STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0834

STATE OF LOUISIANA

VERSUS

JOSHUA MICHAEL MITCHELL

Judgment rendered: SEP 21 2017

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
No. 29246 Div. "F"

The Honorable Elizabeth P. Wolfe, Judge Presiding

* * * * *

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* * * * *

BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

HOLDRIDGE, J.

The defendant, Joshua Michael Mitchell, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (count 1); and obstruction of justice, a violation of La. R.S. 14:130.1 (count 2). The defendant pled not guilty and not guilty by reason of insanity to the charges. During the first trial, the trial court declared a mistrial because there were references to other crimes evidence in the defendant's taped confession. The State took writs, which were denied by this court. The defendant was retried, wherein he maintained his dual plea of not guilty and not guilty by reason of insanity. He was found guilty as charged on both counts. The defendant filed a motion for postverdict judgment of acquittal, which was denied. For the second degree murder conviction, the defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the obstruction of justice conviction, he was sentenced to five years imprisonment at hard labor. The sentences were ordered to run concurrently. The defendant now appeals, designating three assignments of error. We affirm the convictions and sentences.

FACTS

On the night of February 25, 2013, Brandon Parnell picked up his friend, the defendant, in his white Chevrolet 2600 van and they went to Laguna Beach Daiquiris ("the bar") on Florida Boulevard in Denham Springs. The defendant was still upset with Brandon because Brandon had stolen the defendant's gun a few weeks prior to this night. After hanging out for a while, they left the bar a little after 10:00 p.m. While Brandon was driving around, the defendant produced a Taurus .38 Special revolver and shot Brandon once in the head, killing him. The defendant drove the van back to the house he was staying at on Michelle Street in

Denham Springs and picked up his friend Kristy Hasty.[1] The defendant also got some bleach from the house.

Throughout the night (and early morning of February 26), Brandon drove around, disposing of the evidence of the killing. The defendant drove to downtown Baton Rouge, near the U.S.S. Kidd, where he and Kristy took the clothes off Brandon's body and bleached the body. Kristy threw the clothes in a dumpster. The defendant then drove to a wooded area off of Old Hammond Highway and dumped items from the van that had blood on them. The defendant then drove to the Blind River Canal in St. James Parish. The defendant and Kristy threw Brandon's body in the canal. The defendant then drove to a car wash on Memory Lane off of Juban Road in Denham Springs, and washed out the van.

The defendant hid out at a residence on Walker North Road in Walker, until he was apprehended by the police about ten days later. The defendant was taken to the Livingston Parish Sheriff's Office and questioned. In a recorded statement, the defendant admitted that he shot and killed Brandon. The defendant also provided the detectives detailed information of his actions following the killing, wherein he tried to dispose of any evidence of the murder. The defendant's recorded statement was played for the jury.

The defendant testified at trial. The defendant testified that he was sexually abused as a child. He was also sexually abused by a teacher's aide at a residential treatment facility he was staying at when he was an adolescent. According to the defendant, he shot Brandon because, when they were riding in the van, Brandon touched the defendant's leg. This sexual gesture upset the defendant because it reminded him of his past.

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[1] "Kristy" is the correct spelling of her name. Throughout the appellate record, she is incorrectly referred to as "Christy."

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in overruling the defendant's objection to the State's improper argument, and it abused its discretion in denying the motion for mistrial. Specifically, the defendant contends his motion for mistrial should have been granted because, during closing argument, the State referred to the defendant's ability to call any witness he wanted, as well as his failure to call a particular witness.

The defendant argues in brief the trial court erred in failing to grant a mistrial for inappropriate comments made by the State in the opening statement and closing arguments. The first issue regards the State informing the jury in opening that, after the defendant killed Brandon, he went home and picked up his friend Kristy. The defendant then had Kristy help him get rid of Brandon's clothes and dispose of Brandon's body. Defense counsel asked for a mistrial because Kristy was a witness that could not be found and would not be testifying a trial. According to defense counsel, the State's mentioning of Kristy was in violation of the defendant's right to confront witnesses against him. Defense counsel suggested that this testimony about Kristy was in violation of the trial court's ruling on a pretrial motion to exclude statements by certain witnesses. The trial court found no confrontation violation and denied the motion for mistrial.

A mistrial may be ordered, and in a jury case the jury dismissed, when there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law. La. Code Crim. P. art. 775(3). A mistrial is a drastic remedy which should only be declared upon a clear showing of substantial 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.

Because the defendant's argument here is baseless, we find no reason to disturb the trial court's denial of the motion for mistrial. At the outset, we note that the State did not violate the trial court's pretrial ruling regarding the exclusion of statements. About a week before trial on October 15, 2015, one of the issues addressed and ruled on was for a motion for exclusion of all evidence in violation of the defendant's right to confrontation. Defense counsel sought to exclude evidence, particularly "statements or any mention of their statements through inadmissible hearsay" of certain witnesses who would not be testifying at trial, including Kristy. The trial court granted this motion.

When the State mentioned Kristy in its opening statement, it made no references to any statements by or about Kristy. There was no reference to any hearsay or anything accusatory said by Kristy about the defendant and, as such, there was no confrontation violation of the defendant's right to confront his accuser. As noted by the trial court in its ruling denying the motion for mistrial:

> And the Motion to Exclude Statements by Witnesses as Hearsay that we had a ruling on last week, October 15, was against statements by [Kristy] being offered - thank you - into evidence or being offered against the defendant. In this opening statement, Mr. Belser stated that [Kristy] went with the defendant to clean and dispose of the body, something to that effect. Her - merely the fact that she was mentioned as being at the crime scene or being with him is - does not go against my ruling as to the hearing on those statements by her that will be offered. There are no statements by her that will be offered, so the preliminary hearing, I don't find there's any violation on that in my granting of the Motion to Exclude Statements by Witnesses Hearsay. There's no statement by her at this time to exclude. Underlying that, the fact that she can't be found or isn't – hasn't been found will not be called and he's got a right to confront a witness against him, she's not a witness against him. She's not being

> offered as a witness against him. She's just being mentioned as being at the crime scene with him or right after the crime scene. So, for those reasons, I'm denying the motion[.]

Moreover, the defendant, himself, discussed Kristy's involvement in helping him dispose of evidence. In his recorded interview with Lieutenant Brandon Browning, with the Livingston Parish Sheriff's Office, and Detective Brett Forsythe, with the St. James Parish Sheriff's Office, the defendant admitted that he shot and killed Brandon. The defendant then went into detail about how Kristy rode around with him in the van trying to decide what to do with the dead body. According to the defendant, Kristy helped him get rid of Brandon's clothes, and she helped him dump the body over a bridge, into water. The defendant's recorded statement was introduced at trial and played for the jury.

Finally, we note that the State's reference to Kristy in its opening statement was an integral part of its case in proving the second charge against the defendant, obstruction of justice (by tampering with evidence). See La. R.S. 14:130.1. The State addressed these issues when it argued against the defendant's motion for mistrial:

> The [S]tate will not be calling [Kristy]. The only information that I would be eliciting in regards to [Kristy] is her participation after the murder was committed and that comes in through the defendant[']s own statement. The [S]tate will not be offering any statements made by [Kristy]. So, I don't see [any] confrontation violation here.

