NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0521

STATE OF LOUISIANA

VERSUS

RYAN MICHAEL POURCIAU

Judgment Rendered: DEC 22 2016

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APPEALED FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF TANGIPAHOA
STATE OF LOUISIANA
DOCKET NUMBER 1301894, DIVISION A

HONORABLE JEFFREY S. JOHNSON, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND CALLOWAY,* JJ.

*Judge Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

McDONALD, J.

The defendant, Ryan Michael Pourciau, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. He was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

In 2011, Ponchatoula High School students H.V.[1] and the defendant were dating. H.V. was fourteen years old and the defendant was sixteen years old. They lived in the same neighborhood. In October 2012, H.V.'s parents found out that the defendant had gone to their home while they were out and had sex with H.V. H.V.'s parents told H.V. she was no longer allowed to see the defendant; they also spoke personally to the defendant's father and told him his son was not allowed to see their daughter.

Though no longer allowed to see each other, H.V. and the defendant, for a brief time, continued to call and text each other and see each other at school. Eventually, H.V. broke off all communications with the defendant and began seeing someone else. In February 2013, after H.V. refused to talk to him, the defendant left a threatening voicemail on H.V.'s cell phone. H.V.'s father obtained a protective order against the defendant, which prohibited him, among other things, from coming within 100 feet of H.V. or within 100 yards of her residence.

On the morning of April 23, 2013, H.V. was leaving for school. Her younger brother had already gone to school and her father had gone to work. H.V. found the defendant's red hooded sweatshirt next to her vehicle. She called the police. A Tangipahoa Parish Sheriff's Office deputy went to the house and spoke with H.V. and her mother, A.V. The deputy did not see the defendant near the house, so he left, and H.V. went to school. A few minutes later, the defendant approached A.V., who was sitting in a chair under her carport. He shot her once in the chest. The forensic and testimonial evidence suggests that A.V. walked or ran several feet from the chair and collapsed. The defendant then shot her in the head, killing her.

The next day, April 24, sheriff's deputies found the defendant hiding in A.V.'s house, underneath H.V.'s bed. The defendant still had the pistol he used to kill A.V. Upon his arrest,

[1] Initials are used in this opinion to avoid public disclosure of the identity of a victim of a crime under the age of eighteen years. *See* LSA-R.S. 46:1844(W).

the defendant told deputies that he got into an altercation with A.V., a struggle ensued, and the gun discharged twice, resulting in A.V. being struck first in the chest and then in the head. The defendant did not testify at trial.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues the trial court erred in allowing the introduction of other crimes evidence at trial.

In his brief, the defendant, under "Assignment of Error," challenges four instances where the trial court ruled evidence admissible under LSA-C.E. art. 404(B), namely: introduction of a protective order against the defendant in effect before the shooting; the fact the defendant was in possession of a firearm that had been reported stolen; comments made by the defendant the day before the shooting; and child pornography charges.

In the "Law and Argument" portion of his brief, the defendant asserts the State, at the *Prieur* hearing, sought to introduce the above-mentioned evidence. The defendant, however, makes no reference to the child pornography charges and adds a challenge to the admissibility of the State's following evidence: "the defendant's manner of dress and statement to Mark Fletcher had [independent] relevance and should be admitted to prove intent, preparation, plan, identity, and absence of mistake or accident[.]"

At the pretrial *Prieur* hearing,[2] the only evidentiary issues addressed and argued were: 1) the violation of the protective order; 2) the defendant's possession of a stolen gun; and 3) statements the defendant made to students at school. The pornography charge issue was never raised at the *Prieur* hearing, nor was the issue raised in the State's Notice of Intent to use other crimes evidence. Moreover, the defendant himself, in a pretrial motion in limine, sought to introduce evidence stemming from the defendant's pornography involving juveniles charge, namely, pornographic pictures and a pornographic video of H.V. that the defendant had posted on H.V.'s Facebook. Also, at the *Prieur* hearing, the State chose not to make the defendant's dress or Mark Fletcher's observation of him an evidentiary issue; the State, thus, specifically dismissed Paragraph IV of its Notice of Intent.[3] Accordingly, the only issues before us are those

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[2] *See State v. Prieur*, 277 So.2d 126, 130 (La. 1973).

[3] The fourth paragraph of the Notice of Intent stated, in pertinent part:

> On April 10, 2013, the defendant, while wearing a full face gas mask and attired in all black colored tactical clothing, was observed by Mark Fletcher walking past his residence which is located at 39297 Brookfield Drive, in Ponchatoula, Louisiana. On such date, the defendant made a statement to Mark Fletcher that he was in training for "Doomsday."

three mentioned above that were addressed, argued, and ruled on by the trial court at the *Prieur* hearing.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

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. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. *State v. Lockett*, 99-0917 (La. App. 1 Cir. 2/18/00), 754 So.2d 1128, 1130, *writ denied*, 00-1261 (La. 3/9/01), 786 So.2d 115. The trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. *See State v. Galliano*, 02-2849 (La. 1/10/03), 839 So.2d 932, 934 (per curiam).

