STATE OF LOUISIANA	*	**NO. 2017-KA-0170**
VERSUS	*	
		COURT OF APPEAL
TIMOTHY V. LINCOLN	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 520-534, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Regina Bartholomew Woods
* * * * * *
(Court composed of Judge Rosemary Ledet, Judge Regina Bartholomew Woods, Judge Paula A. Brown)

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AFFIRMED
November 3, 2017

Defendant/Appellant, Timothy V. Lincoln ("Defendant"), appeals the jury's verdict finding him guilty of attempted indecent behavior with a juvenile in violation of La. R.S. 14:27:81. Defendant asserts several assignments of error; finding that none have merit, for the following reasons, we affirm Defendant's conviction.

STATEMENT OF THE CASE

On June 4, 2014, Defendant was charged by bill of information with indecent behavior with a juvenile in violation of La. R.S. 14:81.[1] On June 23, 2014,

[1] La. R.S. 14:81 states:

> A. Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person:
>
> > (1) Any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons. Lack of knowledge of the child's age shall not be a defense; or
> >
> > (2) The transmission, delivery or utterance of any textual, visual, written, or oral communication depicting lewd or lascivious conduct, text, words, or images to any person reasonably believed to be under the age of seventeen and reasonably believed to be at least two years younger than the offender. It shall not be a defense that the person who actually receives the transmission is not under the age of seventeen.
>
> B. The trial judge shall have the authority to issue any necessary orders to protect the safety of the child during the pendency of the criminal action and beyond its conclusion.

Defendant appeared for arraignment and pled not guilty. Thereafter, Defendant filed various pre-trial motions, including a motion for discovery and a motion for a preliminary hearing. On September 18, 2014, the district court found probable cause to substantiate the charges. A jury trial commenced on February 17, 2016.

C. For purposes of this Section, "textual, visual, written, or oral communication" means any communication of any kind, whether electronic or otherwise, made through the use of the United States mail, any private carrier, personal courier, computer online service, Internet service, local bulletin board service, Internet chat room, electronic mail, online messaging service, or personal delivery or contact.

D. The provisions of this Section shall not apply to the transference of such images by a telephone company, cable television company, or any of its affiliates, free over-the-air television broadcast station, an Internet provider, or commercial on-line service provider, or to the carrying, broadcasting, or performing of related activities in providing telephone, cable television, Internet, or commercial on-line services.

E. An offense committed under this Section and based upon the transmission and receipt of textual, visual, written, or oral communication may be deemed to have been committed where the communication was originally sent, originally received, or originally viewed by any person.

F. After the institution of prosecution, access to and the disposition of any material seized as evidence of this offense shall be in accordance with R.S. 46:1845.

G. Any evidence resulting from the commission of a crime under this Section shall constitute contraband.

H. (1) Whoever commits the crime of indecent behavior with juveniles shall be fined not more than five thousand dollars, or imprisoned with or without hard labor for not more than seven years, or both, provided that the defendant shall not be eligible to have his conviction set aside or his prosecution dismissed in accordance with the provisions of Code of Criminal Procedure Article 893.

(2) Whoever commits the crime of indecent behavior with juveniles on a victim under the age of thirteen when the offender is seventeen years of age or older, shall be punished by imprisonment at hard labor for not less than two nor more than twenty-five years. At least two years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence.

(3) (a) In addition, the court shall order that the personal property used in the commission of the offense shall be seized and impounded, and after conviction, sold at public sale or public auction by the district attorney in accordance with R.S. 15:539.1.

(b) The personal property made subject to seizure and sale pursuant to Subparagraph (a) of this Paragraph may include, but shall not be limited to, electronic communication devices, computers, computer related equipment, motor vehicles, photographic equipment used to record or create still or moving visual images of the victim that are recorded on paper, film, video tape, disc, or any other type of digital recording media.

On February 18, 2016, the jury found Defendant guilty of attempted indecent behavior with a juvenile in violation of La. R.S. 14:27:81. On August 5, 2016, the district court denied Defendant's Motion for New Trial and sentenced Defendant to one (1) year at hard labor, suspended, to be served concurrently with any other sentences, with credit for time served, and two (2) years of active probation.[2] The district court also required Defendant to register with the Louisiana Department of Corrections, apply for transfer of probation to Plaquemines Parish—the parish of Defendant's residence—and assessed costs against him. The trial court required Defendant to enroll in a counseling program recommended by his probation officer and submit to six (6) drug tests. Initially, the district court suspended the sex offender notification and registration requirements until the appeal became final; however, after the State lodged an objection through a formal motion, the district court ordered Defendant to complete registration with the sex offender registry.

Defendant now files this appeal and asserts six (6) assignments of error.

STATEMENT OF THE FACTS

According to the testimony of the victim, A.F.,[3] Defendant, who was approximately thirty-two (32) years old at the time of the crime, became acquainted with the victim, A.F. who was sixteen (16) years old, through the social

[2] The district court adopted all the conditions of probation, except fines and fees, which were imposed in a Plaquemines Parish case against Defendant. In the Plaquemines Parish case, Defendant's charges were amended to misdemeanors. Defendant pled guilty to the amended charges and received "misdemeanor probation."

[3] In this opinion, the initials rather than the full names of the minor child are used to protect and maintain the privacy of the minor child involved in this proceeding. *See* Uniform Rules, Courts of Appeal, Rule 5-1 and Rule 5-2.

media application ("app"), Snapchat. They used the app to exchange phone numbers with one another and began conversing via text messaging; they texted each other for approximately four (4) or five (5) days before deciding to go on a date.

On February 13, 2014, A.F. told her parents that, in celebration of a friend's birthday, she was going out to eat and watch a movie with said friend. Unbeknownst to her parents, A.F. secretly had made plans to go out with Defendant. Between 6:30 p.m. and 7:00 p.m., Defendant picked A.F. up from the driveway of her home, where she resided with her parents.[4] Thereafter, Defendant drove to a bar named Cheers, which Defendant owned. When they arrived, A.F. remained in the vehicle while Defendant went inside and purchased alcoholic beverages for both of them. Defendant returned to the vehicle with two alcoholic beverages and A.F. stated that she took several sips of the drink that Defendant gave her.

According to A.F., Defendant and she discussed plans to see a movie at Clearview Mall, but, according to A.F., they decided against that out of fear they would be seen together. A.F. testified that Defendant began driving and while driving he called the Ritz-Carlton Hotel ("the Ritz") in New Orleans to make a room reservation. Once they arrived at the Ritz, Defendant checked in and offered to take A.F. to a bar located not too far from the front desk. However, according to

[4] A.F.'s parents' home is located in Plaquemines Parish. On this night, her mother, M.F., was sick, and her father, D.F., was not at home.

A.F., they decided against that because of A.F.'s age. Instead, they proceeded to the reserved hotel room.

Once inside the room, Defendant ordered room service, which included, among other things, pizza, shrimp cocktail, sodas, and chocolate cake. Defendant also ordered the movie "Frozen" for the two of them to watch. Once the movie was ordered, A.F. testified that while she was sitting on the bed, Defendant began undressing. He left his boxer shorts on until after the room service items were delivered; after the delivery, according to A.F., Defendant exposed his penis and asked A.F. to use his cell phone to take a picture of him. After the photograph was taken, Defendant removed his boxer shorts. He then proceeded to serve A.F. with alcoholic cocktails (fruit juices mixed with alcohol that were contained in the mini-bar of the room); he drank unmixed alcohol.

