STATE OF LOUISIANA	*	**NO. 2002-KA-2055**
VERSUS	*	**COURT OF APPEAL**
MICHAEL DANCER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 421-884, SECTION "A"
Honorable Charles L. Elloie, Judge
* * * * * *
Judge Charles R. Jones
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge Terri F. Love)

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AFFIRMED

Michael Dancer appeals his conviction for the murder of Paul Thomas, and his sentence of life imprisonment. We affirm.

PROCEDURAL HISTORY

Dancer was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. Dancer pleaded not guilty. The district court found him competent to proceed at the conclusion of a lunacy hearing. Dancer changed his plea to not guilty and not guilty by reason of insanity, and the district court found him competent to proceed at the conclusion of a second lunacy hearing. The district court denied his motion to suppress his statement. He was tried and found guilty as charged by a twelve-person jury. The district court sentenced him to life imprisonment at hard labor, without benefit of parole, probation or suspension of sentence. The district court denied his motion to reconsider sentence, and granted his motion for appeal. Dancer timely filed his appeal.

The record was lodged with this court, and supplemented with transcripts of the two lunacy hearings. Per the request of Dancer, the record was forwarded to him so that he could file a pro se reply brief. Dancer failed to file his brief within the time allowed by the Court.

FACTS

Dancer was convicted of strangling Mr. Thomas to death in a Chef Menteur Highway motel where the two were spending the night.

At trial, Dr. Paul McGarry, qualified by stipulation as an expert in the field of forensic pathology, testified that he performed an autopsy on the body of Mr. Thomas who was forty-three years old, five feet eight and one-half inches tall, and weighed 145 pounds. Dr. McGarry testified that the cause of death was manual strangulation. He found bruises and scrape marks across Mr. Thomas' cheeks, eyelids, underneath his lips and inside his mouth, all that he described as blunt force injuries. The neck bore curved markings and fingernail markings characteristic of strangulation. He testified that enough force was applied to break the hyoid bone, crush the voice box, and shut off Mr. Thomas' airway, causing his death. There were two abrasions on Mr. Thomas' left hand, the types of injuries Dr. McGarry said occur with a punching injury or where the fist hits something else. Two small abrasions on the back of the right arm were consistent with Mr. Thomas scraping up against something or wrestling against a rough surface in a fight. He testified that these injuries, although minor, indicated that Mr. Thomas was in some type of struggle.

Dr. McGarry further testified that there is a tendency for a person being strangled to lose consciousness before dying. Blood flow is cut off

because the carotid arteries are right beside the structures being compressed. He testified that if there is a letup on that pressure, the person can breath again and be revived and that person turns blue when they have used up all the oxygen that is circulating in his blood, and no new oxygen has come in because he cannot breathe. Dr. McGarry testified that the blood alcohol level of Mr. Thomas was .30, considerably higher than what he said the legal limit was, .08. Dr. McGarry further testified that Mr. Thomas had a large, hard fatty liver, what he would expect in a case of chronic alcoholism. He testified that there is a tendency for people who drink everyday in large amounts to gradually develop a tolerance to having a high blood alcohol level.

New Orleans Police Officer, Duralph Hayes, testified at trial that he and another officer responded to a call between 4:00 and 5:00 a.m. at the Friendly Inn Motel in the 4800 block of Chef Menteur Hwy. Upon arrival they were directed by motel employees to Dancer who was standing by room 814 with the body of Mr. Thomas lying on the ground. Officer Hayes testified that because of the nature of the information he had received, he immediately handcuffed Dancer. When he did so, Dancer looked at the officer and said he had killed the victim. Officer Hayes testified that he immediately advised Dancer of his constitutional rights. Dancer said he

understood his rights and repeated that he killed Mr. Thomas by strangulation. Officer Hayes testified that he detected alcohol in Dancer's breath, that his speech was slightly slurred—but very understandable—and that he was a little unsteady on his feet.