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence that is not relevant is not admissible. LSA-C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403.

The defendant in brief does not explain how the trial court erred in its rulings on the three evidentiary issues addressed at the *Prieur* hearing (the violation of the protective order, the defendant's possession of a stolen gun, and the defendant's statements to students at school). The defendant simply lists the issues, followed by a recitation of law on other crimes evidence.

At the *Prieur* hearing, the State sought to introduce evidence of the defendant's violation of a protective order obtained against him by H.V.'s father. Testimony and argument at the

hearing established that following the dissolution of the defendant's and H.V.'s relationship, H.V. would not answer the defendant's texts or calls. On February 17, 2013, the defendant left a voicemail on H.V.'s cell phone, telling her that he was going to kill her if she did not talk to him. Based on this threatening message, H.V.'s father obtained an "Order of Protection" on H.V.'s behalf and against the defendant, ordering him to not go within 100 feet of H.V. or within 100 yards of her residence. On April 12, 2013, the defendant walked past H.V.'s house, well within 100 yards of the house. The defendant then turned around and walked past her house again. He was wearing a red "hoodie" and black boots, as described by H.V.'s father, who was outside watching the defendant. On the morning of the shooting, but before A.V. was shot, H.V. found what appeared to be the defendant's red hoodie in her yard next to her vehicle. Deputy Lindell Bridges, with the Tangipahoa Parish Sheriff's Office, went to the scene, seized the red sweatshirt, briefly spoke to H.V. and A.V., and then left. Deputy Bridges was four or five miles from the scene when the defendant shot and killed A.V. The trial court found evidence of the defendant's violation of the protective order to be admissible at trial.

The next issue at the *Prieur* hearing was the defendant's possession of a stolen gun, the same gun used to kill A.V. When arrested, the defendant had a Czechoslovakian CZ-52 semi-automatic pistol, a rare gun manufactured in the 1950s and considered a collector's item. Christopher Tyer, the defendant's stepfather, testified that he lived in Kentwood and that he was the owner of the CZ-52 gun. According to Mr. Tyer, the defendant stayed with him from "time to time" from February to April of 2013. When Mr. Tyer realized his gun was missing, he filed a report with the Kentwood police. Mr. Tyer informed the police officer that there was no forced entry at his residence. The State argued that evidence of the stolen gun should be allowed as "res gestae" and, in the alternative, the evidence showed the defendant's intent to kill and was relevant to his plan and preparation. The trial court ruled that evidence of the defendant's possession of the gun was allowed as part of the "res gestae."

The last issue at the *Prieur* hearing was the admissibility of several statements the defendant made to students at school. The day before the shooting, April 22, the defendant made certain statements to three students during lunch at Ponchatoula High School. One student testified the defendant told her that he could not stop thinking about ways to torture H.V. and her family. Another student testified the defendant told him he had a Kevlar vest, a pistol that shot fifteen rounds, and that he was a ticking time bomb waiting to go off. When

the police asked this student why the defendant felt he was a ticking time bomb, the student explained the defendant had said that H.V.'s mother had "put a restraining order for some reason." A third student testified the defendant said H.V.'s father had threatened him by phone calls; the defendant also said he had a vest and "ammo" for his protection. The student also heard the defendant call himself a ticking time bomb. The trial court ruled that the defendant's statements made to these students were admissible.

As noted, the trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. *See Galliano*, 839 So.2d at 934. We find no abuse of discretion in the trial court's rulings. One of the State's theories was the defendant had the specific intent to kill A.V. Under LSA-R.S. 14:30.1(A)(1), second degree murder is a specific intent crime, and the defendant made intent a genuine issue at trial. In his opening statement, defense counsel stated that the defendant did not have specific intent to kill. Defense counsel also stated that the State would not be able to prove that A.V.'s death was not manslaughter or negligent homicide. At trial, the defendant's statement to Detective Heath Martin, with the Tangipahoa Parish Sheriff's Office, was played. In it, the defendant states he and A.V. struggled over the gun and that A.V. pulled the trigger both times, shooting herself in the chest, then in the head.

The prerequisites to the intent exception were satisfied in this case. Before other crimes evidence can be admitted as proof of intent, three prerequisites must be satisfied: (1) the prior acts must be similar; (2) there must be a real and genuine contested issue of intent at trial; and (3) the probative value of the evidence must outweigh its prejudicial effect. *See* LSA-C.E. arts. 403 and 404(B)(1); *State v. Day*, 12-1749 (La. App. 1 Cir. 6/7/13), 119 So.3d 810, 814-15. Where intent is regarded as an essential element of the crime charged, it is proper to admit proof of similar but disconnected crimes to show the intent with which the act charged was committed. *Id.* at 815. *See State v. Blank*, 04-0204 (La. 4/11/07), 955 So.2d 90, 125-26, *cert. denied*, 552 U.S. 994, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007); *State v. Williams*, 96-1023 (La. 1/21/98), 708 So.2d 703, 725-726, *cert. denied*, 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998).