Next, the defendant argues that the State made three improper comments during closing argument, for which the trial court should have granted a mistrial, namely: the State said the defense made no attempt to find Kristy; the State said the defendant had two prior felony convictions, for which he did not plead not guilty and not guilty by reason of insanity; and the State said that the defendant was "well-prepped" for his testimony at trial.

Louisiana Code of Criminal Procedure articles 770 and 771 govern improper comments made during closing arguments and authorize the trial court to correct a prosecutor's prejudicial remarks by ordering a mistrial or admonishing the jury, at the defendant's request. Louisiana Code of Criminal Procedure article 770(2) mandates a mistrial, upon motion of a defendant, when a remark or comment is made by the district attorney within the hearing of the jury during the trial or in argument and refers directly or indirectly to "[a]nother crime committed or alleged to have been committed by the defendant as to which evidence is not admissible."

Louisiana Code of Criminal Procedure article 771 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, or the state, in the mind of the jury:
>
> (1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770 ...
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> * * * * *
>
> 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.

Closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of evidence, to conclusions of fact that may be drawn therefrom, and to the law applicable to the case. Further, the State's rebuttal shall be confined to answering the argument of the defendant. See La. Code Crim. P. art. 774. Prosecutors are allowed wide latitude in choosing closing argument tactics. See **State v. Draughn**, 2005-1825 (La. 1/17/07), 950 So.2d 583, 614, cert. denied, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007). The trial judge has broad discretion in controlling the scope of closing arguments, and this court will not reverse a conviction on the basis of improper closing argument unless

thoroughly convinced that the remarks influenced the jury and contributed to the verdict. See **State v. Prestridge**, 399 So.2d 564, 580 (La. 1981). See also **Draughn**, 950 So.2d at 614.

The trial court in the instant matter instructed that opening statements and closing arguments were not evidence. Much credit should be accorded to the good sense and fairmindedness of jurors who have seen the evidence and heard the argument, and have been instructed by the trial judge that arguments of counsel are not evidence. See **State v. Mitchell**, 94-2078 (La. 5/21/96), 674 So.2d 250, 258, cert. denied, 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996).

In its rebuttal closing argument, the State said it could not find Kristy and that the defendant never tried to find her. Specifically, the State argued:

> Here's what I find funny about what his statement to Stormy[2] and what she says happened and also to what he tells Detective Browning about talking to Stormy as well, is he never tells Stormy about any of this. He wants you to believe that he told [Kristy] that about all - he said the unwanted sexual advances by Brandon Parnell, but never tells Stormy even though he says in his statement to Detective Browning she was like his sister. Awfully convenient that he would tell [Kristy], the one person we cannot find. I also find it convenient that and interesting that the [S]tate has put forth evidence for you that we have attempted to try to find [Kristy], but the defense hasn't. Have you heard any testimony from the defense where they've tried to find this witness who could back up what [the defendant] is trying to get you to believe? No; you haven't.

During trial, Detective Ben Bourgeois, with the Livingston Parish Sheriff's Office, testified that they tried to find Kristy, but could not locate her. The defendant argues in brief that what the State said in closing argument about Kristy assumed facts not in evidence, and that, since the State could not locate her and would not be calling her to testify, its argument inappropriately shifted the burden of proof.

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[2] Stormy McFee was a friend of the defendant who let him move into her house. Kristy lived with them. Stormy testified at trial that the next morning after the defendant killed Brandon, the defendant told Stormy that "he offed a n----r." She then stated the defendant told her that he had shot Brandon.

In denying the defendant's motion, the trial court ruled:

> Detective Ben Bourgeois's testimony addressed the fact the [S]tate attempted to find [Kristy] and the argument that the defendant did not try to find her is simply argument. It wasn't a fact in evidence, but it was an argument as to what the evidence did or did not show. I'm going to deny that finding it's not prejudicial to the defendant so that he cannot receive a fair trial.

While we find no reason to disturb the trial court's denial of the motion for mistrial regarding the State's comment on the unavailability of Kristy, it must be pointed out that the State's reason for mentioning this in closing argument was not improper for the following reasons.

The defendant testified at trial on direct examination that when he was younger he had been sexually abused by his sister, step-grandfather, and a teacher's aide at a residential treatment facility he had stayed at. When the defendant was riding with Brandon on the way to Laguna Beach Daiquiris (the bar), they began talking about the gun Brandon had stolen from the defendant a few weeks before. According to the defendant, Brandon told the defendant that there were other ways he (Brandon) could pay the defendant back. The defendant took Brandon's comment as a sexual suggestion. The defendant testified that when he was riding in the van on the way to the bar, he felt overpowered by Brandon.[3] After going to the bar, they got back in the van and just drove around. According to the defendant, Brandon looked at the defendant and grabbed his (the defendant's) left thigh. The defendant "flashed out," retrieved a gun from under his sweater, and shot Brandon. Later on direct examination, the defendant testified that he told Kristy everything regarding killing Brandon. According to the defendant, Kristy was the only person whom he told about what exactly had happened that night.

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[3] The defendant was 6'9'' tall and weighed 200 pounds. Brandon at the time of his death was 5'10'' and weighed 167 pounds.

When the defendant confessed to killing Brandon during his recorded interview with the police, he never mentioned most of what he testified to at trial regarding why he came to kill Brandon. That is, the defendant stated in his interview that when hanging out with Brandon at the bar, he (the defendant) started getting angry again over Brandon stealing his gun. The defendant continued in his statement that when they left the bar and began riding around, the defendant got himself, in effect, so worked up over his gun being stolen, that he shot Brandon. In this interview, the defendant mentioned nothing about feeling overpowered by Brandon; he said nothing about any sexual suggestions or gestures by Brandon; he said nothing about Brandon touching his leg when they were in the van; he said nothing about past sexual abuse. In other words, it is only at trial that the defendant for the first time suggests that he shot Brandon because of an unwanted sexual advance and his unresolved issues due to his past sexual abuse.

Accordingly, since there was no one else to testify to verify anything the defendant said at trial regarding why he killed Brandon, defense counsel sought on direct examination to establish that Kristy knew "everything" and she knew "exactly" why the defendant killed Brandon. As defense counsel knew, however, Kristy could not be located and would not be testifying at trial.

The State's reference to Kristy in rebuttal closing argument, thus, was to point out the discrepancy between what the defendant told the police and what the defendant testified to at trial regarding the reason why he killed Brandon. The State made clear it attempted to locate Kristy, but could not find her. In pointing out that there was no evidence that the defense sought to find the one witness who could corroborate the defendant's story of why he killed Brandon, the State was implying that the defendant had the same subpoena power as the State. See **State v. Uloho**, 2004-55 (La. App. 5th Cir. 5/26/04), 875 So.2d 918, 927-28, writs

denied, 2004-1640 (La. 11/19/04), 888 So.2d 192, 2008-2370 (La. 1/30/09), 999 So.2d 753. Moreover, even if improper, the State's remarks in rebuttal clearly did not contribute to the verdict or make it impossible for the defendant to obtain a fair trial. See La. Code Crim. P. art. 775; **Uloho**, 875 So.2d at 928.