At some point, A.F. was underneath the covers of the bed, after having removed her shoes and a sweater, which was covering the shirt underneath it.[5] According to A.F., after serving the cocktails, Defendant got into the bed with A.F. and began cuddling her. She relayed to Defendant that she felt nauseated, and he told her to just "lay there." She assumed that her blood sugar was "out of control" because she had been drinking the alcoholic beverages with fruit juices. A.F. recalled that, while lying in the bed, Defendant was hugging and touching her, then she fell asleep.

[5] A.F., who suffers from Type I Diabetes and is insulin-pump-dependent, stated that when she removed her sweater her port, which connects to her insulin pump, was somehow removed too. Thus, she was not receiving the dosages of insulin that keep her insulin levels within a normal range.

She awakened at approximately 3:00 a.m. the next morning, feeling "horrible," and no longer had on any of her clothing. She told the Defendant she needed to go to the hospital; but, Defendant told her that he could not take her to the hospital, because her parents would know that they had been together. Defendant decided to bring her back to her parents' home, but, on the way there, A.F. needed to use the restroom. So, Defendant stopped at Microtel Inn and Suites ("Microtel"), but the front desk agent did not allow A.F. to use the restroom since she was not a registered guest. Afterwards, Defendant drove A.F. straight home and dropped her off at the bottom of her driveway. She walked to the front door of her parents' home and knocked loudly to be admitted inside. Once inside, she vomited and fell into her father's arms. Her father questioned whether she had been drinking, but she told him that she was experiencing diabetic ketoacidosis.

Several days later, at a prescheduled appointment with her psychiatrist, A.F. recounted the incident with Defendant.[6] The psychiatrist urged A.F.'s mother to bring A.F. to Children's Hospital to be evaluated by the medical staff personnel who specialize in sexual abuse/sexual assault cases involving minors.

When A.F. arrived at Children's Hospital, she was referred to the Advocacy Center, which is located on the hospital's campus, for evaluation and interviewing purposes. The Advocacy Center requested the assistance of the New Orleans Police Department ("NOPD"). Initially, Detective Tyra Pruitt ("Det. Pruitt") of the NOPD was dispatched to the location. Because her specialty was child abuse, and

[6] A.F. testified that she had been seeing a psychiatrist "because [she] couldn't accept the fact that [she] was a diabetic."

not sex crimes, she was replaced with Detective Reuben Henry ("Det. Henry") of the Sex Crimes Division of NOPD. Det. Henry testified during cross-examination that Det. Pruitt believed that A.F. and Defendant had engaged in sexual intercourse, therefore making this case more appropriate to be placed with a sex crimes officer, as opposed to a child abuse officer.[7]

When Det. Henry arrived at the Advocacy Center, he observed a forensic interview that was being conducted of A.F. by a forensic interviewer. According to the testimony given by Det. Henry at trial, he recalled the same factual scenario that A.F. stated during her testimony on the witness stand.

Det. Henry testified further that after observing the forensic interview, he obtained a search warrant for video footage and documents from the Ritz and worked with Detective Shawn Burbano ("Det. Burbano") of the Plaquemines Parish Police Department to obtain video footage from Microtel, in order to corroborate what A.F. had stated during the forensic interview. The State showed Det. Henry the video footage, wherein he identified images of A.F. and Defendant at the Ritz. Det. Henry also identified a receipt from the Ritz showing a charge for the room and honor bar purchases totaling over $100.00. He further identified an image of Defendant and Defendant's truck in the video footage obtained from Microtel.

[7] Det. Henry stated that A.F. never recalled or disclosed to anyone that sexual intercourse ever took place between she and Defendant. However, after hearing the initial report, Det. Pruitt assumed that sexual intercourse took place between A.F. and Defendant.

Det. Henry stated that after he obtained the evidence, he met with A.F.'s father, D.F., who gave Det. Henry A.F.'s cell phone. Det. Henry first secured the cell phone with the IT Department of NOPD. He later met with Det. Burbano and Detective Durnin, of the IT Department of Plaquemines Parish Police Department, who conducted a digital forensic examination of the phone. Det. Henry was able to retrieve images, as well as a log of incoming and outgoing calls and text messages. After collecting all of the evidence, Det. Henry obtained an arrest warrant for Defendant.

A.F.'s father, D.F., testified that between approximately 3:30 a.m. and 4:30 a.m. on February 14, 2014, he heard a knock at his front door; when he opened the door, A.F. fell into his arms and vomited all over him. He carried A.F. to the sofa, laid her down, and asked her what happened. A.F. told him that she was at a sleepover at a friend's house and that she made her friend bring her home after she (A.F.) and another girl began fussing with one another. D.F. relayed that A.F. told him the same story the next day.

D.F. testified that he knew Defendant from people in the town talking about him and from a bar, Bucks & Boars, owned by Defendant where D.F. used to "shoot pool." D.F. indicated that he had been to the bar approximately seven (7) or eight (8) times and would speak with Defendant while there; usually, the conversations were about "hunting and shooting hogs and shooting pool and boiling crawfish." D.F. further stated that he and Defendant had mutual friends and that Defendant had frequented D.F.'s home on two occasions.

D.F. recalled that, on approximately February 9 or 10, 2014, Defendant and another friend had come to his home. On the next day, Defendant, along with four (4) or five (5) other people, brought two sacks of crawfish to his home, where they engaged in boiling crawfish and talking. During both occasions, A.F. was present at the house, but the only interaction between Defendant and A.F. occurred when Defendant mentioned something about Snapchat to A.F. At that time, D.F. warned Defendant that he "better not catch [him] Snap-chatting [his] daughter." According to D.F., Defendant laughed it off, and no further interaction was observed by D.F.

A.F.'s mother, M.F., was called to testify at the beginning of the second day of trial. She indicated that she had frequented Bucks & Boars, and was aware that Defendant owned it. She admitted to having known Defendant for a few years prior to the incident. She recalled seeing him at her home during February 2014. She indicated that Defendant had stopped at her home several times during the month, but she denied inviting him there. She stated that several of her friends invited Defendant over. While at their home, Defendant invited M.F. to his bar to shoot pool; he indicated that he would shut down the bar so that her three children, including A.F., could accompany them to the bar. M.F. indicated that she does not allow her children to go to bars, so she and D.F. went to the bar without the kids.

While at the bar, M.F. recalled that Defendant questioned whether she had a problem with him, which she denied. In reply to that, Defendant stated, "Well, then you wouldn't have a problem with me dating your daughter." M.F. told Defendant

that was not going to happen, but she was under the impression that Defendant was joking.

She recalled the night of February 13, 2014, and A.F. telling her that A.F.'s friend was going to pick A.F. up in order for them to go to town with other friends. During the night M.F. texted A.F., and A.F. told M.F. that she was on her way to Copeland's. Early the next morning, at approximately 3:00 a.m., M.F. awakened to see A.F. vomiting on D.F. and D.F. taking care of A.F.