The protective order against the defendant and his violation of it, the gun he took from his stepfather's residence to shoot and kill A.V., and his statements to students the day before the killing were all relevant to show his state of mind. This evidence helped establish the

defendant's frame of mind during the time he was preparing to get even with A.V. for ending his relationship with H.V. and for the protective order that was issued against him. *See State v. Taylor*, 01-1638 (La. 1/14/03), 838 So.2d 729, 746, *cert. denied*, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004) (finding the defendant's "bad thoughts" evidence that he wanted to kill somebody admissible because the statements constituted direct assertions of the defendant's state of mind and were relevant to the defendant's motive and intent); LSA-C.E. art. 803(3) (hearsay exception for statements of then existing state of mind offered to prove the defendant's future acts). *See also State v. Miller*, 98-0301 (La. 9/9/98), 718 So.2d 960, 966-67; *State v. Adams*, 04-0482 (La. App. 1 Cir. 10/29/04), 897 So.2d 629, 632-33, *writ denied*, 05-0497 (La. 1/9/06), 918 So.2d 1029.

This evidence also had independent relevance to the issues of preparation, plan, and absence of mistake or accident. *See* LSA-C.E. art. 404(B)(1); *Taylor*, 838 So.2d at 746. *See also State v. Miller*, 718 So.2d at 966-67; *State v. Johnson*, 15-528 (La. App. 5 Cir. 12/9/15), 182 So.3d 378, 388-89; *State v. Greenberry*, 14-0335 (La. App. 4 Cir. 11/19/14), 154 So.3d 700, 709, *writ denied*, 14-2656 (La. 10/9/15), 178 So.3d 1000; *State v. Lawson*, 08-123 (La. App. 5 Cir. 11/12/08), 1 So.3d 516, 526; *State v. Wright*, 02-1268 (La. App. 3 Cir. 3/5/03), 839 So.2d 1112, 1121; *State v. Michel*, 93-0789 (La. App. 1 Cir. 3/11/94), 633 So.2d 941, 942-43. Any prejudicial effect was outweighed by the probative value of such evidence. *See* LSA-C.E. 403; *State v. Scales*, 93-2003 (La. 5/22/95), 655 So.2d 1326, 1330-31, *cert. denied*, 516 U.S. 1050, 116 S.Ct. 716, 133 L.Ed.2d 670 (1996).

We also find this evidence helped explain and complete the story by proving the defendant's state of mind and the immediate context of events near in time and place to the offense. Integral act evidence incorporates a rule of narrative completeness without which the State's case would lose its narrative momentum and cohesiveness. *See* LSA-C.E. 404(B)(1); *Taylor*, 838 So.2d at 741-42. Integral acts events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the State could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes evidence to insure that the purpose served by admission of other crimes evidence is not to depict defendant as a bad person, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. *State v. Colomb*, 98-2813 (La. 10/1/99), 747 So.2d

1074, 1076 (per curiam).[4] The integral acts doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime, if a continuous chain of events is evident under the circumstances. *State v. Taylor*, 838 So.2d at 741. *See State v. Anderson*, 09-934 (La. App. 5 Cir. 3/23/10), 38 So.3d 953, 960-61, *writ denied*, 10-0908 (La. 11/12/10), 49 So.3d 887; *State v. Jones*, 08-687 (La. App. 3 Cir. 12/10/08), 999 So.2d 239, 252.

We find, further, that even if the other crimes evidence had been inadmissible, the admission of such evidence would have been harmless error. *See* LSA-C.Cr.P. art. 921. The erroneous admission of other crimes evidence is a trial error subject to harmless error analysis on appeal. *State v. Johnson*, 94-1379 (La. 11/27/95), 664 So.2d 94, 102. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *Johnson*, 664 So.2d at 100. Here, the evidence at trial overwhelmingly established the defendant shot and killed A.V. and, as such, any error in allowing such evidence to be presented to the jury would have been harmless beyond a reasonable doubt. LSA-C.Cr.P. art. 921; *Sullivan*, 508 U.S. at 279, 113 S.Ct. at 2081. Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant argues the trial court erred in denying his motion to suppress alleged inculpatory statements. Specifically, the defendant contends the trial court erred in allowing the inculpatory statements he made at the scene and at the hospital to be admitted into evidence.

