NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2013-KA-1191**
VERSUS	*	
		COURT OF APPEAL
ERIK TRACZYK	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 473-300, SECTION "I"
Honorable Karen K. Herman, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome, Judge Daniel L. Dysart)

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FEBRUARY 02, 2015

AFFIRMED

On October 4, 2007, the State indicted Erik Traczyk (also referred to as "defendant") for the August 15, 2007, first degree murder of Nia Robertson (also referred to as "victim"). On October 18, 2012, a jury unanimously found the defendant guilty as charged. On November 30, 2012, the trial court sentenced the defendant to life imprisonment without benefit of parole, probation or suspension of sentence. For the following reasons, we hereby affirm defendant's conviction and sentence.

PROCEDURAL HISTORY

On October 25, 2007, the defendant pled not guilty to first degree murder. On November 15, 2007, the trial court held a competency hearing, after which the defendant was found not competent to stand trial and remanded to the Eastern Louisiana Mental Health System, Forensic Division in Jackson, Louisiana. At a September 26, 2008, competency hearing, the court found the defendant competent to proceed to trial. In January 2009, the trial court reopened the competency proceedings after which the defendant was found not competent to proceed. Following a fourth competency hearing on April 21 and 30, 2009, the trial court continued its finding that the defendant lacked competency to stand trial. On

October 20, 2009, the trial court heard additional testimony and ordered that the defendant once again be examined by the sanity commission. On October 22, 2009, the defendant was found competent. Also on that day, the defendant changed his plea to not guilty and not guilty by reason of insanity ("NGBRI").

On March 4, 2010, the trial court denied motions to suppress evidence and identifications.

On November 4, 2010, the trial court granted the defendant's motion for another competency hearing as well as a sanity commission examination. A competency hearing was held on November 12 and December 14, 2010, after which the trial court again found the defendant incompetent to proceed. Following a subsequent competency hearing on May 19, 2011, the trial court found the defendant competent. On October 25, 2011, the defendant once again appeared before the sanity commission. On October 28, 2011, defense counsel stipulated to the defendant's competency based on the sanity commission's findings.

On February 14, 2012, the defendant was examined by the State's expert medical witnesses in order to determine the defendant's sanity at the time of the murder.

On August 24, 2012, the State agreed to withdraw the death penalty and proceed to trial as a first degree, non-capital, murder case in exchange for the defendant's agreement not to waive his right to trial by jury.

Trial commenced on October 9, 2012. During trial, the court granted the State's motion in limine barring the testimony of the defendant's experts relative to their pre-trial competency determinations.

On October 17, 2012, over defense objection, the State introduced its rebuttal case which included the recordings of the defendant's Orleans Parish Prison jailhouse calls made while he awaited trial.

On October 18, 2012, the jury unanimously found the defendant guilty as charged.

On November 29, 2012, the court denied the defendant's motion for new trial and heard victim impact statements from the victim's parents and Dr. Ryan Pasternak.

On November 30, 2012, the trial court sentenced the defendant to life imprisonment without benefit of parole, probation or suspension of sentence. Also on that day, the trial judge signed the defendant's motion for appeal. Defendant now appeals this final judgment.

FACTS

On August 15, 2007, at about 9:00 p.m., Nia Robertson ("Robertson") was socializing with friends at Pal's Bar on N. Rendon Street in New Orleans. Erik Traczyk was also at the bar, speaking to Karen Robichaux, his landlord/employer, about reconsidering her decisions to evict him and terminate his employment. She refused his requests.

As Traczyk was leaving the bar, he stabbed Dr. Ryan Pasternak, another patron, in the head. Traczyk continued toward the door, and just before exiting, he grabbed Robertson by her head and sliced her throat from ear to ear, nearly decapitating her. Then, he walked out of the bar toward his apartment three blocks away, where he was arrested within minutes of the stabbings.

The State indicted Traczyk for the first degree murder of Robertson. Traczyk entered a dual plea of not guilty and not guilty by reason of insanity.

The only issue at trial was whether the facts indicated that because of mental disease or defect, Traczyk was incapable of determining right from wrong at the time of the murder. La. R.S. 14:14.

At the conclusion of the eight day trial, the jury rendered a unanimous verdict of guilty as charged, and the court sentenced Traczyk to life imprisonment without benefit of parole, probation or suspension of sentence.

At trial, complaint operator Giselle Bertrand testified that on August 15, 2007, at 9:15 p.m., the NOPD received a 911 call reporting an aggravated battery by stabbing at Pal's Lounge. NOPD crime lab technician Tarez Smith Cook processed the scene. She photographed the area and collected fingerprints and blood samples. She explained that the photographs depicted three scenes - Pal's Lounge, 3019 Dumaine Street (the defendant's apartment) and University Hospital on Perdido Street.[1] The blood samples she collected were taken from the interior of the bar, including from the floor and bar stools, the sidewalk at the bar entrance and from the exterior and interior of Dr. Pasternak's vehicle. Cook identified a blood stained Kershaw Ken Onion USA pocket knife with a three inch blade located on the sidewalk near the defendant's apartment.

At 9:15 p.m. on August 15, 2007, Detective Stephen Detective Lindsey and Officer Christopher Dillon were dispatched to Pal's Bar. En route, they learned that there were two stabbings at the bar. The perpetrator was described as a white male, six feet tall, wearing a blue shirt and khaki pants. Dispatch also advised that the perpetrator left the area on foot to his residence at 3019 Dumaine Street.

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[1] The pictures taken at University Hospital were of Dr. Pasternak, the first stabbing victim, who survived the attack, and his blood stained car.

