Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **29th day of January, 2020** are as follows:

BY Crichton, J.:

2017-KA-01921 STATE OF LOUISIANA VS. DACARIUS HOLLIDAY (Parish of East Baton Rouge)

On June 27, 2007, a grand jury indicated defendant Dacarius Holliday ("defendant") for the first-degree murder of two-year-old Darian Coon. On March 14, 2010, a unanimous jury found defendant guilty as charged. On March 17, 2010, the jury unanimously determined that defendant be sentenced to death, finding the following aggravating circumstances proven beyond a reasonable doubt: (1) the offender was engaged in the perpetration or attempted perpetration of second-degree cruelty to juveniles; and (2) the victim was under the age of twelve (12) years. See La. R.S. 14:30 (A)(1) and (5) and La. R.S. 14:93.2.3. This is defendant's direct appeal pursuant to La. Const. art. V, §5(D). Defendant raises 52 assignments of error, variously combined into 29 arguments, all of which will be addressed herein. After a thorough review of the law and the evidence contained in the record before this Court, we find that none of the arguments set forth by defendant constitute reversible error. Accordingly, for reasons that follow, we affirm the defendant's first-degree murder conviction and sentence of death.

AFFIRMED.

Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, heard this case as Justice pro tempore, sitting in the vacant seat for District 1 of the Supreme Court. She is now appearing as an ad hoc for Justice William J. Crain. Retired Judge James H. Boddie, Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

01/29/20

SUPREME COURT OF LOUISIANA

No. 2017-KA-01921

STATE OF LOUISIANA

VS.

DACARIUS HOLLIDAY

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE

CRICHTON, J.*

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This is defendant's direct appeal pursuant to La. Const. art. V, §5(D).[1] Defendant raises 52 assignments of error, variously combined into 29 arguments, all of which will be addressed herein. After a thorough review of the law and the evidence contained in the record before this Court, we find that none of the arguments set

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[1] La. Const. art. 5, § 5(D) provides in pertinent part: "... a case shall be appealable to the supreme court if ... (2) the defendant has been convicted of a capital offense and a penalty of death actually has been imposed."

forth by defendant constitute reversible error. Accordingly, for reasons that follow, we affirm the defendant's first-degree murder conviction and sentence of death.

FACTS AND PROCEDURAL HISTORY

Ms. Amanda Coon ("Ms. Coon") met defendant, 29-year-old Dacarius Holliday, on the last day of her vacation in Pensacola, Florida in early April 2007. Defendant, who lived in St. Louis, Missouri, was in Pensacola visiting his aunt. The same day they met, defendant traveled back to Baton Rouge with Ms. Coon and moved in with her and her two children: four-year-old Daisha and two-year-old Darian, the victim. Early in the morning on May 14, 2007, Ms. Coon left for work, dropping Daisha at daycare on the way. Although Darian ordinarily went to daycare as well, he remained at home that particular day with defendant because Ms. Coon was out of "pull-up" diapers, which the daycare required.

Ms. Coon called to check on Darian around noon, and defendant told her Darian was fine and playing. Later that afternoon while Ms. Coon was at lunch, however, defendant began calling her at work. When she returned from lunch at around 4:00 p.m., she returned defendant's call, and defendant told her to come home right away but did not say why. During that conversation, defendant told Ms. Coon that Darian was sleeping.

When Ms. Coon arrived home from work sometime between 5:30 and 6:00 p.m., defendant met her outside and began telling her that he had "done things in his life," which probably explained what was happening to him. Alarmed, she went inside and found Darian on the sofa, unresponsive, not breathing, and cold to the touch. She ran outside, hysterical, screaming and crying for help. Because of the screaming, neighbor Kim Lejander Godfrey, appeared outside just as Ms. Coon's brother Derrick, who was visiting from Houston, drove up with Ms. Coon's daughter

Daisha. The four adults went into the house, and Ms. Coon called 911 at 5:57 p.m.[2] As defendant punched the walls repeatedly, Ms. Coon, followed by Ms. Godfrey, unsuccessfully attempted CPR at the direction of the 911 dispatcher. Firefighters arrived quickly and attempted to resuscitate Darian, promptly followed by paramedics, who took over the attempt at resuscitation, but detected no breathing or cardiac activity. They continued resuscitation efforts as they transported Darian to Baton Rouge General Hospital, where further life-saving efforts failed, and Darian was pronounced dead at 6:42 p.m.

Defendant voluntarily accompanied detectives to the police station when Darian and his family left for the hospital and gave a voluntary statement to police after hearing his *Miranda* rights[3] and signing a waiver form. Defendant told police that after Ms. Coon and Daisha left that morning, the victim had urinated on himself, so defendant had "beat his ass and put him on the toilet and put him in the tub." Defendant said he ordered Darian to sit on the toilet "for about two hours," or "until the toilet gets tired," as punishment for his toilet-training accident. After leaving Darian on the toilet, defendant informed detectives he fell asleep on the sofa and was awakened by the victim calling out. He moved Darian to the bathtub and again fell asleep while the victim sat in the tub. Defendant awoke because of a noise in the bathroom, indicating that Darian was "not sitting there like this, like he's supposed to, because he's in trouble." Referencing him as a "little bitch," defendant stated Darian was "whimpering and whining," so he dressed him and walked him to a nearby store. When they returned, he put the victim on the sofa and later realized the victim was unresponsive. Defendant denied hitting the victim hard enough to cause injury and speculated that the victim had fallen and injured himself in the

[2] The 911 call, approximately seven minutes in length, consists of Amanda Coon's screaming and virtually incomprehensible pleas for help. The 911 dispatcher can be heard attempting to guide Ms. Coon and neighbor Ms. Godfrey through CPR while they await the arrival of the paramedics.

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

bathroom while defendant was sleeping. When detectives requested a DNA sample, defendant asked for a lawyer for that limited purpose but denied requesting a lawyer for any other reason and continued to re-initiate conversation with the detectives. Eventually, the detectives obtained a warrant for defendant's DNA sample, terminated the interview, and released defendant after obtaining the DNA swabs.

The following day, May 15, 2007, defendant contacted detectives and requested to attend the victim's autopsy because he wanted to offer suggestions about potential causes of the victim's death. Detectives declined his offer but agreed to give defendant a ride to the police station to discuss his concerns further. Dr. Gilbert Corrigan, the pathologist who conducted the autopsy that day, concluded that the victim died of multiple traumatic injuries, including a lacerated liver, a partially lacerated renal artery, and a fractured rib. Dr. Corrigan also observed extensive bruising on the victim's head, face, and body, bruising and a bite mark on the bottom of the victim's foot, an injury to the tip of the victim's penis, and noted as well that the victim's anus appeared slightly dilated and distended.

After the autopsy, detectives again met with defendant, at which time he signed another waiver of rights form. During this interview, defendant speculated that when he "roughed up" the victim for urinating on himself, he could have accidentally "misfired" and broken the victim's rib, which then punctured the victim's lung and killed him. Defendant also told officers "since you've done the autopsy, you probably know," that he had bitten the victim's foot and inserted his finger into the victim's rectum. He claimed he did these things in an effort to revive the victim and check his temperature.[4] Eventually, the detectives told defendant the autopsy showed the victim had died of massive internal injuries, and defendant responded,

[4] At one point during the interview, defendant also indicated he inserted his finger in the child's rectum to check for a bowel movement, stating he understood people to defecate or urinate upon death.

"That's deep—massive internal injuries? That means I fucked up." Officers ended the interview and placed defendant under arrest.