Henry Menant, a security officer for the Friendly Inn Motel, testified that on the night in question he received a complaint that the people in room 814 were being "kind of loud". Mr. Menant knocked on the door and was invited into the room, where one man apologized explaining that the two had a couple of beers, and that they would be quiet. Mr. Menant testified that the two men inside appeared to be associates, sitting down and talking. Approximately one-half hour later, Dancer approached Mr. Menant and told him that he and his friend had a "beef," and that it was either "him or me," and that he had killed him. Mr. Menant did not take Dancer seriously, and continued his duties. Dancer approached him again some thirty minutes later and again told Mr. Menant that he killed his friend. Mr. Menant asked if he was joking, and testified that Dancer laughed and joked with him. He walked with Dancer to room 814, but Dancer did not invite him into the room. Mr. Menant waited about five minutes after Dancer entered the room, but left when Dancer did not come out. Thirty minutes later, Mr. Menant was notified by the desk clerk that someone from room 814 had called to say

that he had killed someone. Mr. Menant told the desk clerk he had checked it out and it was a joke. Thirty minutes to an hour later, Dancer approached Mr. Menant for a third time, asking if he had telephoned the police. Mr. Menant replied that he had not. Dancer again said he had killed his friend mentioning something about the body. He asked Mr. Menant what to do with the body, and Mr. Menant told Dancer to drag it out to him. He stood by the door while Dancer went inside. Once again Dancer did not return, and Mr. Menant continued making his rounds. Subsequently, he saw Dancer again, and this time Dancer pointed out the body of Mr. Thomas lying near the pool.

Mr. Menant admitted on cross examination, after having his recollection refreshed with the written statement he gave to police, that he told a Detective Eckert that Dancer told him that the victim was trying to kill him. He conceded that Dancer never told him that he had strangled with the victim, revived him, then strangled him again as Dancer explained in his videotaped confession.

New Orleans Police Detective, Douglas Eckert, testified that he met with Dancer at the Third District Police station, where he advised him of his Miranda rights. Upon advising him of his rights, Dancer blurted out that he killed the victim by strangling him. Dancer went on to explain that he had

been struck by the victim, and photos were taken depicting bruising underneath or around Dancer's left eye. Detective Eckert testified that nearly five hours elapsed from the time he came into contact with Dancer until the time he took his statement. Detective Eckert testified that he would have waited to take a statement from Dancer despite the five hour elapse in time because he detected alcohol on Dancer's breath when he first talked to him. A videotape of Dancer's statement was played for the jury.

On video Dancer was advised of his Miranda rights, one-by-one, being asked whether he understood each right, one-by-one. He indicated that he did and commented that he may have already incriminated himself. He asked Detective Eckert whether the detective wanted him to make a statement, and the detective replied that it was "totally up to him". Dancer said that he had already made a statement, and signed the rights-of-arrestee form indicating that he understood his rights and was waiving them to make a statement.

Dancer began by saying: "We got into an argument. I killed him." Dancer explained that he and Mr. Thomas met as both were being released from jail the Thursday prior to the killing. The following is taken from Dancer's videotaped confession: He explained that the two drank a fifth of vodka on the afternoon of the homicide, at approximately 12:30-1:00 p.m.,

before going to the motel. They bought a second fifth of vodka at approximately 4:30-5:00 p.m., and had drunk three quarters of it by the time of the homicide. Dancer did not know what time the argument began, as there was no clock in the room. The argument was about the way Mr. Thomas "lived his life; he was talking about killing and robbing other people". This angered Dancer. He went into the bathroom, but before he did Mr. Thomas hit him once in his face with his closed hand. When Dancer came out of the bathroom, Mr. Thomas was talking "s---" and talking about killing Dancer, so Dancer grabbed him by the throat and threw him down between the two beds and strangled him. Dancer said that he strangled Mr. Thomas until he turned blue and became unconsciousness, then Dancer revived him by giving him mouth-to-mouth resuscitation. He said Mr. Thomas asked him to stop. Dancer told him no and said "this is your night," and strangled Mr. Thomas again. Dancer thought he resuscitated Mr. Thomas a second time and then fatally strangled him. When asked whether he revived Mr. Thomas a third time, Dancer said he did not think so. Dancer then took a bath. He said that he had been planning to take a bath before strangling Mr. Thomas, and mentioned that he was thinking that it would be his last bath. Dancer finished the second fifth of vodka after the killing. He finally dragged the body of Mr. Thomas out of the room because Dancer

thought that his body began smelling bad. Dancer said that the verbal confrontation was "drunk talk," but he believed Mr. Thomas would have killed him as he threatened to do.

Detective Eckert testified on cross examination that no "Breathalyzer" test was performed on Dancer, even though there was evidence he had been under the influence of alcohol. The detective explained that this test was limited to use in cases of persons suspected of operating a motor vehicle while intoxicated. He later testified that he did not know whether Dancer was intoxicated or not. Detective Eckert's report reflected the time of the offense as 5:11 a.m. His interview with Dancer began at 10:13 a.m., and ended at 10:32 a.m. Detective Eckert testified that as far as he could recall, two witnesses he interviewed said nothing about Dancer relating to them that he had killed the victim and then revived him.

