See **Ducre**, 596 So.2d at 1384.

Supplemental Brief

In his supplemental brief, the defendant argues that no one identified him as the shooter. According to the defendant, while it was proven that the Dodge Durango that he had borrowed "was at the scene of the shooting moments before the incident"; and that it was also proven "that a shirtless white man had an argument with the victim, and minutes later a shirtless white man shot the victim"; and despite his (the defendant's) own seemingly incriminating statements, the evidence was nevertheless insufficient to prove beyond a reasonable doubt that he was the shooter.

It is true there was no direct evidence in this case in the form of eyewitness testimony to establish the identity of the shooter. As noted, Dauzet did not get a good look at the shooter's face after hearing the gunshots. The overwhelming circumstantial evidence, however, established the identity of the shooter as the defendant.

As noted, the defendant's girlfriend was Patrice Leboeuf, who lived at home with her parents in Theriot. According to Patrice's testimony, following the shooting, on that same day (June 24), the defendant called Patrice and said, "I fu--ed up." The defendant then asked Patrice to pick him up at Carriage Cove, a trailer park. Patrice picked up the defendant and they drove to the Lake Houma Inn Hotel, where they spent the night. The police were looking for the defendant, but were unable to find him that night. The following day, the defendant and Patrice went to Patrice's (parents') house. That night at the house, the police entered the bedroom the defendant and Patrice were sleeping in and arrested the defendant. Detective Voisin was present for the defendant's arrest. According to the detective, as soon as the police opened the bedroom door and turned on the lights, the defendant put his hands up and said he was not going to give them any trouble. Patrice testified that when the police came into the bedroom, the defendant said, "She has nothing to do with it."

The defendant was then transported to the Terrebonne Parish Sheriff's Office. Detective Voisin read the defendant his **Miranda** rights, and the defendant filled out and signed a **Miranda** rights form. According to Detective Voisin, he told the defendant he was under arrest for one count of second degree murder and one count of attempted second degree murder. The defendant then asked the detective how he could be arrested for attempted second degree murder when he only shot one person. Detective Voisin stated that he could not quote the defendant's exact words, but again recalled, "He asked how he could be charged

with one count of attempted second degree murder when he had only shot one person."

On the day of the shooting, the defendant had gone to the home of his friend, Zeth Lodrigue, to ask Zeth for a ride to the store for beer and cigarettes. Zeth and his girlfriend, Tia Linson, were barbecuing, so Zeth let the defendant borrow their (his and Tia's) Dodge Durango. Nang's Dulac Food Store (Nang's) was only a few minutes away, so Zeth and Tia expected the defendant to return their vehicle shortly. Instead, according to Zeth, who testified at trial, the defendant was away with the Durango for forty-five minutes to an hour. According to both Zeth and Tia, the defendant was wearing blue jean shorts and no shirt. Nang's is near Jensen's Seafood, and the boat at Jensen's Seafood dock is where Vo was shot and killed.

The Durango the defendant drove on the afternoon of the shooting was very distinct looking. The vehicle had a silver (or gray) body, a black hood, and no front bumper. According to the 911 calls, the shooting occurred about 3:30 p.m. Detective Voisin obtained the video footage of June 24 from the surveillance camera at Nang's. The DVD of the video footage, which provides several different camera angles, was introduced into evidence at trial, and Detective Voisin addressed several key moments. One of the camera angles captured the outside of the front of the store, including Grand Caillou Road (LA Hwy. 57). According to Detective Voisin, at about 2:48 p.m., Vu Phan is seen walking toward the black and silver Dodge Durango. The Durango drives away, heading south, and Vu Phan is no longer seen in any of the camera angles. At about 3:05 p.m., the Dodge Durango is seen passing in front of Nang's, this time heading north. At about 3:22 p.m., the Durango is again seen, heading south. At about 3:33 p.m., the Durango is again seen heading north.

The CD of the 911 calls was also introduced into evidence. During one call, two people, an unidentified male and boat captain Maurice O'Brien, pass the phone back and forth, each providing the operator with information as they received it. The unidentified caller can be heard speaking to "the captain on this boat," then tells the operator, "It was a guy in a silver Dodge Durango shot the fellow and supposably, I guess, left." Later, Captain O'Brien is on the phone with the operator when he tells her, "I did not see him shoot him ma'am, but I saw them arguing before, and the guy was driving I believe it was a silver Durango."