The next comment by the State in closing argument for which the defendant sought a mistrial was that the defendant had two prior convictions for sexual battery and simple burglary. The State argued that the defendant did not plead insanity for either of these convictions. Defense counsel argued that under La. Code Evid. art. 609.1, the only information permitted concerning prior convictions is the date, name, and charge and, as such, the State exceeded the scope of Article 609.1.

In denying the motion for mistrial, the trial court made the following findings:

> The fact the defendant never pled to not guilty by reason of insanity on the two prior charges was brought out in argument. I'm looking at 609.1 of the Code of Evidence. Code 609.1, Code of Evidence, says that only the date of conviction and the name of the charge is admissible as evidence. Now, it doesn't say as evidence in the code, but as evidence. And I continually say what the [S]tate says and defense say in opening and closing arguments is not evidence. It's not something that I rule on admissibility of. That's an argument by the attorney, not testimony. Defendant is, I mean, the [S]tate is entitled to argue the fact that he didn't plead not guilty by reason of insanity on those two. This was a separate thing. I don't find it prejudices the defendant to the extent that he can't receive a fair trial, and I don't find that it's inadmissible - it's not evidence that it's admissible or not, but it's certainly something the [S]tate can argue.

We see no reason to disturb the trial court's ruling, but add the following observations. The defendant placed his mental status front and center at trial by changing his plea - *after* two doctors found that he was competent to stand trial - from not guilty to not guilty by reason of insanity. The State then filed a motion for examination of the defendant, which sought to have the doctors who had

already been appointed on the sanity commission to examine the defendant to determine his mental condition at the time of the offense. The defendant took the stand at trial and testified he had prior convictions for sexual battery and simple burglary. The State, thus, was clearly permitted to probe the defendant's prior convictions, at least insofar as how he pled when he was first charged with these crimes. And even if the *type* of plea is considered a detail of the conviction or extrinsic evidence outside the scope of La. Code Evid. art. 609.1, we find that evidence of whether the defendant had any prior convictions,[4] wherein he may have claimed insanity in the first instance before ultimately pleading guilty, the State had a good faith basis for questioning the defendant about his previous history and, as such, any error in allowing this line of questioning by the State was harmless. See **State v. Leonard**, 2005-1382 (La. 6/16/06), 932 So.2d 660, 667-68.

Finally, we note that at trial, the defendant was asked on cross-examination if for his two prior convictions he was found not guilty by reason of insanity. The defendant explained that he was convicted by pleading guilty. There were no objections to this line of questioning, contemporaneous or otherwise. Louisiana's contemporaneous objection rule provides that an irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence. See La. Code Crim. P. art. 841(A); **State v. Fisher**, 94-603 (La. App. 3rd Cir. 11/2/94), 649 So.2d 604, 609, writ denied, 94-2930 (La. 4/7/95), 652 So.2d 1344. Thus, when the State discussed the defendant's guilty pleas in closing, it was merely repeating what had otherwise been admitted into evidence at trial. See **State v. Butler**, 30,798 (La. App. 2nd Cir. 6/24/98), 714 So.2d 877, 890-91, writ denied, 98-2217 (La. 1/8/99), 734 So.2d 1222; **State v. Jackson**, 629 So.2d 1374, 1385

[4] We realize the defendant's prior convictions were based on guilty pleas and, as such, a *not* guilty by reason of insanity plea has no place in the context of a guilty plea. Whether or not the State was confused on this issue is unclear, but it appears the State was asking the defendant how he initially pled to the charges, prior to agreeing to plea deals and pleading guilty.

(La. App. 2nd Cir. 1993), writ denied, 94-0201 (La. 5/6/94), 637 So.2d 1046. Defense counsel, therefore, could not complain after closing arguments about an issue that should have been brought to the trial court's attention during trial.

The last comment made by the State in closing argument for which the defendant sought a mistrial was that the defendant was prepped for his testimony. In particular, the State in rebuttal closing argued:

> All they bring to you is the defendant's own self-serving words, and that story has changed so many times. I thought it was interesting - I don't know if you noticed this. Some of you may have caught it, maybe not. But as he's sitting here in this witness chair giving his testimony, very well - prepped testimony mind you, and he's sitting here and as they begin to question him about the abuse of his grandfather he quickly, immediately starts crying and as soon as he's finished talking about that, he immediately stops crying. And I don't know if you caught it, but with the corner of his eye, he then looks up to his defense counsel. Kind of like he's asking is that good enough? Is that what you wanted? [The defendant] has given you completely inconsistent accounts of what has happened of why this all happened, and his story changed yet again while he's under oath.

Defense counsel argued that the State's comments about the defendant's very well-prepped testimony was inappropriate, offensive, and prejudicial to the defendant and that a mistrial should be granted because "there's no way that he could possibly get a fair trial." The trial court noted that what the State argued was "not nice" but denied the motion for mistrial, finding that it did not prejudice the defendant to the extent he could not receive a fair trial.

We find no reason to disturb the trial court's ruling. As previously addressed, there was a marked difference between what the defendant told the police and what the defendant stated at trial for why he killed Brandon. The State in closing took advantage of this disparity and noted that something changed from the time the defendant talked to the police to the time the defendant testified, and implied, perhaps not artfully enough, that the defendant and defense counsel worked out a new theory for why the defendant killed Brandon. We find that the

statements made by the State in closing argument as to what he observed of the defendant on the witness stand was inappropriate and outside of the bounds of proper argument. The prosecutor is not a witness and cannot testify to the actions of the defendant on the witness stand. It is the purview of the jury to watch and evaluate the demeanor of the witnesses on the witness stand and it is not for the prosecutor to give his interpretation. However, a conviction will not be reversed due to an improper remark during closing argument unless the remark influenced the jury and contributed to the guilty verdict. **State v. Martin**, 93-0285 (La. 10/17/94), 645 So.2d 190, 200, cert. denied, 515 U.S. 1105, 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995). Whether the State exceeded the bounds of closing argument or not, we are firmly convinced that these few comments by the State did not influence the jury in any way or contributed to the guilty verdict. See **State v. Sanders**, 93-0001 (La. 11/30/94), 648 So.2d 1272, 1285-86, cert. denied, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996).

Finally, the defendant suggests that the cumulative effect of "the many inflammatory and prejudicial comments from the prosecutor" made a fair trial and fair assessment of the evidence unlikely. These statements made by the prosecutor, according to the defendant, "warranted a mistrial and it was error to not grant them, especially viewing them cumulatively." We found very little to no merit for each claim. The case for accumulation is not somehow made valid by the cumulative effect of meritless claims. See **Mullen v. Blackburn**, 808 F.2d 1143, 1147 (5th Cir. 1987) (per curiam) (rejecting cumulative error claim, noting that "[t]wenty times zero equals zero"). In any event, we find no merit to the defendant's contention that the cumulative effect of the prosecutor's alleged improper arguments was prejudicial. The prosecutorial misconduct the defendant alleges, even if outside the proper scope of closing argument, does not require

relief, singularly or collectively. See **State v. Bridgewater**, 2000-1529 (La. 1/15/02), 823 So.2d 877, 904, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in denying his motions for mistrial on several occasions based on improper comments by witnesses while testifying. The defendant contends that one witness violated his right to confront his accusers and that other witnesses impermissibly commented on other crimes evidence.