When reviewing the correctness of a trial court's ruling on a motion to suppress a confession, the appellate court defers to the trial court's factual and credibility determinations

[4] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403. The Louisiana Supreme Court has left open the question of whether evidence presented under Article 404(B)(1) must pass the balancing test of Article 403. *See Colomb*, 747 So.2d at 1076. In *State v. Garcia*, 09-1578 (La. 11/16/12), 108 So.3d 1, 39, *cert. denied*, 133 S.Ct. 2863, 186 L.Ed.2d 926 (2013), our supreme court stated, "Logically, it falls to the trial court in its gatekeeping function to determine the independent relevancy of such evidence and balance its probative value against its prejudicial effect. La. Code Evid. art. 403." At any rate, we find the prejudicial effect from the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence.

unless such ruling is not supported by reliable evidence. *See State v. Tucker*, 13-1631 (La. 9/1/15), 181 So.3d 590, 610, *cert. denied*, 136 S.Ct. 1801, 195 L.Ed.2d 774 (2016). However, a trial court's legal findings are subject to a de novo standard of review. *See State v. Hunt*, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

It is well settled that the ruling in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) protects an individual's Fifth Amendment privilege during incommunicado interrogation in a police-controlled atmosphere. In *Miranda*, 384 U.S. at 444, 86 S.Ct. at 1612, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Thus, before a confession or inculpatory statement made during a custodial interrogation may be introduced into evidence, the State must prove beyond a reasonable doubt that the defendant was first advised of his *Miranda* rights, that he voluntarily and intelligently waived those rights, and that the statement was made freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. LSA-C.Cr.P. art. 703(D); LSA-R.S. 15:451; *Hunt*, 25 So.3d at 754; *see State v. Patterson*, 572 So.2d 1144, 1150 (La. App. 1 Cir. 1990), *writ denied*, 577 So.2d 11 (La. 1991). Whether or not 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. The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. *State v. Williams*, 01-0944 (La. App. 1 Cir. 12/28/01), 804 So.2d 932, 944, *writ denied*, 02-0399 (La. 2/14/03), 836 So.2d 135.

Although the burden of proof is generally on the defendant to prove the grounds recited in a motion to suppress evidence, such is not the case with the motion to suppress a confession. In the latter situation, the burden of proof is on the State to prove the confession's admissibility. *See* LSA-C.Cr.P. art. 703(D). Since the general admissibility of a confession or inculpatory statement is a question for the trial court, its conclusions on the credibility and weight of the testimony are accorded great weight and will not be overturned unless they are not supported by the evidence. *See Patterson*, 572 So.2d at 1150. In determining whether the trial court's 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. *State v. Chopin*, 372 So.2d 1222, 1223 n.2 (La. 1979).

The defendant first argues that the inculpatory statement he made at H.V.'s house, "minutes" after being shot, was made under duress and without having been informed of his *Miranda* rights. According to the defendant, the "medics were trying to render emergency treatment to [him] and the officers were in his face trying to obtain a statement." The defendant further asserts that the officers "claim" he was advised of his *Miranda* rights, but "we only have their assertion of this as that very important part doesn't appear on the recording."

The two officers who found the defendant hiding under H.V.'s bed the day after he shot and killed A.V. were Detective Martin and Detective Thomas Wheeler, with the Tangipahoa Parish Sheriff's Office. According to Detective Wheeler's testimony at trial, Detective Martin lifted up the bed while he (Detective Wheeler) stood near with his weapon drawn. Both detectives saw the defendant lying on his stomach, with a gun in his hand. Detective Wheeler yelled at the defendant to drop the gun. The defendant did not drop the gun, so Detective Wheeler fired several shots at the defendant. Detective Martin let go of the bed, and the detectives left the bedroom. The defendant had been struck once by a gunshot to the shoulder.

According to Detective Martin's testimony, despite coaxing by the police, the defendant refused to come out from under the bed. Detective Martin saw the gun the defendant had been holding by his (the defendant's) right knee. Having decided to rush the defendant, several police officers, including Detective Martin, quickly re-entered the bedroom. Detective Martin, on his knees and stomach, grabbed the gun, while other officers grabbed the defendant from under the bed. Detective Martin passed the gun to a nearby officer. He explained that during the scramble to apprehend the defendant, the defendant ended up in his lap. At that point, Detective Martin advised the defendant that he was under arrest and *Mirandized* him. The defendant, without any prompting, began explaining, what Detective Martin referred to as, a "seemingly rehearsed story." Detective Martin took out his cell phone and used it to record what the defendant was saying.[5] Since the defendant had already begun talking before Detective Martin got to his phone, the beginning of the defendant's statement is not recorded or transcribed. Detective Martin testified at trial that the missing part of the statement was the

[5] Jessica Jackson, an Acadian Ambulance paramedic, testified at the motion to suppress hearing that she was on the scene (in H.V.'s bedroom) at this time. According to Paramedic Jackson, when the defendant began talking, one or two officers handed her their cell phones to record the defendant. It is not clear from the testimony if one of those officers was Detective Martin.