A grand jury indicted defendant on June 27, 2007, charging him with first- degree murder of Darian Coon. Defendant was arraigned on October 31, 2007, and entered a plea of not guilty. That same day, the State filed a notice of intent to seek the death penalty, designating as statutory aggravating circumstances: 1) the offender was engaged in the perpetration or attempted perpetration of cruelty to juveniles; 2) the offender was engaged in the perpetration or attempted perpetration of second-degree cruelty to juveniles; and 3) the victim was under the age of twelve. On May 20, 2008, the State filed its first amended notice of intent to seek the death penalty and designation of aggravating circumstances, adding to the above list of aggravating circumstances that 4) the offender was engaged in the perpetration or the attempted perpetration of aggravated rape. On October 19, 2009, the State filed its second amended notice of intent to seek the death penalty and designation of aggravating circumstances, deleting two previously designated circumstances, and designating only two: 1) the offender was engaged in the perpetration or the attempted perpetration of second-degree cruelty to juveniles; and 2) the victim was under the age of twelve.

The defense filed more than 90 pre-trial motions, as well as additional supplemental motions. Notable among these were: a motion to suppress and/or preclude the use of DNA evidence at trial; motions to suppress defendant's two statements to police; motions to exclude gruesome autopsy photographs from use at trial; a motion to determine admissibility of the 911 recording for use at trial; and motions relating to jury selection, change of venue, the constitutionality of the death penalty and portions of Louisiana's statutory death penalty framework. The trial court held numerous pre-trial hearings and ruled upon the motions. Both the State

and defendant sought appellate review of some of those rulings.[5]

Jury selection began on March 1, 2010, and a jury was sworn on March 11, 2010. Eight panels of thirteen prospective jurors were examined, and each side exercised all available peremptory strikes. Opening statements took place on March 11, 2010. The State argued that it would present evidence to show that defendant beat the victim to death after he urinated on himself, that he deliberately harmed the victim by biting his foot and damaging the victim's anus, and that he failed to seek medical attention for the victim as the victim died. In its opening statement, the defense posited that the victim's death was an accident in the course of discipline, and the State's evidence would only demonstrate that defendant had acted with negligence or recklessness.

On March 14, 2010, the parties presented closing arguments, after which the trial court instructed the jury. The jury deliberated for approximately one hour and forty minutes before returning with a unanimous verdict of guilty as charged of first-degree murder.

The penalty phase of trial began on March 16, 2010. The State presented victim impact testimony from the victim's mother, Ms. Coon, and the victim's grandfather, Cleveland Coon, who both testified about the effect Darian's death had on their family. Defendant presented mitigation testimony from one family member, his aunt Jacqueline James, who detailed defendant's turbulent upbringing.

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[5] After the trial court denied defendant's motion to exclude the DNA evidence, defendant sought review in the First Circuit, and thereafter in this Court, arguing the DNA evidence should be excluded because it was not relevant to any of the facts at issue. Both courts denied writs. *State v. Holliday*, 10-0401 (La. App. 1 Cir. 3/3/10) (unpub'd), *writ denied*, 10-0495 (La. 3/5/10), 28 So.3d 997.

Defendant filed a motion to exclude the recorded 911 call as irrelevant and prejudicial, which the trial court granted, and to exclude gruesome autopsy photographs, which the trial court granted in part. The State sought review of these rulings, and the court of appeal reversed and remanded. *State v. Holliday*, 09-1553 (La. App. 1 Cir. 9/28/09) (unpub'd). Defendant sought review in this Court regarding the 911 call only, which this Court denied. *State v. Holliday*, 09-2355 (La. 1/8/10), 24 So.3d 863.

In closing, the State argued that the same aggravating factors were before the jury as in the guilt phase of trial, and that none of the enumerated mitigating factors applied to defendant. His only mitigating consideration was a terrible childhood, which applies to many people who do not go on to brutally murder toddlers. The defense, in closing, asked the jury to sentence defendant to life imprisonment, rather than imposing the death sentence, as putting defendant to death would not bring Darian back.

Following closing arguments, the jury deliberated for approximately two hours and returned a verdict of death on March 17, 2010. The jury unanimously found beyond a reasonable doubt the following aggravating circumstances: 1) the offender was engaged in the perpetration or attempted perpetration of second-degree cruelty to juveniles; and 2) the victim was under the age of twelve. The court ordered a pre-sentence investigation and reassigned the matter for further proceedings on July 7, 2010.

On June 30, 2010, defendant filed a Motion for Continuance and For New Trial. Defendant argued therein that he was denied a jury selected from a fair cross-section of the community and that he was prejudiced by the introduction of irrelevant and inaccurate DNA evidence.[6] The trial court held a hearing on defendant's motion for a new trial on July 7, 2010, and, after argument from both sides, denied the motion. Defendant waived sentencing delay, and the court sentenced defendant to death by lethal injection.[7]

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[6] In his motion, defendant argued that a report obtained from biologist Dr. Norah Rudin after his conviction showed that the trial testimony of Julia Naylor, qualified as an expert in DNA analysis, wrongly failed to exclude defendant as a contributor to the DNA swab collected from the victim's penis. Naylor stated that none of the swabs taken from defendant's body or clothing included the victim's DNA, and none of the swabs taken from the victim's body included defendant's DNA. However, she was unable to determine whether defendant was included or excluded in a mixture of DNA swabbed from the victim's penis, because the sample contained insufficient genetic material.

[7] On July 20, 2011, defendant filed a Supplemental Motion for New Trial on the basis of the proposed testimony of pediatrician Dr. Stephen Guertin, consulted post-trial, who, upon reviewing post-mortem photographs of the victim's anus, opined that "[t]here actually is no evidence

The defendant filed a timely counseled appeal brief through the Capital Appeals Project on August 13, 2018, and the State filed a timely brief on March 25, 2019.[8] Defendant thereafter filed a counseled reply brief on October 1, 2019.[9]

DISCUSSION

I. Sufficiency of the Evidence (Defendant's Assignments of Error 3-5)

When issues are raised on appeal both as to sufficiency of the evidence and as to one or more trial errors, the reviewing court must first determine whether there was sufficient evidence to convict. *State v. Hearold*, 90-2094 (La. 6/29/92) 603 So.2d 731, 734.[10] Here, defendant contends in both his counseled application and pro se

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whatsoever that the child sustained anal sexual injury, as Dr. Corrigan made very clear." The court held a hearing on the supplemental motion on October 18, 2011, and denied the motion.

On October 22, 2015, defendant filed in this Court a pro se Motion for New Trial, followed by a Motion to Vacate Conviction and Sentence. This Court declined to consider the pleadings because defendant failed to show he had previously sought review in the courts below. *State v. Holliday*, 15-1979 (La. 2/24/17), 210 So.3d 273.

[8]Additionally, the Innocence Network and the Center for Integrity in Forensic Sciences, Inc., filed an amicus curiae brief on October 1, 2019, as did the Fred T. Korematsu Center for Law and Equality and American Civil Liberties Union of Louisiana on September 18, 2019. In their amicus brief, the Innocence Network and Center for Integrity in Forensic Sciences, Inc., argue that flawed forensic science in conjunction with improper interrogation tactics result in false confessions and wrongful convictions. Specific to the instant case, they argue that defendant's statements and DNA were improperly obtained after he invoked his right to counsel, and that the police used coercive tactics in interviewing defendant such as denying him a requested bathroom break and misinforming him that evidence showed the victim had been sexually assaulted.