Thereafter, NOPD Officers Stephanie Caldwell and Angelle Clivens were dispatched to 3019 Dumaine Street to apprehend the defendant, who was described as a tall white male, having light hair and wearing a blue shirt and light colored pants. As Officers Caldwell and Clivens approached the defendant's apartment, he was standing on the porch attempting to enter the dwelling. Off. Caldwell ordered the defendant to stop and step down from the porch. At that time, she observed a knife in the defendant's hand and also ordered that he drop it. The defendant refused Off. Caldwell's orders, and instead, he began to approach her. Off. Clivens distracted the defendant long enough for Off. Caldwell to knock the knife from the defendant's hand. About that time, Detective Lindsey and Officer Dillon arrived and patted the defendant down. They transported the defendant back to Pal's Bar for a show-up identification. Once the identifications were made, the defendant was arrested and *Mirandized*.

Sgt. Nicole Barbe of the Homicide Division began her involvement in this case the morning after the stabbings. Sgt. Barbe learned that the victim bled to death as a result of a fourteen centimeter laceration of her neck. She learned the defendant's identity and proceeded to meet with several witnesses, including Dr. Pasternak and Jon Skjolaas on August 17, 2007. Both witnesses unequivocally identified the defendant as Dr. Pasternak's assailant from the photographic lineup Sgt. Barbe presented them. Sgt. Barbe also took recorded statements from Karen Robichaux, Allan Parks, Jon Skjolaas, Dr. Patsternak, Greg Hammarstron, Walter Everett, and Scott Middleton.

Trauma vascular surgeon Dr. Bruce Torrance along with several other trauma specialists, assumed Robertson's care at the hospital. Dr. Torrance's first view of the victim caused him to think she had been decapitated because of the

length and depth of the wound on her neck. Dr. Torrance explained that the victim was covered in blood and near death upon initial examination. Her throat was cut from ear to ear. Her trachea and jugular arteries were severed. The doctor opined that the wound was made with great force by a very sharp knife – one sharp enough to slice through layers of skin, muscle, cartilage and the trachea, down to the esophagus. Dr. Torrance further explained that when the victim arrived, she had no heartbeat. The medical team continued life-saving procedures but were unable to get either a pulse or heartbeat.

Pathologist Dr. Richard Tracy autopsied the victim's body on August 17, 2007. Dr. Tracy testified that the victim's neck was cut from ear to ear by a smooth blade knife. Dr. Tracy opined that the wound was inflicted with such force that the victim's trachea and jugular vein were incised. After about thirty seconds, the victim would have been unconscious from loss of blood and obstruction of her airway. The cause of death was loss of blood and/or suffocation.

The State and defense stipulated that if forensic DNA analyst Julie Golden were called, she would testify that the knife seized from the defendant tested positive for the presence of Robertson's blood.

Ashley Adams, Heather Rose, Karen Robichaux, Scott Middleton, Jon Skjolaas, Greg Hammarstrom, Walter "Sonny" Averett, and Allen Parks testified that they were at Pal's Bar on the night of August 15, 2007 and observed the defendant throughout the night as well as assisted Dr. Pasternak and Robertson after the attacks.

The defense began its case with the testimony of Judy Maccri, the defendant's ex-wife. Maccri stated that the defendant's father was an alcoholic and his mother and brother were mentally unstable. Maccri testified that in 1998,

the defendant became paranoid that people were watching/following him and that his house was bugged. He became reclusive and did not want to leave the house. He claimed that the television would talk to him. He would take notes, laugh inappropriately at times and keep to his bedroom. Gradually, his problems intensified, to the point that he said he heard voices. During their marriage, the defendant frequently changed jobs or did not work at all. As a result of a visit to a hospital in New Jersey in 2000, the defendant received anti-psychotic medication. When he would take his medication, the defendant was functional, and his problems would abate. Maccri said she could always tell the defendant's mental condition by physical manifestations - when the defendant was "disturbed," his eyes would bulge out of his head. Maccri divorced the defendant in 2007 because she could no longer deal with his problems. She added that during the time she and the defendant were married, he was never violent with her or anyone else.

Defense witness, Dr. John Thompson, testified by stipulation as an expert in forensic psychiatry. Dr. Thompson examined the defendant in May of 2009 prior to which he reviewed the defendant's prior psychiatric history from various mental health records. Included in those records was one from Hampton Hospital New Jersey pertaining to the defendant's October 28, 2000, admission with a chief complaint/reason: "Patient presented with 'a lot of anxiety, paranoia, and depression.'" Hampton Hospital personnel diagnosed the defendant with major depressive disorder, psychotic features. Another, a report from Virtua Hospital emergency room records dated July 23, 2006, diagnosed the defendant with schizophrenia. Ancora Psychiatric Hospital in New Jersey concluded that the defendant was psychotic not otherwise specified, bipolar not otherwise specified, alcohol abusive, and ruled out substance-induced mood disorder. Also included in

the defendant's mental health records was a report made by Steininger Behavioral Health Care dated August 1, 2006, containing an evaluation of the defendant as suffering from schizoaffective disorder. An Our Lady of Lourdes Medical Center report indicated that the defendant was admitted to that hospital on August 21, 2006. The defendant complained that he was going through a divorce and reported hallucinating/increased paranoid behavior. He said there were terrorists living in his house. The hospital's clinical impression of the defendant was paranoid or psychotic behavior. The records from the Eastern Louisiana Mental Health System ("ELMHS") diagnosed the defendant as exhibiting psychotic disorder not otherwise specified and paranoid personality disorder.

Dr. Thompson noted that all of these institutions prescribed or suggested anti-psychotic medication for the defendant. Dr. Thompson recalled that he interviewed the defendant only once for approximately one hour on May 7, 2009, about two years after the murder. The defendant was not on medication at the time of the interview. Based on the defendant's mental health history and the interview, Dr. Thompson diagnosed the defendant as suffering from schizoaffective disorder. When the doctor asked the defendant about the events of August 15, 2007, in New Orleans, the defendant denied being involved in the incident. Dr. Thompson made clear that he did not evaluate the defendant for his mental state at the time of this offense. Dr. Thompson cautioned that predicting the future is extremely difficult, but he stated that based upon his examination of the defendant, it is more likely than not that the defendant will have symptoms of schizoaffective disorder in the future.