Approximately a week later, M.F. noticed A.F. crying in her room, and A.F. told her that Defendant had taken advantage of her. M.F. denied ever knowing that A.F. and Defendant were in any type of romantic relationship. She further stated that she never would have approved of Defendant being in a relationship with her sixteen year old daughter.

Defendant testified that he owns Bucks & Boars Bar in Buras, Louisiana, and has owned it since 2009. He initially met A.F.'s parents as they frequented his bar at least once monthly since its inception. He played pool with D.F. and enjoyed a cordial relationship with both D.F. and M.F. He indicated that he first met A.F. through his ex-girlfriend—while Defendant dated his ex-girlfriend, A.F. dated his ex-girlfriend's brother. He stated that he began conversing with A.F. four (4) years earlier than the incident, when she added him as a friend on Facebook and Instagram. According to Defendant, approximately two (2) years before February 2014, he and A.F. began conversing with one another after he went on vacation to

Disney World in Florida and posted pictures, to which A.F. responded that she liked Disney World.

Defendant stated that the next time he saw A.F. was when he accompanied a friend of his over to the home of A.F.'s parents. He stated that when he arrived, he and A.F. hugged one another, but no other interaction took place. He further testified that on another occasion, he was at his friend's home and A.F.'s parents were there. While there, he and A.F. were communicating via Snapchat. A.F.'s father caught him on Snapchat with his daughter and asked Defendant if he was Snap-chatting with his daughter. According to Defendant, when Defendant told him yes, they were friends, D.F. said that he did not have a problem with that. Thereafter, Defendant and A.F. continued to communicate with one another via Snapchat.

Defendant recounted that as Valentine's Day approached, A.F. continued to communicate with him via Snapchat and text messaging; A.F. texted Defendant that she did not have plans for Valentine's Day. So, Defendant offered to pick up A.F. and "go up in town or something, go see a movie." Defendant testified that he picked up A.F. and went to his bar, "Cheers." According to Defendant, he went inside to get some paperwork and brought back water for A.F. to drink. Defendant asked A.F. what she wanted to do; A.F. responded that she wanted to see a movie and have dinner. Initially, the plan was to see a movie at the Clearview Shopping Center; however, because there were limited dining options there, according to Defendant, A.F. suggested they go to the Ritz. He further stated that A.F. wanted

to go to the Ritz, because she had seen Defendant's posts and pictures on Facebook showing that he had been to the Ritz in Miami and New Orleans. Defendant told A.F. that the Ritz has room service and that she could rent movies. Thereafter, Defendant and A.F. checked in at the Ritz. Once in the hotel room, A.F. picked up the room service menu and Defendant asked her what she would like to eat. Defendant ordered shrimp cocktail and two (2) beers for himself along with other items that A.F. wanted to try. As Defendant ordered room service, A.F. ordered a Disney movie on the television. According to Defendant, he and A.F. talked and watched the movie. Defendant testified that when room service arrived, he answered the door fully clothed, including his shoes.[8] Defendant testified that A.F. watched the movie and ate a slice of pizza, some cheesecake, and gummy bears.[9] At some point while in the room, A.F. disclosed to Defendant that she was a diabetic. Approximately thirty (30) minutes after A.F. ate half of the cheesecake, she complained that her stomach hurt and that she felt sick. Then, Defendant asked her, "[W]hat do you want to do? Do you want to go home?" According to Defendant, A.F. said it was fine if he took her home because she had insulin there. Defendant further testified that A.F. lifted her shirt to reveal an insulin pump of which he was unaware.

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[8] Defendant denied getting undressed in A.F.'s presence and denied getting into bed with A.F.

[9] Defendant acknowledged that he was charged $100.43 for the honor bar in his hotel room. However, Defendant explained, that because the honor bar is weighted, he was charged for the items being moved from the bar, but that he and A.F. did not consume all of the items from the bar. Specifically, Defendant denied that he and A.F. drank any alcohol or liquor from the honor bar. Defendant asserts that he did not dispute the charges because he and A.F. left the hotel in a hurry.

Defendant testified that within seven (7) or eight (8) minutes, he and A.F. were downstairs and drove away in his truck. A.F. told Defendant that she needed to use the bathroom, so Defendant pulled into a hotel, which refused to allow A.F. to use the restroom because she was not a registered guest. Next, Defendant arrived at A.F.'s home, he watched her until she went inside the house and shut the door, and then left.

Defendant asserted that days after this incident, D.F. invited him to his home to cook crawfish. While D.F. cooked, Defendant talked with M.F. and A.F. Defendant testified that A.F.'s parents knew that he was text messaging her; however, they were not aware that Defendant had taken A.F. out for Valentine's Day. Defendant stated that D.F. asked him about Snapchat and then downloaded the app to his iPhone. Defendant identified various Snapchat photos taken on February 24, 2014, in which he is pictured with D.F., A.F., and A.F's younger siblings. Defendant acknowledged that later that same evening, A.F. emailed him to break up with him because she was tired of sneaking around. Defendant stated that his relationship with A.F. was platonic. Defendant testified that A.F. continued to text message him until February 28, 2014.

In response to questions regarding whether Defendant was trying to evade arrest and prosecution for the current charge, Defendant testified that he travels to Miami to vacation and relax and usually stays between four (4) and seven (7) days. On March 6, 2014, Defendant booked a trip to Miami through his travel agent and

traveled to Miami on March 9, 2014. Defendant further testified that he booked this trip to Miami before being interviewed by police in this matter.

The final witness of the trial was Blayde Franicevich ("Franicevich"). He testified that he has known A.F. since they attended South Plaquemines High School together and they dated in April 2015. He also stated that he knew Defendant. According to Franicevich, A.F. confided to him that "she didn't do anything with [Defendant], that it was just hearsay and that it was her dad pushing her to do it all . . . she didn't want to get [Defendant] in trouble so she was getting in trouble by her dad for not, like, pressing charges on him." Franicevich asserted that A.F. and Defendant were "just buddies" and no sexual acts transpired.

DISCUSSION

Errors Patent

In accordance with La. C.Cr.P. art. 920, we have reviewed this appeal for errors patent; we have found none.[10]

Assignments of Error

In his appellate brief, Defendant assigns the following errors:

1. The district court erred in refusing to grant a mistrial after a detective allegedly made prejudicial remarks alluding to other crimes or bad acts in his testimony.
2. The district court erred in refusing to grant a mistrial after the victim's mother testified that Defendant had raped her daughter.

[10] *State v. Anderson*, 2008-962, p. 2 (La. App. 3 Cir. 02/04/09), 2 So.3d 622, 624.

3. The district court erred in refusing to grant a mistrial when the State indicated that Defendant may have raped the victim in closing arguments.
4. The district court erred in failing to adequately question a juror before replacing her with an alternate.
5. The district court erred in giving conflicting and confusing jury instructions.
6. The multiple prejudicial comments before the jury amount to cumulative errors, which warrant a reversal.

We find that none of Defendant's assignments of error are meritorious. Our discussion as to each assignment of error is herein-below.