In their amicus brief, the Fred T. Korematsu Center for Law and Equality and the American Civil Liberties Union of Louisiana argue that black men should be considered a distinctive group under *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979) for purposes of the fair cross-section doctrine. They argue that black males have a unique experience of discrimination in the criminal justice system, and the distinctiveness of a group is determined by lived experience rather than fixed characteristics. The brief echoes defendant's argument that the presence of black men on a jury has been associated with lower likelihood of a death sentence for black defendants, and jurors empathize more readily with members of their own demographic group, which allows for proper consideration of mitigation evidence.

[9] Defendant also filed pro se motions seeking to dismiss appellate counsel, in which he argued his attorney maintained a conflict of interest, and thereby violated the Louisiana Rules of Professional Conduct, by ignoring defendant's instructions to "pursue an appellant acquittal by raising specific claims…." This Court denied his motion to dismiss counsel, but granted defendant's motion to file a pro se supplemental brief. Defendant subsequently filed several supplemental briefs, as well as an objection to the State's motion for extension of time to file its brief.

[10] This Court further held in *Hearold*:

> The reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with *Jackson*

supplements that the State's evidence was insufficient to support his conviction. He argues specifically that the State failed to exclude every reasonable hypothesis of innocence, in particular, the State failed to prove the victim's injuries were not caused by the extensive resuscitation efforts. Defendant points to several common, mild childhood ailments in the victim's medical history and speculates that these could have caused the victim's death. Defendant also contends the State failed to prove he acted with the requisite specific intent to kill or inflict great bodily harm on the victim. Finally, in his pro se supplement, defendant reasons that the victim died at the hospital, rather than while in defendant's care, so the State could not show that he killed the victim while engaged in the perpetration of second-degree cruelty to juveniles.[11]

In evaluating the sufficiency of the evidence to support a conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt as to each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Captville*, 448 So.2d

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> *v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) in the light most favorable to the prosecution, could not reasonably conclude that all of the essential elements of the offense have been proved beyond a reasonable doubt. When the entirety of the evidence, including inadmissible evidence which was erroneously admitted, is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion by the court of the trial error issues as to that crime would be pure dicta since those issues are moot.
>
> On the other hand, when the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial. If the reviewing court determines there has been trial error (which was not harmless) in cases in which the entirety of the evidence was sufficient to support the conviction, then the accused must receive a new trial, but is not entitled to an acquittal even though the admissible evidence, considered alone, was insufficient. *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

[11] At trial, defendant presented a negligent homicide theory of defense. As such, his current hypothesis of innocence is arguably precluded. *Cf. State v. Juluke*, 98-0341, pp. 4–5 (La. 1/8/99), 725 So.2d 1291, 1293 (alternate and inconsistent theories not considered on appeal).

676, 678 (La. 1984). The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness. *State v. Mussall*, 523 So.2d 1305, 1311 (La. 1988); *State v. Rosiere*, 488 So.2d 965, 969 (La. 1986).

When circumstantial evidence forms the basis of the conviction, the evidence, "assuming every fact to be proved that the evidence tends to prove . . . must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; *see State v. Jacobs*, 504 So.2d 817, 820 (La. 1987) (all direct and circumstantial evidence must meet the *Jackson* test); *State v. Porretto*, 468 So.2d 1142, 1146 (La. 1985) (La. R.S. 15:438 serves as an evidentiary guide for the jury when considering circumstantial evidence).[12] In cases relying on circumstantial evidence to prove one or more elements of the crime, when the fact-finder reasonably rejects the hypothesis of innocence advanced by the defendant at trial, that hypothesis fails, and the verdict stands, unless the evidence suggests an alternative hypothesis sufficiently reasonable that rational jurors could not find proof of the defendant's guilt beyond a reasonable doubt. *Captville*, 448 So.2d at 678.

Under La. R.S. 14:30(A)(1) and (A)(5), to obtain a conviction for first-degree murder in this case, the prosecution was required to prove beyond a reasonable doubt that the victim was under the age of 12, or that defendant killed him with the specific intent to kill or to inflict great bodily harm. To prove the aggravating factor of second-degree cruelty to juveniles, the State had to show that defendant was over the age of 17, and he mistreated or neglected the victim, who was under the age of 17, either intentionally or with criminal negligence, thereby causing serious bodily injury or neurological impairment. La. R.S. 14:30(A)(1) and (5); La. R.S.

[12] When the conviction is based on both direct and circumstantial evidence, and direct evidence is viewed in the light most favorable to the prosecution, as it must be, the facts established by the direct evidence and inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that a defendant was guilty of every essential element of the crime. *State v. Jacobs*, 504 So.2d 817, 820 (La. 1987).

14:93.2.3(A)(1). Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act, and may be inferred from the circumstances surrounding the offense and the conduct of the defendant. La. R.S. 14:10(1); *State v. Butler*, 322 So.2d 189, 192–93 (La. 1975).

We find that under La. R.S. 14:30(A)(1) or (A)(5), the State's evidence in this case was more than sufficient to show each element of the offense and to negate every reasonable hypothesis of innocence. The State introduced testimony from Dr. Gilbert Corrigan, qualified as an expert in forensic pathology, to prove the victim's cause of death. Dr. Corrigan testified that he conducted the autopsy on the victim the day after his death. He concluded that the victim's cause of death was multiple blunt-force traumatic injuries with major abdominal trauma. His internal examination revealed the victim's liver was lacerated and partially torn loose, and there was a laceration in the rear surface of the victim's peritoneal cavity. The victim's kidney was also lacerated, and his renal artery was torn internally and partially lacerated, causing a hemorrhage in and around the kidney. Dr. Corrigan opined that approximately 30 to 40 pounds of pressure per square inch were required to cause the victim's injuries under these circumstances. One of the victim's left ribs had a twisting-type fracture, characteristic of traumatic injury, and was surrounded by a hematoma. Dr. Corrigan testified that the injury to the victim's rib, although only "one-seventh" of the total injuries "certainly was painful. And it would stop him from breathing normally, so it was a major injury." These numerous injuries caused extensive internal bleeding, which Dr. Corrigan indicated ultimately killed the victim. He concluded these injuries were all newly-inflicted shortly before death, as they showed no signs of any early healing processes, and the blood, which filled the victim's abdominal cavity, was fresh. He estimated that the blood loss from the victim's injuries would have likely caused death quickly, possibly within15

to 20 minutes.

In his external examination, Dr. Corrigan observed approximately 75 bruises on the front and back of the victim's body as well as his head. Reviewing the autopsy photographs, he identified round bruising on the victim's chest and abdomen that were characteristic of finger imprints, and five larger bruises on the victim's face and head. Dr. Corrigan noted on cross-examination that the victim "had a lot of bruises. And they are the kind that comes from fingers. A lot of them. Although there are other places where the bruising has fused together, just a big black and blue mark."

Dr. Corrigan testified that the victim had a "distinct lesion" on the end of his penis, which he documented, but he said, "I don't know what this is. It certainly is not the cause of death." He also testified that the victim's anus was "distended and dilated" but the tissues were not perforated.[13]

Defense witness Dr. Robert Burris, who testified as an expert in radiology, countered some of Dr. Corrigan's testimony. Dr. Burris stated that he did not observe any broken bones on x-rays taken of the victim after his death. On cross-examination, however, Dr. Burris noted that the autopsy photographs clearly indicated some type of injury to the victim's rib, and that he would defer to the pathologist who had performed an actual examination of the body.

