NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2011-KA-0996**
VERSUS	*	**COURT OF APPEAL**
DAVID DAVIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 477-647, SECTION "B"
Honorable Lynda Van Davis, Judge
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Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Paul A. Bonin)

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MARCH 13, 2012

CONVICTION AND SENTENCE AFFIRMED

Defendant/appellant, David Quentin Davis, appeals his conviction on manslaughter charges. Because we find that the evidence is sufficient to support the conviction, the conviction is affirmed. However, we reserve to defendant the right to assert his claim of ineffective assistance of counsel in an application for post-conviction relief.

STATEMENT OF THE CASE

Defendant David Quentin Davis was charged by grand jury indictment on April 17, 2008, for second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty. After a sanity hearing, defendant was found competent to proceed. This Court denied defendant's writ application that sought relief from the competency ruling.[1] The trial court denied defendant's motions to suppress the

[1] State v. Davis, unpub., 2008-1108 (La. App. 4 Cir. 9/29/08).

identification and statement. Thereafter, defendant withdrew his plea of not guilty and entered a plea of not guilty by reason of insanity.

Defendant was tried by a twelve-person jury and found guilty of manslaughter. On November 19, 2010, the trial court denied defendant's motions for new trial and for post-verdict judgment of acquittal and sentenced defendant to thirty-eight years at hard labor, without benefit of parole, probation, or suspension of sentence. On that same date, defendant was adjudicated a third-felony habitual offender. The trial court then vacated the original sentence imposed and resentenced defendant to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. This appeal followed.

FACTS

Witnesses at trial testified as follows:

Sara Ann Clawson, the mother of victim Elizabeth Chapman, testified that Elizabeth was twenty-five years old when she died. Elizabeth had three daughters at the time of her death, ages one, two and six years.

New Orleans Police Department Officer Keith Joseph testified he was in the French Quarter Eighth District police station at 3:00 a.m. on either December 26, 27 or 28, 2007. He was approached by two white, homeless-looking males who advised him there was a body under the wharf. The individuals directed Officer Joseph to the body underneath the wharf by the Mississippi River. It was dark underneath the wharf, and the officer needed his flashlight to see. He observed the body and then notified his command desk and a dispatcher to notify EMS, Homicide, and the Crime Lab. After a conversation with officers and the homeless people, the name "David" popped up. Officer Joseph remembered that there was a David who had been sniffing gas. On cross examination, he did not recall if the

two males who had approached him had blood on their clothing or if they appeared under the influence of alcohol.

New Orleans Department Detective Jonathan Bulliung was assigned to the French Quarter's Eighth Police District on December 27, 28 and 29, 2007. He participated in the homicide investigation resulting in the arrest of defendant. Det. Bulliung estimated that the victim's body was approximately fifty yards away from the single entrance to the area underneath the wharf, near St. Louis Street and the river. The body was covered in a blue tarp weighted down with rocks, with the feet sticking out. Det. Bulliung testified that homeless, vagrant-type people lived under the wharf, and that people were living there at the time the body was found.

New Orleans Police Department Detective Greg Hamilton was the lead investigator in the case. He testified that it appeared the victim's body had been moved to its location under the wharf, where it had been sort of wedged between a piling and a driftwood log. He noticed a trail of blood from the entrance of the underneath portion of the wharf fifty feet to the location where the body was located. Det. Hamilton identified photographs of the crime scene underneath the wharf. Det. Hamilton testified that numerous items of evidence were gathered from the area, including trash cans. Some blood-stained rocks found near the body were also collected. Det. Hamilton collected an empty five-gallon gas can because he had smelled gasoline at the scene.

Det. Hamilton later interviewed the two individuals who had reported the body. He said only one, whose last name was Jennings, was a witness. Jennings, who was homeless, lived underneath the wharf. Jennings told the detective an individual nicknamed "Ghost" showed him the body. He related that "Ghost" huffed gasoline. Det. Hamilton learned that the defendant had recently been

arrested. He compiled a photo lineup and presented it to Jennings. Jennings identified the defendant. On the back of the lineup, Jennings wrote: "My choice, No. 6, is Ghost or David. He showed me the body and told me he killed her." Det. Hamilton obtained an arrest warrant for defendant, and defendant was arrested that same evening, on December 28, 2007.

Det. Hamilton went to the scene of the arrest where he observed defendant sitting in the back of a police car, coherent and observant. Defendant was then taken to the homicide division, where defendant was advised of his Miranda[2] rights. Det. Hamilton confirmed that in his police report, he wrote a "U" in the box marked "Sobriety," meaning "unknown sobriety." Defendant signed a form signifying that he understood his rights. Det. Hamilton identified that form. Defendant subsequently gave a recorded statement beginning at approximately 8:30 p.m., which lasted until approximately 9:00 p.m. Det. Hamilton identified a digital video disc of that statement, and it was played for the jury.

The video depicted the defendant sitting at a desk/table within several feet of Det. Hamilton and another officer. Defendant stated his name when asked. Defendant confirmed in the beginning of the statement that he could read, write and understand the English language. He was advised of all of his Miranda rights on the video. They were read by Det. Hamilton from a Rights of Arrestee form. Defendant signed the form. He signified that he waived his right to remain silent/consult with an attorney and gave a statement. At the end of his statement, he confirmed that he had given the statement of his own free will.

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[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In the video, Defendant said he met the victim on Bourbon Street on the night/morning of the killing when she asked to borrow his lighter to smoke crack. He claimed he did not smoke crack with her that night. He said she began to perform oral sex on him on Bourbon Street, but it was too public so they left. The victim, another male, "Derrick," and he walked to the wharf at St. Louis Street. Only defendant and the victim went underneath the wharf. Defendant was somewhat vague about what occurred immediately before he struck the victim, stating he and the victim were "just f--king around." At some point, she was standing. Then, she fell to the ground, and began screaming. Defendant said he freaked out, began to wrestle with her, and then hit her. In response to a question from Det. Hamilton as to what he had hit her with, defendant replied that he had hit her with his hand. The other officer present asked defendant if he had ever hit her with a rock. The defendant replied in the affirmative.

Defendant said he wanted to knock the victim out to stop her from screaming, saying at one point that he had her in a choke hold. He further stated: "And I didn't know what was going to happen and I got scared, and I hit her, with a rock." He said the rock was lying right there. When asked where he had hit the victim with the rock, defendant replied: "On her head." When defendant was asked if he knew how many times he had hit her, and if he knew if he hit her more than once, he replied: "Probably." However, he was not sure. He explained that he had weird issues in his head. Sometimes, he would black out and start thinking he was people he was not. He named the Grim Reaper, in particular. He said he had delusions. He recalled that he had delusions when he was under the wharf with the victim. He said that he had been "freaking out" for a couple of days. At

that point, the other police officer interrupted defendant and redirected him back to talking about another issue.

While defendant first stated that he had sex with the victim before and after he killed her, he later said he did not know if she was dead or alive when he was having sex with her. He also said he took her clothes off after she was dead. He would turn her over while he was having sex with her, apparently to have vaginal and anal intercourse. He saw blood on her face. He covered it with a shirt when he had sex with her. Defendant claimed he had sex with her multiple times, vaginally and anally; and after she was dead, but not after she had turned cold. He moved her body to position it next to a log, and he covered it with a blue tarp that was under the wharf. He took "Derrick" and "Mike" to see the body. Defendant told them, or at least Derrick, that he had killed her and had sex with her. He said "no" when asked had he smoked crack with the victim. However, he added that he smoked some crack with "Baham" later that day—what he referred to as "the next day."