Dr. Craig Waggoner, a licensed clinical and medical psychologist, employed by the Lake Charles Behavioral Health Center, testified that he examined the

defendant in March 2008 for about six hours over the course of four to five days. On those occasions, the defendant refused medication. He reviewed the defendant's prior medical and psychiatric records as well as his educational, family and employment histories. Dr. Waggoner indicated that he was aware that the defendant's father, mother and brother suffered from mental illnesses. The doctor noted that this information is important because there is a genetic predisposition for some types of mental illness. The defendant was guarded about providing information, but he produced numerous documents detailing his military training and service. The defendant denied that he suffered from a mental illness. From his first evaluation of the defendant, Dr. Waggoner diagnosed the defendant with schizophrenia paranoia type versus psychotic disorder not otherwise specified. Dr. Waggoner concluded that the defendant was psychotic in January 2008.

Under cross-examination, Dr. Waggoner read from his report concerning how the defendant described himself: as a "hard working individual who did not like to quit and [who is] eager to do the right thing." Further, the defendant indicated that he was able to tell right from wrong and that "ignorance in others makes him lose his temper." The defendant also said he had a tendency to hold grudges.

Forensic psychologist Dr. Rafael Salcedo testified that he routinely receives appointments from various courts to conduct competency to proceed to trial determinations and/or a person's sanity at the time of the commission of a crime. He recalled that he first examined the defendant on November 15, 2007, ninety days after the murder, and found the defendant to be delusional. In his quest to determine whether the defendant was sane at the time of the murder, Dr. Salcedo reviewed the defendant's past medical and psychiatric information. He did not

review any of the defendant's medical records compiled prior to the murder, only the records compiled after his initial examination of the defendant on November 15, 2007. From those records, Dr. Salcedo opined that the defendant was suffering from a major psychiatric disorder, specifically, paranoid schizophrenia, at the time of the murder. The doctor indicated that the records he reviewed made reference to a long standing history of major mental illness. Dr. Salcedo reasoned that because of the defendant's psychiatric disorder, the defendant was unable to tell right from wrong at the time of the murder.

The defense next called Dr. Richard Richoux, who is board certified in adult psychiatry. Dr. Richoux, jointly with Dr. Salcedo, examined the defendant on November 15, 2007, for approximately forty-five minutes. At that time, Dr. Richoux found the defendant to be delusional, and further, the defendant refused to answer questions and asked for a federal prosecutor. The defendant attempted to control the interview by answering questions with questions. Dr. Richoux termed this behavior a classic paranoid maneuver to control the release of information about himself. Dr. Richoux noted a "lot" of paranoid delusional content in statements the defendant made, and he said that the defendant denied being on medication at that time. In addition, Dr. Richoux said he had no records of the defendant's prior mental health evaluations and/or hospitalizations before the defendant's arrest, but he had seen references to evaluations/hospitalizations in other documents related to the defendant.

The next time Dr. Richoux saw the defendant was on May 15, 2008, at which time the defendant was not on medication. Richoux found the defendant minimally less paranoid at that time in that he was more willing to talk, but he was still delusional, talking about the New Jersey Mafia and about being exonerated of

the present charge. During this evaluation and the previous one, Dr. Richoux was not asked to determine the defendant's sanity at the time of the murder. Although the defendant suffered from mental illness, he was able to tell Dr. Richoux what he was charged with and where the incident occurred. At the end of the May 15 evaluation, however, Dr. Richoux strongly suspected that the defendant did not know right from wrong at the time of the offense. He also opined that the defendant was not malingering or attempting to act mentally ill.

Dr. Richoux saw the defendant for the third time on April 21, 2009, with Dr. Salcedo present. At that time, the defendant was on anti-psychotic medication, and Dr. Richoux had the defendant's records of prior hospitalizations and the characterization of those hospitalizations. Dr. Richoux testified that after meeting with the defendant, he concluded that paranoid schizophrenia was the correct diagnosis, and he opined that that mental illness could have affected the defendant's ability to know right from wrong at the time of the offense.[2]

Colonel Lydia Combs Smith (Colonel Combs), the defendant's older sister, testified that she and the defendant had another brother, William Traczyk, and a sister, Miriam Traczyk. She testified that the family has a history of mental illness and that their father was diagnosed as schizophrenic in his twenties and underwent shock treatment. Her brother, William, also has a history of mental illness. He was diagnosed as schizophrenic in his early twenties, and he had attempted suicide. Colonel Combs said that she had been diagnosed with depression in 2006 and takes medication for the condition.

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[2] This opinion was rendered during a competency hearing. A defendant's knowledge of the difference between right and wrong is relevant in determining his criminal liability, but is totally irrelevant to the issue of his competency to stand trial. See *State v. Bennett*, 345 So.2d 1129 (La.1977).

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Colonel Combs confirmed that the defendant was at one time a reservist military policeman, never a civilian police officer. She recalled that prior to July 1999, the defendant called her to complain that people were following him and bugging his house. From that time on, she kept in contact with the defendant, although he moved around frequently and held various jobs. He continued to exhibit peculiar behavior and thought patterns. She related that the defendant received a medical discharge from the military.

Dr. George Seiden, a physician specializing in psychiatry and forensic psychiatry, testified that he was certified by the American Board of Psychiatry and Neurology in both general and forensic psychiatry. He added that he also holds a Ph.D. in physiology with a subspecialty in neuro-endocrinology. Dr. Seiden explained that pursuant to the State's request, he examined the defendant to evaluate his mental state at the time of the offense, pursuant to which he authored a report on his findings. Dr. Seiden testified that the defendant was affable and cooperative, if not a bit guarded. Dr. Seiden presented the defendant with a consent form which informed the defendant that his conversation with Dr. Seiden was not confidential, and that he had the right to refuse to answer questions and to end the interview at any time. The defendant declined to sign the document without the presence of his attorney. However, the defendant proceeded with the interview.