Ms. Amanda Coon testified as to the victim's age, that the victim's fatal injuries were inflicted after she left him in defendant's care on May 14, 2007, and she demonstrated defendant's criminal neglect of the victim. Specifically, Ms. Coon testified that defendant moved in with her family after she met him while on vacation in Florida about six weeks before the victim's death. As previously noted, Ms. Coon

[13] On cross-examination, Dr. Corrigan made a few other observations, such as a scarred area on the victim's buttocks, what appeared to be scabies, and a white line on the victim's neck that appeared to be a variation in the victim's pigmentation, and not an injury.

verified that while ordinarily her children went to daycare while she was at work, on this particular day, however, Darian stayed home with defendant because the daycare required toilet-training children to wear "pull-up" diapers, and she had run out. She bathed Darian before she left for work because he had wet the bed during the night, and she did not notice any bruises.

Around noon, Ms. Coon called and spoke with the victim. She called again later, but defendant did not put Darian on the phone because he was taking him to the store. Ms. Coon took a late lunch break at approximately 4:00 p.m., and when she returned from lunch she learned from her supervisor that defendant had been trying to call her. Ms. Coon returned defendant's call, and he told her to come home immediately, but did not tell her why. She left work and drove home. Defendant was sitting outside waiting for her when she arrived, and he began talking vaguely about things he had done wrong in his life, but he did not seem upset. Ms. Coon went inside to check on Darian and found him lying on the sofa under a blanket, cold and unresponsive. She called 911 and unsuccessfully tried to perform CPR; her neighbor Ms. Godfrey helped, and defendant punched the walls. Firefighters arrived, soon followed by the paramedics, who sent the family to wait outside while they attended to the victim. Ms. Coon and her brother followed the ambulance when it brought Darian to the hospital, where a doctor informed her that Darian had died. Until the next day when she spoke with detectives, Ms. Coon testified she did not know what had caused Darian's death. As discussed above, Ms. Godfrey corroborated this testimony, confirming that the victim's injuries took place while he was in defendant's care, and that defendant failed to seek help for the unresponsive victim.[14]

[14] Ms. Godfrey testified that on May 14, 2007, she lived in an apartment behind Ms. Coon and her children. That evening, she heard Ms. Coon screaming outside so she exited her apartment to investigate. She followed Ms. Coon into the Coons' home, where the victim was propped up on the sofa, cold, unresponsive, and not breathing. In hysterics, Ms. Coon called 911 and the dispatcher directed her to perform CPR on the victim while they waited for the paramedics; Ms.

The State introduced defendant's two recorded statements given to the police, specifically to establish defendant's age, to show that defendant had the specific intent to inflict great bodily harm when he caused the victim's fatal injuries, and to establish that defendant killed the victim while in the commission of second-degree cruelty to a juvenile. In the recordings, defendant stated that he was 29 years old. In recounting the events of the day, defendant told detectives that after Ms. Coon and Daisha left for work and school, the victim urinated on himself. Because of this, defendant "beat his ass and put him on the toilet and put him in the tub." He told detectives that when the victim has a toilet-training accident, "I get them legs, I get them arms," while demonstrating closed-fist punching, and said, "I might jab, jab him in his stomach." In his second statement, defendant described it as "boxing," while demonstrating the jabs, and explaining that he punched the victim and "roughed his ass up" after he urinated, although he claimed his closed-fist punching was not forceful enough to have killed the victim. However, he also speculated that perhaps he had "misfired" while roughing up the victim and broken his rib, which then punctured one of the victim's lungs and killed him. Using the words "jabbed his ass up" and "punch," defendant said he could not tell detectives how many times he had "misfired" or punched the victim. Defendant asked the detectives if the autopsy revealed the victim's throat had been crushed. The detectives told him no, and defendant replied "that's good, so I, that, so that didn't kill him," then added "since I know I didn't choke him." Defendant also asked the detectives what had caused the victim's death, and they replied that he had died of massive internal injuries. Defendant responded, "That's good . . . . I thought I killed that boy."

Defendant also described punishing the victim for urinating on himself by forcing

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Godfrey took over the effort because she was CPR-certified and Ms. Coon was inconsolable. Ms. Godfrey also testified that defendant was fighting with the paramedics, "like punching the walls and stuff, just going crazy."

the toddler to sit on the toilet, and then in the bathtub, for a prolonged period, telling the victim, "You'll sit there until the toilet gets tired." He re-enacted the scene for the detectives, emulating the victim's voice saying "I'm finished, I'm finished," in a mocking, high-pitched, child-like tone, and replied in his own angry-sounding voice, "no, sit your ass on that motherfuck" . . . "sit your ass there and don't fucking move! You know what I'm saying, I mean, shit. Sit, and don't fucking move!" and "I'll put your ass there in that corner, in that tub, and on that toilet, for about two hours."

Defendant told detectives that he went to sleep on the sofa while the victim was being punished, and a noise from the bathroom woke him up. He speculated the victim had injured himself by falling in the bathroom while defendant was asleep. Because the victim was "whimpering and whining," defendant dressed him and took him to a nearby store. When asked if the victim was able to walk to and from the store independently, defendant answered, "[l]ike I say he was on that bullshit, that whaaa, whaaaaa, that whimpery-ass bullshit, so I got his ass up and carried him all around there." Then defendant stated that, "[i]nstead of me looking at him like he's whimpering and whining because he's hurt, I'm looking at him like he's whimpering and whining because he's acting like a little bitch," and, "he does that all the time, he's always whimpering and whining like a little bitch."

Defendant claimed that he put the victim on the sofa for a nap when they returned from the store, and later noticed the victim was unresponsive. After he was unable to rouse the victim, he began trying to call Ms. Coon and "her best friend," but never called 911 "because I already knew I'd get the blame for it." In the second interview with detectives, after learning the victim's autopsy was complete, defendant volunteered that he had bitten the victim on the bottom of the foot, and claimed he did so in an effort to revive the victim. He also told detectives that "I mean, if y'all did the autopsy, you probably know, the last thing I did, is, I checked for a bowel

movement . . . As far as that whole sticking my finger in his ass thing, I caught myself trying to check his body temperature." Defendant acknowledged that perhaps he was "negligent" for failing to seek medical attention for at least an hour while the victim was unresponsive and explained he thought the victim was already dead.

In brief, defendant contends the evidence at trial supports the reasonable hypothesis of innocence that the victim's internal injuries and extensive bruising were inflicted during the extensive resuscitative attempts, noting that first Ms. Coon and Ms. Godfrey, then firefighters, then paramedics, then the emergency room staff, all unsuccessfully attempted to perform CPR on the victim. Since pathologist Dr. Corrigan testified that the victim would have died between 15 and 20 minutes after receiving the injuries that caused his internal bleeding, and the victim was pronounced dead at the hospital at 6:42 p.m., defendant concludes the fatal injuries were inflicted at roughly 6:30 p.m., at which time paramedics were attempting to resuscitate the victim.

The paramedics detected no heartbeat when they arrived at 6:03 p.m. As noted above, defendant cites paramedic Jessica Wright's testimony that when she arrived, she observed no signs inconsistent with life, and concludes this proves the victim was "still alive" at that point. However, defendant misleadingly omits the context of that statement. In fact, Wright testified as follows:

Q: What shape was he in when you saw him when you got there?

A: He was pulseless and apneic.

Q: Okay. So he had no signs of life at that point?

A: He was in asystole and was not breathing and did not have a pulse.

. . .

Q: When y'all go out and someone has no pulse and is not breathing, do y'all declare them deceased?

A: No. Not unless there is any signs inconsistent with life, which would be like rigor or lividity.

Q: And at that point in time, he didn't have those?

A: No, he did not.

Q: Was he cool to the touch?

A: He was cool, not cold.

. . .

Q: Okay. And on the way to the hospital, were y'all able to resuscitate him at all?

A: He stayed in asystole the entire time. . . .[Meaning h]is heart was not doing anything. It was basically a flat line.