Dancer, testifying at trial in his own defense, confirmed that he had a history of alcoholism, and was treated for that problem in Ohio. He admitted to having a ten-year-old conviction for battery, from Pennsylvania. He also admitted on cross examination, to having a second battery conviction from Florida. He testified that he met Mr. Thomas on the Thursday before the homicide, which occurred the following Monday. He testified that in between Thursday and the day of the homicide he and Mr.

Thomas drank in the French Quarter. He testified that Someone approached them and asked if they wanted some work, and told them to go to the Friendly Inn Motel. After they got the room they began drinking a second fifth of vodka around 4:00 p.m. He testified that they purchased another fifth, a third fifth, at approximately 10:00 p.m. Immediately preceding the homicide, he went into the bathroom. When he came out, Mr. Thomas started throwing food at him. He told him to stop. Dancer testified that this is when Mr. Thomas "flipped out." Mr. Thomas threatened to kill Dancer and got off a chair and hit him, knocking him onto a bed. Dancer said Mr. Thomas fell in between the beds and that was when he "got control of him." He testified that he jumped off the bed, pinned Mr. Thomas to the floor, and killed him. When asked to explain why he killed the victim, Dancer testified that he did so because he was afraid of what Mr. Thomas had told him, referring to the victim having told him that he had robbed and killed others. Dancer testified that he was afraid to let Mr. Thomas up. He testified that he had nowhere else to go, and noted that the room was actually in his name. He testified that he did not kick Mr. Thomas out because he could not afford to keep the room and get enough money to get a bus ticket out of New Orleans. He further testified that he attempted to revive Mr. Thomas several times but was unable to do so. He explained his contradicting statements to

Detective Eckert, that he was drunk and "did not care". He knew he had killed Mr. Thomas, and thought he was going to jail anyway, so he figured he'd "give them something fancy," and "made a bunch of stuff up." He further testified that he was very drunk when he gave the statement. He attempted to call the front desk after the killing, but did not know how to dial out. He then blacked out. When he awoke he successfully called the front desk.

Dancer further testified on cross examination that there was one argument, consisting of about three words, and then the fighting began. He was asked about an inconsistency between his testimony and his prior statement, and whether his memory was better a year later at trial than it was on the day of the homicide. He answered that his memory was better a day after the killing, when he sobered up. He confirmed that he told Detective Eckert and Mr. Fuller that he tried to revive the victim after strangling him. He testified that he did not talk to the Friendly Inn Motel security guard, Mr. Menant, and had not seen him before. He testified that he probably weighed approximately 145 lbs. at the time of the homicide, and was five feet nine inches tall. He did not dispute that Mr. Thomas had weighed approximately 145 lbs. and was five feet eight inches tall. He testified that he dragged the body of Mr. Thomas outside because he was sitting there waiting for police

and it was not pleasant to stare at the body. He admitted that he was emotionally shaken.

Dancer also testified on redirect examination that he was afraid of Mr. Thomas. He testified that all he knew was what Mr. Thomas told him—that he had killed several people and used to rob for a living. He testified that he did not know what Mr. Thomas was capable of and that he said running away was not on his mind, defending himself was.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, Dancer argues that the evidence is insufficient to support his conviction for second degree murder.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State

v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.

In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard.

State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

La. R.S. 14:30.1(A)(1) defines second degree murder in pertinent part as the "killing of a human being when the offender has a specific intent to kill or inflict great bodily harm." Specific criminal 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). Specific intent need not be proven as fact, but may be inferred from the circumstances and actions of the defendant. State v. Hebert, 2000-1052, p. 12 (La. App. 4 Cir. 4/11/01), 787 So. 2d 1041, 1050, writ denied, 2001-1804 (La. 3/15/02), 811 So. 2d 905. Specific intent can be formed in an instant. State v. Cousan, 94-2503, p. 13 (La. 11/25/96), 684 So. 2d 382, 390.

Dancer argues that the State failed to meet its burden of proving that the killing was not in self-defense, and in the alternative, that the evidence supports only a conviction for manslaughter.