Dr. Seiden spent two hours with the defendant, who answered some questions but refused to answer others, although in a polite manner. Dr. Seiden stated that the defendant recalled being at Pal's Bar on the night of August 15, 2007, having a few beers and then returning to his residence. The defendant remembered all the details of his time in the bar except the murder of Robertson

and the injuries to Dr. Pasternak. The defendant denied ever having amnesia or black outs or any previous episodes where he did things that he could not remember. The defendant recalled speaking to Robichaux in the bar that night, but he denied having any interaction with anyone else, other than a misunderstanding with the bartender over money. Responding to the prosecutor's questions concerning amnesia, Dr. Seiden indicated that the evaluation of amnesia is difficult because anyone can claim they do not remember. One form of amnesia is organic; however, the brief memory lapse described by the defendant, i.e., the ability to remember things just before and just after the incident, but not the incident itself, raises suspicion on the part of the examiner. Dr. Seiden said there was no evidence to account for amnesia during the seconds prior to the attacks and until the time the defendant left the bar. The defendant had no brain lesion or any history that would explain it.

Dr. Seiden testified that the focus was the defendant's mental state at the time of the offense. Specifically, in terms of whether the defendant was capable of distinguishing right from wrong with reference to his specific conduct at the time of the murder. In other words, did the defendant have a mental illness and was the mental illness so severe that it prevented him from distinguishing right from wrong at the time of the incident? Dr. Seiden said there was no doubt that the defendant suffered from a major mental illness of psychotic proportions and that most psychotic people are capable of knowing right from wrong, even though they are psychotic. While there was testimony from other experts that the defendant was delusional at the time of the incident, being psychotic and being delusional is different from whether or not a person knows right from wrong. The defendant's behavior on the night of the murder was consistent with his behavior at other times

when he felt wronged, when he felt he was being treated badly, and when he felt justified in retaliating. The defendant's behavior at the time of the murder was a consistent response of his, which is not something that would indicate he did not know what he was doing or did not know that it was wrong. Thus, Dr. Seiden disagreed with Dr.Richoux that the defendant was insane.

In summation, Dr. Seiden testified that, in his opinion, there was no evidence the defendant was so impaired by mental disease that he was unable to realize at the time of the murder that his actions were wrong. Although there is evidence the defendant was delusional, that had nothing to do with knowing right from wrong.

Another of the State's witnesses, Dr. Michael Blue, an expert in the field of forensic psychiatry, testified that he completed his residency in psychiatry at Harvard Medical School and his forensic psychiatry fellowship at Tulane Medical School. Dr. Blue indicated that he was asked by the Orleans Parish District Attorney's Office to perform an independent medical evaluation of the defendant regarding his sanity at the time of the offense. After a four hour interview with the defendant, Dr. Blue diagnosed him as suffering from schizoaffective disorder and concluded that at the time of the offense, there was no evidence to indicate that the defendant's mental disease interfered with or prevented him from understanding the difference between right and wrong. Some of the evidence Dr. Blue found which indicated that the defendant knew right from wrong included that fact that the defendant left the bar after the incident. If the defendant did not feel he had done anything wrong, he would not have left the bar.

Dr. Blue recalled that the defendant's memory of the day of the incident was very clear. The defendant indicated that upon awaking that day, he ate, and

cleaned his living quarters. The defendant remembered going to the bar and socializing, but he indicated that after that his memory disappeared, and the next thing he remembered was leaving the bar. He had no recollection of attacking Robertson or Dr. Pasternak. The defendant said he had some beer that night, but he denied being intoxicated. He admitted to having a knife in his pocket. He recalled walking home, attempting to enter his apartment, and being arrested on his front porch. The defendant told Dr. Blue that he intentionally did not speak with the police because: "You make it worse by saying anything." The defendant indicated to Dr. Blue that the witnesses were lying, and that he did not believe in the insanity defense. When asked to explain his comment about the insanity defense, the defendant said: "You know what, if we are going to talk about this, if this is where the interview is going, I'm going to stop talking at this point. I want to shut this down." Dr. Blue did not find that the defendant was malingering or suffering from amnesia because amnesia would not have been limited just to the seconds in which the crimes were committed.

Dr. Blue found evidence that the defendant knew the difference between right and wrong the night of the incident. The defendant entered the bar, interacted in a socially appropriate manner, paid for his drinks, and knew that it would be inappropriate to interrupt Robichaux's conversation. Had the defendant's ability to tell right from wrong been impaired at that point, it would be very unlikely the defendant would have been able to carry on that socially appropriate interaction. Summarizing, Dr. Blue's ultimate opinion was that a person who is delusional or psychotic at the time a crime is committed can be legally sane at that time and in this case, he believed the defendant knew the difference between right and wrong on August 15, 2007.

The State's final psychiatric rebuttal witness, Dr. Jeffrey Rouse, testified by stipulation as an expert in adult and forensic psychiatry. Dr. Rouse rendered a report dated May 9, 2012, detailing his evaluation of the defendant.[3] In evaluating the defendant, Dr. Rouse employed the definition of legal insanity under Louisiana law, La. R.S. 14:14.[4] He also acknowledged that under Louisiana law, a defendant is presumed legally sane.[5]

Dr. Rouse indicated that the defendant related tha, on the day of the offense, he cleaned his apartment, cooked breakfast, and looked for work. The defendant stated that he went to Pal's Bar around 6:00 or 7:00 p.m. for a few beers. He denied being drunk and speaking with Karen Robichaux at the bar. The defendant remembered being totally shocked when he was arrested on his front porch. He admitted to carrying a knife. He said he was charged with "jugg[ing] up and [sic] man and a woman," which he denied doing. During the defendant's account of the events of the evening, Dr. Rouse noted that the defendant did not present any elements that were overtly paranoid, delusional, bizarre or hallucinatory. The defendant denied memory blackouts or unaccounted for periods of time while he was at the bar, and then he refused to answer any more questions about his state of mind the night of the incident. Opining as to the defendant's motive for killing Robertson and slashing Dr. Pasternak's neck, Dr. Rouse quoted from his report:

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[3] He interviewed the defendant for approximately four hours and also interviewed the eyewitnesses Skjolaas, Dr. Pasternak, Parks, Middleton and Robichaux for about two-and-a-half hours.

