****NOT DESIGNATED FOR PUBLICATION****

STATE OF LOUISIANA	*	**NO. 2017-KA-0417**
VERSUS	*	
		COURT OF APPEAL
CALVIN C. FREEMAN	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 517-165, SECTION "F"
Honorable Robin D. Pittman, Judge
* * * * * *
Judge Tiffany G. Chase
* * * * * *
(Court composed of Judge Paula A. Brown, Judge Tiffany G. Chase, Judge Marion F. Edwards, Pro Tempore)

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CONVICTION AND SENTENCE AFFIRMED

December 29, 2017

The Appellant, Calvin C. Freeman ("Freeman") was charged by grand jury indictment with two counts of aggravated rape in violation of La. R.S. § 14:42. After a trial by jury, Freeman was found guilty as charged as to both counts. He was sentenced to the mandatory sentence of life imprisonment without benefit of probation, parole or suspension of sentence, as to both counts, to run concurrently. Freeman presents the following assignments of error for this Court's review: (1) the verdict was contrary to the law and evidence; (2) the trial court erred in denying the motion for post-verdict judgment of acquittal; (3) the trial court erred in admitting extrinsic evidence regarding the commission of other crimes; (4) the trial court erred in allowing the jurors to review written evidence during deliberations; and (5) the trial court erred in denying the motion for new trial. For the following reasons we affirm Freeman's convictions and sentence.

Facts and Procedural History

On August 22, 2013, Freeman was indicted on two counts of aggravated rape against his two granddaughters, A.T.B., and A.B., who were five and ten years old respectively, at the time of the crime.[1] The case was presented to the jury October 25 through October 27, 2016. The jury found Freeman guilty as to both counts.

On May 27, 2013, A.B. and A.T.B. revealed to their mother, E.B., that their grandfather "messed with them" while in his hotel room.[2] The graphic underlying testimony of the children was that Freeman engaged in oral, anal and vaginal sex

[1] This Court does not identify the names of victims of sex offenses or who are minors at the time of the crime. La. Stat. Ann. § 46:1844(W). Hereinafter, the elder victim is referred to as "A.B.", while her younger sister is referred to as "A.T.B." Their mother will be referred to as "E.B."
[2] Freeman is the children's paternal grandfather.

with them. E.B. called her father, who advised her to report the incident to the police. E.B. contacted the police the next day and the case was assigned to Detective Akron Davis, who opened an investigation. Detective Davis advised E.B. to take the children to the Audrey Hepburn Care Center at Children's Hospital (hereinafter "the Children's Advocacy Center"), where they individually underwent an audiotaped incident history with Ms. Ann Troy, a forensic nurse practitioner. A.B. told Ms. Troy the incident occurred several days before, on May 25, 2013, when she and her sister were dropped off to their grandfather at his hotel. A.B. relayed in the incident history that once she and her sister were alone with Freeman in his hotel room, they were both raped. Ms. Troy concluded that the children suffered anal and vaginal penetration and ultimately diagnosed both children as having suffered sexual abuse.

In addition to the incident history, on May 29, 2013, A.B. and A.T.B. underwent a forensic interview with Tracy Brunetti, a forensic interviewer at the Children's Advocacy Center. The audio and video recordings of the statements taken by Ms. Brunetti were played for the jury. Ms. Brunetti also identified anatomical drawings that were used during A.T.B.'s interview. She stated that Detective Davis viewed the interviews remotely. After the interviews, A.B. identified a picture of Freeman as the perpetrator and a warrant for his arrest was issued.

Following his conviction, Freeman filed a motion to reconsider his sentence, arguing it was excessive. He also filed a motion for new trial based in part on the jury's review of written evidence during deliberations and for post-verdict judgment of acquittal based on insufficient evidence. On November 29, 2016, the trial court denied Freeman's motion to reconsider his sentence, finding that the

sentence was mandatory. The trial court denied both the motion for new trial and the motion for post-verdict judgment of acquittal. This appeal followed.