The applicable justifiable homicide provision, La. R.S. 14:20(1), states that a homicide is justifiable "[w]hen committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life

or receiving great bodily harm and that the killing is necessary to save himself from that danger." When a defendant asserts self-defense, the State has the burden of establishing beyond a reasonable doubt that he did not act in self-defense. State v. Ross, 98-0283, pp. 10-11 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 763; State v. Byes, 97-1876, p. 8 (La. App. 4 Cir. 4/21/99), 735 So. 2d 758, 764.

Detective Eckert testified that he noticed slight bruising underneath or around Dancer's left eye, and that Dancer claimed that Mr.Thomas struck him. The videotape of Dancer giving his statement shows noticeable bruising and swelling around his eye. Dr. McGarry, who autopsied Mr. Thomas, testified that he noted that the two abrasions on Mr. Thomas' left hand were the types of injuries which occur with a punching injury or where the fist hits something else. Thus, the physical evidence supports Dancer's trial testimony and the claim in his statement insofar as he said Mr. Thomas punched him in his face, once. Detective Eckert's testimony that the motel room in question had food particles scattered about as if there had been a food fight supports Dancer's trial testimony that when he came out of the bathroom Mr. Thomas threw food at him. Dr. McGarry also testified that abrasions on Mr. Thomas' arms were consistent with him scraping up against something or wrestling against a rough surface.

Dancer testified at trial that after Mr. Thomas struck him Mr. Thomas fell onto a bed and then down between the two beds. At that point he got on top of Mr. Thomas and strangled him to death. He testified that he attempted to revive Mr. Thomas, but was unsuccessful. However, he said in his statement to Detective Eckert that he did successfully revive Mr. Thomas at least once when Mr. Thomas asked him to stop. Dancer testified that he replied "no," told him that this "is your night," then strangled him again. He testified at both trial and in his statement that he was afraid of Mr. Thomas because Mr. Thomas told him he had killed people before and used to rob for a living. Both Dancer and Mr. Thomas weighed 145 lbs., and were within one-half to one inch in height of each other. Neither was armed.

Any rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could have concluded beyond a reasonable doubt that Dancer did not kill Mr. Thomas in self-defense, i.e., that no reasonable person in Dancer's circumstances could have believed—after strangling Mr. Thoms into unconsciousness, reviving him and rejecting his plea to stop—that he was thereafter in immediate danger of being killed or of receiving great bodily injury, and that the killing of Mr. Thomas was necessary to save himself from that danger.

Dancer next argues that the evidence at worst was only sufficient to

support a conviction for manslaughter. Manslaughter is defined in pertinent part by La. R.S. 14:31 as:

> (1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; …

The Louisiana Supreme Court has explained the relationship between the two separate offenses of homicide and manslaughter as follows:

> It is the presence of "sudden passion" and "heat of blood" that distinguishes manslaughter from murder. This court has repeatedly stated, however, that "sudden passion" and "heat of blood" are not elements of the offense of manslaughter. Rather, they are mitigatory factors in the nature of a defense which exhibit a degree of culpability less than that present when the homicide is committed in the absence of these factors. State v. Lombard, 486 So.2d 106 (La.1986); State v. Tompkins, 403 So.2d 644 (La.1981). Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. Lombard, 486 So.2d at 111.

State v. Snyder, 98-1078, p. 4 (La. 4/14/99), 750 So. 2d 832, 837-838.

"Heat of blood" or "sudden passion" is defined by the jurisprudence as

provocation sufficient to deprive an average person of his self-control and cool reflection. State v. Robinson, 2001-1305, p. 11 (La. App. 4 Cir. 4/17/02), 820 So. 2d 571, 579. However, such provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled or that an average person's blood would have cooled at the time the offense was committed. State v. Collor, 99-0175, p. 10 (La. App. 4 Cir. 4/26/00), 762 So. 2d 96, 102. When reviewing the contention, as made by defendant in the instant case, that evidence was produced that the offender committed the crime in sudden passion or heat of blood, the Jackson v. Virginia standard of review must be employed to determine whether a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could have found that the mitigating factors were not established by a preponderance of the evidence. Snyder, 98-1078 at pp. 4-5, 750 So. 2d at 838. The defendant need not affirmatively establish the factors; the jury is free to infer the mitigating circumstances from the evidence. State v. Lindsey, 98-1064, p. 5 (La. App. 4 Cir. 6/3/98), 715 So.2d 544, 547.