Det. Hamilton confirmed on cross examination that when defendant was arrested he had a twelve ounce vitamin water bottle containing gasoline. He said that he was able to identify defendant as a suspect partly because of other NOPD officers' familiarity with him as an individual who sniffed or "huffed" gasoline. Det. Hamilton verified that defendant was transported to the homicide office around 6:30 p.m. Det. Hamilton did not speak to defendant during the two hours between the arrest and defendant's giving of his statement. Det. Hamilton confirmed that during the interview, defendant replied that he did not know the victim. The best description defendant could give of the victim was that she was a white female with brown hair. Det. Hamilton acknowledged that defendant said

that he suffered from blackouts and had a hard time remembering. He also said that defendant revealed that he was hearing voices. However, Det. Hamilton did not recall whether defendant told him he was hearing voices at the time he was under the wharf with the victim.

Det. Hamilton was questioned on cross examination about his interruption of defendant when defendant had attempted to tell the detective that his mind was messed up and that he did not know what was going on. Det. Hamilton replied that his concern was whether defendant was talking about something that had occurred in the past or at the time of the crime. Det. Hamilton confirmed that he did not request that any tests be performed on evidence obtained from defendant in the examination of him by the sex crimes unit, such as scrapings from underneath his fingernails, etc. He advised he did not seek such tests because defendant confessed to the crime. Det. Hamilton never asked defendant to take him back to the scene and recount what happened that night.

Det. Hamilton acknowledged that he spoke with an Arthur Morgan, a French Quarter bouncer. Mr. Morgan had on clothes that he claimed were bloodied from a fight. Mr. Morgan told Det. Hamilton that he had second-hand information as to the whereabouts of a body. The police obtained a warrant to seize Mr. Morgan's clothes for testing. However, Det. Hamilton advised that they were not tested because by that time, the defendant had confessed to the murder and the defendant's confession fit the crime.

On re-direct examination, Det. Hamilton described himself as "being overwhelmed" during his interview of defendant, considering the condition of the victim and what defendant was saying he did to her. He conceded that maybe something could be wrong with defendant, but that it would probably take a

professional to analyze him. Det. Hamilton said he would note a defendant's condition if he believed he was so intoxicated that he could not understand his rights.

Det. Hamilton stated that Morgan knew defendant and Derrick Abbot. He confirmed on re-cross examination that Derrick Abbott was once a suspect. He revealed that he had actually arrested Abbott for accessory after the fact. Det. Hamilton denied that he had ever considered that defendant was accepting all responsibility for the crime to cover someone else's involvement. He said that possibility never crossed his mind.

New Orleans Police Department Officer Brian Elsensohn testified that his partner and he apprehended defendant walking on the sidewalk in the 1200 block of Kelerec Street, just outside the French Quarter. He said defendant appeared to kind of slouch down a bit as he looked over his shoulder and observed the marked police unit. Officer Elsensohn testified that when he asked defendant to step over to the police car, the defendant walked over. The officer described defendant as semi-polite and said he had a vitamin water bottle half-full of gasoline. Defendant stated to the officers that he liked to drink gas. Officer Elsensohn asked defendant his name, and he gave his correct name, David Davis. Defendant understood all of the questions posed to him. Once it was determined that defendant was the individual wanted for the murder, he was handcuffed and advised of his rights. Officer Elsensohn indicated that defendant understood his Miranda rights, although he did not execute a Rights of Arrestee form. After the Crime Lab came to the scene of the arrest, Officer Elsensohn relocated defendant to University Hospital, where a homicide detective took over. He said defendant seemed very calm and polite.

Officer Elsensohn confirmed that his report was written on December 28, 2007. He also confirmed that in his report, he had written that the initial incident had occurred about 3:30 a.m. He further confirmed that he arrested defendant at 6:30 p.m., which he agreed was fifteen hours after the incident. Officer Elsensohn admitted that he could not tell for certain whether defendant was sober when arrested. He also conceded that nowhere in his report was there anything about defendant slouching, although he reiterated that his recollection was that defendant slightly slouched down when he saw Officer Elsensohn and his partner in their police car. Defendant did not run, but came to him when directed to do so.

New Orleans Police Department Crime Lab Officer Gary Salinger went to University Hospital to photograph and document any trace evidence that was collected off defendant. He did this in the hospital sexual assault room. He photographed defendant, his inner and outer clothing, his tattoos, and abrasions and scratches on his body. He finished at 12:50 a.m. Office Salinger identified his photographs. He described defendant as calm and cooperative. Defendant was not slurring his speech and had no problem standing up for the photographs.

Sheri Pellagalle, a sexual assault and forensic nurse at University Hospital, conducted a forensic examination of defendant on December 28, 2007. In the history defendant gave to her, he stated that he was talking to a girl by the wharf. She started to scream loudly, so he beat her with a rock. In his medical history, he related that he had "serious mental illness and schizophrenia." When asked about present medications, defendant reported that he had not been taking his medication. She said defendant was calm, cooperative, alert, and he was oriented to time and place. He had multiple abrasions/small cuts to his face, his head, his arms, his legs

and his penis. She said two positive swabs for semen were collected. Nurse Pellagalle added that defendant's lacerations appeared fresh and looked new.

Dr. Samantha Huber, a forensic pathologist employed by the Orleans Parish Coroner's Office, was qualified by joint stipulation as an expert in the area of forensic pathology. Dr. Huber performed an autopsy on Elizabeth Chapman on the morning of December 28, 2007. She described injuries to the victim. The most severe were to her face and around her mouth. The victim had jagged lacerations around her lips where her teeth probably went through her lips. Dr. Huber stated that the victim lost six teeth due to blunt force trauma and had multiple fractures of her jaw. The victim had injuries to both sides of her head. The left side had a large laceration that went through the skin, subcutaneous tissue, and muscle. Dr. Huber testified that there was not an area of the victim's body where she did not suffer some sort of blunt force injury, including the upper chest, the abdomen, the thighs, both knees, both shins, both calves, the upper and lower arms, both hands, both elbows, the upper part of the buttocks and the upper back.

Dr. Huber indicated that the cause of death was brain injuries caused by blunt force trauma to the head. The victim had fractures at the base of her skull that bruised her brain and caused it to swell to such an extent that it herniated into the foramin magnum and disrupted the respiratory centers of her body. The victim was alive when the injuries to her face were inflicted, evidenced by blood found in her mouth and trachea, and also aspirated blood found in her lungs. There was a laceration to the victim's anus that occurred before she died. Dr. Huber replied that a rock, which the doctor handled as an item of evidence, could have caused the facial injuries and damage depicted in a State exhibit. Dr. Huber also testified on cross examination that fragmentation of the victim's lower lip was possibly caused

by animal activity after her death, as well as a small area on her left cheek and the tip of her nose.