[4] La. R.S. 14:14 provides:

> Insanity
>
> If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility.

[5] La. R.S. 15:432.

> Although there is no clear motive for the crime, the interaction between [the defendant] and Karen Robichaux immediately prior to the crime suggests that interpersonal rejection . . . a feeling that you have gotten rejected by another person . . . frustration and anger, not overt paranoia or psychotic command hallucinations, i.e., a voice telling you, commanding you to do something, are possible reasons for his actions.

Dr. Rouse said that his interview of the defendant plus the large amount of personal, medical, educational and employment information on the defendant led him to conclude that "to a reasonable degree of medical certainty, the defendant's actions with regard to his current charge of murder were not the direct result of a mental disease or defect of sufficient severity to render him incapable of distinguishing between right and wrong." In support of the foregoing conclusion, Dr. Rouse explained:

> [The defendant] has a history of extreme paranoid ideation, bizarre delusions and auditory hallucinations as was evidenced in the documentation in his inpatient psychiatric admissions, his journal writings, his interactions with the police in Pennsylvania and New Mexico. However, I have no evidence of symptoms of such severity during his time in New Orleans, i.e., right before the crime, and - - nor at the time of the crime. Although there is evidence of argumentativeness, erratic interpersonal behavior at work, threatening his - - his roommate/roommate's family and odd facial expressions at the bar, these facts do not support a level of psychiatric impairment sufficient to render him incapable of distinguishing right from wrong.
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> After assaulting the victims at the bar, [the defendant] fled, [i.e., left] the scene and was observed wiping blood from the knife, two actions highly suggestive of knowledge of the wrongfulness of his actions.

During cross-examination, Dr. Rouse said that at the time he interviewed the defendant, he (the defendant) was on anti-psychotic medication. Further, Dr.

Rouse, acknowledged that medication can relieve or reduce some of the symptoms of schizoaffective disorder.[6]

The final witness called was Don Hancock, the telecommunications supervisor for the Orleans Parish Sheriff's Office, Technical Services Division, who testified that he is a custodian of records for recordings of jailhouse telephone calls made by inmates. He testified to the procedure whereby all inmate telephone calls made from jail are automatically recorded. He said all inmates are issued a PIN (personal identification number) or folder number, and that PIN or folder number is used for making telephone calls. He testified that when an inmate picks up a handset, he/she is automatically prompted to do several things, including enter a phone number and state his/her name. The inmate is also informed that the phone call he/she is about to make will be recorded. He testified that all of the recorded inmate phone calls are archived. Mr. Hancock identified State's Exhibit 121 in globo as requests for the defendant's phone calls dated from August 15, 2007, through November 15, 2007; from October 11, 2010 through November 1, 2010; and from May 1, 2012 to June 15, 2012. He identified State's Exhibit Nos. 122 and 123 as the disc recordings of the aforementioned calls. The recordings of the defendant's jailhouse calls were played in court as the jury followed along with the transcriptions of the calls.

ASSIGNMENT OF ERROR NUMBER 1[7]

In his first assignment of error, the defendant claims he was denied his constitutional right to present a defense. This assignment arises from the grant of

[6] Dr. Blue participated in the interview with Dr. Rouse and confirmed that medication affects schizoaffective disorders.

[7] A review for errors patent on the face of the record reveals none.

the State's motion in limine, which sought to prohibit the defendant from introducing at trial any evidence that he was: (1) examined for competency prior to trial; (2) determined to be incompetent to stand trial; (3) hospitalized in a mental health facility prior to trial; and (4) forcefully medicated pretrial. The State grounded the motion on the argument that the defendant's competency to stand trial was irrelevant to the determination of whether the defendant knew right from wrong at the time of the offense. The State filed the motion after *voir dire* but prior to calling any witnesses.

On appeal, the defendant points out that his experts, Drs. Richard Richoux and Raphael Salcedo, evaluated his competency to stand trial, and that in the course of that assessment, they concluded that he was insane at the time of the murder. Consequently, the defendant argues, the refusal to allow the defense the opportunity to present Drs. Richoux's and Salcedo's competency hearing testimony destroyed his defense and his ability to rebut the presumption of sanity by: (1) forcing it to revamp its presentation of evidence; (2) undermining the reliability and credibility of the defense experts by excluding a major portion of the facts and circumstances on which the defense experts based their opinions; and (3) allowing the prosecution to exploit the ruling to inappropriately undermine the integrity of the defense experts and their opinions.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 302; 93 S.Ct. 1038, 1049; 35 L.Ed.2d 297 (1973). "The right to offer the testimony of witnesses. . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19; 87 S.Ct. 1920;

18 L.Ed.2d 1019, 1023 (1967). "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." *Id.* "This right is a fundamental element of due process of law." *Id*.

The "right to present a defense, however, does not require the trial court to permit the introduction of evidence that is irrelevant or has so little probative value that it is substantially outweighed by other legitimate considerations in the administration of justice." *State v. Everett,* 11-0714, p. 30 (La. App. 4 Cir. 6/13/12), 96 So.3d 605, 627, *writs denied*, 12-1593, 12-1610 (La. 2/8/13), 108 So.3d 77. Relevant evidence is defined by La. C.E. art. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, all relevant evidence is admissible. La. C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403.

In this case, the trial judge found the defendant competent to proceed based upon the opinions of all the defendant's doctors as well as the entire treatment team at ELMHS. The defendant cites *State v. Doyle,* 11-0587 (La. 3/23/11), 56 So.3d 948, and *State v. Everidge,* 96-2665 (La. 12/2/97), 702 So.2d 680, which he argues support his claim that the trial court's exclusion of testimony relating to his pretrial competency examinations impaired his ability to present a complete sanity defense. However, both of those cases are distinguishable from this case.