Dancer argued all along that he acted in self-defense, that he was afraid of Mr. Thomas, and that when Mr. Thomas hit him in the face and threatened to kill him, he got on top of Mr. Thomas—after the victim fell to

the floor—and intentionally strangled him to death. Neither Dancer's testimony nor his statement given to police evidences sudden passion or heat of blood so as to deprive him of his self-control and cool reflection. As he noted in his trial testimony, the "argument" between the two men consisted of three words, presumably being the victim's statement: "I'll kill you." Dancer stated in his videotaped statement that he revived Mr. Thomas, and when Mr. Thomas asked him to stop, he told the him "no", saying to him that it was "your night." Any rational trier of fact could have interpreted this statement as Dancer telling Mr.Thomas that this was his night to die. Any rational trier of fact viewing the evidence in a light most favorable to the prosecution could have found that the mitigating factors were not established by a preponderance of the evidence.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, Dancer argues that the district court erred in denying his motion to suppress his videotaped statement, as it was not freely and voluntarily given because of his state of intoxication.

The Louisiana Supreme Court set forth the applicable law in State v. Simmons, 443 So. 2d 512 (La. 1983) as follows:

> Before a confession can be introduced into evidence, the state must affirmatively prove that it was free and voluntary and not made under the

influence of fear, duress, intimidation, menaces, threats, inducements or promises. R.S. 15:451; State v. Robinson, 384 So.2d 332 (La.1980). The state must also establish that an accused who makes a confession during custodial interrogation was first advised of his Miranda rights. State v. Kersey, 406 So.2d 555 (La.1981); State v. Robinson, supra.

Intoxication will render a confession inadmissible when the intoxication renders the defendant incapable of understanding his right to remain silent. In State v. Robinson, supra at 335, this court reiterated its standard for determining the effect of intoxication on confessions. There we noted:

"... Where the free and voluntary nature of a confession is challenged on the ground that the accused was intoxicated at the time of interrogation, the confession will be rendered inadmissible only when the intoxication is of such a degree as to negate defendant's comprehension and to render him unconscious of the consequences of what he is saying. Whether intoxication exists and is of a degree sufficient to vitiate the voluntariness of the confession are questions of fact. State v. Rankin, 357 So.2d 803 (La.1978). The admissibility of a confession is in the first instance a question for the trial judge. His conclusions on the credibility and weight of the testimony relating to the voluntariness of a confession will not be overturned unless they are not supported by the evidence. State v. Hutto, 349 So.2d 318 (La.1977)." See also State v. Godeaux, 378 So.2d 941, 943 (La.1979); State v. Hammontree, 363 So.2d 1364, 1367-1368 (La.1978).

443 So. 2d at 515-516.

A court must look to the totality of the circumstances surrounding the confession to determine its voluntariness. State v. Lavalais, 95-0320, p. 6 (La. 11/25/96), 685 So. 2d 1048, 1053. The testimony of police officers alone can be sufficient to prove the defendant's statements were freely and voluntarily given. State v. Jones, 97-2217, p. 11 (La. App. 4 Cir. 2/24/99), 731 So. 2d 389, 396. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670, p. 11 (La. App. 4 Cir. 3/3/99), 729 So. 2d 132, 137.

In Simmons, supra, the defendant was arrested at 7:15 p.m., and gave two recorded statements at 11:10 p.m. and 11:45 p.m. that same evening. The police officer who took the statements said the defendant was very cooperative and did not appear to be under the influence of intoxicants of any sort, while the owner of a bar testified that the defendant had consumed at least six bottles of wine that day. The court held on appeal that the testimony negated any claim of intoxication sufficient to vitiate the voluntariness of the confessions.

In the matter Sub Judice, Detective Eckert testified at the motion to suppress hearing that when Dancer was arrested he appeared to be under the

influence of alcohol, but that Dancer's statement was not taken until more than five hours later. Detective Eckert replied in the negative when asked whether, to his knowledge, Dancer was intoxicated at the time of the statement. Detective Eckert further testified that it was his understanding that Dancer and Mr. Thomas had consumed almost two fifths of vodka between 5 p.m. the evening before the murder and the time of the murder, around 1:00 or 2:00 a.m. the next morning.

Dancer stated in his statement that he and Mr. Thomas began drinking the first fifth of vodka at approximately 12:30-1:00 p.m. the afternoon before the homicide. They then purchased a second fifth at approximately 4:30-5:00 p.m. Dancer also stated in the videotaped statement that they drank all but one-quarter of that fifth by the time of the argument and strangling, and that he finished it after the killing. He testified at trial, however, that they consumed the second fifth and purchased a third fifth at approximately 10:00 p.m.