Assignments of Error Numbers 1, 2, 3 & 6

Defendant's first three assignments of error address the district court's refusal to grant a mistrial after he alleges that prejudicial statements and statements of other crimes evidence were made by a detective, the victim's mother, and during the State's closing arguments, respectively. The sixth assignment of error concerns what Defendant asserts is the cumulative nature of the alleged prejudicial statements that, when considered as a whole, warrant a reversal. For ease of discussion, all four of these assignments will be discussed consecutively.

Applicable Law

"Mistrial is a drastic remedy which should only be declared upon a clear showing of prejudice by the defendant." *State v. Coleman*, 2012-1408, p. 12 (La. App. 4 Cir. 1/8/14), 133 So.3d 9, 20 (citing *State v. Leonard*, 2005–1382, p. 11 (La.6/16/06), 932 So.2d 660, 667). Further, "[t]he mere possibility of prejudice is

insufficient to warrant a mistrial." *Id*. "[E]xcept for instances in which the mandatory mistrial provisions of La. C.Cr.P. art. 770 are applicable, [the remedy] should only be used when substantial prejudice to the defendant is shown." *Id*. (quoting *State v. Castleberry*, 98-1388, p. 22 (La. 4/13/99), 758 So.2d 749, 768). Motions for mistrial are governed by La. C.Cr.P. art. 770, the mandatory mistrial provision, and La C.Cr.P. art. 771, the discretionary mistrial provision. *State v. Griffin*, 2015-0125, p. 29 (La. App. 4 Cir. 9/16/15), 176 So.3d 561, 578, *writ denied*, 2015-1894 (La. 11/7/16), 208 So.3d 896, *reconsideration not considered*, 15-1894 (La. 1/25/17).

Pursuant to La. C.Cr.P. art. 770(2), a mistrial shall be ordered upon motion of a defendant "when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to: . . . [a]nother crime committed or alleged to have been committed by the defendant as to which evidence is not admissible[.]"[11] "An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial." La. C.Cr.P. art. 770.

La. C.Cr.P. art. 771 provides for discretionary mistrial or admonition when a remark or comment made within the hearing of the jury during trial or in argument

[11] The general rule in Louisiana is that evidence of other crimes or bad acts committed by the defendant is not admissible at trial. *State v. Garcia*, 2009-1578, p. 53 (La. 11/16/12), 108 So.3d 1, 38; La. C.E. art. 404.

is of such a nature that it might create prejudice against the defendant in the mind of the jury. *See also* La. C.Cr.P. art. 775 (providing that, "upon motion by a defendant, a mistrial shall be ordered . . . when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.")

Assignment of Error Number 1

In the first assignment of error, Defendant asserts that the district court erred in refusing to grant a mistrial after Det. Henry alluded to other perceived crimes or bad acts during his testimony, in violation of La. Code Crim. Proc. Art. 770(2) and La. C.E. arts. 403 and 404(B). The portion of Det. Henry's testimony of which Defendant complains is as follows:

> Q. [Defense counsel] [D]id you do anything in this case besides the search warrant at the Ritz-Carlton and helping behind the scenes with the forensic interview at the Advocacy Center.
>
> A. [Det. Henry] Yes.
>
> Q. Okay. Issuing the arrest warrant for my client, correct?
>
> A. Correct.
>
> Q. And what else?
>
> A. We executed a search warrant at your client's residence after we learned he fled to Miami once he realized that the police was investigating the crime and so we executed a search warrant and corroborated some of the information we received from the father [D.F.] because the father believed that Mr. Burbano[12] came over, I believe, after this incident and made threats towards him, not direct threats but threats, using several weapons. . . . .
>
> Q. Okay, but --
>
> A. Well, you asked the question.

[12] Det. Henry used the name Mr. Burbano mistakenly; he was referring to Defendant.

* * *

> A. And on one of the things that was brought up is that [Defendant] is in possession of a lot of firearms because some of the members of . . . [A.F.'s] family that knows [sic] the defendant felt intimidated and afraid and was able to corroborate that he does have an arsenal of firearms inside his trailer. Other information that was obtained during the search warrant, that's for Plaquemines Parish and their investigations.

It was not until after the colloquy had ended and the State had concluded its redirect of Det. Henry that defense counsel objected to and moved for a mistrial based on Det. Henry's statements that were elicited during defense counsel's cross-examination. The district court denied Defendant's motion for mistrial, but offered to admonish the jury to disregard all testimony of Det. Henry regarding the search warrant. The district court then gave defense counsel a moment to consult with Defendant. After a recess, the trial proceeded without an admonition to the jury.

First, even assuming that Det. Henry's statements constituted impermissible evidence of other crimes or bad acts evidence, we find that defense counsel's objection was untimely. In *State v. Broaden,* the Louisiana Supreme Court stated that an objection is untimely if it is made after the State has conducted re-direct examination, the witness has left the witness stand, and the court has recessed. 1999-2124, p. 17 (La. 02/21/01), 780 So.2d 349, 361. Moreover, Louisiana's contemporaneous objection rule provides that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." La. C.Cr.P. art. 841(A); *State v. Knott,* 2005–2252, p. 2 (La. 5/5/06), 928 So.2d 534, 535. The contemporaneous objection rule has two purposes: (1) to require counsel to call an error to the judge's attention at a time when the judge may correct the

error; and (2) to prevent defense counsel from "sitting on" an error and gambling unsuccessfully on the verdict, and later resorting to appeal on an error that might have been corrected at trial. *Id*. Defendant's failure to timely object barred the district court from accomplishing its job of correcting the "error" and now, after Defendant has had the opportunity to "sit on the error," he wants to raise it at this level when it should have been timely raised at the district court level.

Defendant also claims that Det. Henry used defense counsel's questions as a pretext to interject prejudicial commentary and "untruth" and that the proper remedy was to grant a mistrial. Defendant relies on *State v. Douglas*, 389 So.2d 1263 (La. 1980), to support his argument.

In *Douglas*, it was argued on appeal that the testifying officer had implied that the defendant was recently released from Angola and that the testifying officer had therefore made an impermissible reference to other crimes. The Supreme Court stated:

> An investigating officer is a witness, but is closely related to the district attorney in presentation of the prosecutor's case. Therefore, a prejudicial remark by an experienced police officer should be viewed with considerable concern as to the fairness of the trial, and may require granting a mistrial, especially if the remark was precipitated by or should have been anticipated by the district attorney.

However, the *Douglas* Court went on to state that the decision of whether to grant a mistrial under the circumstances before the district court "was left to the sound discretion of the trial court" and concluded it was not an abuse of discretion to refuse to grant a mistrial based on the police officer's remarks. *Id*.

Moreover, it is well settled that a police officer is not a "court official" for purposes of La. C.Cr.P. art. 770. *Griffin*, 2015-0125, pp. 29-30, 176 So.3d at 578 (citing *State v. Augustine*, 2012–1759, pp. 7-8 (La. App. 4 Cir. 9/18/13), 125 So.3d 1203, 1208).[13] Thus, Defendant's argument that mistrial is warranted with regard to Det. Henry's statements can only be based on La. C.Cr.P. art. 771.