Dr. Jeffrey Rouse, called as a witness by the defense, was qualified by joint stipulation as an expert in the field of forensic psychiatry. He testified that he had been retained to evaluate defendants by defense attorneys on four occasions and on behalf of the State three times. Dr. Rouse confirmed that it was his opinion that defendant was able to distinguish between right and wrong at the time of the offense. The State questioned Dr. Rouse concerning the criteria for determining competency to proceed to trial; then, it asked whether he would expect someone who could not distinguish right from wrong to meet such criteria. Dr. Rouse answered "likely not." He noted, however, that the issues of sanity at the time of the offense and competency to proceed to trial pose two different questions. Dr. Rouse did not interview defendant until June 2010, approximately thirty months after the crime at issue.

Defense counsel asked Dr. Rouse the effect that alcohol abuse from the age of nine would have on a healthy brain. He testified that alcohol abuse at a young age would probably render a person more vulnerable to psychiatric issues, such as depression, as he grew older. He said that if the alcohol abuse went on long enough, it could have some cognitive effects, such as difficulty with thinking or reasoning capacity. Dr. Rouse opined that hallucinogenic abuse, such as LSD or hallucinogenic mushrooms that started at the age of nine, could also cause a person to be a little more susceptible to experiencing psychiatric issues later in life.

Dr. Rouse advised that abusing more than one substance at a time for long periods of time could have additive effects, such as placing one at a greater risk for either mood problems or psychiatric issues later in life. Dr. Rouse noted that

sniffing gasoline could cause lots of physical problems and, insofar as the brain is concerned, could slow intellectual development and cause depressive and psychotic symptoms as well.

Dr. Rouse explained that he was not a child psychiatrist when asked what might cause a nine-year-old to start using drugs. He added, however, that it would appear that any significant trauma, such as family instability, lack of parental supervision, or other childhood difficulties, could cause drug usage. He testified that the effect of physical abuse could cause difficulties for victims in regulating their emotions, including controlling anger. Dr. Rouse added that abuse could manifest with victims having difficulties in combating depression and in hurting themselves. He also stated that child trauma had been shown to decrease the size of certain parts of the brain.

Dr. Rouse testified that a young man who observed his mother use cocaine and prostitute herself in front of him would essentially send a message that substance abuse is okay and potentially send a message that it is okay to indulge in criminal activity. He added that such observations would be traumatic and difficult for a child to see, given that children look to their parents to be the caretakers, not the other way around.

On the issue of a young boy being raped by his stepfather, Dr. Rouse opined that rape is one of the most difficult traumas a person can go through. It can result in post-traumatic stress disorder and, down the line, difficulties with controlling one's emotions and trusting other people, and a whole host of social and occupational difficulties. Dr. Rouse said having to live with one's attacker, such as a step-father, would only exacerbate the stated difficulties. He also stated that persons who have been raped by a stranger do better than persons raped by a loved

one or a person who is supposed to be closer to the victim. Dr. Rouse testified that repeated trauma can only make any underlying psychiatric issue worse.

Dr. Rouse relayed that he worked in a competency restoration unit in the Feliciana Forensic Facility in Jackson, Louisiana. Dr. Rouse confirmed that multiple medical records recounted that defendant reported sexual abuse from his first step-father, as well as rapes while he was in prison. Dr. Rouse's review of a box of documents provided to him by the State reflected medical records of close to ten psychiatric hospitalizations.

Dr. Rouse testified that it was relatively common for schizophrenics to hear auditory hallucinations, but rarer for them to have visual hallucinations. Dr. Rouse was aware that defendant, as a child in 1995, was diagnosed as having a brain infection. Dr. Rouse testified that such an infection could lead to delayed development, difficulty with intellectual tasks throughout their lifetime, and "theoretically," difficulties with mood or psychotic disorders later in life. He referenced an episode in 2004 or 2006 where defendant was hospitalized after being released from jail and came home to discover his wife in bed with someone else. Dr. Rouse replied that he would not expect a person with a healthy brain to be a necrophiliac, explaining that such an act was so outside the realm of normal expected sexual behavior that everyone would classify that as being unusual.

While Dr. Rouse stated that he considered malingering—faking or exaggerating psychiatric symptoms—for defendant, he did not believe he had been malingering any of his symptoms in any of the situations defense counsel had described. Dr. Rouse confirmed that when Dr. Sarah Deland, one of his mentors in his forensic psychiatry training, examined defendant three days after the murder, she reported that defendant appeared to be experiencing auditory and visual

hallucinations, as well as having paranoid and bizarre delusions, including that people were talking through his mouth and controlling his thoughts. He confirmed that Dr. Deland found at that time, December 31, 2007, three days after the murder, that defendant was psychotic—suffering from a serious mental illness—as well as a substance abuser; that he presented a risk of harm to himself; and that he was not competent to assist his counsel and proceed to trial. Dr. Rouse agreed that in 1995, thirteen years prior to the murder of Elizabeth Chapman, defendant was diagnosed by a psychiatric facility as being homicidal.

Dr. Rouse testified on cross examination that the State had retained him in early May 2010 to examine defendant to determine defendant's sanity at the time of the offense. Dr. Rouse identified his report prepared in connection with his examination. He agreed that defendant suffered from a number of mental illnesses. He reviewed a box of medical records provided to him by the State—which included records from inpatient hospitals and outpatient clinics—legal documents, arrest reports, the police report in the instant case and a DVD of the police interview conducted with defendant after his arrest.

Dr. Rouse acknowledged that throughout defendant's childhood, adolescence, and adult life, he had been given a number of different labels for his psychiatric issues. Defendant told Dr. Rouse that he felt bad, did not know why he killed Elizabeth Chapman, and that he had never hurt anyone before. Dr. Rouse said he attempted in numerous ways to get defendant to recall for him the incident. However, defendant was not able or not willing to discuss with him what he was thinking and feeling at that moment. Dr. Rouse said that defendant's actions prior to the murder were "essentially an extended substance abuse binge of alcohol,

hallucinogens, inhalants, and whatnot." He said that gave him a clue, "although not definitive proof," that he was intoxicated at the time of his crime.

Dr. Rouse recounted that defendant described using hallucinogens, drugs like LSD, mushrooms, mimosa and morning glory plants, more than ten thousand times—more than anyone else that Dr. Rouse had ever heard use hallucinogenic drugs. Defendant also told Dr. Rouse that he smoked marijuana and used other drugs such a methamphetamine, opiates, including heroin, pain prescriptions, and cocaine. Defendant also admitted that he was a frequent user of inhalants, such as gasoline and nitrous oxide/laughing gas, and/or propane.

Dr. Rouse concluded that defendant was sane at the time of the offense—that he was able to determine the wrongfulness of his action. Defendant knew what he was doing was wrong. Dr. Rouse believed that the overwhelming contributing factor to defendant's behavior in murdering Elizabeth Chapman was the degree of his voluntary multiple substance abuse at the time. Dr. Rouse stated that he did not believe that the acts would have happened in the absence of the intoxicating substance abuse, although he conceded that was speculation on his part. He stated on re-direct examination by defense counsel that other contributors to defendant's behavior were his untreated schizophrenia and his near homeless, transient lifestyle.

Dr. Harminder Mallik, called as a rebuttal witness by the State, was qualified by joint stipulation as an expert in the field of forensic psychology. He testified that he was initially appointed by the trial court along with Dr. Sarah Deland to a sanity commission charged with determining defendant's competency to proceed to trial. Dr. Deland and he examined defendant on July 17, 2008, April 6, 2009, and August 5, 2009. He believed Dr. Deland had previously been brought into the

case as a defense expert, but ultimately she was appointed as part of the sanity commission. Dr. Deland interviewed defendant on December 31, 2007, and on March 14, 2008. Dr. Mallik and Dr. Deland submitted a joint report, dated July 28, 2010.