Errors Patent

We have conducted a careful examination of the record before us pursuant to the provisions of La. C.Cr.P. art. 920, and find no **errors patent** on the record.

Verdict Contrary to Law and Evidence and Post-Verdict Judgment of Acquittal

When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence.[3] Freeman maintains that: (1) the verdict was contrary to the law and evidence and (2) the trial court erred in denying his motion for post-verdict judgment of acquittal. As Freeman's first two assignments of error relate to the issue of sufficiency of the evidence, we therefore combine the two issues for purposes of judicial efficiency.

The issue in both assignments of error center squarely on the sufficiency of the evidence presented at trial.[4] *Jackson v. Virginia* addressed the proper standard when reviewing a challenge to the sufficiency of the evidence.[5] "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

[3] *State v. Zeigler*, 40,673, p.4 (La. App. 2 Cir. 1/25/06), 920 So. 2d 949, 953, *writ denied*, 2006-1263 (La. 2/1/08), 976 So. 2d 708.
[4] *State v. McGee*, 37,919, p.2 (La. App. 2 Cir. 12/10/03), 862 So. 2d 452, 454 (citing La. C.Cr.P. art. 821(B)).
[5] *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979) See *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624–1625.

crime beyond a reasonable doubt."[6] That standard recognizes the duty of the trier of fact, in this case the jury, to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."[7] A trial court shall grant a post-verdict judgment of acquittal only if it determines that the evidence, when viewed in the light most favorable to the State, does not reasonably permit a finding of guilty.[8]

La. R.S. § 14:42 provides in pertinent part:

> A. First degree rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
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> …
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> (4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

It is well recognized that the testimony of the victims alone may be sufficient to demonstrate all the elements of first degree rape, even where there is no introduction by the State of medical, scientific or physical evidence to prove the commission of the offense.[9]

Freeman maintains that the testimony of the victims, when compared with the physical evidence, presents an irreconcilable conflict between the two, making the testimony insufficient to convict.[10] He points to the lack of physical evidence to

[6] *Id.*
[7] *State v. Ellis*, 2014-1511, p.2 (La. 10/14/15), 179 So.3d 586, 588, *cert. denied*, 136 S. Ct. 1462, 194 L. Ed. 2d 553 (2016).
[8] *State v. McGee*, 37,919, p.2 (La. App. 2 Cir. 12/10/03), 862 So.2d 452, 454 (citing La. C.Cr.P. art. 821(B)).
[9] *State v. Reel*, 2010-1737, p.8 (La. App. 4 Cir. 10/3/12), 126 So.3d 506, 513, *writ denied*, 2012-2433 (La. 4/12/13), 111 So.3d 1018 (citing *State v. Hotoph*, 99–243, p. 13 (La. App. 5 Cir. 11/10/99), 750 So.2d 1036, 1045)).
[10] *State v. Mussall*, 523 So. 2d 1305, 1311 (La. 1988).

corroborate the victims' testimony and that A.B. and A.T.B. were coached to lie and create a false narrative. In support of this contention, Freeman cites to A.T.B.'s trial testimony wherein she often indicated that she had little recollection of her prior recorded statements or of what happened, thus making the testimony insufficient to convict him.

At trial, the State presented testimony of A.B. and A.T.B., E.B., Ms. Troy, Ms. Brunetti, and Detective Davis, along with recorded statements made to Ms. Troy and Ms. Brunetti. Admittedly, much of the evidence against Freeman was the testimony of the two young victims, their incident history conducted with Ms. Troy and the expert testimony of Ms. Troy.

A.B. and A.T.B. provided explicit testimony at trial and through prior taped interviews regarding the abuse they suffered at the hands of Freeman.[11] A.B. indicated in the incident report with Ms. Troy that Freeman put his private part in her butt, more than one time. Ms. Troy showed her a diagram of the body and A.B. demonstrated where she was kissed by Freeman. She pointed out on the diagram where he put his private parts during the incident. A.B. testified at trial that she was screaming and in pain during the incident and that Freeman threatened her if she told anyone. At trial, A.T.B. confirmed that she underwent a videoed forensic interview with Ms. Brunetti, where she described what happened to her.