Arguably the most important piece of circumstantial evidence was the jailhouse recordings, where the defendant, in his own words, places himself at the scene of the shooting. In the first recorded phone conversation on June 26, 2012, between the defendant (in jail) and Heather (the mother of their children), the defendant concedes that the police caught him, but suggests to Heather that he acted in self-defense. This particular call was also transcribed for the jury. Following are the pertinent excerpts from that call:

> Defendant: Hey what's up.
> Heather: Nothing. Where the hell you at.
> Defendant: I'm in jail.
> Heather: Oh they caught you.
> Defendant: Yeah they got me. Just uh man
> Heather: (inaudible).
> Defendant: Just just man I know you uh I know you gonna have to do what you gotta do you know but just get some minutes on the phone so I could talk to the kids.
> Heather: Man what the f--k you was thinking man.
> Defendant: Well I told you what I wanted couldn't have it so I mean it wasn't just me I mean I it wasn't even supposed to go down like that I the dude tried to cut me when I got out the truck to go use the bathroom he I didn't even I mean it wasn't even no arguing just bringing him down there. I guess they thought I was out to do them something and he just f--king cut me in my arm.
>
> * * * * *
>
> Heather: But uh aren't they gonna move you to a different prison for murder.
> Defendant: Yeah I'm going I'm probably gonna go to Angola. Be even better you could bring the kids over there. I mean it's still a little ride it's not like you gonna have to come every time uh that's all gonna have to wait for a while.

Heather: Like why.
Defendant: Huh.
Heather: You didn't think about them first.
Defendant: Yeah I did that's our kids I mean I'm not trying to say I didn't let's not just talk about that right now I mean (inaudible) it's it's happened I mean what else I'm gonna do you know. (inaudible) they got more to it than that I mean I was trying to protect myself we we don't know (inaudible) just what I'm booked with right now I don't know how it's gonna go down. I mean but I know I was trying to protect myself what I'm supposed to do I was trying to protect myself.

* * * * *

Defendant: Well look this is I don't wanna talk about that right now... All right just tell them I love them and I love you too and I mean uh just I'm I gotta keep my head up keep your head up too just everything I mean it it's gonna it it no telling how it's gonna go down because like I told you it wasn't just my fault I mean this wasn't just nothing to do with me I didn't just go up to somebody and shoot them I had a f--king reason to do the shit what I did I had to protect myself.

Another recorded phone conversation took place on June 27, 2012, between the defendant and Patrice (his girlfriend). This particular call was also transcribed for the jury. Following is the pertinent excerpt from that call:

Defendant: Cause they all putting it like uh they he said he came back again today he said they putting it like uh like nobody like like like they didn't have nothing to do with it like you know like I just went there and shot a dude you know try to kill the man.
Patrice: Yeah.
Defendant: And it wasn't you know like I told him he said he said they got 2 stories to it and he knows uh he he [.]

Another recorded phone conversation took place on June 30, 2012, between the defendant and Patrice. Following is the pertinent excerpt from that call:

Defendant: They put it like this, just like, I just shot an innocent bystander, I don't even know how the hell that can be, how in the hell can that be you know, I mean these people tried killing me, they don't even understand it . . .

Based on the foregoing, the jury could have reasonably concluded that the State proved the defendant's identity as the person who shot and killed Vo. After a thorough review of the record, we find the evidence clearly negates any reasonable probability of misidentification and supports the jury's 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 second degree murder, and that the mitigatory factors of manslaughter were not established by a preponderance of the evidence. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam); **Ducre**, 596 So.2d at 1384.

This supplemental assignment of error is without merit.

SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 2

In his second supplemental assignment of error (by different counsel), the defendant argues the trial court erred in finding him competent to proceed to trial. Specifically, the defendant contends that the trial court should have ordered him to a mental hospital for further evaluation, as Dr. Salcedo recommended.

Based on defense counsel's motion, the trial court appointed a sanity commission. Three doctors examined the defendant at different times. The opinion letters of the doctors were filed with the trial court. At the competency hearing (about one-and-one-half years prior to trial), the doctors did not testify and no other testimony was adduced. The trial court noted it had reviewed the opinion letters of the doctors, and found the defendant was able to proceed to trial.