defendant explaining that he had gotten into an altercation with A.V. and that it escalated. In particular, according to Detective Martin's testimony at the motion to suppress hearing, the defendant told Detective Martin that he placed his left hand over A.V.'s mouth, and when she tried to call the police, the defendant threw the phone. The following is the relevant part of the transcription of the defendant's statement after explaining he had gotten into an altercation:

> And she pulled it out and started struggling with it. At that point, I was holding her. She started to call the police first ... I threw it out. I threw the phone out of her hand, and I used one hand, my left hand, to cover her mouth. Since I was pushing back on her mouth to get her to shut up, we fell on top of one another with the gun drawn. And when I fell on her, her thumb was on the trigger ... not thumb ... her finger was on the trigger trying to shoot me. And since I fell on her ... I shot herself once and she continued to struggle pointing the gun at me after she shot herself. And she shot herself the second time on the side of the head because I pulled the gun, and I apparently pulled the gun in just the right way that made her finger pull the trigger.

In denying the motion to suppress this statement, the trial court stated:

> All right. Based on the testimony I heard in toto, if you will, it seems that Paramedic Jackson's testimony seems to support what was testified to by Detective[s] Martin and Fleming. I'm satisfied at some point in time the Defendant did say, "I don't want to speak. I don't want to talk. I want an attorney." But based upon an independent, nonlegal witness, the paramedic, Ms. Jackson, she says that he began to -- after he said, "I don't want to talk anymore. I want an attorney," began to make a statement all on his own. It was not in response to any questions that were being asked of him. She corroborates Detective Martin's testimony in that Martin said, "He began to make a statement. When I realized he was actually making a statement, I felt like I should record it."
>
> So he then handed her the phone. She said some detective handed her a phone and she recorded it.
>
> So it certainly seems to me at that point in time, her testimony, even though she is not an expert, is that he appeared to be calm. He appeared to understand what was going on, and his vital signs, which she physically took, all appeared to be normal in spite of the fact he had just been shot.
>
> So it appears as it relates to this statement, that the statement was given freely and voluntarily by Mr. Pourciau; so, the motion to suppress is denied as it relates to this statement.

We find no reason to disturb the trial court's ruling denying the motion to suppress the defendant's inculpatory statement. Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. *State v. Maten*, 04-1718 (La. App. 1 Cir. 3/24/05), 899 So.2d 711, 721, *writ denied*, 05-1570 (La. 1/27/06), 922 So.2d 544. Detective Martin testified that he *Mirandized* the defendant. This was a credibility issue, and the trial court chose to believe the detective. Further, Detective Walter Fleming, with the Tangipahoa Parish Sheriff's Office, testified at the motion to suppress hearing that he was at the scene when the defendant was apprehended. Detective Fleming testified that he helped pull the defendant out from under the bed. He also indicated that Detective Martin advised the

defendant of his *Miranda* rights. When asked at what point the defendant was advised of his rights, Detective Fleming testified, "Right when I pulled him from underneath the bed, he practically landed in Detective Martin's lap. And almost right after that, he went to -- he told him -- advised him of his *Miranda* rights."

Also, despite the defendant having been shot, we do not find his statement was made under duress. The defendant appeared more than willing, if not eager, to tell his side of the story. Paramedic Jessica Jackson testified at the motion to suppress hearing that the defendant had sustained a "small puncture wound" to the shoulder, and that it was not life threatening. She also indicated that all his vital signs were normal, and there was no "visible distress." Detective Martin, also a registered emergency medical technician, testified at both the motion to suppress hearing and trial that he treated the defendant's shoulder wound. At both the hearing and trial, when asked about the defendant's responsiveness, Detective Martin stated, "He was eerily calm." When asked at trial what he meant by that, Detective Martin stated: "That there was no change in pitch in his statement to me in the way he was talking. It was just a flat tone and looking me in the eyes, wanting to gain my full attention."

When asked at the motion to suppress hearing if the defendant was conscious or could talk after being shot, Detective Fleming testified, "He was conscious and he was coherent. Remarkably coherent." Detective Fleming also indicated that, despite the gunshot wound, the defendant was "remarkably calm." Detective Fleming further testified that the defendant never asked for an attorney. According to Paramedic Jackson, while still on the floor and being tended to, the defendant began talking, without prompting, about "how he killed A.V." When he finished his story, the defendant said he was not saying anything else without an attorney. At this point, Paramedic Jackson testified that the police stopped all questioning.

Dr. Jay Smith, the emergency room physician at North Oaks Hospital who treated the defendant, testified at the motion to suppress hearing that the defendant had a single gunshot wound to his right shoulder area, there was no damage to any major organ or vascular structures, and his vital signs were all "very stable throughout the time." Tiffany Pizzitola, a registered nurse who treated the defendant at North Oaks Hospital, testified at the motion to suppress hearing that the defendant's vital signs were stable and that he could talk. She also indicated the defendant was released from the hospital about four hours later. The defendant wanted to stay at the hospital. When it was explained to him that there was no medical reason

for him to stay and that he would be discharged, the defendant told Nurse Pizzitola that he was going to come back and kill everyone.