[11] A.T.B. testified at trial but frequently indicated she did not remember much of what happened. She was nine years old at the time of trial, but only five when she was videotaped following the incident. She admitted she was scared to testify. A.B., in her direct testimony, also confirmed that A.T.B. was reluctant to ever discuss what happened to her and it was difficult for A.T.B. to talk about the incident at all.

The parties stipulated to the expertise of Ms. Troy as an expert in physical and sexual abuse of children, including delayed disclosure. Ms. Troy described in detail how a child is diagnosed with sexual abuse and explained the process she uses to make a diagnosis of sexual abuse. Specifically, she considers the totality of the situation, including the behavior of the child, whether the child provides a clear, detailed, spontaneous history, along with lab exams. Ms. Troy pointed out that both children had multiple marks on their bodies, consistent with the history the children provided regarding those marks. While the marks were not indicative of sexual abuse, they were consistent with the children's stories, helping to confirm their truthfulness.

Ms. Troy's also addressed Freeman's challenges regarding the lack of physical evidence or injuries indicative of sexual assault. She noted that in the majority of child sexual abuse cases there is little or no physical evidence. A.B. testified that Freeman vaginally penetrated when she was five years old.[12] Ms. Troy acknowledged that if A.B. had earlier experienced some penetration or "grooming" at the hands of Freeman, she would not expect to see any visible injuries five years later because her body was already maturing. Ms. Troy also explained the negative results of the victims' rape kits. Studies reveal that if a rape kit is not performed within twenty-four hours, often physical evidence will not exist. Testimony also revealed that there was a delay in the children being

[12] The children lived with Freeman's mother, Martha Freeman, in Milwaukee for several years. Ms. Freeman testified at trial that the courts had given her temporary custody of the children in July 2011 when E.B. was incarcerated in Louisiana. The children were in Ms. Freeman's custody from July 2011 until January or February 2013. She acknowledged that her son, Freeman, would occasionally watch his grandchildren while she was at work.

examined and the testimony of the children was that they swam in a hotel pool the next day.

Detective Davis testified regarding his attempts to collect physical evidence and speak to potential witnesses, including Freeman's girlfriend, who fled through a hotel window after he announced himself. He spoke to the hotel manager who provided little to no information on the case. Detective Davis also attempted to collect evidence from the hotel room; however, the room had already been cleaned by the time he arrived thus destroying any potential evidence.

Ms. Brunetti, forensic interviewer with the Children's Advocacy Center also testified at trial. She interviewed both A.B. and A.T.B., separately, on May 29, 2013. Detective Davis observed the interview from another room via a close circuit television. The purpose of the forensic interview was to allow the children to give free recall and to allow them to give a narrative with non-leading questions about what occurred. Ms. Brunetti noted that both children were able to give clear and concise descriptions of what happened to them.

Regarding allegations made by Freeman that the children had been coached to lie, Ms. Troy gave specific testimony about the safeguards professionals put in place to recognize when a child has been coached. She maintained that she is always checking for any potential signs of coaching and would immediately call child protection services if she noted any red flags. Furthermore, she testified that all children are different regarding their reaction to abuse and how they decide to report abuse. Ms. Troy acknowledged that children will often lie to get out of

trouble, but will generally not lie to create more chaos. She squarely addressed potential concerns regarding the truthfulness of A.T.B.'s trial testimony. Ms. Troy opined that if a young child discloses sexual abuse but does not have immediate access to counseling, it would not be surprising if she is later reluctant to discuss any details of the event. A child, if not given early access to counseling after a disclosure, will often suppress those memories as a form of denial. Ms. Troy was unequivocal in her testimony that the children were being truthful about the sexual abuse suffered at the hands of Freeman.

