NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 KA 0779

STATE OF LOUISIANA

VERSUS

KARL HOWARD

Judgment Rendered: DEC 21 2017

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of West Baton Rouge
State of Louisiana
Docket Number 130500

Honorable J. Robin Free, Judge Presiding

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

WHIPPLE, C.J.

The defendant, Karl Michael Howard, was charged by amended grand jury indictment on count one with principal to second degree murder, a violation of LSA-R.S. 14:30.1, and on count two with conspiracy to commit second degree murder, a violation of LSA-R.S. 14:26 and LSA-R.S. 14:30.1., and pled not guilty. After a trial by jury, the defendant was found guilty as charged on both counts.[1] The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. He now appeals, assigning error to the trial court's admission into evidence of Facebook messages and autopsy photographs, and to the trial court's denial of a motion for mistrial based on prosecutorial remarks. For the following reasons, we affirm the defendant's conviction and sentence on count one, and remand with instructions.

At the outset, we note that the record shows the trial court did not impose a sentence on count two.[2] It is well settled that a defendant can appeal from a final judgment of conviction only where sentence has been imposed. LSA-C.Cr.P. art. 912(C)(1); State v. Chapman, 471 So. 2d 716 (La. 1985) (per curiam). In the absence of a valid sentence, the defendant's appeal is not properly before this court. See State v. Blackburn, 2009-0178 (La. App. 1st Cir. 6/12/09), 2009 WL 1655484 (unpublished); State v. Soco, 94-1099 (La. App. 1st Cir. 6/23/95), 657 So. 2d 603. Accordingly, the defendant's conviction on count two is not properly before this court on appeal, and we do not address the assignments of error in

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[1]The grand jury indictment in this case charges the defendant along with Monique O. Kitts and Corey Knox with the same offenses. Prior to jury selection, the State made an oral motion to sever Knox's case. The trial court granted the State's motion to sever, and the defendant and codefendant Kitts proceeded to trial. The codefendant was found guilty as charged. She also filed an appeal. See State v. Kitts, 2017-0777.

[2]The record contains a uniform commitment order which reflects the defendant was sentenced to "LIFE" on count one and "LIFE" on count two. However, neither the sentencing minutes nor the sentencing transcript reflect the imposition of two sentences on the defendant. The sentencing transcript and minutes must prevail over the commitment order. See State v. Lynch, 441 So. 2d 732, 734 (La. 1983). We also note that the sentence reflected for count two in the uniform commitment order would be illegal. On count two, the defendant can be "imprisoned at hard labor for not more than thirty years." See LSA-R.S 14:26(C) & 14:30.1(B).

regard to count two. After sentencing on count two, the defendant may perfect a new appeal concerning count two.

STATEMENT OF FACTS

On June 9, 2010, Officer Thomas Southon, who was employed as a patrol officer with the Addis Police Department (ADP) at the time, was dispatched to the residence of Corey Kitts (the victim) and Monique Kitts (wife of the victim and the codefendant) due to a reported burglary or theft of $4,000.00 and a suspicious red vehicle previously parked across the street from the complainant's residence in an empty lot. Officer Southon was only a half mile away from the residence when he received the dispatch at approximately 7:40 p.m., and arrived within two minutes, but no one was there. The codefendant arrived approximately twenty to twenty-five minutes later. She claimed that she had withdrawn over $4,000.00 out of the bank for bills and placed $4,000.00 of it in the nightstand next to her sleeping husband, but that when he woke up to go to work, the money was missing. Officer Southon asked to see the area from which the money was removed and to speak with Mr. Kitts. However, the codefendant did not allow Officer Southon to enter the home to investigate the burglary, stating that she did not want to alarm her daughter. When Officer Southon asked the codefendant about a suspicious vehicle reportedly seen across the street from the house earlier that morning, she described the vehicle as a red Mazda. When he asked for Mr. Kitts' phone number, the codefendant insisted on calling the victim herself, did not provide the phone number, and indicated that she would have the victim contact the police.

One month later, on July 9, 2010, Major Paul Marionneaux of the West Baton Rouge Parish Sheriff's Office (WBRPSO) and Detective William Starnes of the ADP were summoned to the Kitts residence due to a reported burglary in progress. Upon entry, the officers noticed that there were no apparent means of a forced entry or exit, and saw misplaced furniture, glass, coins, and many other

items on the floor. They noted that items of value and a small amount of cash were in open sight, which was inconsistent with a burglary. They announced their presence, and as they made their way through the house, they heard someone yelling. They noted the presence of the codefendant, and Dorey Kitts and Corey Kitts, Jr. (the children of the codefendant and the victim), in the master bedroom. They observed shell casings on the floor and the deceased victim lying in his bed. Based on the location of the shells or casings, they concluded that the shooter was standing when the shots were fired.