In *Griffin*, this Court addressed whether a sergeant's reference to a defendant's prior felony conviction warranted a new trial under La. C.Cr.P. art. 771. The sergeant, when asked whether he arrested the defendant for a traffic violation by defense counsel, responded that he also arrested the defendant for being a felon in possession of a firearm. The district court denied the motion for mistrial. This Court affirmed, stating in pertinent part:

> This court in the *Augustine* case held that a mistrial is not warranted when a police officer makes a direct response to defense counsel's questioning that refers to other crimes that the defendant committed. In that case, we rejected the defendant's argument that the officer's "reference to him being wanted on a murder charge mandated a mistrial pursuant to Louisiana Code of Criminal Procedure articles 770, 771 and Louisiana Code of Evidence article 404(B)." *Augustine,* 12–1759 at p. 7, 125 So.3d at 1208. In support, we cited *State v. Kimble,*375 So.2d 924 (La. 1979) and *State v. Tribbet,*

[13] As noted by this Court in *Griffin*, the *Augustine* Court discussed the Louisiana Supreme Court case, *State v. Schwartz*, 354 So.2d 1332 (La. 1978), which questioned the wisdom of "our recent statements that a police officer witness is not a 'court official' whose reference to inadmissible other crimes evidence mandates a mistrial under La. C.Cr.P. art 770." *Griffin*, 2015-0125, p. 30, n. 19, 176 So. 3d at 579 (citing *Augustine*, 2012–1759, pp. 7–8, 125 So.3d at 1208 and *State v. Schwartz*, 354 So.2d at 1332, n. 2). The *Augustine* Court noted that the *Schwartz* case involved a police officer who gratuitously implicated the defendant in other crimes and had a recurring pattern of giving unresponsive answers in a number of cases, which could not be excused as being inadvertent, unplanned, or unexpected by prosecuting attorneys. In the present case, Defendant has not alleged that the detective engaged in a pattern of unresponsive answers and, as will be discussed below, the State did not elicit the testimony from the detective as it was a response to a question asked by defense counsel.

> 415 So.2d 182, 184 (La. 1982). We noted that in *Kimble, supra,* the Louisiana Supreme Court held that "'the state cannot be charged with testimony elicited by defense counsel implying that defendant had previously committed other crimes and that defendant cannot claim reversible error on the basis of that evidence which is elicited.'" *Augustine,* 12–1759 at p. 9, 125 So.3d at 1208. We further noted that the Supreme Court reiterated its holding in the *Tribbet* case. *Id.* Finally, we noted that the prohibition of evidence of other bad acts in La. C.E. art. 404 B(1) does not apply to testimony elicited by defense counsel. *Augustine*, 12–1759 at p. 9, 125 So.3d at 1209.
>
> Applying those principles here, the statement of concern was made by a police officer—Sergeant Palumbo—testifying in direct response to defense counsel's questioning. It was thus testimony elicited by defense counsel. Sergeant Palumbo was responding to the defense counsel's questioning as to what Mr. Griffin was arrested for when he referred to another crime committed by Mr. Griffin. Denying the motion for a mistrial, the district court orally reasoned that "the witness felt that he was being responsive to the question asked by Counsel. Therefore, in effect, opening the door with the response that was ultimately provided." We agree. We thus find no abuse of discretion in the district court's conclusion that the comment was not so prejudicial as to deprive defendant of a fair trial such as to warrant a mistrial under La. C.Cr.P. art. 771. There is no merit to this assignment of error.

Griffin, 2015-0125, pp. 31-32, 176 So.3d at 579–80.

In the present case, similarly, the testimony at issue was provided by a detective in response to questions posed by defense counsel as to "what else" the detective did in the course and scope of the investigation. In discussing the procurement and execution of the search warrant, Det. Henry indicated that Defendant owned firearms, made threats towards D.F., and fled from the police. Because these statements were elicited by defense counsel, not by the district attorney, it does not appear that Det. Henry's testimony would mandate a mistrial.

Moreover, after Det. Henry made the complained-of assertions, he conceded that Defendant was not arrested for "threats with a firearm or assault with a firearm."

Even assuming the above-referenced statements constituted impermissible other crimes evidence and that the objections to these statements were properly preserved for review, they would be reviewed under a harmless error standard. *State v. Copelin,* 2016-0264, p. 22 (La. App. 4 Cir. 12/07/16), 206 So.3d 990, 1005. "[A]n error is harmless if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error." *State v. Blank,* 2004-0204, p. 53 (La. 04/11/07), 955 So.2d 90, 133.

In this case, the State presented the testimony of A.F. and her parents, as well as documentary evidence—all proving the elements of the crime for which Defendant was charged. Whether A.F.'s family feared Defendant because he kept firearms in his trailer did not contribute to the jury's verdict in light of the strength of the State's case.

Additionally, the district court offered to admonish the jury to disregard "any and all" of the testimony obtained from Det. Henry concerning the search warrant. However, defense counsel, apparently after consulting with Defendant, chose not to pursue an admonition. Accordingly, the district court did not abuse its discretion in declining to grant a mistrial based on Det. Henry's comments.

Thus, this assignment of error is without merit.

Assignment of Error Number 2

As his second assignment of error, Defendant claims that the district court erred in refusing to grant a mistrial after the victim's mother, M.F., testified that Defendant had raped her daughter. The statement alleging rape occurred during M.F.'s direct examination:

> Q. [The State]: Now, did [A.F.] eventually disclose to you what actually happened on the night of February 13, 2014?
>
> * * *
>
> A. [M.F.] I don't know the exact date she told me.
>
> * * *
>
> A. From the -- I would say maybe a week later. I'm not sure.
>
> Q. And then how did she disclose to you?
>
> A. She -- she was crying in her room and I went in her room and she was really upset and she said that -- that he -- we don't know the full story what really happened. That he -- (witness crying) -- he took -- he raped her, took advantage of her.

The defense counsel objected, and the district court sustained the objection. Defense counsel then asked for a bench conference. Outside of the presence of the jury, defense counsel moved for mistrial and argued that jurisprudence holds that when the State elicits a prejudicial answer from its own witness, a mistrial may be granted. The State claimed that M.F. was not referencing the charges against Defendant in Plaquemines Parish that included Carnal Knowledge of a Juvenile, which "the jury does not know anything about." The State argued that "what the jury heard was a mother getting a first report of the acts that form the nexus of this

and that in her opinion, her daughter was raped because she was taken advantage of."

The district court denied the motion for mistrial, finding that the witness did not allude to events that occurred in Plaquemines Parish and that because a charge of Indecent Behavior with a Juvenile "could carry a possible act of intercourse and/or sex," M.F's testimony was "not so inflammatory and so prejudicial as to warrant a mistrial." The district court then "strongly caution[ed]" the State, as follows:

> I'm not going to hear this "opening the door," you know, "she opened the door on cross." You need to instruct your witnesses that there is no reference to those type of words again or editorializing with those type of words such as "rape" unless the victim said that to her in the first report.
>
> Also, no allusions to anything in Plaquemines Parish at all.

Upon the request of the State, the district court permitted the State to speak with M.F. before she returned to the witness stand about the rules of mistrial and the parameters of her testimony. The district court then admonished the jury to disregard "any . . . testimony regarding the opinion of the mother [M.F.] as to whether or not a rape may have occurred in this case" and to "disregard that testimony as if it did not happen."