We find no reason to disturb the ruling of the trial court. Dr. Mary L. Eschete, a medical doctor and the Deputy Coroner of Terrebonne Parish, was appointed to the sanity commission and was the first to examine the defendant. In her opinion letter, Dr. Eschete noted that the defendant knew the charges against him and the consequences if convicted. He understood the pleas he could take and he was able to discuss the events of the day of the alleged charges. Dr. Eschete further stated that the defendant had mild to moderate mental retardation, and concluded that he understood the proceedings against him and would be able to assist his attorney.

Dr. Michael L. Watkins, a medical doctor in Houma, was appointed to the sanity commission and was the second doctor to examine the defendant. In his opinion letter, Dr. Watkins noted the defendant's thought processes were organized and goal-directed. A review of the records made available prior to the interview indicated the defendant had learning disabilities and read at the fifth grade level. There were no mention of psychiatric abnormalities in these records, and it was stated he was able to interact well socially. It was further noted the defendant had rather exceptional mathematical abilities, given his learning disability. Dr. Watkins concluded that the defendant was competent to assist his attorney in his defense.

The third doctor to interview the defendant, and appointed to the sanity commission, was Dr. (Ph.D.) Rafael F. Salcedo, a forensic psychologist. The defendant suggests in his supplemental brief that the trial court erred in finding him competent to proceed to trial. Because Dr. Salcedo suggested the defendant undergo a comprehensive inpatient evaluation, the defendant argues in brief that his competency to proceed to trial remained a question and that "the trial court's determination was contrary to the opinion of Dr. Salcedo."

Dr. Salcedo did not make the finding that the defendant was not competent to proceed to trial. Dr. Salcedo, in fact, made no finding at all. It was only because of the defendant's extremely difficult behavior during the interview that the doctor suggested an inpatient evaluation. Because the tone of Dr. Salcedo's opinion letter suggests malingering on the part of the defendant and, therefore, perhaps competency, we find it necessary to provide most of the contents of the letter:

> Dear Judge Bethancourt:
>
> Pursuant to court appointment, on this date I had an opportunity to attempt to perform a competency evaluation on Mr. Richard Verdin. . . . Unfortunately, efforts to perform the evaluation were significantly compromised by what appeared to be obvious resistance

on the part of Mr. Verdin. For example, when asked his date of birth, he looked perplexed, looked at the deputy who was in the examination room, and then in a painstakingly slow manner, said "April 30th". When asked about the year of his birth, he again hesitated, stating "1987".

Thus began a pattern of exceedingly sluggish response times, which were inconsistent with Mr. Verdin's demeanor when challenged about the fact that he might not be cooperating with the examination. Without any hesitation in his response times, he seemed offended when I pointed out inconsistencies in some of the information he shared. For example, he indicated that he spent a significant amount of time in jail, and when asked about that, he offered vaguely "for not paying child support, and for trawling without a trawling license". This information seemed at odds with Mr. Verdin's claims that he had no idea what the highest grade was he completed in school, although he was quick to point out "I was in Special Ed". He also claimed to have been trawling "all my life". When I asked if he started trawling when he was 2 years of age, he seemed to become irritated, and he said "yeah, I was trawling when I was 2 years old".

As can be seen from the foregoing, it was extremely difficult to elicit reasonable behavior on the part of Mr. Verdin, not so much because he necessarily suffers from a major psychiatric disorder, but primarily because he was being fundamentally uncooperative.

Given the extreme lack of cooperation on the part of this individual, I am unable to render an opinion regarding his competency to proceed to trial. I would note that I did not see any objective evidence, based on his clinical presentation, that he suffers from a psychotic disorder, a delusional disorder, or any other major psychiatric illness. He did attempt to portray himself as a severely intellectually impaired individual, although again, there were significant internal inconsistencies in that regard as well.

At this juncture, I have no opinion as to whether or not Mr. Verdin is able to meet the Bennett criteria[2] for competency to proceed to trial. I was simply unable to elicit sufficient cooperation on his part to obtain valid results on which to render such an opinion. He does not appear to be suffering from the usual psychiatric disorders which usually impair an individual to such a degree that they are unable to understand simple concepts such as what they are charged with. Mr. Verdin was actually able, toward the end of the interview process, to acknowledge that he was charged with "murder", although he refused to define what this meant.