Paramedic Amie Cramer similarly testified that when they arrived, the victim was cool to the touch, had no pulse, and was not breathing. The paramedics cut off his shirt with trauma shears to attach a cardiac monitor, which detected no heart rhythm. With his shirt removed, they observed numerous bruises all over the victim's body. When asked whether their resuscitative efforts could have caused "any extra injuries" to the victim, Cramer responded "that's probably always a possibility," however, before they began working on the victim, she saw "there were bruises everywhere," and when her partner intubated the victim, they saw the victim's "mouth is cut. And he has bruises on his face. When we removed the shirt, there were bruises everywhere. And that was before we had vigorously began CPR."

Defendant argues the paramedics found no signs "inconsistent with life," such as rigor mortis or lividity, which defendant interprets as meaning the victim's fatal injuries occurred subsequent to their arrival. However, defendant both misunderstands and misinterprets the evidence introduced at trial, which shows that although the victim was not *pronounced* dead until 6:42 p.m., he had already ceased breathing and was cold to the touch when Ms. Coon and Ms. Godfrey found him and

called 911 at 5:57 p.m.[15]

Furthermore, the victim also had bruising covering the entire bottom of his foot, which does not comport with defendant's resuscitation theory, and a prominent bite mark that defendant admitted he inflicted. The autopsy photograph reveals a clear dental impression on the victim's foot.[16]

We find defendant's explanation that he bit the victim in an attempt to revive him implausible. Moreover, there is no reasonable scenario in which the mild and ubiquitous childhood illnesses the victim had—like ear infections, ringworm, diaper rash—could have caused the victim's cardiac arrest, which necessitated the resuscitative attempts in the first place. Defendant's claim that the victim was "unhealthy" is contradicted by testimony from the victim's pediatrician since birth, Dr. Melvin Murrill, who testified that the victim "had normal, routine things that almost all children get. But otherwise he was healthy."

We find that the State presented sufficient evidence to show that the two-year-old victim died because of the severe beating the 29-year-old defendant inflicted upon him. Moreover, we conclude there is sufficient evidence to show that defendant had the specific intent to inflict great bodily harm on the victim when he repeatedly punched him with enough force to lacerate the toddler's internal organs and cause internal bleeding, ordered him to sit for hours on the toilet as punishment for a toilet-training accident, and bit the victim on the foot with enough force to leave clearly visible dental impressions. Even after the toddler had died of the injuries

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[15] The Autopsy Protocol states "[The victim] was found unresponsive at home, taken to Baton Rouge General Hospital where he was declared dead following failure to respond to treatment at 1842 on May 14, 2007."

[16] Paramedic Jessica Wright testified that she and paramedic Amie Cramer responded to the 911 call, and when they arrived the victim had no pulse and was not breathing. The victim was slightly blue and cool to the touch, but not cold, and had no signs of rigor or lividity. Despite their attempts to resuscitate Darian, they were never able to get Darian's heart to resume beating. She reported the victim's case to the Office of Children's Services because she observed numerous bruises on the victim's body, which varied in color, leading her to believe they were in various stages of healing. However, Wright testified that she would defer to a pathologist's opinion on whether the bruises were fresh or in various stages of healing.

caused by defendant's beating, defendant spoke of "beating his ass" and mocked the dying child's cries as "whimpery-ass bullshit," and referred to him as a "little bitch." Particularly in conjunction with defendant's animus toward the toddler, evident in his videotaped statement, the fatal internal injuries defendant inflicted while punching and beating the two-year-old victim are sufficient to show defendant's specific intent to kill or inflict great bodily harm. *Cf. State v. Fuller*, 414 So.2d 306, 301 (La. 1982) (Specific intent to cause serious bodily harm inferred because "[w]hen a much stronger man hits a younger, smaller man, the fact finder could rationally conclude that the offender intended to cause, at a minimum, unconsciousness and/or extreme physical pain."); *State v. Hager*, 13-0546 (La. App. 5 Cir. 12/27/13), 131 So.3d 1090, 1092–93 (Specific intent to cause serious bodily injury can be inferred where male defendant punched female victim with sufficient force to fracture her orbital bone.); *State v. Accardo*, 466 So.2d 549, 551–52 (La. App. 5 Cir. 1985), *writ denied*, 468 So.2d 1204 (La. 1985) (specific intent to cause serious bodily injury where male defendant struck female victim in the head, causing her face to swell).

The State also showed that by punching a toddler with closed fists, biting his foot with enough force to leave a clear impression of his teeth, inserting his finger into the child's anus, and failing to seek medical attention when the child was unresponsive and not breathing, defendant mistreated or neglected the victim intentionally, or with criminal negligence, and thereby caused serious bodily injury. These elements establish the aggravating factor of second-degree cruelty to a juvenile. We reiterate that:

> the court does *not* determine whether another *possible* hypothesis has been suggested by defendant which *could* explain the events in an exculpatory fashion. Rather, the reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the alternative hypothesis is sufficiently reasonable that a rational juror could not 'have found proof of guilt beyond a reasonable doubt.'

State v. Captville, 448 So.2d 676, 680 (La. 1984) (internal citation omitted) (emphasis added). Based upon the aforementioned analysis, under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), we find the State has proven beyond a reasonable doubt each of the essential elements of the crime charged. As a result, this assignment of error is without merit, and we therefore turn to defendant's remaining assignments of error.

II. Pre-Trial (Assignments of Error 40, 41, 48, 38)

A. Change of venue (Defendant's Assignment of Error 40)

Defendant argues the trial court erred by denying his Motion for Change of Venue because pre-trial publicity prejudiced the venire and prevented him from receiving a fair trial.

A defendant is guaranteed an impartial jury and a fair trial. La Const. art. I, § 16; *State v. Brown*, 496 So.2d 261, 263 (La. 1986); *State v. Bell*, 315 So.2d 307 (La. 1975). To this end, the law provides for a change of venue when a defendant establishes that he will be unable to obtain an impartial jury or a fair trial at the place of original venue. *Bell*, 315 So.2d at 309; *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 1419-20, 10 L.Ed.2 663 (1963). Changes of venue are governed by La.C.Cr.P. art. 622, which provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.

Nonetheless, "a defendant is not entitled to a jury entirely ignorant of his case and cannot prevail on a motion for change of venue merely by showing a general level of public awareness about the crime," and "whether a defendant has made the requisite showing of actual prejudice is 'a question addressed to the trial court's sound discretion which will not be disturbed on appeal absent an affirmative

showing of error and abuse of discretion.'" *State v. Lee*, 05-2098, p. 33, (La. 1/16/08), 976 So.2d 109, 133 (internal citation omitted).

Only rarely will prejudice against a defendant be presumed. *See State v. David*, 425 So.2d 1241, 1246 (La. 1983) ("[U]nfairness of a constitutional magnitude will be presumed in the presence of a trial atmosphere which is utterly corrupted by press coverage or which is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of the mob."). Otherwise, the defendant bears the burden of showing actual prejudice. *State v. Vaccaro*, 411 So.2d 415 (La. 1982); *State v. Adams*, 394 So.2d 1204 (La. 1981); *State v. Williams*, 385 So.2d 214 (La. 1980); *State v. Felde*, 382 So.2d 1384 (La. 1980).

In the present case, on September 19, 2007, before jury selection began, defendant filed a Motion for a Change of Venue, arguing that he could not receive a fair trial in East Baton Rouge Parish because of excessive and prejudicial pre-trial publicity. On February 12, 2008, defendant filed a Supplemental Motion for Change of Venue, which included attachments relating to newspaper and television coverage of the case. The trial court denied defendant's motion at a hearing on February 23, 2009, finding: "[t]he court does not feel that the defendant would be prejudiced in any way by having his trial here in East Baton Rouge Parish."