Dr. Mallik testified that defendant's psychiatric history dated back to when he was eight years old, which was subsequent to the sexual abuse he had been subjected to by his stepfather. He was not officially treated at any psychiatric facility until he was twelve years old, when he was referred by the Pearl River Youth Center after he had been arrested for shoplifting. He was not hospitalized, but was diagnosed with conduct disorder, adjustment disorder, and oppositional disorder, and he was provided counseling. Three years later, at age fifteen, he was admitted to a mental hospital in Ogden, Utah. He appeared to have been intoxicated at that time, mainly from sniffing gasoline. Defendant was described at that time as being psychotic, under the influence. He was discharged from that hospital after three weeks against medical advice because he did not then pose a danger to himself or others. Dr. Mallik noted that defendant's substance abuse history began at age eight years old and that his drug of choice was sniffing gasoline. He would carry a bottle of gasoline, put it on a rag, and sniff it. Dr. Mallik stated that during his evaluation of defendant, defendant said he could not remember a day since he was a young child where he was not intoxicated.

Some two years later, at age sixteen, defendant had one of four admissions to Northshore Psychiatric Hospital, after a five-day binge of sniffing gasoline. He was found to pose a danger to himself and to others at that time and diagnosed with a possible bi-polar disorder, polysubstance dependence. He was eventually discharged. That same year, he was hospitalized in a Gulfport, Mississippi hospital

and diagnosed with adjustment disorder, depression, possible bipolar disorder, substance abuse, and borderline personality disorder. The records noted that he appeared to be very paranoid and was a potential danger to himself.

In 1995, at age seventeen, defendant was admitted for the second time to Northshore Psychiatric Hospital due to a suicide attempt where he cut both wrists, chased his mother with a knife, and jumped off a roof. He had also reported some psychotic symptoms, describing visual hallucinations of the demons, and he felt that he was going to hell. He was discharged three weeks later and given a diagnosis of drug dependence and dysthymia—a chronic, sub-chronic depression the individual presents with on a long-term basis, but which does not meet the criteria for major depression. It was in connection with this hospitalization that defendant was first given medications, including anti-psychotic medications, to stabilize him.

A few weeks later, he was hospitalized for the third time at Northshore Psychiatric Hospital. This hospitalization was precipitated by a report that he had been raped in jail, after which he had stabbed himself in his arm with a pencil. Dr. Mallik said this was the first time defendant was actually diagnosed with a psychotic symptom/disorder. However, Dr. Mallik testified that the ongoing diagnosis in almost every hospitalization of defendant was chronic drug dependency.

Defendant's fourth admission to Northshore Hospital occurred in 1999, after he had cut both his wrists and was taken in by police. Again, he was diagnosed with schizophrenia and treated with anti-psychotic medications. Two months later, he was admitted to Gulf Coast Mental Health for outpatient treatment. Within three months, he was transferred to Pine Grove Hospital in October 1999. At Pine

Grove, he was also diagnosed with psychotic disorder. Defendant left Pine Grove Hospital against medical advice.

Dr. Mallik testified that defendant's last three hospitalizations, once in in 2004 and twice in 2006, were at Mississippi State Hospital. With reference to these hospitalizations, Dr. Malik stated "[a]gain, there is an ongoing pattern over here where he has ongoing drug use, has been diagnosed with psychotic disorder and has had ongoing depression and has been given medications for treatment." He said defendant's record reflected a history of non-compliance with taking prescribed medications. Dr. Mallik explained that "against medical advice" means that physicians feel that the patient's treatment is not yet completed and they would prefer the patient to stay. He added that one's liberty cannot be restrained if one does not meet the criteria to be involuntarily committed.

Dr. Mallik relayed that in interviews with defendant, defendant revealed that he left his family to come to New Orleans in the summer of 2007. He was not on any medications at the time. He reported that he was drinking, using LSD, ecstasy, mushrooms, and was huffing a lot of gasoline. He was living on the street and would go under the wharf at the edge of the French Quarter to get high. He did not stay there because of the rats. Defendant told Dr. Mallik that during this time, he was twice taken to the hospital by New Orleans police for bizarre behavior. He was also in the Orleans Parish Prison for approximately three months on a burglary charge. He left jail on December 2, 2008, and he stayed with a girlfriend for a couple of days in St. Rose. He was then arrested in Jefferson Parish for DWI. After defendant got out of jail for that arrest, he returned to the French Quarter. He thought his girlfriend had left him. He felt he did not have anyone and nowhere to go, so he consumed drugs.

As it pertains to the instant offense, defendant told Dr. Mallik that he remembered siting on Bourbon Street after he took some ecstasy and mushrooms and started to huff gasoline. He said the victim came up to him and asked to borrow his lighter. He ended up accompanying her while she was smoking crack. They bought crack at the Round-Up bar and went underneath the wharf to smoke it. He gave a guy named Mike a small amount of crack in exchange for letting him use his mattress and blanket. Defendant said he remembered having sex with the victim and huffing gasoline at the same time. He said he remembered that the victim was screaming; that he woke up next to her and she was cold; and that he "freaked out." Dr. Mallik maintained defendant admitted that it was possible that he hit the victim with his hand because she was screaming, but he did not believe that he would have killed her. Defendant claimed he had no recollection of killing the victim.

Dr. Mallik testified that in his opinion, to a reasonable degree of medical certainty, despite defendant having been diagnosed with a psychiatric disorder and having a longstanding history of mental illness, defendant's mental problems did not reach the level that it precluded him from distinguishing between right and wrong at the time of the offense. In particular, he did not believe that defendant's mental illness history impacted his ability to distinguish right from wrong with regard to the killing of Elizabeth Chapman. Dr. Mallik said that Dr. Deland signed off on the report and shared his medical conclusion.

On cross examination, Dr. Mallik testified that when Dr. Dreland and he examined defendant on July 17, 2008, they determined he was not competent to stand trial. This meant that he did not understand the charges against him; did not

understand the Bennett[3] criteria for competency; and would not have been able to assist his counsel in his own defense. He reiterated that as for defendant's insanity at the time of the offense, Dr. Deland and he both concluded that there was no underlying psychiatric disorder that would have precluded defendant from distinguishing between right and wrong at the time he murdered the victim. Dr. Mallik said the behaviors defendant presented with in most of his hospitalizations were due to his being under the influence of drugs. He said that if one takes an individual and loads him up with drugs, he will become psychotic.

Dr. Mallik did agree that substance abuse was not the sole cause of defendant's problems. He was shown a drug test result dated October 29, 2004, from Mississippi State Hospital that indicated negative results for testing for cocaine, methamphetamines, morphine, cannabis (marijuana), barbiturates, and one other drug. Dr. Mallik was also shown a drug test dated February 25, 1995, from Northshore Regional Medical Center in Slidell, Louisiana, that was negative for everything, except barbiturates. He acknowledged that defendant could have been prescribed a barbiturate to control seizures when defendant reported a history of having seizures.

Dr. Mallik agreed that at no point did either Dr. Deland or he believe defendant was malingering/faking it.