The record reveals that Freeman presented evidence at trial and questioned the witnesses regarding the possibility that they were coached or exaggerating. He also presented the testimony of two witnesses who he maintained could vouch for his credibility. The jury rejected Freeman's theory that the children had been coached. Instead, the jury found the testimony and evidence presented by the State regarding A.B. and A.T.B.'s accounts of the rape credible. The jury also had the benefit of hearing Ms. Troy's testimony, wherein she expounded on why she believed the children's accounts. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness.[13] The testimony of both children, coupled with the testimony of Ms. Troy was sufficient for the trier of fact to conclude Freeman's guilt. When reviewing the totality of the evidence presented by the State, we find sufficient evidence presented to prove, beyond a reasonable doubt, that Freeman committed the crimes of first degree rape. Moreover, for the

[13] *State v. Robertson*, 95-0645, p.5 (La. App. 1 Cir. 4/4/96), 672 So.2d 391, 395, *writ granted in part*, 96-1048 (La. 10/4/96), 680 So. 2d 1165 (citing *State v. Richardson,* 459 So.2d 31, 38 (La.App. 1st Cir.1984)).

reasons stated above, the trial court did not err when it denied Freeman's motion for post-verdict judgment of acquittal. Accordingly, this Court finds no merit to these two assignments of error.

Other Crimes Evidence

Freeman's next assignment of error is that the trial court erred in admitting extrinsic evidence of other crimes, specifically, regarding the commission of pandering, obstruction of justice and witness intimidation under La. C.E. art. 412.2. A trial court's decision regarding admissibility of other crimes evidence will not be overturned unless it is shown there was an abuse of discretion.[14]

La. C.E. art. 412.2 is an exception to the general rule outlined in La. C.E. art. 404(B)(1) and directs the admission of evidence of similar crimes, wrongs, or acts in sex offense cases.[15] It provides, in pertinent part:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
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> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.

[14] *State v. Jones*, 2008-687, p.19 (La. App. 3 Cir. 12/10/08), 999 So.2d 239, 252 (citing *State v. Gibbs*, 41,062, p.5 (La. App. 2 Cir. 6/28/06), 935 So.2d 349)).
[15] *State v. Cox*, 2015-0124, p.1 (La. App. 4 Cir. 7/15/15), 174 So. 3d 131, 133, *writ denied*, 2015-1557 (La. 10/10/16), 207 So.3d 407.

Freeman claims that improper evidence of pandering, obstruction of justice and witness intimidation was introduced through the testimony of E.B. wherein she testified about her relationship with Freeman and her fear for her and her family's safety. A review of the record reveals that defense counsel did not object to this testimony on the basis of inadmissible evidence of other crimes. Additionally, Freeman allowed the admission of the very evidence he seeks to exclude through the direct examination of his witness, Kenneth Polk, who admitted that Freeman and his son introduced him to the life of pimping and prostitution, which Polk called "the game." Freeman likewise elicited testimony from his mother, Martha Freeman, who acknowledged that her son and several of his sons had been pimps.

Evidence of obstruction of justice and witness intimidation was introduced through the audio recordings of the jailhouse phone calls between Freeman and his family. Defense counsel likewise did not object to the admissibility of these calls. As such, this issue has not been preserved for appellate review.

Furthermore, the record reflects that the State provided notice of intent to use La. C.E. art. 412.2 evidence at trial on May 18, 2015. At the hearing on the notice on July 24, 2015, the defense acknowledged the evidence was admissible but argued that the notice was untimely. The trial court disagreed and found the notice was timely filed. There is no indication in the record that Freeman sought supervisory review of this ruling. Freeman has not briefed or raised the issue of timeliness of the State's notice to this Court. Accordingly, we find this assignment of error without merit.