The defendant first argues in brief that certain testimony by Detective Bourgeois violated his right to confront his accusers. According to the defendant, this testimony was in direct violation of the trial court's October 15, 2015 ruling (discussed in the first assignment of error), wherein the court granted the defendant's motion to exclude statements or any mention of their statements through inadmissible hearsay of certain witnesses who would not be testifying at trial, including Kristy and Brandon's mother, Cynthia Gill.

The Sixth Amendment to the United States Constitution guarantees an accused in a criminal prosecution the right to be confronted with the witnesses against him. The confrontation clause of the Louisiana Constitution expressly guarantees the accused the right "to confront and cross-examine the witnesses against him." La. Const. of 1974 art. I, § 16. Confrontation rights mean more than the ability to confront witnesses physically. **State v. Borden**, 2007-396 (La. App. 5th Cir. 5/27/08), 986 So.2d 158, 169, writ denied, 2008-1528 (La. 3/4/09), 3 So.3d 470. Their main purpose is to secure for the defendant the opportunity to cross-examine. **Id.** Cross-examination is the primary means by which to test the

believability and truthfulness of testimony, and it provides an opportunity to impeach or discredit witnesses. **State ex rel. L.W.**, 2009-1898 (La. App. 1st Cir. 6/11/10), 40 So.3d 1220, 1226, writ denied, 2010-1642 (La. 9/3/10), 44 So.3d 708.

Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. Code Evid. art. 801(C). Hearsay evidence is not admissible except as otherwise provided by the Code of Evidence or other legislation. La. Code Evid. art. 802; **State v. Leonard**, 2005-42 (La. App. 5th Cir. 7/26/05), 910 So.2d 977, 986, writ denied, 2006-2241 (La. 6/1/07), 957 So.2d 165.

In **Crawford v. Washington**, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365-66, 158 L.Ed.2d 177 (2004), the United States Supreme Court discussed the Confrontation Clause and held that testimonial hearsay statements may be admitted as evidence at a criminal trial only when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. Confrontation errors are subject to the harmless error analysis. **State v. Stokes**, 2014-1562 (La. App. 1st Cir. 6/17/15), 175 So.3d 419, 423. If a confrontation error occurred, a reviewing court must determine whether the error is harmless beyond a reasonable doubt. See **Id.** Factors to be considered by the reviewing court include the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on major points, the extent of cross-examination that was otherwise permitted, and the overall strength of the State's case. **Id.** The verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. **Id.** See **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

The complained of testimony is where Detective Bourgeois stated that he copied part of the surveillance video from the bar to his cell phone and showed it to Brandon's parents. According to the detective, Ms. Gill, indicated that it could be the defendant on the video. Brandon's mother gave Detective Bourgeois the defendant's cell phone number. The other complained of testimony is where Detective Bourgeois stated that he had talked to Kristy. The pertinent exchange is the following:

> Q. All right. Based on your conversations with Ms. McFee, what did you do next?
> A. We then wanted to speak to a roommate of hers, [Kristy].
> Q. All right. Were you able to speak with [Kristy]?
> A. Yes. [Kristy] is a white female who was deaf[.]

At this point, defense counsel objected and moved for a mistrial because Detective Bourgeois mentioned Kristy's name, and because he elicited the possible identity of the defendant through Ms. Gill, both of which violated the defendant's Sixth Amendment right to confront his accusers. The defendant argues in brief that because neither Ms. Gill nor [Kristy] was testifying and Ms. Gill's statement was elicited, it violated the defendant's "right to confront his accuser/identifier."

In denying the motion for mistrial regarding Kristy's name being mentioned by Detective Bourgeois, the trial court stated in pertinent part:

> [My] ruling on . . . October 15, was against statements by [Kristy] being offered . . . into evidence or being offered against the defendant . . . Her - merely the fact that she was mentioned as being at the crime scene or being with him is - does not go against my ruling as to the hearing on those statements by her that will be offered. There are no statements by her that will be offered[.] . . . There's no statement by her at this time to exclude. Underlying that, the fact that she can't be found or isn't – hasn't been found will not be called and he's got a right to confront a witness against him, she's not a witness against him. She's not being offered as a witness against him. She's just being mentioned as being at the crime scene with him or right after the crime scene.

We find no reason to disturb the trial court's ruling. Detective Bourgeois testified that he spoke to Kristy. There was no testimony regarding Kristy beyond this. There was nothing adduced or offered regarding the content of their conversation, and no statements made by Kristy were adduced or offered. In the brief testimonial exchange with Detective Bourgeois regarding Kristy, Kristy was in no way identified or established as a witness against the defendant. Accordingly, since there were no testimonial statements of Kristy, hearsay or otherwise, admitted into evidence, there was no confrontation error.

In denying the motion for mistrial regarding Detective Bourgeois's testimony about what Ms. Gill told him, the trial court stated, in pertinent part:

> I am going to deny that motion. . . . The defense counsel, of course, relies on Criminal Code of Procedure Article 770 which provides upon motion of a defendant a mistrial shall be ordered when remark or comment made within the hearing of the jury, or the judge, district attorney, or a court official during the trial or in argument infers [indirectly] or directly [to] another crime, or would be so prejudicial as to prevent trial as to which - a fair trial as to which evidence is not admissible.
>
> And, of course, 770 provides that an admonition to the jury to disregard the remark or comment is not sufficient in certain circumstances. The police officer's answer or statement that the victim's mother, [Ms. Gill,] reviewed a video from Laguna Beach and said that she thought that was [the defendant] with her son on the video was not offered for the truth of the matter, but simply as an explanation to prompt the further investigation in the matter, and I find it for -- I don't find that the court officer was intentionally unresponsive, or it was intended to present improper evidence to the jury. They weren't malicious or improperly made or intended and he is not going to be held to the standard of court officials. Consequently, the Article 772 doesn't apply to the comments and a mandatory mistrial is not due at this point. So, for those reasons, I am going to admonish the jury.
>
> * * * * *
>
> I also looked at 775. I do not find this is so defective or prejudicial to the defendant. I would think that if this does go up at some point to the courts of appeal or supreme court that it would be considered harmless error. Again, the courts of appeal and supreme court look very distastefully on mistrials, understandably. It takes a lot to get to it by the [S]tate and the defense and the resolution if it can be fair to both parties is the resolution at trial. Not a mistrial expected by the courts.

We find no reason to disturb the trial court's ruling. Detective Bourgeois's comment about what Ms. Gill told him was unsolicited testimony. See **State v. Thompson**, 597 So.2d 43, 46 (La. App. 1st Cir. 1992), writ denied, 600 So.2d 661 (La. 1992). The questioning by the State was to elicit the steps Detective Bourgeois took to develop the defendant as a possible suspect. The detective explained that he had gotten information that Brandon was last seen at the bar, and that he had gotten a copy of the bar surveillance video. The detective observed Brandon and an unknown person leave the bar parking lot around 10:10 p.m. The State then stated, "Okay. And based on that information, what happened next, Detective." Responding in a somewhat extended narrative, Detective Bourgeois explained that he was able to copy some of the surveillance video to his cell phone, and showed this video to Brandon's parents. He then stated that Brandon's mother saw who appeared to be the defendant on the video, and that she gave him the defendant's cell phone number. The detective then continued to explain, in narrative form, how he pursued his investigation with the defendant's number.