In *Doyle,* the defendant presented evidence at trial attacking his confession to murder as involuntary owing to his mental retardation. The appellate court, however, ordered that the jury be instructed not to consider the defendant's mental retardation as evidence of the defendant's state of mind when the offense was committed. The Supreme Court reversed the appellate court, finding that the limiting instruction was not warranted because the defendant's not guilty and not guilty by reason of insanity plea allowed the jury to consider whether the defendant's mental retardation rendered him incapable of determining right from wrong at the time of the murder. Consequently, unlike this case, the defendant in *Doyle* was prevented from introducing at trial evidence of his state of mind at the time of the offense, which because of his not guilty and not guilty by reason of insanity plea, prevented him from presenting any defense. In this case, the defendant did present evidence to support his defense and his contention that he was incapable of distinguishing right from wrong at the time he murdered Robertson.

In *Everidge,* the defendant was charged with rape and sought to introduce testimony from a friend that the defendant and victim were casually acquainted and had arranged a rendezvous for sex. The trial court disallowed the testimony on the basis that it was hearsay. The defense proffered the evidence. The defendant was convicted. The Supreme Court reversed the defendant's conviction, finding that the trial court mischaracterized the proffered testimony because the evidence was offered to prove that the conversation between the defendant and the victim had taken place, not for the purpose of proving the factual content of the conversation.

The defendant argues that *Everidge* stands for the proposition that the constitutional right to present a defense includes the right to present a complete

defense, and that the right to present a complete defense is violated "if the court erroneously excludes evidence which would have substantially helped the defense." The exclusion of the evidence proffered in *Everidge* was error because, contrary to the trial court ruling, the evidence was not hearsay.

In this case, the defendant has not shown that the trial court's exclusion of the evidence of his prior incompetency was erroneous. The defendant's experts described at trial in detail what they testified to at the competency hearings. Both Dr. Richoux's and Dr. Salcedo's trial testimony identified the sources of their information, in addition to the face-to-face interviews with the defendant that they used to diagnose the defendant; the identification of the medication he was taking during the course of their examinations of him; the breadth and volume of the defendant's past mental health records; the reports written by the defendant's treating physicians at ELMHS; examination of court records, witness statements and police reports; and a detailed explanation of their diagnosis and reasons therefor. Moreover, although the defense experts admitted that they had never examined the defendant to determine whether he was able to discern right from wrong at the time of the attacks, they did in fact testify at trial that, in their opinions, the defendant did not have that capacity. The only issues Drs. Richoux and Salcedo were not allowed to address at trial were the purpose of the defendant's pretrial examinations, and the facts that he had been found incompetent to stand trial and had been forced medicated. Their trial testimony fully explored the length, depth and frequency of their evaluations of the defendant; the wealth of pre and post-crime psychiatric information to which they were privy and the reasoning upon which their opinions were based. In addition, Dr. Richoux described the shift in the defendant's demeanor when he was placed

on medication. The defense presented other witnesses who attested to the defendant's long-term mental problems.

After a review of the record, we do not find that the trial court abused its discretion by excluding evidence at trial concerning the defendant's competency, hospitalization in a mental health facility and forced medication prior to trial. The defendant has failed to establish that the fact that he was unable to show that the doctors examined him for the purpose of determining his competency to proceed undermined or prejudiced his defense. The evidence was irrelevant, and the defendant's arguments to the contrary are not persuasive.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the defendant argues that the trial court misapplied the law in admitting jailhouse call recordings offered by the State as rebuttal. The defendant identifies the evidence in question as the twenty-four minute PowerPoint presentation, which consisted of transcriptions of thirty-six of the defendant's jailhouse calls. The defendant maintains that the trial court erred on two grounds: first, the recordings were not proper rebuttal evidence, and second, the State failed to authenticate the recordings.

"The state has the right to rebut evidence adduced by the defendant." *State v. Williams*, 445 So.2d 1171, 1180 (La.1984). Since "the state does not and cannot know what evidence the defendant will use until it is presented at trial …the state is given the right of rebuttal." *Id.* at 1181. "Proper rebuttal evidence is offered to explain, repel, counteract or disprove facts given in evidence by an adverse party." *State v. Deboue*, 552 So.2d 355, 362 (La.1989) (citing *State v. Constantine*, 364 So.2d 1011, 1013). "Such evidence may be used to strengthen the State's original case." *State v. Huizar*, 414 So.2d 741, 750 (La.1982). The State is allowed to

present rebuttal evidence for the reason that it is required to present its case first and cannot anticipate the exact nature of the defense. The determination of whether evidence is proper rebuttal evidence and hence, admissible, is an issue which is addressed to the sound discretion of the trial court judge. *Id.*

All evidence, including expert testimony and lay testimony, along with the defendant's conduct and actions, 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. Silman*, 95-0154, p.7 (La.11/27/95), 663 So.2d 27, 32. Lay testimony pertaining to the 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. Claibon*, 395 So.2d 770, 773-74 (La.1981).

Concerning the defendant's claim of improper rebuttal evidence in this case, he explains that, because the jailhouse calls in question were irrelevant to the issue of his sanity, they were inadmissible. Moreover, he claims that the jailhouse calls prejudiced him because the jailhouse calls presented "new" issues, which he was denied the ability to refute because the trial court refused his request for surrebuttal.

In this case, a review of the jailhouse calls in question bears upon the defendant's sanity, which the jury was entitled to consider; i.e. information as to his mental functioning and state of mind prior to and after the murder, thought process, ability to recall information, actions on the night of murder, possession of the bloodied knife which killed the victim, and recollection of his arrest on August 15, 2007. Furthermore, although the defendant alternatively complains that the calls contain some injudicious comments on his part, which he claims served no

purpose other than to antagonize the jury against the defense, he has not shown that the probative value of the calls was substantially outweighed by the risk of unfair prejudice. Contrary to the defendant's assertion, the jailhouse calls did not introduce any "new" issues or facts which he should have been allowed to defend against and mostly consisted of the general exchange of familial information between the defendant and his two siblings.