Cell phone records for the time periods preceding and following the murder were analyzed by WBRPSO Detective Kevin Cyrus. The records revealed frequent communications among the defendant, codefendant Kitts, Corey Knox, and David Johnson. David Johnson worked for Kleinpeter Farms Dairy delivering milk in 2006. Two daycares in Plaquemine were part of his route, one owned by the codefendant and the other owned by her sister. Johnson, who was being trained at the time, was introduced to the codefendant by his supervisor. When the codefendant did not have the money to pay Johnson at the time of the deliveries, she began making arrangements to pay him at a later date at a different location. They ultimately began conversing in a flirtatious manner, exchanged telephone numbers, and developed a sexual relationship.

In December of 2006, the codefendant first began making comments indicating that she was sick of her husband and jokingly suggested that she would be better off if he were dead, before ultimately becoming serious and asking Johnson to find someone to kill the victim. Johnson accepted funds from the codefendant on separate occasions over the following months, although according to Johnson, he had no intentions of having someone kill the victim.

In 2008, the codefendant asked Johnson if he thought the defendant would kill the victim. Johnson had previously introduced the defendant, who was a

friend of Johnson's brother, to the codefendant. Johnson told the codefendant that the defendant would probably kill the victim, but after the codefendant gave Johnson another $1,000.00, which she intended for Johnson to give to the defendant, Johnson kept the entire $1,000.00 and never spoke to the defendant about it. Johnson denied that the codefendant ever asked him again to contact the defendant, stating that he assumed that the codefendant subsequently spoke to the defendant directly.

Corey Knox testified that he and the defendant were friends for about thirteen years, and that the defendant sometimes referred to him as "Cousin" although they were not actually cousins. Knox confirmed that one day the defendant called and asked him if he wanted to make some money. He initially said yes, but when the defendant told him he would have to kill someone in exchange for the money, he told him, "Hell, no." According to Knox, the defendant persisted, telling him that it would be easy and that the door would be unlocked, but he still declined. He and the defendant drove by the Kitts residence during the nighttime hours on two separate dates before the actual murder took place. A day or two before the actual murder, they pulled up at the residence (during nighttime hours), and the defendant walked into the victim's yard. Knox testified that he was unsure as to what took place after the defendant entered the yard, stating that the defendant was not gone for long.

On the day of the murder, the defendant called Knox from a Jack-in-the-Box on Plank Road and told him that he was having car trouble and needed a ride to get a package of money. Knox confirmed that when he picked up the defendant from the Jack-in-the-Box between 8:00 and 9:00 that morning, he was driving his mother's gray Durango. Knox further identified the photograph of the vehicle in

evidence.[3] The defendant pointed out the residence just as Knox passed it. Knox backed up and parked his vehicle in front of the residence, and the defendant exited the vehicle and walked along the side of the house. While his vehicle was parked in front of the Kitts residence with the engine running, Knox saw a neighbor come outside to warm up his vehicle. The defendant came back to the car about two minutes later, jumped in, told Knox he was ready to go back to the Jack-in-the-Box, and gave Knox approximately two hundred dollars retrieved from a white envelope that he had in his hand when he reentered the truck.[4] According to the autopsy report, the victim suffered gunshot wounds to the neck, face, and head, and died of the multiple perforating gunshot wounds.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant argues that the trial court erred in allowing the State to elicit Johnson to read Facebook entries to the jury despite repeated objections on the basis of them being irrelevant and more prejudicial than probative. The defendant notes that Johnson was not identified as the sender or receiver of the messages, or as being a party to any of the conversations. Specifically noting that some of the conversations were between the codefendant and someone referred to as "Savage Leggz," the defendant contends that while Johnson initially identified Savage Leggz as the defendant, the identification was later called into question. The defendant argues that the State never presented any evidence to establish that he sent any of the Facebook messages. The defendant further argues that the Facebook messages also caused confusion over insurance proceeds, contending that a message about a claim for

[3]The vehicle was also identified by the victim's neighbor, Sean Douglas, as the one he saw parked behind the victim's truck on the morning of the murder.

[4]Dorey Kitts, the daughter of the victim and codefendant, testified that she recalled telling the police that the back door was unlocked when she discovered her father after he had been shot.

floor damages collected by the Kitts before the murder was misrepresented as a conversation about proceeds on a life insurance policy in order to establish a motive for murder. The defendant notes that the messages contained sexually explicit language, and argues that they did not contain any information to aid the jury in determining who sent them or to whom they were sent, that they only served to inflame the jury, and that they had no probative value.