Based on the foregoing, we find the trial court did not err in admitting the defendant's statement made at H.V.'s house. The State carried its burden of proving he was *Mirandized* before making the inculpatory statement and that the statement was freely and voluntarily given.

The defendant next argues that the inculpatory statement he made at the hospital was not freely and voluntarily made because he had invoked his right to silence and asked for a lawyer before he made the statement. Further, the defendant had been given morphine while in the hospital and, as such, he argues he was not in the proper mental state to answer questions.

The trial court denied the motion to suppress, without reasons. We see no reason to disturb the trial court's ruling. According to his testimony at the motion to suppress hearing, Deputy Michael Drude, with the Tangipahoa Parish Sheriff's Office, rode with the defendant in the ambulance and, for security purposes, stayed with the defendant in the hospital room. During this time, Detective Dale Athmann (lead detective), with the Tangipahoa Parish Sheriff's Office, went to the hospital to interview the defendant. Detective Athmann *Mirandized* him, and the defendant said he understood his rights. The defendant did not give Detective Athmann a statement, so the detective left the hospital. Deputy Drude was present when Detective Athmann *Mirandized* the defendant.

According to Deputy Drude's testimony at both the motion to suppress hearing and trial, about thirty minutes after Detective Athmann left the hospital room, Deputy Drude remained in the room with the defendant handcuffed to the hospital bed. The defendant kept opening and closing his eyes and looking at Deputy Drude. Finally, Deputy Drude asked the defendant if he could do anything for him. Deputy Drude then asked the defendant if he wanted him (the deputy) to tell his parents or his attorney anything. The defendant informed the deputy that he (the deputy) did not know his (the defendant's) story. Deputy Drude asked the defendant not to tell his story because he did not know anything about it. Further, Deputy Drude was at the hospital only for security measures, not for investigative purposes. The defendant, nevertheless, began speaking to Deputy Drude. According to Deputy Drude, the defendant told him that he left his jacket in front of H.V.'s house to see how quickly an officer would respond

to the scene. After an officer came to the house and left, and after he saw H.V.'s father and H.V. leave the house, he knew that A.V. would be alone. He confronted her near the rear of the house, put his hand over her mouth, and put a knife to her throat. He backed her up until she fell into a chair. She grabbed the defendant's pistol, they struggled, and the gun discharged, striking her in the chest. They continued to struggle and the gun went off a second time, striking her in the head. The defendant continued that if A.V. would have just given him the guns in the cabinets, he would have let her go.

Detective Gary Baham, with the Tangipahoa Parish Sheriff's Office, testified at trial and at the motion to suppress hearing that attorney J. Garrison Jordan contacted him, and told him that he was representing the defendant and that he was invoking the defendant's right to remain silent on his behalf. Mr. Jordan also sent a letter to Detective Baham, confirming this. The letter was dated April 24, 2013, and appears to have been faxed at about 9:36 a.m. Detective Baham contacted Deputy Albert Sharp, with the Tangipahoa Sheriff's Office, who was at the hospital with the defendant. Detective Baham told Deputy Sharp the defendant was not to be questioned. Later, when Deputy Sharp saw Deputy Drude talking to the defendant, Deputy Sharp called Detective Baham and informed him of the situation. Detective Baham told Deputy Sharp to tell Deputy Drude to terminate any questioning of the defendant. Deputy Sharp testified at trial that at this point he called Deputy Drude out of the room, informed him of the situation, and told him to call Detective Baham. Deputy Drude left the hospital room and did not return. Deputy Sharp testified he heard the defendant and Deputy Drude talking but did not specifically hear any of the conversation.

The defendant in brief suggests that Deputy Drude violated his invocation of his right to silence. The defendant further suggests he invoked his right to silence before he went to the hospital when, toward the end of his statement he gave in H.V.'s bedroom, he said that he did not want to talk anymore, that he did not like talking to the police, and they were not there to help you. The defendant also avers his rights were violated by law enforcement who questioned him after being made aware he had invoked his right to counsel.

We note initially that the defendant's comment in his first statement, *after* he had already inculpated himself, that he did not want to talk to the police anymore, was not an invocation of his right to remain silent. Moreover, even if it was such an invocation, the police did not further question the defendant after this time. As such, when the defendant began

speaking again to Deputy Drude at the hospital, this constituted a waiver of any prior invocation of his right to remain silent or for an attorney.

