

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2017-KA-1028**  
**VERSUS** \*  
**MELVIN LOPEZ** \* **COURT OF APPEAL**  
**A/K/A MARVIN LOPEZ** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

\* \* \* \* \*

APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 525-642, SECTION "I"  
Honorable Karen K. Herman, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Pro Tempore**

\* \* \* \* \*

(Court composed of Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins,  
Judge Dennis R. Bagneris, Pro Tempore)

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**A/K/A MARVIN LOPEZ**

**AFFIRMED**

**MARCH 14, 2018**

Defendant, Melvin Lopez, appeals his conviction on one count of second degree murder, a violation of La. R.S. 14:30.1, and his sentence to life in prison without benefit of probation, parole, or suspension of sentence. For the reasons that follow, we affirm the defendant's conviction and sentence.

*FACTS AND PROCEDURAL HISTORY*

On April 8, 2015, New Orleans Police Officer Jeff Wellborn responded to a 9-1-1 call made from a Rally's on General DeGaulle concerning an incident at 223 West Park Court. When he arrived at the door of the residence, Officer Wellborn was met by a Hispanic male, later identified as the defendant, saying in Spanish: "I killed her, I killed her." Inside the house Officer Wellborn found the victim, Ms. Esperanza Jimenez Rojas, who was defendant's cousin, on the floor with multiple stab wounds. Returning to the front of the house, Officer Wellborn again encountered defendant, who put his hands together as if to be cuffed. A second officer arrived on the scene and secured defendant in a police vehicle. Defendant was taken to a hospital and treated for injuries to his head, and subsequently taken to the Homicide Office at police headquarters.

The Grand Jury returned an indictment charging defendant with one count of second degree murder, a violation of La. R.S. 14:30.1, and an order was issued for defendant's arrest. Defendant initially entered a plea of not guilty but subsequently changed his plea to not guilty by reason of insanity.

At trial, the jury heard testimony from Officer Jeff Wellborn, the NOPD officer who initially responded to the scene, and from Homicide Detective Robert Barrere, who was the lead investigator in the Rojas murder. Detective Barrere

explained that he arrived at the scene of the crime a little after midnight and worked with crime scene technicians to take photographs and collect evidence. Detective Barrere identified a photograph of a blood-covered knife underneath the passenger tire of a truck parked behind 223 West Park Court. He also identified several photographs of bloody footprints taken at the scene, a photograph of a second knife next to the victim, and a number of photographs of the victim, all of which were entered into evidence. Detective Barrere stated that upon examining defendant's shoes at the scene, the officers noticed that he was wearing Jordan shoes, which matched the bloody foot impressions found in the house and on the outside steps. He further testified that at the scene, defendant seemed coherent, was calm, and appeared to understand what was taking place.

Dr. Samantha Huber, the Chief Forensic pathologist for Orleans Parish, testified that the victim received ten knife wounds, but the left lung stab wound was the only wound that caused a vital organ to be pierced. Dr. Huber stated that the victim would have lived several minutes after receiving the injuries, and she categorized the death as a homicide.

Ms. Elizabeth Hamilton, a DNA Analyst from the Louisiana State Police Crime Lab, testified regarding DNA testing on evidence taken from the scene. The victim's fingernail clippings indicated the presence of a DNA profile consistent with the defendant's profile. In addition, testing of blood stains from defendant's blue jeans and shorts were consistent with the DNA profile of Ms. Rojas.

The State also offered testimony from other residents at 223 West Park Court. Mr. Henry Madrid Eborra testified that he awoke to a woman's screams, and he got out of bed and went to his door to listen. He heard the voice of a man

saying, “I killed her, I killed her.” Ms. Dilcia Lainez, another resident of 223 West Park Court, also testified that she heard defendant saying he had killed Ms. Rojas.

Defendant, through a translator, testified that he had been in the United States for two and a half years. He missed his two daughters in the Dominican Republic and wanted to return there, so his cousin, Ms. Rojas, bought him a plane ticket to return to Santo Domingo. Defendant testified that on the night in question, he and his cousin left to get something to eat and then returned to the house. Defendant went to sleep on one sofa and Ms. Rojas slept on another sofa, because she was going to drive him to the airport for his early flight the next morning. Defendant claims that he does not remember much after that until the police arrived, but he stated that he remembered being on the phone asking for help because the Devil was present. Defendant denied being under the influence of alcohol or drugs.