Out of the 102 venire members questioned, defendant now identifies ten venire members who reported having seen mention of the case in the media. Our review of the record reflects four additional venire members who reported media exposure to the court, which is roughly 14% of the venire. The court questioned each of these individuals at the bench, out of earshot of the panel. The majority of those prospective jurors reported having seen only headlines or minimal facts of the case and indicated they were not influenced by their media exposure and had no opinion of the case. Those who did express bias indicated they were not influenced by the

media coverage, but rather by their personal emotional response to crimes involving young children. It appears that only three, or roughly 3%, were excused on this basis. This Court has held that where exposure to media coverage results in 11% of a venire removed for bias, this "does not even approach a threshold showing of community-wide prejudice." *State v. Magee*, 11-0574, p. 25, (La. 9/28/12), 103 So.3d 285, 306. Since the mere 3% of jurors excused for bias here is notably less than the 11% of a venire removed in *Magee*, we do not find defendant has shown any error in the trial court's ruling denying his motion for a change of venue. Consequently, we find this assignment of error is without merit.

B. Incomplete Chain of Custody (Defendant's Assignment of Error 41)

Defendant argues that the trial court erred by permitting the State to introduce "several pieces of physical evidence in this case, including a blanket, a towel, the child's clothing, swabs from both Darian and Mr. Holliday, and Mr. Holliday's underwear," because the State failed to establish a complete chain of custody for those items. Defendant suggests the erroneous introduction of this evidence violated his right to due process. The State counters that defendant cites no authority for his argument that introduction of evidence despite an incomplete chain of custody constitutes a due process violation. Nor can defendant show prejudice here, the State argues, because the chain of custody was complete until after the crime lab finalized the testing and re-sealed the evidence.[17]

Lack of positive identification or any defect in the chain of custody goes to the weight of the evidence rather than to its admissibility. *State v. Sam*, 412 So.2d 1082,

[17] We note here, however, that the State need not show a continuous chain of custody if the evidence as a whole establishes more probably than not that the objects introduced were the same objects originally seized by police officers. *See State v. Johnson*, 598 So.2d 1152, 1156 (La. App. 1 Cir. 1992), *writ denied*, 600 So.2d 676 (La. 1992) ("[A] continuous chain of custody is not essential to enable the State to introduce physical evidence as long as the evidence as a whole establishes that it is more probable than not that the object introduced was the same as the object originally seized.").

1086 (La. 1982). Ultimately, the factfinder decides any chain of custody or connexity of the physical evidence issues. *State v. King*, 355 So.2d 1305, 1310 (La. 1978); *see also* La.C.E. art. 901(B)(1) (testimony of a witness with knowledge that a matter is what it is claimed to be suffices to authenticate it).

As an initial matter, the record here shows that the defense, rather than the State, introduced the bags containing the bath towel, black shorts, gray shorts, red shirt, pink toilet-training panties, and quilt into evidence as Defense Exhibits 2 and 3. As such, defendant's claims regarding those items are baseless.

Regarding the remaining evidence, defendant objected at trial to testimony from the Louisiana State Police Crime Lab's Forensic DNA Analyst, Julia Naylor, and the introduction of the results of her DNA testing.[18] Defendant acknowledged that the testimony established the chain of custody from its collection at the crime scene through the point when the evidence was tested by the crime lab. Defendant argued, however, the State had not established the chain of custody for the return of the evidence from the crime lab to the East Baton Rouge Police Department's evidence room, after the crime lab had tested the evidence. Specifically, Louisiana State Police Crime Lab Technicians Marja Porteus and Lindsey Corkerin Martrain had testified that the evidence forms were missing signatures which would indicate that the evidence was returned to the sending agency. The State responded that the chain of custody was adequate because it was complete through the point that Ms. Naylor conducted the DNA testing, which was the critical time, and that after the testing Ms. Naylor had sealed the evidence, which remained sealed until arriving in the

[18] Ms. Naylor testified regarding her procedure for receiving evidence and testing it, as well as identifying the seals and marks placed on each envelope as the evidence was collected, stored, and transferred between agencies. She described opening each envelope, conducting the applicable testing, and then resealing the envelope for return to the sending agency. She also identified the seals she had placed on the envelopes containing penis swabs, oral swabs, anal swabs, and a finger swab from the victim, as well as envelopes containing swabs from defendant's cheek and penis, swabs from a pair of grey Hanes underwear, and blood samples from the victim. Ms. Naylor also identified her initials on the seals, and confirmed that neither the seals nor the envelopes had been altered since the envelopes left her custody at the Crime Lab.

courtroom. The trial court overruled defendant's objection without elaboration.

Here, defendant's contention that the chain of custody was broken after the Louisiana State Police Crime Lab conducted DNA testing on various items of evidence does not warrant further attention. In conjunction with the testimony establishing the chain of custody from the crime scene through testing at the crime lab, Ms. Naylor's testimony identifying the evidence envelopes bearing her initials and the unbroken seals she placed on the evidence after she had completed her testing are sufficient to show that the evidence is what it purports to be. We find defendant fails to show any error in admitting the evidence and thus does not establish a due process violation. This assignment of error is without merit.

C. Erroneous denial of motion to quash indictment as unconstitutionally vague (Defendant's Assignment of Error 48)

Defendant contends the trial court erred by failing to quash his indictment, because his indictment merely tracked the language of the first-degree murder statute and failed to provide defendant with adequate notice of the factual basis for the charge. Defendant's indictment states:

> On this, the 27th day of June, 2007, the Grand Jury of the Parish of East Baton Rouge, State of Louisiana, charges that on or about the 14th day of May, 2007, at and in the Parish, District and State aforesaid, Dacarius Holliday committed the offense of: First Degree Murder violating Louisiana Revised State 14:30 on or about May 14, 2007, he committed first degree murder of Darian Coon, contrary to the law of the State of Louisiana and against the peace and dignity of the same.

In reviewing the indictment, we find defendant was properly charged in compliance with La.C.Cr.P. Art. 465(A)(31), which provides a short form indictment for first-degree murder: "A.B. committed first degree murder of C.D." *State v. Manning*, 03-1982, pp. 48–49 (La. 10/19/04), 885 So.2d 1044, 1089–90 (this Court holding that it has consistently upheld the constitutionality of the short form indictments, citing *State v. Baylis*, 388 So.2d 713, 718–19 (La.1980) and *State v. Liner*, 373 So.2d 121, 122 (La.1979). As a result, we find this assignment of error

is without merit.

D. Security Measures denied defendant due process (Defendant's Assignments of Error 37, 38)

Defendant contends that the courtroom security measures at his trial violated his right to due process and that the trial court abdicated its duty by failing to articulate a case-specific finding before permitting the sheriff's department to restrain him during trial with a knee brace and a shock belt.

Absent exceptional circumstances, a defendant before the court should not be shackled, handcuffed, or garbed in any manner destructive of the presumption of innocence or detrimental to the dignity and impartiality of the judicial proceedings. *State v. Stephens*, 412 So.2d 1057, 1059 (La. 1982); *State v. Wilkerson*, 403 So.2d 652, 659 (La. 1981). To find reversible error, the record must show an abuse of discretion by the court resulting in clear prejudice to the accused. *Wilkerson*, 403 So.2d at 659.