Whether the police have scrupulously honored a defendant's right to cut off questioning is a determination made on a case-by-case basis under the totality of the circumstances. *State v. Leger*, 05-0011 (La. 7/10/06), 936 So.2d 108, 125, *cert. denied*, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). In *State v. Prosper*, 08-839 (La. 5/14/08), 982 So.2d 764, 765, our supreme court found that, given the totality of the circumstances, the defendant's comment, "I don't have nothing else to say," during a police interview did not reasonably suggest a desire to end all questioning or remain silent, where the defendant continued making other statements. *See State v. Hebert*, 08-0003 (La. App. 1 Cir. 5/2/08), 991 So.2d 40, 46, *writs denied*, 2008-1526, 1687 (La. 4/13/09), 5 So.3d 157, 161 (where, when the defendant at the start of the interview indicated he did not want to talk to the police, and the detective continued to ask him general questions, this court found that the police did not engage in conduct that destroyed the defendant's confidence in his right to cut off questioning, that the defendant remained in control of whether or not he would talk to the police, and the police did not browbeat the defendant into making a statement). *See State v. Watson*, 14-0350 (La. App. 1 Cir. 9/19/14), 2014 WL 4668773 (unpublished), *writ denied*, 14-2211 (La. 6/19/15), 172 So.3d 649.

Similarly, in this case, the defendant at the scene said he did not want to talk anymore. Sometime later, however, at the hospital, the defendant told Deputy Drude about A.V.'s death, despite the deputy telling the defendant he did not want to hear his story. Deputy Drude specifically noted at trial that, regarding his role toward the defendant, there was no interrogation involved. Deputy Drude also made clear that he never asked the defendant any questions in the ambulance, he had never seen the letter Mr. Jordan sent to Detective Baham, and no one told him that the defendant was represented. It is clear, thus, the defendant had no desire to remain silent but instead voluntarily, and without solicitation, spoke to Deputy Drude.

In *Davis v. United States*, 512 U.S. 452, 460-61, 114 S.Ct. 2350, 2355-56, 129 L.Ed.2d 362 (1994), the United States Supreme Court held that a suspect during questioning who desires the assistance of counsel must unambiguously request counsel. In *Berghuis v. Thompkins*, 560 U.S. 370, 381-82, 130 S.Ct. 2250, 2259-60, 176 L.Ed.2d 1098 (2010), the

Supreme Court found that the rule for invoking the right to remain silent was the same as the *Davis* rule for invoking the right to counsel; that is, the accused who wants to invoke his right to remain silent must do so unambiguously. Even if Mr. Jordan's representation of the defendant immediately attached upon Mr. Jordan's communication to Detective Baham, and despite the defendant himself having no knowledge of this, the defendant's unsolicited statement to Deputy Drude waived any implicit right of the defendant to have all questioning cease. *See Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981); *State v. Montejo*, 06-1807 (La. 1/16/08), 974 So.2d 1238, 1251-58, *vacated on other grds*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). That is, the defendant's statement to Deputy Drude, despite never being interrogated by the deputy, reflected an intent by the defendant to continue his exchange with law enforcement. *See State v. Robertson*, 97-0177 (La. 3/4/98), 712 So.2d 8, 31, *cert. denied*, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998).

The defendant also suggests his statement at the hospital was not freely and voluntarily given because he was under the influence of morphine when he spoke to Deputy Drude. When a confession is challenged on the ground that it was not freely and voluntarily given because the defendant was intoxicated at the time of the confession, the confession will be inadmissible only when the intoxication is of such a degree as to negate the defendant's comprehension and to make him unconscious of the consequences of what he is saying. Whether intoxication exists and is sufficient to vitiate the voluntariness of a confession are questions of fact, and the ruling of the trial court on this issue will not be disturbed unless unsupported by the evidence. *State v. Williams*, 602 So.2d 318, 319 (La. App. 1 Cir.), *writ denied*, 605 So.2d 1125 (La. 1992).

Nurse Pizzitola testified at the motion to suppress hearing that the defendant was given five milligrams, or half a dosage, of morphine. She indicated that the medicine did not cause any change in his pulse rate or blood pressure, and it did not cause any kind of state of euphoria or delirium. Dr. Smith, the emergency room physician, testified at the motion to suppress hearing that the defendant was administered five milligrams of morphine, an amount that "would be a pretty minor, small dose for an adult man." Dr. Smith indicated that, other than helping pain, the morphine did not have any noticeable effects on the defendant.

There was nothing in the defendant's statement at the hospital that suggested his awareness and understanding were in any way affected because of the small amount of morphine he was given. There was no evidence of intoxication to any extent. Accordingly,

nothing in the record before us suggests that the defendant's alleged impaired state was of such a degree as to negate his comprehension or make him unaware of the consequences of what he was saying to Deputy Drude. We find the trial court's ruling is supported by the evidence and, thus, will not be overturned. *See Williams*, 602 So.2d at 319; *Patterson*, 572 So.2d at 1150.