We find, as well, based on the foregoing, that what Ms. Gill told Detective Bourgeois was not hearsay because it was not offered for the truth of the matter asserted. See La. Code Evid. art. 801(C). Detective Bourgeois was merely setting out how, during his investigation, each bit of information led to new information, which led finally to all evidence pointing to the defendant. There is no indication that Detective Bourgeois's statement about what Ms. Gill told him was made in order to prejudice the defendant, but rather how his investigation unfolded. See **State v. Tribbet**, 415 So.2d 182, 184-85 (La. 1982); **State v. Henson**, 351 So.2d 1169, 1170-71 (La. 1977). Such testimonial evidence of a police officer is admitted not to prove the truth of the out-of-court statements, but to explain the

sequence of events leading to the arrest of the defendant from the viewpoint of the investigating officer. See **State v. Patton**, 2010-1841 (La. App. 1st Cir. 6/10/11), 68 So.3d 1209, 1220; **State v. Taylor**, 2007-93 (La. App. 5th Cir. 11/27/07), 973 So.2d 83, 98, writ denied, 2007-2454 (La. 5/9/08), 980 So.2d 688.

Moreover, even if what Ms. Gill told Detective Bourgeois is considered inadmissible hearsay, the introduction of such evidence was harmless. This testimony was merely cumulative because the defendant admitted to the police that he shot and killed Brandon. The defendant, in his own words, put himself at the bar with Brandon the night Brandon went missing. In his own words, the defendant explained to the police that he went to the bar with Brandon in his van, they hung out at the bar a bit, then left the bar together in the van. Accordingly, if there was confrontation error, it was harmless beyond a reasonable doubt. See **Sullivan**, 508 U.S. at 279, 113 S.Ct. at 2081; **Stokes**, 175 So.3d at 423. See also **State v. Robertson**, 2008-297 (La. App. 5th Cir. 10/28/08), 995 So.2d 650, 662-63, writ denied, 2008-2962 (La. 10/9/09), 18 So.3d 1279.

The defendant next complains that Dr. Jose Artecona made impermissible references to other crimes evidence. See La. Code Evid. art. 404(B). Dr. Artecona, a member of the sanity commission, testified at trial that the defendant was competent to stand trial and that he was not insane when he shot and killed Brandon. The complained of testimony is the doctor's two references to "jail" and his comment that the defendant and Brandon were "partners in crime."

When Dr. Artecona was asked on direct examination whether he thought the defendant had a mental illness when he examined him, the doctor responded in pertinent part: "I felt that he had some anxiety, some depression, and he mentioned that he was having difficulty adjusting to life in the jail setting. I felt those symptoms were mild and they were adequately treated with medications."

Dr. Artecona continued to testify about his treatment of the defendant ... when he stated: "There's no history – I mean, essentially, after the age of seventeen, he did not receive any further medical health treatment until he was seen at the jail, and really there has not –" At this point, defense counsel asked to approach.

After some discussion, defense counsel asked for a mistrial based on Dr. Artecona's two references to the defendant being in jail. The trial court denied the mistrial, finding these jail references were not so prejudicial that the defendant could not get a fair trial. The trial court also noted in pertinent part: "It's just indispensable [sic] that he was in jail. He was arrested. He went to jail. You know, whether he bonded out or not, they don't know and they're not entitled to know that he's still in jail."

We find no reason to disturb the trial court's denial of the motion for mistrial. Under La. Code Crim. P. art. 770(2), 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 another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. An impermissible reference to another crime deliberately elicited by the prosecutor is imputable to the State and would mandate a mistrial. See **State v. Boudreaux**, 503 So.2d 27, 31 (La. App. 1st Cir. 1986). 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 Dr. Artecona.

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

> In the following cases, upon the request of the defendant or the [S]tate, 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, defense counsel objected to the remarks and moved for a mistrial, rather than an admonition. Because Dr. Artecona's remarks fell within the scope of La. Code Crim. P. art. 771, the granting 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 noted, mistrial is a drastic remedy which should only be declared upon a clear showing of prejudice by the defendant, and the trial court has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. See **Berry**, 684 So.2d at 449.

There is no showing of clear prejudice to the defendant since Dr. Artecona's remarks were vague and too generalized to have made any substantial impact in the mind of the jury. Neither of the doctor's oblique comments that the defendant had "difficulty adjusting to life in the jail setting" or that "he did not receive any further medical health treatment until he was seen at the jail" were an unambiguous reference to a particular crime committed or alleged to have been committed by the defendant. See **State v. Newman**, 515 So.2d 548, 550-51 (La. App. 1st Cir. 1987), writ denied, 581 So.2d 681 (La. 1991); **State v. Collins**, 470 So.2d 553, 557-58 (La. App. 1st Cir. 1985).

Moreover, the doctor's comments were unsolicited. Unsolicited and unresponsive testimony is not chargeable against the State to provide a ground for mandatory reversal of a conviction. See **Thompson**, 597 So.2d at 46. See also **State v. Harrison**, 32,643 (La. App. 2nd Cir. 10/27/99), 743 So.2d 883, 888-89, writ denied, 99-3352 (La. 6/30/00), 765 So.2d 327 (where, in upholding the trial court's denial of a motion for mistrial based on a prospective juror's comment that the only thing he heard about the defendant was that he was back in jail, the second circuit found the comment was "not only unrelated to other crimes evidence but was an unsolicited response to an intended yes or no question by the [S]tate.").

We note as well that both of the defendant's prior convictions were brought out at trial. Further, the defendant himself testified about being at Hunt Correctional Center. There should be little doubt that the jurors knew that at some point the defendant was in jail. It would not be unreasonable, either, for the jury to assume that the defendant was charged with a serious crime, second degree murder, and he could be incarcerated pending trial. In any case, Dr. Artecona's brief, vague comments about jail did not require a mistrial. See **State v. Dickson**, 49,984 (La. App. 2nd Cir. 8/12/15), 174 So.3d 1242, 1250, writ denied, 2015-1706 (La. 10/17/16), 208 So.3d 374; **State v. Barnes**, 2013-576 (La. App. 3rd Cir. 12/11/13), 127 So.3d 1070, 1072-75, writ denied, 2014-0043 (La. 6/13/14), 140 So.3d 1188; **State v. Santos**, 2009-789 (La. App. 5th Cir. 4/13/10), 40 So.3d 167, 173-76, writ denied, 2010-1080 (La. 11/24/10), 50 So.3d 828; **State v. Giles**, 2004-359 (La. App. 3rd Cir. 10/6/04), 884 So.2d 1233, 1237-40, writ denied, 2004-2756 (La. 3/11/05), 896 So.2d 62; **Collins**, 470 So.2d at 557-58. 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.

The final remark of Dr. Artecona complained of by the defendant was the following: "The issue, however, is was he mentally ill at the time, and what I reviewed is that he had a long history of – with Mr. Parnell. They were partners in crime." Defense counsel objected, moved for a mistrial, and argued that the doctor's testimony that Brandon and the defendant were "partners in crime" was an impermissible reference to an excluded bad act.

In denying the motion for mistrial, the trial court stated in pertinent part: "The court is going to deny the motion, not finding the prejudicial conduct in the courtroom makes it impossible for the defendant to obtain a fair trial. As the [S]tate said, no particular crime was mentioned. Partners in crime is a slang statement."