All relevant evidence is admissible, and evidence that is not relevant is not admissible. LSA-C.E. art. 402. Louisiana Code of Evidence article 401 defines relevant evidence as "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." Louisiana Code of Evidence article 403 states: "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." In questions of relevancy, much discretion is vested in the trial court, and its rulings will not be disturbed on appeal in the absence of a showing of manifest abuse of discretion. State v. Pooler, 96–1794 (La. App. 1st Cir. 5/9/97), 696 So. 2d 22, 46, writ denied, 97–1470 (La. 11/14/97), 703 So. 2d 1288.

As noted above, the defendant herein objected to the Facebook Live entries in question on the grounds of relevancy. The entries read out loud to the jury during Johnson's colloquy with the State began with a January 2010 communication between "Savage Leggz" (repeatedly identified as the defendant) and the codefendant, wherein the defendant questioned the codefendant as to the whereabouts of her husband, the victim. When the codefendant replied that her husband was at work, they both stated, "Thank God." The trial court overruled the objection, stating that he understood the relevance of the entries and their intended purpose, and further, that the members of the jury had to decide what they actually

showed. Additional entries included references to an apartment that the codefendant leased and her disgruntlement with the fact that Johnson's wife would be staying in the apartment, and other communications containing sexually explicit commentary.

The defendant again objected to the relevance of the communications, noting in part that some of the codefendant's communications were not with the defendant or any other party to the case. As instructed by the trial court, the State informed the jury that certain passages did not involve the defendant, but instead consisted of the codefendant's communications with another associate. The defense attorney interrupted again after the following statement by the codefendant was read to the jury: "Still waiting on my insurance check." The defendant contended that the State was intentionally attempting to mislead the jury, claiming that the reference was not regarding a life insurance check. The prosecutor indicated that he was not sure of the type of insurance check being referenced and further stated that the defendant would have the opportunity to address it on cross-examination. The trial court warned the State that it was not allowed to mislead the jury, and the parties agreed to stipulate to the jury that the victim was still alive at the time of the statement in question, and that at the time, the Kitts were waiting for an insurance check regarding a claim based on damage to their home.

The Facebook entries at issue were introduced to expose the jury to the status of the marriage of the victim and the codefendant and the nature of her communications outside of the marriage before the murder. We find no abuse of discretion by the trial court in allowing this evidence to be presented at trial and in overruling the defendant's objections, as any prejudice was outweighed by their probative value. We note that Johnson was subject to cross-examination regarding the communications, and the jurors were made aware when Johnson lacked firsthand knowledge. Moreover, the parties stipulated to the jury that the victim

was still alive at the time of Kitts' statement regarding an insurance check, and that the Kitts were waiting for an insurance check regarding damage to their home at the time. We also agree that the evidence was relevant and that its probative value was not outweighed by any danger of unfair prejudice, confusion of the issues, or misleading the jury. Moreover, considering the record in its entirety, we find that any error in this regard was harmless and that the verdict herein was surely unattributable to any such error. See Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Thus, we find no merit in assignment of error number one.

ASSIGNMENT OF ERROR NUMBER TWO

In assignment of error number two, the defendant argues that the trial court erred in overruling his objection to autopsy photographs that were gruesome, cumulative, and irrelevant. The defendant argues that the photographs inflamed the jury and had no probative value since factors such as the victim's death, the trajectory of the bullet, and the location or severity of the wounds were not at issue and/or in dispute in this case. The defendant further contends that the photographs were not necessary to prove corpus delicti or the identification of the victim. The defendant notes that in addition to Dr. Suarez, several other witnesses established that the victim died of three gunshot wounds to the head. The defendant further notes that Major Marionneaux took photographs of the body and the shell casings and that these photographs were shown to the jury and introduced as evidence. Thus, the defendant argues that any probative value of the autopsy photographs was outweighed by prejudice to the defendant.