We note initially that, despite defendant's argument, the record reflects that defendant expressly agreed on the record to the court's security plan, and as a result, he has waived this claim. Specifically, defendant filed an "Omnibus Motion to Allow Mr. Holliday the Benefit of the Presumption of Innocence," requesting that he be permitted to wear civilian clothes during trial, that he not be shackled at trial, and to limit the uniformed officers inside and outside the courtroom. The court addressed the motion at a hearing on October 15, 2008. The court agreed to permit defendant to change into street clothes during trial, but denied defendant's request to wear street clothes during all other non-trial proceedings. The court deferred ruling until trial on defendant's request to limit courtroom security because courtroom security needs were not yet clear. The court noted that the security measures protect court staff, attorneys, and members of the public, explaining that the courtroom deputies and other safety measures were not exclusively directed at

defendant.

During a subsequent motion hearing on February 23, 2010, the court addressed the plan for courtroom security at trial to "make sure we have the record correct as to what we discussed in chambers." Noting that the plan had been negotiated during "the final pretrial status conference that took place in chambers," the trial court stated that defendant would wear a knee brace and shock belt around his waist and under his clothes. The court advised defendant that if he disrupted the courtroom decorum (as he had done on prior pre-trial occasions), he would be warned and the restraints would be used. If defendant further disrupted proceedings, the courtroom deputies would use their taser guns as necessary to restore order, after which defendant would be removed from the courtroom to a secure room from which he could hear the proceedings through a speaker. The trial court also explained that per the courtroom's ordinary trial policy, two uniformed deputies were to be stationed near defendant, and any additional deputies would be plain-clothes officers. The defense affirmed on the record that this was the plan that was previously discussed, and that the defense had no objection. Defendant now argues the court erred by failing to issue a case-specific ruling justifying the use of the restraints. However, it appears the court did not issue such a ruling because defendant agreed to the security plan. As such, defendant has waived this claim. La.C.Cr.P. art. 841.[19]

Moreover, defendant wore the shock belt and knee brace under his street clothing and therefore, they were not visible to the jury. The record does not indicate that

[19] La. C.Cr.P. art. 841 provides:

> A. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.
> B. The requirement of an objection shall not apply to the court's ruling on any written motion.
> C. The necessity for and specificity of evidentiary objections are governed by the Louisiana Code of Evidence.

any juror would have been aware that defendant was wearing concealed restraints or that defendant's right to due process was violated. We find this assignment of error is without merit.

III. Voir Dire and Related Jury Issues (Defendant's Assignments of Error 15-28, 35, and 44)

The purpose of voir dire is to determine the qualifications of prospective jurors by testing their competency and impartiality and to assist counsel in articulating intelligent reasons for exercising cause and peremptory challenges. *State v. Stacy*, 96-0221, p. 5 (La. 10/15/96), 680 So.2d 1175, 1178. The grounds for which a juror may be challenged for cause are set forth in La.C.Cr.P. art. 797 and La.C.Cr.P. art. 798.[20] In applicable part, jurors may be challenged if the juror lacks a qualification

[20] Per La.C.Cr.P. art. 797:

> The state or the defendant may challenge a juror for cause on the ground that:
> (1) The juror lacks a qualification required by law;
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;
> (4) The juror will not accept the law as given to him by the court; or
> (5) The juror served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense.

Per La.C.Cr.P. art. 798:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
> (1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;
> (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known:
> > (a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him;
> > (b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath; or
> > (c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or
> (3) The juror would not convict upon circumstantial evidence.

required by law, if the juror is not impartial, whatever the cause of his partiality, and if the juror will not accept the law as given by the court. La.C.Cr.P. art. 797.

A trial court is vested with broad discretion in ruling on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93-1189, p. 7 (La. 6/30/95), 658 So.2d 683, 686. Prejudice is presumed when a trial court erroneously denies a challenge for cause, and the defendant ultimately exhausts his peremptory challenges. *State v. Robertson*, 630 So.2d 1278, 1280 (La. 1994). Further, an erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. *Cross*, 93-1189 at 6, 658 So.2d at 686. "[A] challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied." *State v. Hallal*, 557 So.2d 1388, 1389–90 (La. 1990).

Here, defendant exhausted his peremptory challenges and therefore need only show that the trial court abused its discretion by denying his challenges for cause. *Robertson*, 630 So.2d at 1281.

A. The trial court erred in allowing the State's removal of black jurors under the "literacy requirement." (Defendant's Assignments of Error 15-17)

Defendant argues that the trial court erroneously permitted the State to exclude three black venire members, Curtis Price, Latoya Causey, and Cortina Hills for failure to satisfy the literacy requirement. Defendant contends the literacy requirement historically has been used as a tool of racial oppression, and the jurors in question could read, write, and understand English sufficiently to qualify for

service under La.C.Cr.P. art. 401(A)(3).[21] Defendant asserts that their exclusion demonstrates the State's use of the literacy requirement as an unconstitutional pretext for racial discrimination. The State, in contrast, argues that the voir dire record shows as a whole, the jurors themselves, unprompted by direct questioning, volunteered information as it relates to their struggles with reading, writing, and understanding. The State asserts the record establishes that the jurors in question were not "possessed of sufficient knowledge of the English language," and were thus unqualified to serve as jurors in this capital case.

Curtis Price. Defendant argues the court erred by granting the State's cause challenge as to Curtis Price, because Price was competent to serve on the jury as demonstrated by his ability to read aloud from the list of aggravating circumstances. Furthermore, defendant notes Price understood what "unanimous" meant once it was explained to him, and as a result of Price's work as a carpenter, he indicated he can use a tape measure.

The transcript shows that as the prosecutor was explaining the voir dire process, Price interjected "I don't understand none of it. You know, even you be talking to

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[21] La. C.Cr.P. art. 401 provides:

> A. In order to qualify to serve as a juror, a person must:
> (1) Be a citizen of the United States and of this state who has resided within the parish in which he is to serve as a juror for at least one year immediately preceding his jury service.
> (2) Be at least eighteen years of age.
> (3) Be able to read, write, and speak the English language and be possessed of sufficient knowledge of the English language.
> (4) Not be under interdiction or incapable of serving as a juror because of a mental or physical infirmity, provided that no person shall be deemed incompetent solely because of the loss of hearing in any degree.
> (5) Not be under indictment for a felony nor have been convicted of a felony for which he has not been pardoned by the governor.
> B. Notwithstanding any provision in Subsection A, a person may be challenged for cause on one or more of the following:
> (1) A loss of hearing or the existence of any other incapacity which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.
> (2) When reasonable doubt exists as to the competency of the prospective juror to serve as provided for in Code of Criminal Procedure Article 787.

me now I really don't understand what you are really talking about. . . ." Price explained that he was unable to follow or understand the proceedings and legal concepts and that he had difficulty filling out the questionnaire. Price also stated that he struggles with reading and writing and, although he has limited vision, he does not have glasses.

Initially, the State and defense presented a joint cause challenge, citing Price's insufficient literacy as demonstrated by his questionnaire. However, the defense then withdrew its cause challenge, explaining that despite his difficulty writing, Price could follow along with the oral proceedings and appeared to be able to read at least somewhat, since he had made an effort to answer many questions on the questionnaire. The State responded that Price had repeatedly expressed his inability to understand voir dire. The judge declined to rule initially, in order to continue to observe Price's responses as voir dire proceeded. After doing so, the court granted the State's cause challenge, as the court did not "feel that he can understand the proceedings that is going on."