Moreover, even if we did find the trial court's admission of the unrecorded inculpatory statement into evidence to be erroneous, such admission would have been harmless error. The admission of a confession or inculpatory statement is a trial error, similar in both degree and kind to the erroneous admission of other types of evidence, which must be reviewed to determine whether the error was harmless. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991); *State v. Harris*, 01-2730 (La. 1/19/05), 892 So.2d 1238, 1261, *cert. denied*, 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005). An error is harmless if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error. *State v. Koon*, 96-1208 (La. 5/20/97), 704 So.2d 756, 763, *cert. denied*, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997).

As noted, the evidence overwhelmingly established the defendant shot and killed A.V. The day after A.V. was killed, the defendant was found hiding in A.V.'s house, beneath H.V.'s bed. When he was apprehended, he still had the gun he used to kill A.V. Also, with his unsolicited statement to Detective Martin immediately following his arrest and apprehension, the defendant put himself, and only himself, at the scene where, and when, A.V. was killed. Considering the foregoing, we are convinced that even had the defendant's inculpatory statement at the hospital been erroneously introduced into evidence, the guilty verdict actually rendered was surely unattributable to the error. *See* LSA-C.Cr.P. art. 921; *Sullivan*, 508 U.S. at 279, 113 S.Ct. at 2081.

Accordingly, the trial court did not err or abuse its discretion in denying the motion to suppress the statement defendant made at the hospital. By the time the defendant had made this statement, he had been twice *Mirandized*, once by Detective Martin and once by Detective Athmann. Unsolicited and unprompted, the defendant offered an explanation to Deputy Drude of how A.V. died, in the hopes, it appears, of exculpating himself at least to some extent. In any event, the defendant's statement was freely and voluntarily given. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, the defendant argues that the failure of two jurors to participate in deliberations deprived him of a fair trial.

The defendant was convicted of second degree murder by a ten to two verdict. Following the reading of the verdict, defense counsel asked that the jury be polled. The trial court stated to the jury, "I am going to ask you if this was your verdict and a simple yes or no will be sufficient." When asked if this was their verdict, ten of the jurors responded "yes" and two of the jurors responded they were "undecided." It appears polling sheets were not used and, if they were, they were not made part of the appellate record.

The defendant asserts in brief that two jurors "did not participate in the deliberations." He further argues that the "undecided" votes violated LSA-C.Cr.P. art. 812. These assertions are baseless. There is nothing in the record before us that indicates these two jurors did not participate in deliberations, nor has the defendant pointed to any instance of this alleged lack of participation. The "undecided" votes were tantamount to "no" votes. The ten jurors who voted "yes" satisfied the requirement of LSA-C.Cr.P. art. 782(A), and as such, the guilty verdict is valid.[6]

Moreover, the defendant's reliance on LSA-C.Cr.P. art. 812 is misplaced. Article 812 provides:

> The court shall order the clerk to poll the jury if requested by the state or the defendant. It shall be within the discretion of the court whether such poll shall be conducted orally or in writing by applying the procedures of Paragraph (1) or Paragraph (2) of this Article.
>
> (1) Oral polling of the jury shall consist of the clerk's calling each juror, one at a time, by name. He shall announce to each juror the verdict returned, and ask him, "Is this your verdict?" Upon receiving the juror's answer to the question, the clerk shall record the answer.
>
> If, upon polling all of the jurors, the number of jurors required by law to find a verdict answer "Yes," the court shall order the clerk to record the verdict and the jury shall be discharged. If, upon polling all of the jurors, the number required to find a verdict do not answer "Yes," the jury may be remanded for further deliberation, or the court may declare a mistrial in accordance with Article 775.
>
> (2) The procedure for the written polling of the jury shall require that the clerk hand to each juror a separate piece of paper containing the name of the juror and the words "Is this your verdict?" Each juror shall write on the slip of paper the words "Yes" or "No" along with his signature. The clerk shall collect the

[6] The punishment for second degree murder is life imprisonment at hard labor without benefits. *See* LSA-R.S. 14:30.1(B). Louisiana Code of Criminal Procedure article 782(A) provides in pertinent part, "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."

> slips of paper, make them available for inspection by the court and counsel, and record the results. If a sufficient number of jurors as required by law to reach a verdict answer "yes" the clerk shall so inform the court. Upon verification of the results, the court shall order the clerk to record the verdict and order the jury discharged. If an insufficient number required to find a verdict answer "Yes," the court may remand the jury for further deliberation, or the court may declare a mistrial in accordance with Article 775.

The defendant argues that LSA-C.Cr.P. art. 812 requires each juror to either answer "yes" or "no" as to the verdict rendered. This is a requirement, however, under LSA-C.Cr.P. art. 812(2), where a *written* polling of the jury is used. The polling in the case was oral, and as such, LSA-C.Cr.P. art. 812(1) was satisfied. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.