Defendant, relying on *State v. Overton*, 337 So.2d 1201 (La. 1976), argues that because the State's question prompted M.F.'s accusation of rape, a mistrial was mandatory under La. C.Cr.P. art. 770(2).[14] In *Overton*, the Louisiana Supreme

[14] In its brief, the State argues that Defendant cannot assert that a mistrial is required on these grounds because Defendant only argued before the district court that the statement is prejudicial to the defense and that this argument is too vague to preserve a claim under the mandatory

Court stated that "an impermissible reference to another crime deliberately elicited of a witness by the prosecutor would be imputable to the State and would mandate a mistrial." 337 So.2d at 1205 (citing *State v. Lepkowski*, 316 So.2d 727 (La. 1975)).[15]

However, a more recent case that discusses other crimes evidence elicited by the State from a State's witness such that it would trigger a mistrial pursuant to La. C.Cr.P. art. 770, notes that "a statement is not chargeable to the State solely because it was in direct response to questioning by the prosecutor." *State v. Pierce*, 2011-320, p. 5 (La. App. 5 Cir. 12/29/11), 80 So.3d 1267, 1271 (citing *State v. Ventris*, 2010–889, p. 20 (La. App. 5 Cir. 11/15/11), 79 So.3d 1108, 1122). "Although a prosecutor might have more artfully formulated the question that provoked a witness's response, where the remark was not deliberately obtained by the prosecutor to prejudice the rights of the defendant, it is not the basis for a

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mistrial provisions of La. C.Cr.P. art. 770. However, it appears that the State was aware that Defendant was objecting to M.F.'s testimony based on other crimes evidence as the district attorney specifically claimed "the defense is alleging that we're referring to other crimes . . . we're not talking about a separate act than what is our charged offense."

[15] It is important to note that the *Lepkowski* case cited by *Overton* found that the deputy's statement, which alluded to a previous conviction, was not a basis for mistrial in part because the "matter was covered by [La]. C.Cr.P. 771" and was properly disposed of by admonition to jury to disregard. *State v. Lepkowski*, 316 So. 2d 727, 729 (La. 1975). The portion of *Lepkowski,* upon which Defendant relies to establish a mistrial was required under La. C.Cr.P. art. 770, actually occurred in the dissent. *Id.* at 730 (Barham, Justice, dissenting). Justice Barham stated:

> [A]ny comment by a witness for the State which is directly responsive to a question propounded by the prosecutor should be imputed to the State and treated as if it were made by the district attorney for the purposes of La.C.Cr.P. art. 770. The prosecutor cannot subvert the legislative intent embodied in Article 770 and deny defendant a fair trial by an impartial jury merely by placing in the mouth of his witness words which, if spoken by the prosecutor himself, would require automatic mistrial.

mistrial." *Pierce*, 2011-320, pp. 5-6, 80 So.3d at 1271-72 (citing *Ventris*, 2010–889, p. 20 (La. App. 5 Cir. 11/15/11), 79 So.3d 1108, 1122-23).

Here, the State asked M.F. "how" A.F. disclosed to her what occurred on the night in question and M.F. responded "[A.F.] was crying . . . was really upset and she said that . . . we don't know the full story [sic] what really happened. That he . . . he raped her, took advantage of her." As noted by the State, this assertion could be viewed in different ways. M.F.'s testimony could indicate that A.F. told her mother that Defendant raped her, or it could be M.F.'s interpretation about what transpired based on A.F.'s statements. It also could refer to a crime that occurred in a separate parish, as Defendant argued before the district court. Nevertheless, a review of the record indicates M.F.'s rape allegation was not purposefully elicited by the State because the testimony was given in response to the State's question regarding the manner in which A.F. divulged the events that occurred on the evening of February 13, 2013. Moreover, the record indicates that M.F. was crying when she provided this testimony and thus appears to have been an emotional outburst and not purposefully uttered to prejudice Defendant.

Based on the aforementioned, Defendant's second assignment of error lacks merit.

Assignment of Error Number 3

As his third assignment of error, Defendant contends that the district court erred in refusing to grant a mistrial when the State indicated in closing arguments

that Defendant may have raped the victim knowing that such a remark was inadmissible and unsupported by the testimony, evidence, or charge.

The comment to which Defendant refers occurred during the State's rebuttal argument:

> [I]s it a shock that when she's reporting to her psychiatrist and the doctors at Children's what happened to her, she doesn't mention, "Oh, I took a photograph too"? She's relating a possible sexual assault, a possible rape, what she does know about him getting naked, him being with her, her illness. It's not making a story grander if she's telling the doctors what they need to know to treat her.

The record reveals that defense counsel requested a side-bar to preserve her contemporaneous objection during closing arguments. After the jury retired to deliberate, defense counsel objected to the district attorney's stating that a "possible rape" occurred because Defendant was not charged with rape and because "there was no testimony of rape other than by the mother, who was admonished." The district court overruled the objections and denied the motion for mistrial.[16]

This Court, in *State v. Haynes*, has stated, in pertinent part, the following mandates as it relates to closing arguments of prosecutors:

> The scope of closing argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The argument shall not appeal to prejudice. The state's

[16] Although in the transcript the district court stated that the motion for mistrial was denied, the record does not affirmatively evince that defense counsel moved for mistrial. The State does not contend that Defendant failed to move for mistrial in its brief; on the contrary, the State notes that the district court overruled defense counsel's objections and denied a mistrial. Presumably, then, defense counsel moved for mistrial when she lodged her objections during the sidebar.

> rebuttal shall be confined to answering the argument of the defendant." La.C.Cr.P. art. 774. Prosecutors may not resort to personal experience or turn argument into a plebiscite on crime. *State v. Williams,* 96–1023, p. 15 (La.1/21/98), 708 So.2d 703, 716. 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, *cert. denied, Casey v. Louisiana,* 531 U.S. 840, 121 S. Ct. 104, 148 L.Ed.2d 62 (2000), citing *State v. Martin,* 539 So.2d 1235, 1240 (La. 1989) (closing argument that referred to "smoke screen" tactics and defense as "commie pinkos" was inarticulate but not improper). Further, the trial judge has broad discretion in controlling the scope of closing arguments. *Id.* Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have heard the evidence. *State v. Ricard,* 98–2278, p. 4 (La. App. 4 Cir. 1/19/00), 751 So.2d 393, 396. Even if the prosecutor exceeds 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. Huckabay,* 2000–1082, p. 30 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093, 1110. *See also State v. Draughn,* 2005–1825 (La. 1/17/07), 950 So.2d 583.

State v. Haynes, 2013-0323, p. 12 (La. App. 4 Cir. 5/7/14), 144 So.3d 1083, 1090.

Defendant argues that in the rebuttal, the State indicated "there was another 'possible rape'" by Defendant and therefore referred to another crime. Defendant also notes that this comment was made after the district court had admonished the State concerning M.F.'s accusation of rape and after Defendant and Franicevich testified that no physical intercourse occurred.

The State however, asserts that when it referred to a "possible sexual assault, a possible rape," it was discussing the incident that occurred at the Ritz and was not insinuating that Defendant perpetrated a separate rape or assault.