Written Evidence Viewed by Jury

In this assignment of error, Freeman maintains the trial court erred in allowing the jurors to view written evidence during deliberations. La. C.Cr.P. art. 793(A) provides in pertinent part, that a juror, during deliberations "shall not be permitted to refer to notes or to have access to any written evidence." The general rule is that jurors may not inspect written evidence in order to examine its verbal contents during deliberations.[16] Convictions have been reversed "where the jury viewed a defendant's confession or written statement or re-examined verbal testimony during deliberations."[17] In *State v. Baham*, this Court found that it was error to allow a jury to review a transcribed statement of a witness in the jury room.[18] However, "[p]arties may agree to waive a statutory provision such as La. Code Crim.P. art. 793. Such an agreement must be in clear express language and must be reflected in the record."[19] In *State v. Augustine*, during deliberation the jurors requested to review evidence presented at trial, which included transcripts of jailhouse conversations.[20] Augustine's attorney only objected to the transcripts' admissibility but failed to lodge an objection under La. C.Cr.P. art.793.[21] Therefore, the court in *Augustine* held that the issue was not preserved for review, because "an error cannot be availed of after verdict unless it was objected to at the time of the occurrence. [22] Likewise, in *State v. Savoy*, 2005-92 (La. App. 3 Cir. 11/2/05), 916 So.2d 339, the jury asked for the audio recording of the defendant's statement to the police and for all other evidence, except the photograph of the

[16] *State v. Freetime*, 303 So. 2d 487, 490 (La. 1974).
[17] *State v. Zeigler*, 40,673, p.10 (La. App. 2 Cir. 1/25/06), 920 So. 2d 949, 956, *writ denied*, 2006-1263 (La. 2/1/08), 976 So. 2d 708.
[18] *State v. Baham*, 2013-0058, p.11 (La. App. 4 Cir. 10/1/14), 151 So. 3d 698, 705, *writ denied*, 2014-2176 (La. 9/18/15), 178 So. 3d 138.
[19] *State v. Adams*, 550 So. 2d 595, 599 (La. 1989)
[20] 2012-1759, p.12 (La. App. 4 Cir. 9/18/13), 125 So. 3d 1203, 1210, *writ denied*, 2013-2484 (La. 4/4/14), 135 So. 3d 639.
[21] *Id.*
[22] *Id.* at 1210-11.

police lineup. When the jury notified the trial judge of its request, the trial judge discussed the issue with the prosecution and defense counsel. Defense counsel agreed that the evidence should be provided to the jurors, only questioning the procedural method by which the jury should listen to the audiotape. Defense counsel expressly stated, when the discussion turned to which particular items they were requesting, that the court should "[g]ive them everything." The Third Circuit found such language to be a clear and express waiver of the provisions of La. C.Cr.P. art. 793. The Court held that "having waived the provisions of Article 793, the defendant is precluded from raising this issue on appeal."[23] Thus, the issue must be preserved for appellate review.

Our Supreme Court has recognized that jurors may, during deliberations, inspect physical evidence in order to arrive at a verdict but cannot inspect written evidence to assess its verbal contents.[24] The general rule, as provided in La. C.Cr.P. art. 793, is that a jury is not to inspect written evidence except for the sole purpose of a physical examination of the document itself to determine an issue which does not require the examination of the verbal contents of the document. For example, a jury may examine a written statement to ascertain or compare a signature, or to see or feel it with regard to its actual existence.[25]

In the case *sub judice,* the jury retired to deliberate and sent a note to the judge via sheriff's deputy. The jurors requested to view the nurse's report and the

[23] Assuming that the trial court's action amounted to error, the erroneous presentation of written, documentary evidence to the jury during deliberations is trial error that can be quantitatively assessed in the context of other evidence, and therefore is subject to harmless error analysis. *Savoy*, 2005-92, p.13, 916 So.2d at 347.
[24] *State v. Perkins*, 423 So.2d 1103, 1109 (La. 1982); see also *State v. Freetime*, 303 So.2d 487, 489–90 (La. 1974).
[25] *State v. Johnson*, 541 So.2d 818, 824 (La. 1989); *Perkins*, 423 So.2d at 1109–1110.