ERRORS PATENT

A review of the record reveals one error patent. The record reflects that the trial court denied defendant's motions for post-verdict judgment of acquittal and for new trial on the day of sentencing. It then proceeded to sentence defendant that

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

same date without waiting the required twenty-fours. La. C.Cr.P. art. 873 expressly requires a twenty-four hour delay between the denial of both a motion for new trial and a motion in arrest of judgment. This court has held that the same twenty-four hour delay is required in the case of the denial of a motion for post-verdict judgment of acquittal. State v. Green, 2010-0791, pp. 19-20 (La. App. 4 Cir. 9/28/11), 84 So. 3d 573, 586, writ denied, 2011-2316 (La. 3/9/12), 84 So. 3d 551; State v. Wilson, 526 So. 2d 348, 350 (La. App. 4 Cir. 1988).

However, the failure to observe the twenty-four-hour delay is harmless error where the defendant does not complain of the failure to observe the delay or his sentence. See State v. Duncan, 2011-0563, p. 8 (La. App. 4 Cir. 5/2/12), 91 So. 3d 504, 511(delay after denial of motions for new and for arrest of judgment); State v. Green, 2010–1355, p. 12 (La. App. 4 Cir. 6/22/11), 69 So. 3d 695, 703, writ denied, 2011-1672 (La. 1/20/12), 78 So. 3d 140 (delay after denial of motion for new trial). In the instant case, defendant has not raised a claim on appeal as to his sentence. Therefore, any error by the trial court in failing to observe the delay amounts to harmless error.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant argues that the evidence was insufficient to support his conviction because the jury was not rational in concluding that defendant failed to prove by a preponderance of the evidence that he was suffering from a mental defect which impaired his ability to distinguish right from wrong at the time of the offense.

Defendant and the State both correctly cite the following applicable jurisprudence as set forth in State v. Silman, 95-0154, p. 7 (La. 11/27/95), 663 So.

2d 27, 32 that requires consideration in evaluating a claim of insanity at the time of the offense:

> In Louisiana, a legal presumption exists that a defendant is sane at the time of the offenses. La. R.S. 15:432. To rebut the presumption of sanity and avoid criminal responsibility, defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. La. C.Cr.P. art. 652. Criminal responsibility is not negated by the mere existence of a mental disease or defect. To be exempted of criminal responsibility, defendant must show he suffered a mental disease or mental defect which prevented him from distinguishing between right and wrong with reference to the conduct in question. La. R.S. 14:14; State v. Williams, 346 So.2d 181 (La.1977). The determination of sanity is a factual matter. All the evidence, including expert and lay testimony, along with the defendant's conduct and action, should be reserved for the fact finder 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. Bibb, 626 So.2d 913 (La. App. 5th Cir.1993), writ denied, 93-3127 (La. 9/16/94); 642 So.2d 188; State v. Claibon, 395 So.2d 770 (La.1981). Lay testimony pertaining to defendant's actions, both before and after the crime, may provide the fact finder with a rational basis for rejecting unanimous medical opinion that the defendant was legally insane at the time of the offense. State v. Peters, supra; State v. Claibon, supra.
>
> In reviewing a claim for insufficiency of evidence in an action where an affirmative defense of insanity is raised, this court, applying the standard set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), must determine whether under the facts and circumstances of the case, any rational fact finder, viewing the evidence most favorable to the prosecution, could conclude, beyond a reasonable doubt, that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense. State v. Peters, 94-0283 (La. 10/17/94); 643 So.2d 1222; State v. Nealy, 450 So.2d 634 (La.1984); State v. Price, 403 So.2d 660 (La.1981); State v. Claibon, supra; State v. Roy, 395 So.2d 664 (La.1981).

Defendant avers that the above jurisprudence as applied by this Court in State v. Currie, 2000-2284 (La. App. 4 Cir. 2/13/02), 812 So.2d 128 supports his position that the evidence was insufficient to convict. In Currie, this Court reversed the second degree murder conviction of a defendant who was fifteen when he had pleaded not guilty and not guilty by reason of insanity, to the stabbing death of his mother. This Court found that no rational trier of fact could have found that defendant failed to prove by a preponderance of the evidence that he

was incapable of distinguishing between right and wrong, and therefore was insane, at the time of the offense. Defendant strenuously argues that the instant case demands the same result as in Currie.

In that case, the defendant, Robert Currie, stabbed his mother to death as she sat beside the pool at a French Quarter hotel. Currie's friend testified at trial that Currie was hearing voices the night he committed the crime, and Currie had come to believe he was a vampire and was immortal. Mental health experts who treated Currie before the murder said that he was pre-occupied with violence, exhibited psychotic symptoms and could not separate fantasy from reality. He had evidence of organic brain damage which may have resulted from a childbirth delivery accident that caused him to have a stroke or from a fractured skull suffered in an accident when he was one year old. Psychiatrists who examined him after the murder diagnosed him as a paranoid schizophrenic with polysubstance dependence and described him as psychotic and depressive.

Dr. Sarah Deland, the same clinical psychiatrist who found the present defendant sane, testified at Currie's trial that he did not know right from wrong when he killed his mother. She disagreed with Dr. Mallik, who also testified at that trial, that Currie was sane. Dr. Deland cited Currie's mental health history, brain injuries sustained at birth, his delusional thoughts, his fascination with death and vampires, and his age in support of her finding of insanity.

Although the defendant in Currie and the defendant in the present matter share a history of mental illness and substance abuse problems, the principal distinction in the instant matter is that all three doctors who examined this defendant concluded that he understood the difference between right and wrong at

the time of the offense. In particular, Dr. Deland, who examined both defendants, found Mr. Davis sane at the time he killed Elizabeth Chapman.

Based on the findings of the mental health physicians who examined him after the offense and in viewing all the facts and circumstances in the instant case in a light most favorable to the prosecution, we find that any rational trier of fact could have concluded beyond a reasonable doubt that defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense. Defendant did not present sufficient evidence to rebut the legal presumption of sanity. Hence, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, defendant argues that the evidence was insufficient to support his conviction because the State failed to negate his defense of intoxication. Defendant asserts that his level of intoxication at the time of the offense prevented him from forming the specific intent to kill or to inflict serious bodily harm required for conviction under La. 14:31(A)(1), the only manslaughter option with which the jury was charged.[4]

This Court outlined the applicable general standard of review for sufficiency of the evidence in State v. Huckaby, 2000-1082, p. 32 (La. App. 4 Cir. 2/6/02), 809 So. 2d 1093, 1111, as follows:

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[4] La. R.S. 14:31 states, in pertinent part:

> A. Manslaughter is:
>
> (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; ….

> 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).

Again, both defendant and the State properly cite and quote this Court's decision in State v. Smith, 94-2588, p. 5 (La. App. 4 Cir. 3/27/96), 672 So. 2d 1034, 1038, for the following applicable burden of proof for a defendant seeking to defend on the ground that his intoxication precluded him from forming specific intent:

> Where the circumstances indicate that an intoxicated condition precluded the presence of specific criminal intent, this constitutes a defense. La. R.S. 14:15. The defendant has the burden of proving his intoxication at the time of the offense and the State must negate the defense beyond a reasonable doubt. State v. Davis, 92-1623 (La. 5/23/94), 637 So.2d 1012, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994). The State must prove that specific intent was present despite the defendant's

> alleged intoxication. State v. Mitchell, 572 So.2d 800 (La. App. 4th Cir.1990), writ denied, 576 So.2d 47 (La.1991).