Given the seriousness of the charges, and again, out of an abundance of caution, the Court may wish to find Mr. Verdin incompetent to proceed to trial, and remand him to the Eastern Louisiana Mental Health System-Forensic Division, where a comprehensive inpatient evaluation can be performed, with a goal of ruling out malingering versus symptom magnification. Conversely, the Court may consider that there is insufficient, clinically valid data to support a psychiatric diagnosis on the part of this individual, who

---

[2] See **State v. Bennett**, 345 So.2d 1129 (La. 1977).

> was being so obviously uncooperative with the examination process. In that regard, absent an underlying mental disease or defect which impairs an individual's ability to meet the Bennett criteria for competency to proceed to trial, the presumption is typically one of competence.

(footnote added).

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. La. Code Crim. P. art. 641; **State v. Odenbaugh**, 2010-0268 (La. 12/6/11), 82 So.3d 215, 227, cert. denied, __ U.S. __, 133 S.Ct. 410, 184 L.Ed.2d 51 (2012). The trial court was presented with the expert opinions of two doctors who found the defendant competent to proceed to trial, with the third doctor unable to provide an opinion either way because of the defendant's extreme recalcitrance and refusal to cooperate with the doctor during the interview. See **State v. Williams**, 2003-942 (La. App. 5th Cir. 1/27/04), 866 So.2d 1003, 1009-10, writ denied, 2004-0450 (La. 6/25/04), 876 So.2d 832 (finding the trial judge did not abuse his discretion in refusing to appoint a third sanity commission where the doctor's report did nothing more than recommend further evaluation because the defendant had been uncooperative during his latest evaluation). Here, two of the doctors found the defendant competent to proceed to trial and *none* of the three doctors found the defendant lacked the capacity to understand the proceedings against him or to assist in his defense. Based on the foregoing, we find the trial court correctly found the defendant was competent to proceed to trial. See **State v. Young**, 576 So.2d 1048, 1062 (La. App. 1st Cir.), writ denied, 584 So.2d 679 (La. 1991).

This supplemental assignment of error is without merit.

SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 3

In his third supplemental assignment of error (by different counsel), the defendant argues the trial court erred in denying his motion for mistrial.

Specifically, the defendant contends he should have been granted a mistrial because he asserts in his brief that the lead detective testified that he (the defendant) would have to testify regarding a specific fact.

The defendant suggests in his supplemental brief that a witness testified about the failure of the defendant to testify on his own defense. No such thing occurred. Moreover, the testimony came as a result of defense counsel, Kerry Byrne, pressing the issue while cross-examining Detective Voisin. The defendant in this supplemental brief simply states that the lead detective "responded to a question" when he testified, "That would be a question to ask [Mr. Verdin]." The defendant provides no context, does not reference any page numbers, and does not provide the question asked by Byrne.

The testimony at issue concerned the defendant's understanding of what he was being charged with when brought in for questioning. Following is the relevant portion of Byrne's cross-examination of Detective Voisin:

> Q. Now at some point, you advised Mr. Verdin that he was under arrest?
> A. Yes.
> Q. And in fact, you detailed an account of that in your report; correct?
> A. Yes.
> Q. Now when you told him that he was under arrest for second degree murder and attempted second degree murder, that isn't all you told him, was it?
> A. I told him he was under arrest for murder and for attempted second degree murder. My exact wordings, I mean.
> Q. Well, weren't your exact words as per your report that you told him that he was under arrest for one count of second degree murder for shooting and killing Vo Hung and one count of attempted second degree murder for shooting at Duc Pham?
> A. Then yeah, that would have been, I mean.
> Q. Okay. The reason why I ask that is, is that Mr. Erny asked you whether, you know, Mr. Verdin had said anything to you at that time, and you testified that he says or he said something -- I forget the exact words that you used. That you know, he didn't know why he was being charged with attempted murder because he only shot one person.
>
> But you had just told him that he had only shot, you know, he's arrested for shooting and killing one person and shooting at -- so might he have been just questioning why he was being charged for --

> just questioning the charges rather than, I mean, do you -- I guess that's for the jury to determine, but --
> A. That would be a question to ask him.