Photographs are generally admissible if they illustrate any fact, shed any light upon an issue in the case, or are relevant to describe the person, thing or place depicted. State v. Mitchell, 94-2078 (La. 05/21/96), 674 So. 2d 250, 257, cert. denied, 519 U.S. 1043, 117 S. Ct. 614, 136 L. Ed. 2d 538 (1996). Post-mortem

photographs of the victim are generally admissible to prove corpus delicti, to establish the identity of the victim, the location, severity and number of wounds, and to corroborate other evidence of the manner in which death occurred. State v. Martin, 93-0285 (La. 10/17/94), 645 So. 2d 190, 198, cert. denied, 515 U.S. 1105, 115 S. Ct. 2252, 132 L. Ed. 2d 260 (1995). The mere fact that a photograph is gruesome does not in and of itself render a photograph inadmissible. It is well settled that a trial court's ruling with respect to the admissibility of allegedly gruesome photographs will not be overturned unless it is clear that the prejudicial effect of the evidence outweighs its probative value. See LSA-C.E. art. 403; State v. Perry, 502 So. 2d 543, 558–59 (La. 1986), cert. denied, 484 U.S. 872, 108 S. Ct. 205, 98 L. Ed. 2d 156 (1987). For reversible error to be found, the photographs must be so gruesome as to overwhelm the jurors' reason and lead them to convict without sufficient other evidence. Martin, 645 So. 2d at 198.

In this case, the photographs that the trial court approved were not so graphic as to result in undue prejudice to the defendant. The photographs were relevant to show corpus delicti, to establish the identity of the victim, the location, severity and number of wounds, and to corroborate other evidence of the manner in which the victim's death occurred. We do not find that seeing the photographs in question would have overwhelmed the reason of the jurors and led them to convict the defendant without sufficient other evidence. This assignment of error is also without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In assignment of error number three, the defendant argues that the trial court erred in denying the motion for mistrial or, in the alternative, failing to admonish the jury regarding the State's prejudicial remarks on the defendant's guilt and the trustworthiness of defense counsel. The defendant specifically points out that at trial, as defense counsel asserted that Jeffery Aucoin, a forensic accountant, could

not prove that the codefendant paid the defendant, prosecutor Scotty Chaubert objected, stating, "Your Honor, with all due respect, this antic is crazy. This man has been called as an expert not to prove his innocence or guilt. If he was guilty, he would be sitting over there with them." The defendant argues that the prosecutor's remarks infringed upon his presumption of innocence and denied him due process of law. The defendant further argues that in accusing the defense attorney of using crazy antics, the prosecutor implied that defense counsel was untrustworthy and unfit. The defendant contends that a contemporaneous admonishment was mandated by statute and that the trial court erred in opting to address the issue in closing instructions.

Louisiana Code of Criminal Procedure article 770 provides that a defendant may move for a mistrial when the judge, district attorney, or a court official makes a remark or comment within the jury, during the trial or in argument, which directly or indirectly refers to: (1) race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury; (2) another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible; (3) the defendant's failure to testify in his own defense; or (4) the judge's refusal to direct a verdict. Louisiana Code of Criminal Procedure article 771 allows the State or the defendant to request that the court promptly admonish the jury to disregard irrelevant or prejudicial remarks made by the judge, district attorney, or a court official when the remarks are not within the scope of LSA-C.Cr.P. art. 770, or made by a person other than the judge, district attorney, or court official, regardless of whether or not the remark is within the scope of LSA-C.Cr.P. art. 770. The court may grant a mistrial on the defendant's motion if it is satisfied that an admonition is insufficient to assure the defendant a fair trial. LSA-C.Cr.P. art. 771; see Pooler, 696 So. 2d at 48; State v. Brown, 95–0755 (La. App. 1st Cir.

6/28/96), 677 So. 2d 1057, 1068. A mistrial under LSA-C.Cr.P. art. 771 is at the trial court's discretion and should be granted only where the witness's or prosecutor's prejudicial remarks make it impossible for the defendant to obtain a fair trial. See State v. Miles, 98–2396 (La. App. 1st Cir. 6/25/99), 739 So. 2d 901, 904, writ denied, 99–2249 (La. 1/28/00), 753 So. 2d 231.

In this case, after the remarks in question were made, defense counsel asked to approach the bench and moved for a mistrial, contending that the prosecutor was referring to the defendants as guilty and undermining the presumption of innocence. The trial court denied the motion for mistrial and the subsequent request to "clear it up" with the jury, noting that proper jury instructions would be given regarding the defendants' presumption of innocence. The trial court further denied the specific request for a contemporaneous instruction to the jurors on the presumption of innocence. On appeal, the defendant does not challenge the trial court's ruling regarding the inapplicability of Article 770. Instead, he only argues the trial court abused its discretion in failing to grant a mistrial or a prompt admonishment under Article 771.