In the instant case, defendant had a well-documented polysubstance abuse problem, along with serious mental illness, much or most of it precipitated by his polysubstance abuse.

In support of his intoxication defense, defendant argues that he reported to Dr. Malik that he had taken ecstasy and mushrooms, and was huffing gasoline had the time he was having sex with the victim. However, Dr. Malik testified that he could not be certain how defendant's use of drugs would have affected his behavior, although he speculated that it would not have been in a positive manner. Additionally, Dr. Mallik's first interview of defendant was not until July, 17, 2008, more than six months after the crime.

Defendant also cites the testimony of Dr. Rouse. Dr. Rouse described defendant's apparent behavior prior to the murder as "essentially an extended substance abuse binge of alcohol, hallucinogens, inhalants, and whatnot." He said that gave him a clue, "although not definitive proof," that defendant was intoxicated at the time of his crime. Dr. Rouse later testified that he believed the overwhelming contributing factor to defendant's behavior in murdering Elizabeth Chapman was the degree of his voluntary multiple substance abuse. Dr. Rouse did not believe that defendant's acts would have happened in the absence of the intoxicating substance abuse. However, Dr. Rouse conceded that this was speculation on his part. He also stated on redirect examination by defense counsel that other contributors to defendant's behavior were his untreated schizophrenia and his near homeless, transient lifestyle.

Defendant argues that his reaction to the victim screaming was not that of a sober man and that it was abnormal for a man in that situation to be afraid. He submits, however, that it makes sense that someone who had just inhaled gasoline and ingested ecstasy and mushrooms might have become frightened.

The State counters that defendant's claims of intoxication are only defendant's self-serving statements to psychiatrists that he was intoxicated at the time he killed the victim. Our review of the record supports the State's position.

When arrested for the instant offense some fifteen hours after the murder, defendant had a vitamin bottle half-filled with gasoline, and he told the officer he liked to drink gasoline. The arresting officer who testified stated that he could not tell whether defendant was sober or not. Thus, even assuming defendant was not completely sober, he was not visibly intoxicated.

Defendant appeared sober when he gave his video statement to police at 8:34 p.m., some seventeen hours after the killing. During his statement, defendant explained his apparent sketchy recollection of some facts surrounding the killing. He mentioned blackouts, thoughts that he was someone else, and the fact that he had been "freaking out" for a couple of days. Importantly, he did not mention any recent drug use or intoxication as a reason for his sketchy recollection or that he had consumed any substance.

However, even assuming defendant was intoxicated, mere intoxication is not a defense. Intoxication is a defense in this matter only if it precluded the formation of a specific intent to kill or inflict great bodily harm. La. R.S. 14:15; Smith, supra. Defendant admitted in his statement that he hit the victim in the head with a rock to stop her from screaming. He wanted to shut her up, quickly; he admitted that he "tried knocking her out." He had already tried to stop her from screaming

by applying a "military chokehold." That did not work, so he consciously escalated the application of force by striking her in the head with a rock. While defendant told police that he probably struck her with the rock more than once, but did not remember, he did not dispute that he killed her. The forensic evidence showed that she received more than one blow to the head and face area.

The record lacks sufficient evidence to show that defendant was intoxicated to such a degree that he did not specifically intend to inflict great bodily harm or kill the victim when he struck her. As with defendant's insanity defense, when we view the evidence in a light most favorable to the prosecution, any rational trier of fact could have concluded beyond a reasonable doubt that defendant formed the requisite specific intent to inflict great bodily harm or kill the victim, despite his intoxication.

ASSIGNMENT OF ERROR NO. 3
SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 1
SUPPLEMENTAL ASSIGNMENT OF ERROR NO. 2

In his third assignment of error, reiterated and amplified by his first supplemental assignment of error, defendant argues that the trial court erred in instructing the jury that the defense of intoxication did not apply to the responsive verdict of manslaughter. In conjunction therewith, defendant argues in his second supplemental assignment of error, that his trial counsel was ineffective in failing to object to this erroneous jury instruction.

Appellate counsel supplemented the record to show that during the last day of the jury trial conference, the trial court stated that it would only charge the jury as to the type of manslaughter that required the specific intent to kill or inflict great bodily harm and moreover, would instruct the jury that the voluntary intoxication defense does not apply to manslaughter because it does not require specific intent

to kill. Appellate counsel concedes that trial counsel failed to object to the complained of jury instruction when it was actually given to the jury. When the trial court asked whether there were any objections on the record to the jury instructions as read to the jury, defense counsel replied that he had none.

The State also asserts that defendant failed to object to the proposed instruction during the charge conference or to the actual charge given. Thus, the State represents defendant did not preserve the issue for appellate review. See La. C.Cr.P. art. 801 ("A party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error. …"). Given that both the State and defendant agree that trial counsel did not timely object to the disputed jury instruction, we are compelled to find that this assignment of error was not preserved for appellate review.

We next determine whether defense counsel's failure to timely object to the jury instruction on intoxication meant that defendant had ineffective assistance of counsel. This court set forth the applicable jurisprudence on ineffective assistance of counsel in State v. Rubens, 2010-1114, pp. 58-59 (La. App. 4 Cir. 11/30/11), 83 So. 3d 30, 66-67, writ denied, 2012-0374 (La. 5/25/12), 90 So. 3d 410, as follows:

> "As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post-conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." State v. Howard, 98–0064, p. 15 (La. 4/23/99), 751 So.2d 783, 802. However, where the record is sufficient, the claims may be addressed on appeal. State v. Bordes, 98–0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So.2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). State v. Brooks, 94–2438, p. 6 (La. 10/16/95), 661 So.2d 1333, 1337 (on rehearing); State v. Robinson, 98–1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So.2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97–2220, p. 8 (La. App. 4 Cir.

> 5/12/99), 733 So.2d 736, 741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 686, 104 S.Ct. at 2064; State v. Ash, p. 9 (La. App. 4 Cir. 2/10/99), 729 So.2d 664, 669. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068; State v. Guy, 97–1387, p. 7 (La.App. 4 Cir. 5/19/99), 737 So.2d 231, 236.
>
> This court has previously recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." Bordes, 98–0086, p. 8, 738 So.2d at 147, quoting State v. Bienemy, 483 So.2d 1105, 1107 (La.App. 4 Cir.1986). Moreover, as "opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." Id. quoting State v. Brooks, 505 So.2d 714, 724 (La.1987).

In the case at bar, the trial court first instructed the jury as to the charged offense of second degree murder and the defense of voluntary intoxication. It then instructed the jury as to the responsive verdicts of manslaughter and negligent homicide. The court advised the jury that in order to convict defendant of the responsive verdict of manslaughter, it must find that defendant killed the victim; that defendant had the specific intent to kill or inflict great bodily harm; and that the killing was 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. These instructions comport with the definition of manslaughter under La. R.S. 14:31(A)(1). The trial court did not instruct the jury as to the two other types of manslaughter under La. R.S. 14:31(A)(2) that do not require specific intent; yet, after subsequently instructing the jury as to the responsive verdict of negligent homicide, the trial court stated:

> The instructions I gave you previously about the defense of voluntary intoxication may only be applied to the crime of second degree murder, where the specific intent to kill is an element of that crime. The voluntary intoxication defense may not be applied to the crimes of manslaughter or negligent homicide since those crimes do not require the perpetrator to act with the specific intent to kill.