We find that the State's remarks during closing and rebuttal arguments were improper, because they spoke of evidence that was not put into the record before the jury, i.e., the [alleged] rape of A.F. by Defendant. However, the remarks do not warrant reversal of Defendant's conviction. We are not thoroughly convinced the comments contributed to or influenced the verdict considering the amount of evidence that the State introduced throughout the trial, as well as the fact that the jury returned a verdict of *attempted* indecent behavior with a juvenile, rather than indecent behavior with a juvenile, which lends credence to the proposition that the jury disregarded the State's reference to rape.

Accordingly, this assignment of error is without merit.

Assignment of Error Number 6

Regarding his sixth assignment of error, Defendant contends that the multiple prejudicial comments before the jury amount to cumulative errors, which warrant a reversal. Defendant relies on *State v. Duplessis*, 457 So.2d 604 (La. 1984) to support his argument.

In *Duplessis,* the prosecutor repeatedly made inappropriate remarks during closing arguments. The prosecutor commented on evidence outside the record; stated that defense counsel was a "very skillful lawyer"; told the jurors that defense counsel had them removed at one point in trial because he did not want them to hear a witness' answer; and concluded his arguments with "a blatant appeal to prejudice" by predicting dire consequences in case of acquittal. The district court allowed the prosecutor to make these comments, failed to give an admonition to

the jury, and told defense counsel not to interrupt the prosecutor's closing argument. The *Duplessis* Court found reversal was necessary due to the cumulative nature of errors. The Supreme Court stated:

> When such blatantly defiant tactics by the prosecutor are permitted, the result is the frustration of a criminal justice system which is designed to insure that a person is sent to prison only after being convicted on the basis of a jury's fair (and not prejudicially influenced) evaluation of reliable evidence. In the present case, such tactics were not only *permitted,* but were actually *approved* when the trial judge twice reprimanded the defense attorney for making proper and meritorious objections. [Emphasis in original].

Duplessis, 457 So.2d at 610-611.

Defendant argues that "despite its distinctions from *Duplessis*" the combined prejudicial statements of Det. Henry, M.F., and the State's closing argument, and conflicting jury instructions likewise denied him a fair trial. However, the remarks of the State and testimony of the State's witnesses do not constitute the kind of "blatant defiance" addressed in *Duplessis*. Unlike *Duplessis*, the district court in the present case did not permit or endorse the allegedly damaging comments. Here, the district court offered to admonish the jury to disregard the untimely objected-to testimony of Det. Henry, but defense counsel opted to refrain from the admonishment after consulting with Defendant. The district court also sustained the objection to M.F.'s reference to rape and instructed the jury to ignore her testimony in that regard. With respect to the State's comments in rebuttal closing arguments, the district court heard the arguments of both parties outside the presence of the jury and determined that a mistrial was not warranted.

Furthermore, subsequent to *Duplessis*, the Louisiana Supreme Court has found that the combined effect of assignments of error, none of which warrants reversal on its own, does not deprive a defendant of his right to a constitutionally fair trial. *State v. McElveen,* 2010-0172, pp. 57-58 (La. App. 4 Cir. 9/28/11), 73 So.3d 1033, 1071-72 (citing *State v. Copeland*, 530 So.2d 526, 544-45 (La. 1988). The Louisiana Supreme Court has noted that the "cumulative error" doctrine has lost favor in the Louisiana courts. *Id*. (citing *State v. Draughn*, 2005–1825, p. 70 (La. 1/17/07), 950 So.2d 583, 629); *see also State v. Manning*, 2003–1982, p. 78 (La. 10/19/04), 885 So.2d 1044, 1110 (citing *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987)), which rejected the cumulative error doctrine by noting that "twenty times zero equals zero"). As detailed above, Defendant failed to show prejudice as a result of any of the alleged errors and thus he cannot show that their combined effect entitles him to relief. As such, Defendant's assignment of error lacks merit.

Assignment of Error Number 4

As his fourth assignment of error, Defendant argues that the district court erred in failing to adequately question Juror No. 6 before replacing her with an alternate. La. C.Cr.P. art. 789(A) provides for the removal of jurors and replacement with alternate jurors when the original jurors "become unable to perform or [are] disqualified from performing their duties." If the court replaces a juror after deliberations have begun, the court shall order the jury to begin deliberations anew. La. C.Cr.P. art. 789(C). When there is an allegation that a juror

must be replaced after the jury is selected and sworn, the district court should hold an evidentiary hearing with all parties to determine if the juror needs to be removed. *State v. Colbert*, 2007-0947, p. 22 (La. App. 4 Cir. 7/23/08), 990 So.2d 76, 90 (citing *State v. Fuller*, 454 So.2d 119, 123 (La. 1984)).

Here, the record provides that after the district court recessed for the jury to deliberate, the district court was notified there was an issue with deliberations. Juror No. 6 was brought into the courtroom and the following colloquy occurred:

> The Court: . . . I understand there's an issue with the deliberations?
>
> [Juror No. 6]: Yeah, in my point of view. Like I say, I heard everything, I seen everything, but I still -- I'm still not with what they want to do.
>
> The Court: Okay, you don't have to give up your position on something just to reach a verdict. You are entitled by law to hang on to your position. But are you dialoguing with your fellow jurors? Are you talking with them?
>
> [Juror No. 6]: . . . I'm talking with them, Judge, and I'm . . . I'm listening to them. But I still don't feel where [sic] its right.
>
> * * *
>
> The Court: . . . You don't have to sacrifice your opinion but are you -- because I was kind of hearing that you're not participating in the process? Are you --
>
> [Juror No. 6]: Yes, I am, and I'm listening to them. And I hear what they're saying but it's just not – not me, what they're saying. It's just not. I'm sorry. It's just not me.

Thereafter, Juror No. 2, the jury foreman, was called and questioned as follows:

> The Court: . . . Something's come to the Court's attention that perhaps one juror will not participate in the deliberations. If you could tell us what's going on. Not how anybody's voting.
>
> [Jury Foreman]: . . . Yeah, we're deliberating and discussing all the facts and we thought we -- everyone

had come to the same conclusion and when we started to vote, that's when the other juror mentioned that she didn't want to be part of it . . . she didn't want to agree to anything. She didn't' want to say "yes" or "no," she just didn't want to be part of the process.

The Court: Okay, it's not that she had a different verdict.

[Jury Foreman]: No. No verdict at all.

* * *

Everyone was talking, and there was never a point where we all said out loud this is what we've agreed to because we never once said we've all agreed to it. We came to a point in the discussion to where we said we are ready to vote basically. And that's when she decided that she didn't want to take part in the voting process.

The Court: So she will not vote at all with the group.

[Jury Foreman]: Right, correct.

The Court: And the process is that you're asking your fellow jurors, "Let's write down what our verdict would be" or "Discuss what our verdict would be" and that's the part where Juror No. 6 has decided she will not --

* * *

--indicate -- which way she's going or --

Jury Foreman: Correct.

* * *

The Court: . . . This is kind of a fine distinction. The deliberative process was not over, correct? Where there was . . . a distinct vote and there was just a disagreement in the vote. It's my understanding from you that the deliberative process was still kind of going on.

* * *

You were starting to vote and that's when the juror said, "I will not participate in this"?

[Jury Foreman]: Correct, correct.