On cross examination, defendant denied any diagnosis of mental disease or defect, though he stated that he suffered from depression. He testified that he loved his cousin and that they had a wonderful relationship. He denied ever fighting or having any other conflict with her. He admitted to killing Ms. Rojas but claims that it was “not my soul, my heart, my personality that killed her ... I didn’t have any intention to kill my cousin.” He claimed that the Devil killed his cousin.<sup>1</sup>

<sup>1</sup> During cross-examination, the following exchange occurred:

- Q: And you knew what you did that night – you know what happened to your cousin, right?
- A: Well of course, yes, because they had already told me. You know, and I find out because the police told me that I killed her.
- Q: And you admitted to killing her.
- A: Yes, I admit that I killed her. But it wasn’t me that killed her.
- Q: Who was it?
- A: I didn’t kill her. It wasn’t me. I know that it was not my soul, my heart, my personality that killed her. ... The Devil

At the conclusion of trial, defendant was convicted of second degree murder and sentenced to life without benefit of probation, parole, or suspension of sentence.

### *DISCUSSION*

#### *Errors Patent*

Our review of the record detected one error patent related to the grand jury indictment. Under La. C.Cr.P. art. 382 A, “[a] prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury.” Under La. C.Cr.P. art. 383, an indictment must be “indorsed ‘a true bill,’ and the indorsement must be signed by the foreman.”

According to the district court’s minute entry, the grand jury indictment charging defendant Melvin Lopez with one count of second degree murder was returned in open court on July 23, 2015 and was signed by the grand jury foreperson. The record includes a copy of the front of the indictment, but it does not contain a copy of the back, where the grand jury foreperson would have signed.

This Court previously has determined that there is no reversible error where the district court’s minutes reflect “that a true bill was returned and the grand jury return of indictments reflects that the indictment was signed by the grand jury foreperson.” *State v. Hawkins*, 16-0458, p. 13 (La. App. 4 Cir. 5/17/17), 219 So.3d 1133, 1141 (citing *State v. Chambers*, 16-0712, p. 4 (La. App. 4 Cir. 2/15/17), 212 So.3d 643, 647-48). Moreover, the failure of a defendant to object to alleged deficiencies in an indictment and the failure of a defendant to file a motion to

was the one that killed her. Ladies and gentleman, it wasn’t me, it wasn’t me.

quash the indictment on that basis waives those errors. *Hawkins*, 16-0458, p. 13, 219 So.3d at 1141 (citing *State v. Porche*, 00-1391, p. 5 (La. App. 4 Cir. 2/14/01), 780 So.2d 1152, 1155). Because the court minutes show that the indictment charging Mr. Lopez was returned in open court and signed by the jury foreperson, we find no reversible error.

#### *Defendant's First Assignment of Error*

During its deliberations, the jury asked to review a portion of Officer Wellborn's body camera video involving an interaction with a civilian witness. Defendant contends that the trial court erred in sustaining the State's objection and therefore preventing the jury from reviewing the body camera video. The trial court ruled that the portion of the video that the jury wanted to review was testimonial in nature and therefore unavailable for review under La. C.Cr.P. art. 793.

A violation of La. C.Cr.P. art. 793 is reviewed under a harmless error analysis. *State v. [Charles] Johnson*, 97-1519, p. 17 (La. App. 4 Cir. 1/27/99), 726 So.2d 1126, 1134. It is this Court's duty to determine whether the error, if any is found, was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). The error may not be declared harmless if there is a reasonable possibility that the error contributed to the verdict obtained. *Id.*; see also *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S.Ct. 1710, 1717 (1993); *Fahy v. State of Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230 (1963).

Defendant does not explain how the verdict here would have been different if the trial court had permitted the jury to review the requested portion of the body camera video during deliberations. Nonetheless, we consider whether the trial

court committed error in refusing to let the jury view the requested portion of Officer Wellborn's body camera video.

Article 793 requires jurors to rely on their memories to reach a verdict; testimony may not be repeated to the jury. If a juror requests it, however, and the court in its discretion permits it, "the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict." *Id.* "The general rule as expressed by C.Cr.P. 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." *State v. Perkins*, 423 So.2d 1103, 1109-10 (La. 1982) (emphasis in original).

Defendant relies on *State v. Brooks*, 01-0785 (La. 1/14/03), 838 So.2d 725, to support his contention that the trial court erred in refusing to allow the jury to review the body camera video. In *Brooks*, the trial court allowed the jury, during its deliberations, to view videotapes depicting the defendant's drug transactions. 01-0785, p. 1, 838 So.2d at 726. On appeal, the court of appeal reversed the defendant's convictions and sentences on grounds that the trial court erred in allowing the jury to review this evidence during deliberations. The Supreme Court reversed the court of appeal, finding that the videotapes in question were *res gestae*. As to the application of La. C.Cr.P. art. 793, the Supreme Court stated:

The statute generally prohibits "access to any written evidence" for its verbal content and prohibits the repeating of testimony to jurors during deliberations. However, in the present case, the audible portions of the videotape recorded not the testimony of the defendant or the undercover agent who made the transactions, but the

res gestae statements made by the parties as the offense occurred.