La. R.S. 14:15 expressly states that "[w]here the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent … this fact constitutes a defense to a prosecution for that offense." Defendant, therefore re-urges that as a matter of law, the trial court erred in the instant case by instructing the jury that the defense of intoxication did not apply to the responsive verdict of manslaughter which, as the court had charged the jury, required specific intent to kill or inflict great bodily harm. As such, defendant maintains that trial counsel was ineffective for his failure to timely object because the jury likely would not have convicted defendant of manslaughter if it had been instructed that intoxication was a defense to manslaughter.

The State's opposition contends in part that regardless as to whether or not the jury instruction was proper, this Court is without sufficient facts to determine whether trial counsel was ineffective for his failure to object. We agree. Based on the record before us, we cannot determine if the failure to object was part of defense counsel's trial strategy.

As referenced hereinabove, as a general rule, claims of ineffective assistance of counsel are more properly raised by application for post-conviction relief in the trial court where a full evidentiary hearing may be conducted, if warranted. Given the lack of any evidence in the record as to why defense counsel failed to object to the jury instruction at issue, we reserve to defendant the right to raise his ineffective assistance of counsel claim in an application for post-conviction relief,

where a full evidentiary hearing can be conducted with the State and defendant's trial counsel present.

ASSIGNMENT OF ERROR NO. 4

In his fourth and final assignment of error, defendant argues that he was deprived of his right to a fair trial by the prosecutor's improper rebuttal argument.

The general rules on closing/rebuttal argument are that the scope of closing argument shall be confined to the evidence admitted, the lack of evidence, conclusions of fact that the State or defendant may draw therefrom, the law applicable to the case; and that the argument shall not appeal to prejudice. La. C.Cr.P. art. 774. The State's rebuttal shall be confined to answering the argument of the defendant. Id. Prosecutors may not resort to argument involving personal experience or turn argument into a plebiscite on crime. State v. Fortune, 2010-0599, p. 8 (La. App. 4 Cir. 12/22/10), 54 So. 3d 761, 766; State v. Jackson, 2008-0286, p. 10 (La. App. 4 Cir. 4/29/09), 11 So. 3d 524, 532-533. A prosecutor should refrain from making personal attacks on defense strategy and counsel. State v. Manning, 2003-1982, p. 75 (La. 10/19/04), 885 So. 2d 1044, 1108, citing State v. Brumfield, 96-2667, p. 9 (La. 10/20/97), 737 So. 2d 660, 666 and State v. Duplessis, 457 So. 2d 604, 609 (La. 1984).

However, prosecutors have wide latitude in choosing closing argument tactics. State v. Casey, 99-0023, p. 17 (La. 1/26/00), 775 So. 2d 1022, 1036; Jackson, 2008-0286, p. 10-11, 11 So. 3d 524 at 533. Further, a trial court has broad discretion in controlling the scope of closing arguments. Casey, supra; State v. Jones, 2010-0018, p. 9 (La. App. 4 Cir. 11/10/10), 51 So. 3d 827, 833. If the prosecutor does exceed the bounds of proper argument, a reviewing court will not reverse a conviction unless thoroughly convinced that the argument influenced the

jury and contributed to the verdict. State v. Wiltz, 2008-1441, p. 6 (La. App. 4 Cir. 12/16/09), 28 So. 3d 554, 558; State v. Harvey, 2008-0217, p. 4 (La. App. 4 Cir. 5/13/09), 12 So. 3d 496, 499. Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fair mindedness of the jurors who heard the evidence. Harvey, supra.

In the present matter, defense counsel objects to the following statements the prosecutor made in his rebuttal argument:

> BY MR. ALFORD:
>
> And I will begin by addressing the theme of [defense counsel's] closing arguments that everyone in David Davis' life has failed him, that everyone just pushed him aside and didn't care about David Davis, but especially the lawyers, the judges and the doctors. The lawyers, the judges and the doctors [sic] and he wanted to make sure that you knew he wasn't paid for this case. Ladies and gentlemen I invite you all back at the close of your jury service to come watch a case where [defense counsel] is paid to represent the person sitting at this table and you will see something totally different. You will see preparation. You will see concern. You will see attention to the defendant. The only person that has done nothing on this side of the bar to protect David Davis is this man (indicating) [defense counsel].
>
> BY MR. FULLER:
>
> Objection.
>
> BY THE COURT:
>
> Overruled.
>
> CONTINUATION OF REBUTTAL ARGUMENT
>
> BY MR. ALFORD:
>
> The State, myself, I requested a doctor to examine him. After two and a half years this man never once picked up the phone and called a doctor. I called the doctor. And I didn't say go interview David Davis and give me a report that he knew what he was doing December 27-28, 2007. I said interview this guy and let me know what you think in your medical opinion.
>
> Judge Lynda Van Davis did her job to protect this man. She appointed Dr. Deland and Dr. Mallik (spelled phonetically) to interview David Davis, not John Fuller.
>
> BY MR. FULLER:
>
> Objection, judge.
>
> BY THE COURT:
>
> Overruled.
>
> BY MR. FULLER:

He knows I already had Dr. Deland's initial report.

BY THE COURT:

Overruled.

CONTINUATION OF REBUTTAL ARGUMENT

BY MR. ALFORD:

That's why he's objecting right now because he knows what I'm saying is the truth.

The lawyers that represented this man for three weeks, three weeks, when he was charged with first degree murder took the time to call Dr. Deland and retain her. Please interview my client. They contacted her obviously within three days of the event. They got on the phone and they said David Davis is potentially crazy, please interview him, Dr. Deland. They represented him for [sic] weeks and did more than this man did in three years and he wants to blame it on me, Judge Davis and every other lawyer and judge that –

BY MR. FULLER:

Objection. First of all –

CONTINUATION OF REBUTTAL ARGUMENT

BY MR. ALFORD:

- that saw this man before.

BY THE COURT:

Overruled.

BY MR. FULLER:

That's misstating the facts.

BY THE COURT:

Overruled.

CONTINUATION OF REBUTTAL ARGUMENT

BY MR. ALFORD:

If he wants to bring up Dr. Deland, let him. He's saying he didn't meet the Bennett Criteria to be competent. And I believe he also told you in his closing argument don't pay attention when the State gets up and talks about competency because there's a difference between competency and sanity at the time of the act. And that's exactly right. I'm not going to stand here and say, you see this man, obviously he looks fine and dandy because he's been medicated in jail. That's exactly right. But Dr. Deland's letter was about competency to stand trial. The Bennett Criteria. That's what her letter says. At this time I find he does not meet the Bennett Criteria to stand trial. He cannot assist his lawyers. And he keeps going on about her December 31st, interview of Davis which says he's clearly psychotic. She sees him three days after and he's clearly psychotic. Dr. Deland had more insight to this man than any other doctor because she saw him three days after the event. But [defense counsel] never contacted a doctor. Dr.

Deland, Dr. Mallik, Dr. Rouse, they walk these halls every Tuesday and Thursday.

BY MR. FULLER:

Objection. I cross examined Dr. Deland at the competency hearing.