The State represented to the trial judge that the calls were introduced to refute the claim of insanity raised by the defense experts, Drs. Richoux and Salcedo. The State did not attempt to reserve any part of its case in chief in order to surprise the defendant. Because the jailhouse calls were clearly rebuttal evidence, and because the defendant has failed to prove that the State intended to introduce the phone calls to deceive the defense or obtain an undue advantage, we find no merit in this assignment of error.

The defendant also complains that the recordings and transcription of the jailhouse calls were not properly authenticated because no one who actually created the tapes or the transcripts appeared at trial to testify. He complains there was no testimony verifying that the voice on the recordings was his and that the State did not eliminate the possibility that some other inmate may have used the defendant's folder number at the time the calls were made.

For evidence to be admitted at trial, it must be identified and authenticated. *See State v. Magee,* 11–0574, p. 41-42 (La. 9/28/12), 103 So.3d 285, 315-316 (citing *State v. Drew,* 360 So.2d 500, 518 (La.1978)). In *State v. Norah,* 2012-1194 (La. App. 4 Cir. 12/11/13), 131 So.3d 172, *writ denied,* 14-0084 (La.6/20/14), 140 So.3d 1188, this court authenticated jailhouse calls on the following testimony:

> . . . the prosecution called Don Hancock, the telecommunications supervisor for the Orleans Parish Sheriff's Office, as their witness with knowledge. As part of his position, Mr. Hancock maintains the telecommunications systems at the prison, including the archives of recorded prisoner calls, and is the custodian of those records. The prosecution then had Mr. Hancock identify and authenticate both the tape recordings and the transcripts of the defendants' jailhouse calls.
>
> Regarding the tape recordings of the defendants' jailhouse calls, Mr. Hancock explained that every inmate call is recorded and stored as part of a regular protocol at the prison. These calls are then catalogued according to the folder number of each prisoner. Mr. Hancock explained that each disc was made by entering the defendants' folder numbers into the archiving system, and burning the recordings onto that disc. Mr. Hancock identified the discs containing the recorded calls made by the defendants from April 19th to April 26th of 2010, while they were in custody at Orleans Parish Prison. Mr. Hancock testified that, while he did not burn the CD himself, his associate, Jim Huey, did create the discs.
>
> While Mr. Hancock may not have tied the tape recordings to the defendants through voice identification, Mr. Hancock made a sufficient showing of authenticity under La. C.E. art. 901. The recordings were directly tied to the defendants by their unique folder numbers. The trial judge did not abuse his discretion in admitting the tape recordings of the defendants' jailhouse calls into evidence as they were sufficiently authenticated under La. C.E. art. 901.

*Id.*at p. 31-32, 131 So.3d at 192-193.

In this case, Don Hancock, the telephone supervisor for the Orleans Parish Sheriff's Office, authenticated the recordings by explaining that his job entailed maintaining the inmate phone system at the jail. His office recorded all inmate phone calls, and all recordings of those calls were archived. Hancock also testified that each inmate was assigned a unique number code to access the jail's phone system. He also noted that when a call is answered, that person is informed by an automated system that all jailhouse calls are subject to recording and monitoring.

Hancock identified State's Exhibits 122 and 123 as the CDs containing the recorded phone calls made by the defendant from August 15, 2007 through May 1, 2012. Hancock testified that he did not listen to the calls nor prepare the transcriptions, only that he gave copies of the disks to the prosecutor.

Norah held that even in the absence of testimony identifying the voice on the recording, considering the procedure established by which jailhouse calls were recorded and catalogued, the recordings were entitled to the presumption of regularity, absent objective evidence to the contrary. In this case, Hancock testified that he was the custodian of the records of the jailhouse calls and detailed the recording and identification procedures employed to authenticate those recordings, just as he had done in *Norah.* Consequently, the recordings in this case are entitled to the presumption of regularity. Accordingly, we find the defendant's jailhouse calls were relevant, probative and proper rebuttal evidence to his insanity defense.

ASSIGNMENT OF ERROR NUMBER 3

In his third assignment of error, the defendant contends he was denied his constitutional right to confront the evidence against him presented by the jailhouse calls because the State presented the calls during rebuttal. The defendant argues that, by allowing the State to present the recordings to the jury after its medical experts had left the stand, the trial court prevented him from showing the insignificance of the recordings through cross examination.

In support of his argument, the defendant cites *State v. Van Winkle,* 94-0947 (La. 6/30/95), 658 So.2d 198. In *Van Winkle*, the defendant's son was found suffocated in his bedroom, and the defendant was arrested for his murder. The defense theory was that a man who lived in the apartment was a homosexual

hustler who brought home another man, and these two men accidentally killed the boy during forced attempted homosexual activity. In furtherance of this theory, the defendant sought to question: (1) the roommate about his sexual activities and source of income; (2) the coroner about the condition of the victim's anal orifice; (3) the State's chemist as to why the absence of sperm in the anal swabs containing seminal fluid did not necessarily disprove sexual activity; (4) the bartender of the bar where the roommate hung out as to what he meant by the bar being a "hustler" bar; and (5) another bartender of the bar as to whether the bar was a gay bar. The district court refused to allow counsel to question the witnesses as to these areas, and the defendant was convicted of her son's murder. The court of appeal affirmed her conviction. On review, the Supreme Court reversed, finding the trial court's ruling prevented the defendant from presenting a defense. The Supreme Court found that the evidence the trial court refused to admit was relevant to the issue of whether someone else may have committed the murder. The Court stated: "By abridging the cross examination of these witnesses, the trial court impaired [the defendant's] constitutional right to present a defense." *Id*. at 7, 658 So.2d at 202. The Court further held that this error was not harmless as there was a reasonable possibility that the excluded evidence might have contributed to the verdict. The case against the defendant was based upon circumstantial evidence, and the defense theory (that the roommate and another man who was seen leaving the apartment early on the morning of the murder committed the murder) may well have given the jurors reasonable doubt of the defendant's guilt. The Supreme Court reversed the conviction and remanded for a new trial.