A mistrial is a drastic remedy that the trial court should grant only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. The trial court has sound discretion in determining whether a mistrial should be granted, and its denial of a motion for mistrial will not be disturbed on appeal absent an abuse of that discretion. 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. Moreover, the failure of a trial court to admonish the jury is considered harmless error when there is substantial evidence of the defendant's guilt. State v. Texada, 99–1009 (La. App. 3d Cir. 2/2/00), 756 So. 2d 463, 483, writ denied, 2000–2751 (La. 6/29/01), 794 So. 2d 824.

Even when the prosecutor's statements and actions are excessive and improper, credit should be given to the good sense and fair-mindedness of the jurors who have seen the evidence and heard the arguments. State v. Bridgewater, 2000–1529 (La. 1/15/02), 823 So. 2d 877, 902, cert. denied, 537 U.S. 1227, 123 S. Ct. 1266, 154 L. Ed. 2d 1089 (2003). The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. State v. Ortiz, 2011–2799 (La. 1/29/13), 110 So. 3d 1029, 1034 (per curiam), cert. denied sub nom, Ortiz v. Louisiana, ___ U.S. ___, 134 S. Ct. 174, 187 L. Ed. 2d 42 (2013). Consequently, the aim of due process is not punishment of society for the misdeeds of the prosecutor, but avoidance of an unfair trial to the accused. While a prosecutor should prosecute with "earnestness and vigor" and "may strike hard blows, he is not at liberty to strike foul ones." State v. Tassin, 2011–1144 (La. App. 5th Cir. 12/19/13), 129 So. 3d 1235, 1249, writs denied, 2014–0284, 2014–0287 (La. 9/19/14), 148 So. 3d 950 (quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935)).

The State argues that this comment was taken "completely taken out of context" and explains that the State's "comment was meant to demonstrate that it was the [defendants] who were on trial, not Mr. Aucoin." To the extent that the prosecutor's remarks herein could be deemed improper, and that the remarks fall within the ambit of Article 771, an admonition would have been in order. Nonetheless, we note that prior to deliberation, the trial judge presented the jury instructions, which included proper directions to the jurors as to their role as the sole judges of the law and facts on the issue of guilt or innocence and their duty to accept and apply the law. Regarding the presumption of innocence, the trial court specifically added the following,

> The defendants are presumed to be innocent until each element of the crime necessary to constitute guilt is proven beyond a reasonable doubt. Thus, the defendants are not required to prove their innocence. The defendants begin the trial with a clean slate.
>
> The burden is on the State to prove the defendants' guilt beyond a reasonable doubt. In considering the evidence, you must give the defendants the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence...

While the trial court did not contemporaneously admonish the jury following the prosecutorial remarks at issue, we find that the above instruction was sufficient to negate any possibility of a misunderstanding as to the presumption of innocence and burden of proof. As noted above, a conviction will not be reversed due to improper remarks unless the remarks influenced the jury and contributed to the guilty verdict. The prosecutorial remarks at issue were not of such a serious nature to warrant a mistrial. There is no indication that the prosecutor's remarks so inflamed the jury that it influenced the jury's verdict. The record shows the jury was instructed that they were only to consider the evidence presented in reaching their verdict. They were further instructed that the arguments of counsel were not evidence.

The record shows that the trial as a whole was conducted fairly, and there was abundant evidence of the defendant's guilt.[5] As previously stated, much credit is accorded to the good sense and fair-mindedness of the jurors who have seen the evidence and heard the arguments, and have been instructed by the trial judge that arguments of counsel are not evidence. Bridgewater, *supra*. We do not find that the prosecutor's statements at issue deprived defendant of a fair trial. Thus, we conclude that the drastic remedy of a mistrial was not warranted in this case, and the court's failure to promptly admonish the jury was harmless beyond a

[5]We note that at trial, Johnson testified that weeks after the murder had taken place, codefendant Kitts confessed to him that she had the victim murdered but would not specifically confirm the murderer's identity. Subsequently, Johnson spoke to the defendant and he confessed to Johnson in detail that he had successfully killed the victim. Consistent with Knox's trial testimony, the defendant informed Johnson that an unnamed cousin assisted him with the murder as the driver, and that they used his cousin's mother's vehicle, a gray Durango.

reasonable doubt. See State v. Stelly, 93–1090 (La. App. 1st Cir. 4/8/94), 635 So. 2d 725, 729, writ denied, 94–1211 (La. 9/23/94), 642 So. 2d 1309. Considering the foregoing conclusions, assignment of error number three is also without merit.

CONVICTION AND SENTENCE ON COUNT ONE AFFIRMED; REMANDED FOR IMPOSITION OF SENTENCE ON COUNT TWO AND CORRECTION OF THE ERRONEOUS UNIFORM COMMITMENT ORDER.