BY THE COURT:

Overruled.

CONTINUATION OF REBUTTAL ARGUMENT

BY MR. ALFORD:

Every Tuesday and Thursday those doctors are in this building, as is [defense counsel]. And never once does he pull the doctor aside and say, hey, Dr. Deland you interviewed David Davis, let's talk about that. Let's talk about your feelings. Let's talk about what you thoughts were. Never does pull Dr. Mallik aside –

BY MR. FULLER:

Objection. I did pull Deland aside.

BY THE COURT:

Overruled.

BY MR. FULLER:

They know what she told me and that's why he didn't call her.

BY THE COURT:

Overruled.

CONTIUNATION OF REBUTTAL ARGUMENT

BY MR. ALFORD:

Never happened. And you know it didn't happen. He never did the same with Dr. Rouse. If you recall on both Dr. Mallik and Dr. Rouse, [defense counsel] proudly proclaimed, arrogantly proclaimed now Doctor, they paid you. We never once talked before today about this case, did we? No, sir, we didn't. ….

Defendant also complains of the following comments:

BY MR. ALFORD:

It is the Defense's burden to prove insanity. Excuse me. It's beyond a preponderance of the evidence. It is the Defense's burden to prove that at the time of the act David Davis was insane. That's why it's so egregious that this man never talked to a doctor. Never once did he try to get a doctor.

The State rested after presenting the evidence of guilt because it's not our burden. So if anybody, other than David Davis should be on trial it would be John Fuller up first –

BY MR. FULLER:

Objection. That's –

CONTINUATION OF REBUTTAL ARGUMENT

BY MR ALFORD:

- because he did nothing.

BY THE COURT:

Overruled.

BY MR. FULLER:

That's ridiculous, Judge.

BY THE COURT:

Overruled.

CONTINUATION OF REBUTTAL ARGUMENT

BY MR. ALFORD:

It is ridiculous. For somebody –

BY MR. FULLER:

He knows I talked to all these doctors.

BY THE COURT:

Overruled.

BY MR. FULLER:

And if he wants to be honest –

BY THE COURT:

Keep talking.

BY MR. FULLER:

- they told me he was crazy, too –

BY THE COURT:

Keep talking. One hundred dollars.

BY MR. FULLER:

- before they got on the stand yesterday.

BY THE COURT:

Two hundred dollars. And you owe me one from yesterday, so now you're at three.

CONTINUATION OF REBUTTAL ARGUMENT

BY MR. ALFORD:

Desperate times call for desperate measures.

Mr. Fuller knows what he's looking at. And there are some legal words that describe the type of behavior that went on in this trial.

Whenever a doctor makes a misdiagnosis they call it malpractice. It's his burden. It's not the State's burden to prove insanity. So what does he do? Nothing. He does nothing. He doesn't call a doctor. He doesn't get him to evaluate him. But yet he wants to blame everybody and everyone else besides himself and David Davis.

At trial, the only ground for objection made by defense counsel to the prosecutor's argument was that the prosecutor misstated the facts. On appeal, defendant does not raise that objection. Instead, he argues that the prosecutor

engaged in a relentless personal attack on defense counsel and that this attack was "endorsed" by the trial court when it fined defense counsel for his attempts to provide reasons for his objections.

A defendant cannot avail himself of an alleged error unless he made a contemporaneous objection at the time of the error. La. C.Cr.P. art. 841(A); State v. Cuccia, 2005-0807, p. 34 (La. App. 4 Cir. 3/15/06), 933 So. 2d 134; State v. Spain, 99-1956, p. 11 (La. App. 4 Cir. 3/15/00), 757 So. 2d 879, 886. Not only does an objection have to be made, but La. C.Cr.P. art. 841(A) requires that a defendant make known the grounds for his objection, and he is limited on appeal to those ground [sic] articulated at trial. State v. Ott, 2010-1307, p. 13 (La. App. 4 Cir. 1/5/12), 80 So. 3d 1280, 1287. These rules apply to alleged improper closing argument by prosecutors. Id.

At trial, defense counsel failed to object specifically to the prosecutor's closing argument on the ground that the prosecutor engaged in an improper personal attack on him that exceeded the bounds of proper argument. Hence, defendant cannot now raise that issue on appeal. Notwithstanding same, even if this Court were to consider defendant's general claim of improper closing argument, the prosecutor's comments do not amount to reversible error.

The State asserts that the prosecutor's closing argument was proper because his comments were directed at the lack of expert evidence presented by defense counsel to prove that his is client was insane at the time of the offense. Our review of the record shows that the prosecutor specifically commented on this lack of evidence in his rebuttal. The defendant has the burden of proof to prove by a preponderance of the evidence that he was insane at the time of the offense.

Therefore, this Court agrees with the State that the prosecutor's closing argument as to the lack of evidence was proper under La. C.Cr.P. art. 774.

This Court also rejects defendant's claim that the prosecutor's alleged portrayal of defense counsel as inept was prejudicial. This so-called "inept" portrayal of defense counsel, in view of the evidence of defendant's psychiatric and personal history, could just as easily have engendered sympathy for defendant, rather than bias against him.

Defendant relies on State v. Duplessis, 457 So.2d 604 (La. 1984), to support his claim of improper closing argument. That reliance, however, is misplaced. In Duplessis, the Louisiana Supreme Court reversed the defendant's conviction after finding the prosecutor's closing argument was improper. In reversing, the Duplessis Court referenced the prosecutor's claim that defense counsel had removed jurors from the courtroom because defense counsel did not want them to hear a witness' answer to a question.

The Louisiana Supreme Court stated that "[s]such deliberate misconduct makes a mockery of the rules of evidence and defeats the purpose for excluding unreliable evidence in the first place. Such comments may also lead the jury to believe that defense counsel was using technical objections to conceal his client's guilt." Duplessis, 457 So.2d at 609.

The Duplessis Court also found that the prosecutor "concluded his argument with a blatant appeal to prejudice by predicting the dire consequences in case of acquittal." Id. Moreover, the prosecutor told the jurors that most convictions were based on only one identification witness, and that "a bus full of witnesses might not be enough for defense counsel because he was such a skillful attorney. The

Court deemed it "damaging" that the trial judge chastised defense counsel in front of the jury for interrupting closing argument. Id. at 610.

In contrast, in the instant case, at no time did the prosecutor make any comment that approached the prejudicial effect of the Duplessis prosecutor's comment to jurors that defense counsel had them removed from the courtroom because he did not want jurors to hear a witness' answer to a question. The prosecutor in this matter also did not make a blatant appeal to prejudice by predicting the dire consequences of acquittal.

We also find that the trial court acted within its discretion to sanction defense counsel for the repeated objections raised during the prosecutor's closing argument. Defense counsel, after being admonished by the trial court, continuously posed objections to factually rebut the prosecutor's closing argument; thereby interrupting the orderly process of the trial.

Upon reviewing the record and in crediting the good sense and fair mindedness of the jury, we are far from convinced that the prosecutor's closing argument improperly influenced the jury and contributed to the verdict such that this Court should reverse defendant's conviction. This assignment of error is without merit.

Based on the foregoing reasons, defendant's conviction and sentence are affirmed. However, defendant may assert in an application for post-conviction relief his claim of ineffective assistance of counsel.

CONVICTION AND SENTENCE AFFIRMED