Detective Eckert testified at trial that Dancer began giving his statement at 10:13 a.m. The videotaped statement indicated Detective Eckert checking his watch at the commencement of the statement, and saying that the time was 10:13 a.m. The videotape also indicates that Dancer was orally advised of each of his five Miranda rights separately, and

he indicated by separate positive responses that he understood them. He stated that he did not have his glasses, and so could not read part of the rights of arrestee form before checking off the box signifying that he was waiving his rights and giving a statement. However, Detective Eckert read each section to him. He asked Detective Eckert if he wanted him to make a statement, and the detective said: "That's totally up to you." Dancer laughed, stated that he had already made statements, and said: "Oh, what the hell."

The videotape initially shows Dancer to be in what appeared to be a tired or fatigued condition. His hands were cuffed in front of him. At one point he raised his hands to lean his head on them. He did not appear fatigued during the giving of his statement. He was seated in a comfortable-looking chair with armrests, upon which he rested his arms. His right leg was crossed over his left most of the time. He did not appear intoxicated in the videotape, and thus the videotape confirms Detective Eckert's assessment that he was not intoxicated at that point. His statement was clear and straightforward.

Dancer also testified at trial that he recalled some things the next day, after he sobered up. However, even assuming he was suffering some residual intoxication when he waived his rights and gave a statement more

than five hours after he had consumed any alcohol, the record does not reflect that he was intoxicated to such a degree that it could be said that he did not understand his Miranda rights—that his statement was not freely and voluntarily given.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In his final assignment of error, Dancer argues that the mandatory life sentence imposed on him was constitutionally excessive, and he complains that the district court did not consider any mitigating sentencing factors as per La. C.Cr.P. art. 894.1. He timely filed a motion to reconsider sentence based on the grounds of constitutional excessiveness and failure to consider mitigating factors, which was denied by the district court.

La. Const. art. I, § 20 explicitly prohibits excessive sentences; State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677. Courts have the power under La. Const. art. I, § 20 to declare to a sentence excessive, although it falls within the statutory limits

provided by the legislature. Id., 97-1906, p. 6, 709 So. 2d at 676. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979. When a trial court determines a sentence from a carefully tailored penalty statute, such as the statute applicable in the instant case, La. R.S. 14:30.1, there is a strong presumption that the sentence is constitutional. State v. Bunley, 2000-0405, p. 24 (La. App. 4 Cir. 12/19/01) 805 So. 2d 292, 308, writ denied, 2002-0505 (La. 1/24/03), 836 So. 2d 41. To rebut the presumption that a mandatory sentence is constitutional, a defendant must clearly and convincingly show that he is exceptional, meaning that because of unusual circumstances the defendant is a victim of the legislature's failure to assign sentences meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See State v. Lindsey, 99-3256, p. 5 (La. 10/17/00), 770 So. 2d 339, 343 (mandatory life sentence under the Habitual Offender Law).

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v.

Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. If adequate compliance with La. C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Ross, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762.

However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So. 2d at 819.

In State v. Soraporu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is " 'whether the trial court abused its broad sentencing discretion, not whether another sentence might have

> been more appropriate.' " State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear[s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id.

In the matter Sub Judice, although the district court did not state for the record any mitigating factors it considered, the record supports the sentence. It is true that Dancer had no prior felony convictions when this crime was committed. Dr. Salcedo testified at the two lunacy hearings that Dancer had a history of depression and suicide attempts, and a long-standing alcohol abuse problem. Dr. Salcedo said he would also “suggest” that Dancer had a borderline personality disorder formerly associated with

substance abuse.

However, Dancer strangled another person to death. When Mr. Thomas pleaded with him to stop, Dancer told him "no", that "this is your night," meaning that this was Mr.Thomas' night to die, and proceeded to strangle him to death. It cannot be said that Dancer clearly and convincingly exhibited by his depression and alcohol abuse problems that he is exceptional, meaning that because of unusual circumstances he is a victim of the legislature's failure to assign sentences meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. Dancer fails to cite a single instance where an appellate court has found the imposition of the mandatory life sentence for a conviction of second degree murder constitutionally excessive.

There is no merit to this assignment of error.

DECREE

For the foregoing reasons, the conviction and sentence of Michael Dancer are affirmed.

AFFIRMED