We find no reason to disturb the trial court's ruling. As suggested by the trial court, "partners in crime" is an idiom or colloquialism similar to the phrase "thick as thieves," suggesting closeness between two people. In any event, the phrase was vague and innocuous and referenced no crime or bad act. It should further be noted that while this motion for mistrial was being argued, Dr. Artecona informed the trial court that those were the defendant's own words he was quoting, not his.

The defendant next complains of testimony regarding the defendant's threat of Stormy. The defendant states in brief:

> Stormy ... testified for the [S]tate and admitted she left out some information when initially speaking with the police. Her claim that [the defendant] had threatened to kill her had previously been excluded as other crimes evidence that was not relevant and was more prejudicial than probative. Officer [Cody] Harmon reiterated the alleged threat and the defense objected and moved again for a mistrial and it was again denied.

The other crimes evidence ruled on previously in this trial regarding Stormy was that she was not allowed to testify about the defendant stealing some of

Kristy's property. The defendant in brief cites only to a few pages of Detective Harmon's testimony and a few pages of Stormy's testimony. It would appear, given the defendant's suggestion that the threat was "reiterated," that he is referring to the earlier testimony of Detective Bourgeois, who testified that he was talking to Stormy when the defendant called her from his cell phone. Detective Bourgeois testified that he recorded some of the conversation and that the defendant told Stormy "that he was hiding out at 37662 Walker North Road, north of Walker in Livingston Parish and that he also had the van hid out there and that if she told anybody where he was at that he would kill her." Defense counsel objected. The trial court overruled the objection, finding:

> The statement was not offered for the truth of it. It's part of the investigation. I didn't find that it was irrelevant. It was actually part of the act and part of the obstruction of justice allegation against the defendant, and for those reasons, I didn't find it was prejudicial. I found the relevancy outweighs any prejudicial value.

The only complained of testimony at issue in the defendant's brief is the following exchange with Detective Harmon on direct examination regarding developing leads in the investigation:

> Q. Okay. Subsequent to that, y'all ultimately do get additional information to lead you to the suspect in this case; correct?
> A. Yes.
> Q. All right. And at some point, do you obtain information that led you to go search for certain items throughout Baton Rouge and other locations?
> A. Yes. We had a witness that came forth that advised us that she was threatened by the suspect, [the defendant], who --
> Q. If I may stop you right there. Detective, what –

At this point defense counsel objected. After an off-record bench conference, the examination of Detective Harmon continued to its conclusion. The issue of the objection was then taken up again. Defense counsel argued that the defendant's threat to Stormy was an inadmissible prior bad act and that it prejudiced the defendant. Defense counsel asked for a mistrial in the alternative.

The trial court ruled that the defendant was not prejudiced and further stated, "I didn't really think it went far enough because the defense caught it and it was more of a cautionary objection."

We agree with the trial court's ruling. Detective Harmon did not mention Stormy's name. He said merely that a witness was threatened by the defendant. The foregoing notwithstanding, it does appear that Detective Harmon was referring to Stormy and what she had told Detective Bourgeois about being threatened. The testimony was therefore cumulative of Detective Bourgeois's earlier testimony, which had been objected to and overruled by the trial court. Further, this remark by Detective Harmon was unsolicited and unresponsive, and even the State interrupted the detective's testimony before the objection was lodged. As already noted, such testimony is not chargeable against the State to provide a ground for mandatory reversal of a conviction. See **Thompson**, 597 So.2d at 46. Finally, we note that any prejudice created by the testimony that the defendant threatened a witness (after he killed Brandon) was outweighed by its probative value and would be admissible under La. Code Evid. art. 403, because this evidence served to help prove the obstruction of justice charge against the defendant.

Finally, the defendant argues that a comment made by Dr. David Hale during the State's rebuttal to the defendant's case-in-chief required a mistrial. Dr. Hale testified on direct examination that he examined the defendant and that the defendant never mentioned any kind of sexual advance by Brandon. The defendant's issue with Brandon, rather, was that Brandon was a bad person who took advantage of him and other people. At this point, the State asked, "And to your knowledge, doctor, what did he mean by taking advantage of?"

Dr. Hale replied:

> Well, he had stolen a gun from [the defendant], a gun that he had spent $150 on, by the way. He had taken it from him on a ruse. I think [the defendant] had gone to wash some clothing, and the victim said, well, let me hold the gun while you go into the laundromat, and [the defendant] said, well, you know, that was okay. I don't like taking guns into businesses. That's probably a bad idea. So fine. His friend was to drive the van behind the laundromat and pick him up when he was done. He was going to put the things in the wash, leave, come back with him. He goes out back, no van, no person, no gun. That gun had previously been used to commit a robbery of some drug dealers –

Defense counsel objected at this point and moved for a mistrial, arguing that there was a pretrial order by the court to redact and exclude any and all evidence relating to a robbery prior to the defendant's gun being stolen. Defense counsel further argued, because of cumulative errors, that it was impossible for the defendant to get a fair trial.

In denying the motion for mistrial, the trial court found:

> And what I heard Dr. Hale say, I actually think the defense jumped up in time to object. Dr. Hale did not state the defendant had participated in a robbery, or linked the defendant to a robbery. Just said something about the gun in the robbery. It was very close. I don't think it prejudiced the defendant to the point that it's requiring a mistrial. That it would prejudice him so much that he cannot get a fair trial. The jury has heard about the convictions of the defendant by his own testimony, so it's not as though it's more prejudicial at this point. But, again, he did not - the witness did not link the defendant to a robbery - to the robbery. He said the gun had been a subject of a robbery, or used in a robbery. I can't remember exactly what he said at that point. But I don't find that it's so prejudicial that the defendant cannot receive a fair trial.

We see no reason to disturb the trial court's ruling. Like defense counsel argued at trial, the defendant in brief argues that the mistrial was denied "despite the trial court's pre-trial ruling that the evidence of any previous robberies were to be excluded from the jury as they were too prejudicial[.]" The referenced pretrial ruling here addressed only the taped statement of the defendant's confession. The parties agreed that any reference to other crimes evidence, including a robbery by the defendant, would be redacted from the version that would ultimately be played

for the jury. The State did precisely that - redacted any other crimes evidence from the defendant's recorded statement - and, as such, there was no violation of any pretrial ruling.

Again as with other witnesses, Dr. Hale's statement about the gun being used to commit a robbery was unsolicited and unresponsive testimony and, as such, was not chargeable against the State to provide a ground for mandatory reversal of a conviction. See **Thompson**, 597 So.2d at 46. Further, as the trial court indicated, Dr. Hale made no mention of the defendant when talking about the gun, other than the defendant owned that gun and it was stolen by Brandon. As such, Dr. Hale did not directly refer to any crime committed or alleged to have been committed by the defendant.

In any case, Dr. Hale's brief, vague comment about a stolen gun being used in a robbery did not require a mistrial. See **State v. Jackson**, 2000-191 (La. App. 5th Cir. 7/25/00), 767 So.2d 833, 835-36. 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.