At this point, Byrne moved for a mistrial, arguing that the defendant was under no obligation to testify on his own behalf. The prosecutor replied in part:

> Absolutely not. He is not an officer of the court, and I was going -- the question, he was le[d] into that by Mr. Byrne because Mr. Byrne was asking this witness to speculate what Mr. Verdin might have done. So what, I mean, that's a logical explanation. So if anybody, it's his own fault for bringing that up.
>
> * * * * *
>
> If the judge says it or if the attorneys say it, or you know, if the DA says it, then it is. But the same rule doesn't apply, especially, when he's led into it by defense attorneys. So that's, that's ludicrous in my opinion.

Byrne replied to this that he "would at least ask to admonish the jury to disregard that last statement by Detective Voisin." The trial court denied the motion for mistrial. Byrne then changed his mind about wanting the jury to be admonished. Thus, no admonishment was given.

The defendant suggests in brief that Detective Voisin "should have known better than to comment on the defendant's right to not testify at trial." As noted, however, Detective Voisin made no mention of this. It appears, instead, the detective was merely suggesting to Byrne that he could not possibly know the answer to Byrne's confused narrative that was, in effect, not even a question.

In any event, we find no reason to disturb the trial court's denial of the motion for mistrial. Under La. Code Crim. P. art. 770(3), a mistrial shall be ordered when a remark or comment made within the hearing of the jury by the judge, district attorney, or a court official during trial or argument refers directly or indirectly to the failure of the defendant to testify in his own defense. Article 770 is inapplicable in this case because the alleged prejudicial comment was not made by the judge, district attorney, or court official, but rather by Detective Voisin.

Absent a showing of a pattern of unresponsive answers or improper intent by the police officer, such a comment would not fall within the purview of Article 770. See **State v. Watson**, 449 So.2d 1321, 1328 (La. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 952 (1985); **State v. Johnson**, 2006-1235 (La. App. 1st Cir. 12/28/06), 951 So.2d 294, 301.

The controlling provision is La. Code Crim. P. art. 771(2), which provides in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant . . . in the mind of the jury:
>
> * * * * *
>
> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official[.]
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

Here, Byrne objected to the detective's response and moved for a mistrial rather than an admonition. An admonishment must be requested by one of the parties, and while defense counsel initially requested an admonishment, he subsequently chose not to seek an admonishment. See La. Code Crim. P. art. 771; **State v. Jack**, 554 So.2d 1292, 1296 (La. App. 1st Cir. 1989), writ denied, 560 So.2d 20 (La. 1990). Because Detective Voisin's comment fell within the scope of Article 771, the denial of a mistrial was within the broad discretion of the trial court. Louisiana Code of Criminal Procedure article 775 provides in part that "[u]pon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771." As a general matter, mistrial is a drastic remedy which should only be declared upon a clear showing of prejudice by the defendant. In addition, a trial

judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. **State v. Smith**, 418 So.2d 515, 522 (La. 1982); see **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. A reviewing court in Louisiana should not reverse a defendant's conviction and sentence unless the error has affected the substantial rights of the accused. See La. Code Crim. P. art. 921.

There was no showing of clear prejudice to the defendant. Detective Voisin was doing his best to respond to Byrne who seemed more to be thinking aloud than asking the detective a specific, direct question. In any case, Detective Voisin's single, brief response of "That would be a question to ask him" did not require a mistrial. The detective's comment was clearly not intended to draw the jury's attention to the defendant's failure to testify (if for no other reason than that the trial was still ongoing and this comment was made during the prosecution's case-in-chief) and, as such, constituted neither a direct nor indirect reference to the defendant's failure to take the stand. See **State v. Hebert**, 96-1884 (La. App. 1st Cir. 6/20/97), 697 So.2d 1040, 1045-46, writ denied, 97-1892 (La. 12/19/97), 706 So.2d 450. There has been no showing of any prejudice tending to deprive the defendant of the reasonable expectation of a fair trial, and the trial court did not abuse its discretion in denying the motion for mistrial. See **Berry**, 684 So.2d at 449.

This supplemental assignment of error is without merit.

CONCLUSION

For all of the foregoing reasons, we affirm the defendant's sentence and conviction.

CONVICTION AND SENTENCE AFFIRMED.