victims' transcribed audio statements made to Ms. Troy. The trial judge conferred with both the prosecution and defense about the request. Neither side objected. The jury was brought down to the court room to view the documents. When the jury came into the courtroom, they began looking at the documents. Initially, defense counsel had no objection to the jurors discussing the documents among themselves. However, defense counsel subsequently objected, and the trial court informed the jurors they could not deliberate while viewing the documents. The trial court allowed the jurors to view the documents, and the jurors then returned to the jury room to continue their deliberations.

The record before this Court suggests that defense counsel acquiesced in the presentation of the exhibits to the jurors and several cases support the conclusion that the issue was not properly preserved for appellate review. As in *Augustine* and *Savoy*, defense counsel's acquiescence to the jury review of the evidence and failure to object are tantamount to a waiver of La. C.Cr.P. art. 793 and therefore presents nothing for this Court to review. [26] Accordingly, we find no merit to this assignment of error.

Motion for New Trial

In his final assignment of error, Freeman argues the trial court erred in denying his motion for new trial after the jury was allowed to view written evidence during deliberations.[27]

La. C.Cr.P. art. 851 provides in pertinent part:

[26] *State v. Johnson,* 97–1519 (La. App. 4 Cir. 1/27/99), 726 So.2d 1126; *State v. Dowl*, 2009-0989 (La. App. 4 Cir. 5/12/10), 39 So.3d 754.

[27] The standard of review on the trial court's denial of a motion for new trial is abuse of discretion *State v. Johnson*, 95-711, p.10 (La. App. 3 Cir. 12/6/95), 664 So. 2d 766, 772, *writ denied*, 96-0082 (La. 3/29/96), 670 So. 2d 1236 (citing *State v. Washington,* 614 So.2d 242 (La.App. 3 Cir.), *writ denied,* 619 So.2d 575 (La.1993)).

> A. The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case, the motion shall be denied, no matter upon what allegations it is grounded.
> B. The court, on motion of the defendant, shall grant a new trial whenever any of the following occur:
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> . . .
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> (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error.

On November 29, 2016, the trial court conducted a hearing on the motion for new trial, or in the alternative, post-verdict judgment of acquittal. Freeman argued that the verdict was contrary to the law and evidence because the trial court erred in allowing the jury to view written documents during deliberation. Freeman contended this error was prejudicial. Freeman's former counsel, Joseph Rome, testified at the hearing, which addressed whether there was a contemporaneous objection by Freeman to the jurors viewing written material. Mr. Rome maintained he witnessed discussion among the jurors while they were viewing the documents. However, Mr. Rome admitted no specific objection was made to allowing the jurors to review the written materials themselves. The transcript demonstrates that the trial judge cautioned the jurors to refrain from deliberating in the courtroom. In denying the motion for new trial, the court made a determination that it heard no deliberation among the jurors while they were reviewing the written material.

As noted above, in the preceding section, a defendant may waive their right against the prohibition of jurors reviewing written evidence.[28] Here, as noted at the hearing on the motion for new trial, defense counsel believed the written

[28] *State v. Adams*, 550 So. 2d 595, 599 (La. 1989).

material would be beneficial to their client, thus had no objection to the jurors reviewing the exhibits in the courtroom, after the jurors had already retired to deliberate. Therefore, as no contemporaneous objection was made to actually viewing the exhibits, Freeman waived his right to raise that issue on appeal for the first time.[29] As this Court cannot say the trial court abused its discretion, we find no merit to this assignment of error.

[29] *State v. Curington,* 09-867, p. 8 (La. App. 5 Cir. 10/26/10) 51 So.3d 764, 771, *writ denied,* 2010-2612 (La. 4/8/11), 61 So.3d 684.

Conclusion

For the reasons set forth herein, we affirm Freeman's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.