The defendant suggests again in brief that a mistrial should have been granted because of "all the other violations and grounds for mistrial in the [S]tate's presentation of its case." As with the first assignment of error, we found very little to no merit for each claim and, as such, there is no more validity to be found in this group of claims than in any single claim. See **Blackburn**, 808 F.2d at 1147. In any case, we find no merit to the defendant's contention that the cumulative effect of the alleged violations was so prejudicial that the defendant was denied a fair trial.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the jury erred in returning a guilty verdict for the second degree murder of Brandon. Specifically, the defendant contends that the preponderance of evidence established that he was insane at the time he killed Brandon.[5]

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 La. Code of Crim. P. art. 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.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1(A)(1). 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

[5] The defendant does not address his obstruction of justice conviction in this assignment of error.

intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982).

In Louisiana, a legal presumption exists that a defendant is sane at the time of the offense. La. R.S. 15:432. To rebut the presumption of sanity and avoid criminal responsibility, the defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. La. Code Crim. P. art. 652; **State v. Silman**, 95-0154 (La. 11/27/95), 663 So.2d 27, 32. Criminal responsibility is not negated by the mere existence of a mental disease or defect. To be exempted of criminal responsibility, the defendant must show he suffered a mental disease or defect that prevented him from distinguishing between right and wrong with reference to the conduct in question. La. R.S. 14:14; **State v. Pravata**, 522 So.2d 606, 613 (La. App. 1st Cir. 1988), writ denied, 531 So.2d 261 (La. 1988). The determination of sanity is a factual matter. All the evidence, including expert and lay testimony, along with the defendant's conduct and actions before and after the crime, should be reserved for the factfinder to establish whether the defendant has proven by a preponderance of the evidence that he was insane at the time of the offense. **State v. Williams**, 2001-0944 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 942, writ denied, 2002-0399 (La. 2/14/03), 836 So.2d 135.

When a defendant who affirmatively offered the defense of insanity claims that the record evidence does not support a finding of guilty beyond a reasonable doubt, the standard for review by the appellate court is whether or not any rational factfinder, viewing the evidence in the light most favorable to the prosecution, could conclude that the defendant had not proved by a preponderance of the evidence that he was insane at the time of the offense. **State v. Claibon**, 395 So.2d 770, 772 (La. 1981).

The defendant suggests in brief that, based on his own testimony, the testimony of Pamela Crawford, an attorney for the Louisiana State Mental health Advocacy Service, and the medical report of Dr. Cornelius Schutte, an expert in clinical psychology, introduced into evidence, no rational trier of fact could have found that he had not proven by a preponderance of evidence that he was insane at the time of the offense. The defendant's claim that he was insane when he killed Brandon is baseless.

The defendant points out in brief that Ms. Crawford, a staff attorney, who worked with the defendant at the Louisiana State Mental Health Advocacy Service, testified at trial that the defendant was there for five to six years, but was unable to complete the eighteen-month New Directions program. Ms. Crawford noted the defendant had been physically and sexually abused by his sister and step-grandfather until the age of twelve. At New Directions, a staff member was charged with sexually abusing the defendant. Ms. Crawford also knew the defendant had been diagnosed with post-traumatic stress disorder (PTSD), sexual disorder, and mood disorder.

Dr. Schutte treated the defendant in 2004 and 2006. His reports on the defendant were read aloud to the jury. (The reports were not transcribed in the appellate record). The defendant in brief does not cite to anything particular in Dr. Schutte's reports, except to note that Dr. Hale, on cross-examination, agreed with Dr. Schutte that the defendant's abuse was "catastrophic" or "horrific." When asked on cross-examination about Dr. Schutte's 2004 diagnosis of the defendant as having PTSD based in part on catastrophic sexual abuse, Dr. Artecona agreed that "at the time that Dr. Schutte first evaluated him that's what he stated and he felt that the reason for what he considered the diagnosis of [PTSD] was because of the severe sexual abuse that [the defendant] had suffered."

Finally, the defendant in brief points out his own testimony at trial where "he chronicled the years of abuse he had encountered." The defendant notes how he testified to "feeling overpowered and uncomfortable by Brandon's sexual advance and he 'flashed out – blacked out.'" The defendant also notes how Detective Browning testified that the defendant was in the closet when he was arrested and that, according to the defendant, he again "flashed out."

Dr. Artecona did not find the defendant was insane at the time of the offense (or at any time). The defendant produced no evidence of insanity. The evidence established that despite some cognitive issues, the defendant was sane and knew right from wrong on the night he shot and killed Brandon.

The trial court appointed Dr. Artecona and Dr. Hale to the sanity commission requested by the defendant. Dr. Artecona was called during the State's case-in-chief and testified that he interviewed the defendant a second time to determine if he met the criteria for legal insanity at the time of the offense. The doctor noted at this time, the defendant was doing quite well. He was not depressed or anxious or on any medication. Dr. Artecona looked at the defendant's medical records, the police reports, and listened to the defendant's statement to the police. Dr. Artecona testified that during the defendant's taped confession (about ten days after the defendant had killed Brandon and disposed of the body and other evidence), the defendant was calm and courteous. His responses were relevant and on track. There was no talk from the defendant of hearing voices or having flashbacks. Dr. Artecona noted that the defendant in the first part of the interview distanced himself from responsibility by claiming he did not know anything about what had happened. Only after the defendant was confronted with the facts by the detectives did he decide to be truthful. The doctor further noted that there was no evidence of disorganized or psychotic motive.

Dr. Artecona noted that the second time he saw (examined) the defendant, the defendant told him that when he killed Brandon, he heard the voice of his "accuser," whom the doctor assumed was his step-grandfather, and that the voice, in effect, told him he had to get Brandon before Brandon got him. Dr. Artecona stressed, however, that when he looked at the facts of the case, the defendant was very upset that Brandon had robbed him, and that his motive for killing was that he was very angry and wanted revenge. Dr. Artecona pointed out that before they had even left the bar, the defendant called someone named Dejean and told him that he had a body in the van. The doctor testified that this suggested premeditation, or that there was no psychotic motive for the killing. Dr. Artecona also pointed out that while the defendant suggested to the doctor that he had heard a voice, the defendant never mentioned any of this to the detectives during his confession. The defendant had ample opportunity, according to the doctor, to tell the detectives that he "clicked out" or heard the voice of his accuser, but said none of this. Dr. Artecona suggested that this whole idea (of hearing things) "came much after the fact that somehow he acted in [sic] this way because he had some momentary flashback." In the doctor's view, there was a rational motive for killing Brandon: anger and revenge. It should be noted that on redirect examination (by defense counsel), the defendant testified that he did not hear voices at the time of the shooting.

In 2014, the defendant was diagnosed with major depressive disorder and bipolar disorder. Dr. Artecona testified that flashbacks are not one of the symptoms commonly associated with major depression or bipolar affective disorder, or with manic depression. Dr. Artecona explained:

> [S]omebody who has flahsbacks who has PTSD you would have expected to see a pattern of flashbacks. Yes. When you look at their history, you look at their psychiatric history, and their psychiatric

> history is peppered with similar instances of these type of symptoms. So, if somebody has PTSD and one of their signs or symptoms is flashbacks, you would have expected that these flashbacks would have occurred many points - at many points in time during the last many, many years, and you would have expected that the psychiatric records would have shown that this was indeed the case ... I have not reviewed any records that would support that there were flashbacks except what he described happened at the moment during the second interview. That's the only time that that has been mentioned. And, again, that was after the fact. That was not mentioned in the interview with detectives, or anything like that.