* * *

She wasn't trying to agree or disagree with what the overall vote was, she didn't want to place any vote in any direction.

The district court informed the jury foreman to instruct the jury not to deliberate any further. The district court then heard arguments from defense counsel, which moved for a mistrial, arguing that six (6) votes are required to find Defendant guilty and that the alternate juror should not be used unless a juror is unable to take part because of an illness.[17] The State, however, claimed that the appropriate remedy was to replace the juror with the alternate and that the juror's refusal to deliberate was "akin to a medical issue in that she is no longer capable for [sic] carrying out her duties as a juror."

The district court subsequently heard testimony from Deputy Sheriff Shawanda O'Neal, who stated that Juror No. 6 advised her that "she did not want to participate in deliberations," did "not agree with the process," and "was ready to go home." The district court also noted that the previous day after adjournment, as Juror No. 6 passed the bench, she stated that "she would not be coming back tomorrow." The district court further stated:

> At first I thought that the juror was kind of joking with the court or maybe she was serious. I was getting a difficult read from her. And I said, "Well, you know you have to come back tomorrow," and she said, "I'm not coming back tomorrow" but then started kind of joking so then I thought she was maybe in an offhanded way just making small conversation. However, in the back of my mind, I thought that was an odd thing for a juror to say on their way out of court.

[17] In his brief, Defendant argues that the alternate was discharged and not available. At trial, defense counsel also argued that the alternate juror was dismissed after the jury was instructed to deliberate. However, the record shows that that alternate was not dismissed and remained in the district court's "chambers since the jury deliberations began."

After noting the jury foreman's testimony that "it's not just a matter of different verdicts" and that Juror No. 6 disagreed with and would not participate in the deliberative process, the district court replaced Juror No. 6 with the alternate juror and ordered that the jury begin the deliberations anew.

Defendant argues that the colloquy between the district court and Juror No. 6 is inconclusive. Defendant claims that the district court assumed that Juror No. 6 was refusing to cooperate in deliberations although Juror No. 6 actually indicated that "no one will listen to her." Defendant argues that it was error to dismiss Juror No. 6 where deliberations had begun and that, due to the incomplete questioning of Juror No. 6, it was possible that the jury was actually hung. Defendant claims that it is unlikely that Juror No. 6 refused to participate because that issue was addressed during *voir dire*.

Once a juror is selected, she is expected to serve unless death or illness occurs, as well as any other cause that would render her unfit to perform her duty. *State v. Square*, 257 La. 743, 846, 244 So.2d 200, 237 (1971), *vacated in part (on other grounds)*, 408 U.S. 938, 92 S. Ct. 2871, 33 L.Ed.2d 760 (1972) (citation omitted).

A review of the record reveals that the district court acted properly in holding an evidentiary hearing to determine whether Juror No. 6 was able to perform her duties. Juror No. 6 testified that she was "listening," but did not agree with her fellow jurors, potentially suggesting that the jury had merely reached an impasse regarding the guilt or innocence of Defendant. However, the district

court's questioning of the jury foreman and Deputy O'Neal shows that Juror No. 6, in fact, refused to participate in the deliberative process. The jury foreman testified that Juror No. 6 did not want to "be a part of" the deliberations and declined to vote "yes" or "no." Deputy O'Neal testified that Juror No. 6 advised her that she did not want to be involved in jury deliberations and did not agree with the process. These statements were further corroborated by the district court itself, which noted that at the end of the previous day of trial, Juror No. 6 had expressed she did not want to "come back" and serve on the jury.

Although the record does not show that Juror No. 6 was unable to be impartial or unbiased, the record does show that Juror No. 6 refused to partake in the deliberative process; therefore, the district court did not err in finding that she was incapable of performing her duties as a juror and rendering a verdict under La. C.Cr.P. art. 789(A). Accordingly, Defendant has not shown that the district court abused its discretion by removing Juror No. 6 and replacing her with the alternate juror. *See Fuller,*454 So.2d at 123 (the district court has discretion to utilize the service of an alternate juror, rather than to grant a mistrial, upon a proper finding that this is the best course of action).

Thus, this assignment of error is without merit.

Assignment of Error Number 5

Defendant next claims that the district court erred in giving the jury conflicting and confusing instructions by telling the jury to first to "reach a verdict,

or not reach a verdict" and then stating that the jury's verdict "must be unanimous."

After replacing Juror No. 6 with the alternate, the district court stated:

> All right, ladies and gentlemen, the law requires that you begin your deliberations anew. Obviously, our alternate is now Juror No. 6 and she's entitled to full participation in the deliberative process as you work towards hopefully reaching a verdict in the case, or not reaching a verdict, whatever the jury's decision is in this case.
>
> Again, it must be unanimous but now our alternate is Juror No. 6. I'd ask you to start you deliberation again anew as if you had not discussed anything in the case with each other. Thank-you. You can go to the jury room.

The jury then exited the courtroom and the original juror was excused from service.

No objections, however, were made by defense counsel to the district court's allegedly confusing instruction. La C.Cr.P. art. 801(C) provides:

> 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. The nature of the objection and grounds therefor shall be stated at the time of objection. The court shall give the party an opportunity to make the objection out of the presence of the jury.

See also La. C.Cr.P. art. 841(A)("[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence").

This Court has also found that the failure to object to jury instructions precludes a defendant from raising the issue on appeal. *See State v. Hollins,* 2011-1435, p. 32 (La. App. 4 Cir. 8/29/13), 123 So.3d 840, 863 (declining to address a

pro se assignment of error concerning a jury charge where no objections were made during the jury instructions); *State v. Plaisance*, 2000-1858 , p. 38 (La. App. 4 Cir. 3/6/02), 811 So.2d 1172, 1198 (holding that a defendant was prohibited from arguing that the district court had erred in failing to instruct jury on penalties for both first and second degree murder where the record did not reflect a contemporaneous objection to this issue and the defendant did not represent that he lodged an objection); *State v. Davis*, 1997-1827, p. 3 (La. App. 4 Cir. 3/10/99), 732 So.2d 79, 81 (finding that the defendant's challenge to a jury instruction on burden of proof was precluded because defense counsel did not make a contemporaneous objection to the jury charge); *see also State v. Dilosa,* 2001-0024, p. 17 (La. App. 1 Cir. 5/9/03), 849 So.2d 657, 671 (stating that "[e]rroneous instructions or failure to give jury instructions are not errors patent, and absent an objection during the trial, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction"). Because defense counsel did not object to the district court's instruction on reaching a verdict and/or the unanimity of the verdicts, Defendant has not preserved the issue for review.

Moreover, harmless-error analysis applies to jury instruction errors. *State v. Wells*, 2014-1701, p. 13 (La. 12/8/15), 209 So.3d 709, 717. Taking into account the evidence discussed in the previous assignments of error, the verdict of attempted indecent behavior with a juvenile was surely not attributable to the district court's allegedly confusing jury instructions.

Because no timely objection was made to the challenged instructions and the record does not reflect that jurors were confused by the district court's jury charges concerning the required verdict and/or the deliberative process after Juror No. 6 was replaced, we find that Defendant's assignment of error lacks merit.

DECREE

For the aforementioned reasons, we affirm the Defendant's conviction and sentence.

AFFIRMED