In *Van Winkle*, the excluded evidence was highly relevant in proving that someone else was responsible for the offense and created the compelling

circumstances required in order to justify reversing the convictions. However, in this case, unlike *Van Winkle,* the purportedly excluded evidence falls well short of the type of evidence that was excluded in *Van Winkle.* Even assuming the State's experts testified that the jailhouse calls played no pivotal role in their sanity opinion, in order to obtain relief, the defendant would have to show that the jury weighted the evidence so heavily in reaching its verdict, that had the defendant been allowed to show the insignificance of the recordings, the jury likely would have returned a different verdict. Considering that the jury heard the extensive and thorough testimony of Drs. Seiden, Blue and Rouse, it is more reasonable to conclude that that evidence was the basis for the jury finding the defendant sane at the time he murdered Robertson, not the jailhouse calls.

ASSIGNMENT OF ERROR NUMBER 4

In his final assignment of error, the defendant argues that the trial court misapplied the law by admitting two items of inflammatory and irrelevant evidence – (1) the victim's mother's witness impact statement requesting that the jury impose the harshest penalty, and (2) the victim's autopsy photographs.

With regard to the victim's mother's statement, the defendant objects to the following exchange:

> Mrs. Marvel Robertson: As tragic as these circumstances are, I will never get her back so taking another life for me does not get her back, but at the same time I would ask that, as you think about these proceedings and what has happened, that justice for Nia-that the defendant will spend the rest of his-
>
> Defense Counsel: Your Honor, I object to the opinion of sentencing.
>
> Mrs. Marvel Robertson: I would ask that you think of my daughter-

> Defense Counsel: Judge-
>
> The Court: Go ahead.
>
> Mrs. Marvel Robertson: I would ask that you think of my daughter and know that whatever the law allows as the worst punishment would –
>
> Defense Counsel: Your Honor, we didn't interrupt, but objection to anything about law and punishment. It is improper.
>
> Mrs. Marvel Robertson: I would just say think of Nia. I will never get her back. She died a horrendous, horrendous death and I would ask that you keep that (in mind) and remember us for her family and the city. Thank you.

La. R.S. 46:1844(K) provides for the right of the victim or designated family member to make an oral and written victim impact statement which may contain information related to the impact of the offense upon the victim or family and any other information the victim or family wishes to share regarding the overall effect of the crime on them.

The defendant maintains that the victim's mother's statement urged the jury to evaluate the evidence according to sympathy, passion, and prejudice, which the law prohibits. In addition, the defendant contends the trial court further prejudiced his case by informing the jurors that if they accepted the defendant's claim of insanity, he may at some point be released from State supervision, thereby denying justice to the victim's family.

In this case, the jury listened to eight days of testimony which established the defendant's sanity at the time of the murder. To suggest that the jury's verdict was the result of the emotional response to the victim's mother's statement is nothing more than conjecture. Even if there was error, the error was harmless

when measured against the substantial expert evidence of the defendant's sanity at the time he murdered Nia Robertson.

The next evidentiary error the defendant urges in this assignment is that the trial court misapplied the law in admitting autopsy photographs over defense objection. The defendant argues the photographs were extremely gruesome and ghastly as they depict the victim's appearance after coroner's personnel manipulated the victim's neck wound by removing the sutures which the emergency room physicians applied during their attempt to save the victim's life and do not show the natural state of the victim's wound. Moreover, he notes that the cause of death was not at issue, and that the photos served no purpose other than to inflame the jury. In support, he cites *State v. Morris,* 245 La. 175, 157 So.2d 728 (1963), which involved the introduction of "gruesome and ghastly" color slides of the victim before and during the autopsy. The Louisiana Supreme Court found reversible error when the trial court admitted color slides of the victim before and during autopsy where there was no issue or controversy as to the cause of death, and the only remaining issue was whether the homicide had been committed intentionally.

"Even when the cause of death is undisputed, the state is entitled to the moral force of its evidence and post-mortem photographs of murder victims are admissible to prove *corpus delicti*, to corroborate other evidence establishing cause of death, as well as the location and placement of wounds, and to provide positive identification of the victim." *Magee,* 11-0574 at 55, 103 So.3d at 323. "Photographic evidence will be admitted unless it is so gruesome that it overwhelms jurors' reason and leads them to convict without sufficient other evidence." *State v. Koon*, 96-1208, p. 34 (La.5/20/97), 704 So.2d 756, 776. The

admission of "gruesome photographs is not reversible error unless it is clear that their probative value is substantially outweighed by their prejudicial effect." *State v. Broaden*, 99-2124, p. 23 (La. 2/21/01), 780 So.2d 349, 364, quoting *State v. Martin*, 93-0285, pp. 14-15 (La. 10/17/94), 645 So.2d 190, 198.

In this case, the photographs depicted the fatal injuries suffered by Nia Robertson and the condition and location of those injuries on her body.[8] The record indicates that the trial judge reviewed, and significantly restricted, the number of autopsy photographs she allowed the State to introduce at trial. The judge deemed the photographs relevant to the presentation of the State's case more probative than prejudicial. In addition, the guilty verdict in this case did not depend solely on the pictures, but rather upon the expert medical testimony and the testimony of several eyewitnesses to the defendant's murderous attack on Nia Robertson on August 15, 2007. After a review of the record, we do not find that the trial judge abused her discretion by allowing certain of the autopsy photographs into evidence at trial.

Accordingly, for these reasons, we hereby affirm the defendant's conviction and sentence.

AFFIRMED

[8] It is noteworthy that in this case, photographs of the victim were not taken at the scene. Thus, the autopsy photographs were the only means to show the jury the extent of the victim's fatal wounds.