Dr. Artecona further noted that in the defendant's interview with the detectives, the defendant was still in the bar when his issues with Brandon started "pinching" his nerves again. At that moment, the defendant thought about killing him, and asked himself if he really wanted "to do this." Dr. Artecona noted that this was an indicator that the defendant could distinguish right from wrong.

Dr. Artecona further testified that other indications that the defendant knew right from wrong were his actions after killing Brandon. The defendant had someone help him bleach the body and dispose of the body. He cleaned out the van and dumped Brandon's clothes. The defendant told a female friend that if she said anything, he would kill her. The doctor opined that, again, this suggested to him that the defendant knew what he had done was wrong and, as such, could distinguish right from wrong.

According to Dr. Artecona, there was no evidence that the defendant was disorganized, psychotic, or actively mentally ill. During his interview with the detectives, the defendant was quite respectful and his thinking was clear. The doctor reiterated he saw no evidence at that time that the defendant was suffering from a major mental illness.

Dr. Artecona further pointed out in his testimony how Dr. Schutte's opinion of the defendant had changed from 2004, when he first treated the defendant, to 2006, the last time he treated the defendant. Specifically, Dr. Artecona testified:

> [Dr. Schutte] changes his opinion, however, two years later, and in his opinion two years later, because of the behavior that [the defendant] was exhibiting, Dr. Schutte has a much different opinion. So, when he first sees him in 2004, that's precisely what he says. He says that he suffers, due to a significant history of sexual abuse he met criteria for [PTSD]. He also met criteria of a sexual disorder, NOS, meaning somebody who is attracted, or who gets sexual enjoyment from things that perhaps are abnormal or most of us wouldn't consider enjoyable. And he noted that he was having problems with physical aggression, depression, sleep disturbances, fearfulness, and anxiety. Two years later, however, Dr. Schutte sees him, and at this point, [the defendant] had continued to exhibit sexually aggressive behavior, sadistic fantasies, and sadism is the enjoyment of inflicting pain in other people. He - Dr. Schutte noted that [the defendant] resisted any work focus on PTSD and continued to act out sexually towards peers and staff. He had violent fantasies, frustrated - he would harm himself when frustrated, and just to - and this is from his report. He says [the defendant's] PTSD symptoms had abated, meaning they had gone down, and that he had become increasingly sadistic in his sexual proclivities. In other words, his sexual desire became increasingly sadictive [sic]. Dr. Schutte... added that he "no longer presented with full - fledged [PTSD] symptoms that had been the case two years ago. It appears that this adolescent has moved from a PTSD presentation to being fully identified with the sexual perpetrator and having developed a more sadistic sexual pattern of arousal and attraction."

Dr. Hale, a clinical psychologist and clinical neuropsychologist, testified at trial that when he spoke to the defendant about the night he shot Brandon, the defendant did not mention that Brandon made any sexual advances. The second (and last) time Dr. Hale interviewed the defendant was in January of 2015 and, according to Dr. Hale, the defendant had a longstanding cannabis dependency. Dr. Hale also diagnosed the defendant with antisocial personality, in which a "person violates the rules of society, is irritable or aggressive, acts in ways that show little regard for their own safety, or the safety of other people." Dr. Hale added that this type of person typically did not "have much remorse or guilt about those activities."

The most significant evidence of ability to distinguish right from wrong in many insanity defense cases is evidence of the accused's attempts to hide evidence of the crime. **State v. Armstrong**, 94-2950 (La. 4/8/96), 671 So.2d 307, 313. The

defendant in this case went to great lengths to cover up his crime. After shooting and killing Brandon, the defendant placed the body on the floor of the van and drove around. He then went home, and enlisted the help of Kristy to help him dispose of any evidence of the killing. The defendant took all the clothes off Brandon's body, and then bleached the body in order to remove any evidence of DNA (as discussed by the defendant in his taped confession). The defendant had Kristy toss Brandon's clothes in a dumpster. The defendant then drove to another parish (St. James) and, with Kristy's help, tossed Brandon's body from a bridge into a canal. The defendant also threw out items from the van that appeared to have blood on them. The defendant took the van to a car wash to wash off any blood in the van. The defendant then went home and made sure that he and Kristy showered and got rid of the clothes they were wearing. The defendant then left the house he was staying at (Stormy's house) and, for over a week, hid out in a residence in Walker. He also kept Brandon's van hidden behind the residence where he was staying. When the police found the defendant's location, the defendant was hiding in a closet to avoid detection. All of these actions, designed to conceal and misdirect, clearly indicated the defendant knew that killing Brandon was wrong. See **State v. Heath**, 447 So.2d 570, 576 (La. App. 1st Cir. 1984), writ denied, 448 So.2d 1308 (La. 1984). See also **State v. Butler**, 50,582 (La. App. 2nd Cir. 5/25/16), 197 So.3d 179, 183; **State v. Bailey**, 2011-1003 (La. App. 3rd Cir. 5/30/12), 92 So.3d 606, 617-18, writ denied, 2012-1508 (La. 1/18/13), 107 So.3d 626; **State v. Knowles**, 598 So.2d 430, 435 (La. App. 2nd Cir. 1992).

Based on the foregoing, any rational factfinder could have found that the defendant did not prove by a preponderance of the evidence that he was insane at the time of the offense. The defendant might have had cognitive disorders, or issues with aggression and having sadistic, sexual proclivities, but such mental

deficits do not rise to the level of insanity. The defendant's criminal responsibility was not negated by the mere existence of a mental disease or defect. See **State v. Sopczak**, 2002-235 (La. App. 5th Cir. 6/26/02), 823 So.2d 978, 986, writ denied, 2002-2471 (La. 3/21/03), 840 So.2d 548; **State v. Bibb**, 626 So.2d 913, 933-40 (La. App. 5th Cir. 1993), writ denied, 93-3127 (La. 9/16/94), 642 So.2d 188. See also **State v. Johanson**, 332 So.2d 270, 272 (La. 1976).

The appellate court does not assess the credibility of witnesses or reweigh evidence. **State v. Smith**, 94-3116 (La. 10/16/95), 661 So.2d 442, 443. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of witnesses in whole or in part. **State v. Robinson**, 2002-1869 (La. 4/14/04), 874 So.2d 66, 79, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004). The jury heard the testimony of the doctors, the detectives, Stormy, and the defendant. The jury heard evidence that the defendant attempted to eliminate any evidence of the shooting, and that he could not be found by law enforcement for about ten days thereafter. The defendant never turned himself in voluntarily, but hid out before being apprehended by the police. Flight and attempt to avoid apprehension indicate consciousness of guilt, and therefore, are circumstances from which a juror may infer guilt. See **State v. Fuller**, 418 So.2d 591, 593 (La. 1982).

In light of the evidence presented by the State, the trier of fact could infer the defendant knew the difference between right and wrong at the time he shot and killed Brandon. Therefore, any rational trier of fact could find that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense. See **Pravata**, 522 So.2d at 614. See also **State v. Johnson**, 43,935 (La. App. 2nd Cir. 2/25/09), 3 So.3d 697, 704.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.