01-0785, p.2, 838 So.2d at 727. The Court reasoned: “under the plain language of La. C.Cr.P. art. 793, a videotape/audiotape recording of a crime as it occurs is neither written evidence nor testimony.” The *Brooks* Court also noted that the jury foreperson had “asked the state to pause each videotape and then to proceed slowly frame by frame, as if the tape were a series of still photographs[,]” indicating that the jurors were viewing each tape “primarily for its visual and not verbal content.” 01-0785, p.5, 838 So.2d at 729. Thus, the trial court in *Brooks* did not err in permitting the jury to view the videotape evidence.

We find *Brooks* distinguishable. Unlike *Brooks*, the portion of the body camera video that the jury requested to view again involved Officer Wellborn’s interaction with a witness who did not testify at trial. This interaction was not a video depiction of the crime being committed; it was not *res gestae*.

In *State v. Sellers*, the Court explained that the “prohibition against repeating testimony to the jury is reflected in jurisprudence applicable in this state since the earliest times and was first codified by Article 395 [in] the Louisiana Code of Criminal Procedure of 1928.” 01-1903, pp. 6-7 (La. App. 4 Cir. 4/10/02), 818 So.2d 231, 235 (citing *State v. Freetime*, 303 So.2d 487 (La. 1974)). Jurors are prohibited from reviewing written notes or testimony during deliberations in order to prevent them from giving undue weight to the limited portion of the testimony that is being reviewed. *Freetime*, 303 So.2d at 488.

The trial court did not err in disallowing the jury to review the requested portion of the video evidence on the basis that it constitutes “testimony” under La. C.Cr.P. art. 793. This assignment of error has no merit.



### *Defendant's Second Assignment of Error*

Defendant's second assignment of error argues that he was denied due process because he was convicted by a non-unanimous jury verdict. Under Louisiana law, only capital offenses require a unanimous verdict of twelve jurors. La. C.Cr.P. art. 782 A. Otherwise, a case "in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict." *Id.*; LA. CONST. art. I, § 17(A).

The issue of non-unanimous jury verdicts has been considered and rejected by this Court in a number of other cases. In *State v. Mack*, 12-0625, pp. 4-5 (La. App. 4 Cir. 5/6/15), 162 So.3d 1284, 1287-88, our Court held:

[O]ur present jurisprudence provides that non-unanimous verdicts in noncapital felony cases do not violate the Sixth and Fourteenth Amendments. Defendant makes no persuasive argument that non-unanimous verdicts in noncapital felony cases calling for mandatory life sentences without parole upon conviction call for a different result. *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); *McDonald v. City of Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (recognizing *Apodaca*'s continuing viability); *State v. Bertrand*, 2008-2215 (La.3/17/09), 6 So.3d 738; *State v. Curtis*, 2011-1676 (La.App. 4 Cir. 3/13/13), 112 So.3d 323.

*Id.* (Footnote omitted).

In *State v. Bertrand*, the Louisiana Supreme Court held that non-unanimous jury verdicts were not unconstitutional. The Court found that La.C.Cr.P. art. 782 "withstands constitutional scrutiny" and refused to assume that the United States Supreme Court's "still valid determination that non-unanimous twelve-person jury verdicts are still constitutional may someday be overturned." *Bertrand*, 08-2215, p. 8 (La. 3/17/09), 6 So.3d 738, 743; *see also State v. Barbour*, 09-1258, p. 16 (La. App. 4 Cir. 3/24/10), 35 So.3d 1142, 1151, *cert. denied*, 562 U.S. 1217, 131 S.Ct.

1477 (2011) (finding *Bertrand* dispositive of defendant's argument that a non-unanimous jury verdict violated the Fifth, Sixth and Fourteenth Amendments); *State v. Frith*, 13-1133, pp. 18-19 (La. App. 4 Cir. 10/22/14), 151 So.3d 946, 957 (finding defendant has failed to meet his burden of proving that either LA. CONST. art. I § 17(A) or La.C.Cr.P. art. 782(A) is unconstitutional insofar as these statutes provide for non-unanimous jury verdicts).

Under *Bertrand*, *Barbour*, and *Frith*, defendant's second assignment of error has no merit.

#### *CONCLUSION*

For the reasons stated above, we affirm defendant's conviction and sentence.

**AFFIRMED**