Latoya Causey. After Price voiced his inability to understand the questions and explanations provided in voir dire, Causey raised her hand and also interjected with the same complaint. In a sidebar, Causey explained that she had "a hard time following" the questions during voir dire, and that she required assistance with her juror questionnaire because she has a "slow learning disability." Causey elaborated that she lives with her parents, does not work, and has difficulty with reading and writing. While in school, she was assigned to the special education small-class resource room because of her difficulty remembering and understanding what she hears. Causey also indicated she needs things repeated several times to understand them, and she has trouble with "hard words." Causey said she included that information in her questionnaire. Causey stated that she could be fair, but "I could understand the law, but the questions like half of the words that I am hearing I am

not really understanding them."

On the court's request, Causey was able to read and answer aloud several questions from her questionnaire, but was stumped by the word "circumstances," which she could neither decipher nor define. Causey responded affirmatively when asked whether she "could be an independent juror in this case," but further stated that she could not read medical or lab reports.

The State challenged Causey for cause because she could not understand the law and evidence. The defense objected, arguing that it is not uncommon for people to have difficulty with medical or lab reports and Causey was able to read several questions from her questionnaire. The court granted the State's cause challenge after reviewing Causey's questionnaire and confirming that the jury coordinator had provided Causey with extensive assistance in completing her questionnaire. Defendant contends this ruling was erroneous because Causey was able to read several questions from her questionnaire aloud in the courtroom, demonstrating she had adequate command and understanding of the English language to serve as a juror.

Cortina Hills. Like Price and Causey, Hills raised her hand to say she could not understand "[e]verything you told me. I don't understand it. I am hard of understanding. I dropped out at the eighth grade so I really don't know that much." Hills explained that she had never worked, and although she can write and read to a limited extent, she did not understand most questions on the questionnaire, such as: "A person accused of a crime does not have to testify in his defense and his silence may not be used against him. How do you feel about that?"

The State thereafter challenged Hills for cause for the same reasons as Causey and Price, and the defense objected without elaboration. After a recess during which the judge reviewed her questionnaire, the court granted the State's cause challenge and excused Hills because of her limited education and difficulty understanding the

proceedings. Defendant contends the trial court erred by granting the State's cause challenge because Hills said she had not been diagnosed with a learning disability, and she could understand some legal concepts when they were explained to her.

Our review of the voir dire record reveals no error by the trial court in granting the State's challenges for cause with respect to prospective jurors Price, Causey, and Hills. Here, each of the jurors in question demonstrated exceptional difficulty following along with the voir dire proceedings and were unable to complete their juror questionnaires independently. While they may have been able to complete portions of their questionnaires or read short passages with direct assistance, we find the trial court did not err by ruling Price, Causey, and Hills were not competent to serve as jurors due to their inability to independently understand the trial proceedings. Additionally, as the State points out in a footnote in their brief, both Hills and Causey stated that they could not consider the death penalty, so they also would have been subject to a cause challenge on those grounds. Although defendant provides a lengthy history of the literacy requirement's use as a tool of racial oppression,[22] we do not find any indication that the literacy requirement was used as a proxy for racial discrimination in this case, or that the trial court otherwise erred by excusing these venire members for cause. This assignment of error is without merit.

B. The trial court erred in granting cause challenges against jurors who demonstrated they could consider a death sentence. (Defendant's Assignments of Error 18-20)

The legal standard for determining whether a prospective juror may be excluded for cause because of his views on capital punishment is whether his views would "prevent or substantially impair the performance of his duties as a juror in

[22] Defendant relies upon the United States Supreme Court's discussion of this issue in *Shelby v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), as well as *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

accordance with his instructions and his oath." *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (holding that a prospective juror who would vote automatically for a life sentence is properly excluded); *see also Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *State v. Sullivan*, 596 So.2d 177 (La. 1992), *rev'd on other grounds*, *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In a "reverse-*Witherspoon*" context, the basis of the exclusion is that a prospective juror "will not consider a life sentence and . . . . will automatically vote for the death penalty under the factual circumstances of the case before him." *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1284.[23] Jurors who cannot consider both a life sentence and a death sentence are "not impartial" and cannot "accept the law as given . . . by the court." La.C.Cr.P. art. 797(2), (4)[24]; *State v. Maxie*, 93-2158, p. 16 (La. 4/10/95), 653 So.2d 526, 534–35. In other words, if a prospective juror's views on the death penalty, as indicated by the totality of his responses, would "prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths," whether those views are for or against the death penalty, he or she should be

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[23] The "substantial impairment" standard applies to reverse-*Witherspoon* challenges. In *Morgan v. Illinois*, 504 U.S. 719, 738–39, 112 S.Ct. 2222, 2234–35, 119 L.Ed.2d 492 (1992), the Supreme Court held that venire members who would automatically vote for the death penalty must be excluded for cause, reasoning that any prospective juror who would automatically vote for death would fail to consider the aggravating and mitigating circumstances and thus violate the impartiality requirement of the Due Process Clause. *Id.* at 728, 112 S.Ct. at 2229. The *Morgan* Court adopted the *Witt* standard for determining if a pro-death juror should be excused for cause.

[24] La. C.Cr.P. art. 797 provides:

> The state or the defendant may challenge a juror for cause on the ground that:
> (1) The juror lacks a qualification required by law;
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;
> (4) The juror will not accept the law as given to him by the court; or
> (5) The juror served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense.

excused for cause. *State v. Taylor*, 99-1311, p. 8 (La. 1/17/01), 781 So.2d 1205, 1214; *State v. Hallal*, 557 So.2d 1388, 1389–90 (La. 1990).

Although the accused is entitled to full and complete voir dire, La. Const. Art. I, § 17, the scope of counsel's examination rests within the sound discretion of the trial judge, and voir dire rulings will not be disturbed on appeal absent a clear abuse of that discretion. La.C.Cr.P. art. 786; *State v. Cross*, 93-1189, pp. 6–7 (La. 6/30/95), 658 So.2d 683, 686–87; *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280. The right to a full voir dire does not afford the defendant unlimited inquiry into possible prejudices of prospective jurors, *i.e.*, their opinions on evidence or its weight, hypothetical questions, or questions of law that call for prejudgment of facts in the case. *State v. Ball*, 00-2277, p. 23 (La. 1/25/02), 824 So.2d 1089, 1110. Rather, Louisiana law provides that a party interviewing a prospective juror may not ask a question or pose a hypothetical which would demand the juror's pre-commitment or pre-judgment as to issues in the case. *Id.*; *see, e.g.*, *State v. Williams*, 230 La. 1059, 1078, 89 So.2d 898, 905 (La. 1956) ("It is not proper for counsel to interrogate prospective jurors concerning their reaction to evidence which might be received at trial."); *State v. Smith*, 216 La. 1041, 1046–47, 45 So.2d 617, 618–19 (La. 1950) ("[H]ypothetical questions and questions of law are not permitted in the examination of jurors which call for a pre-judgment of any supposed case on the facts."); *Ball*, 00-2277, p. 23, 824 So.2d at 1109–10 (trial court correctly forbids questions the evident purpose of which is to have a prospective juror pre-commit to certain views of the case); s*ee also State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (N.C. 1989) ("Jurors may not be asked what kind of verdict they would render under certain named circumstances."); *Jahnke v. State*, 682 P.2d 991, 1000 (Wyo. 1984) (court properly refused questions that were "patent requests to obtain the reaction of potential jurors to the appellant's theory of defense."), *vacated on other grounds*, *Vaughn v. State*, 962 P.2d 149, 151 (Wyo. 1998).

While this Court's jurisprudence clearly provides that counsel may not detail the circumstances of the case and then ask jurors to commit themselves to a particular verdict in advance of trial, the Court has also squarely held that a juror who knows enough about the circumstances of the case to realize that he or she will be unable to return a sentence of death is not competent to sit as a juror, although the juror may also express an abstract ability to consider both death and life sentences. *State v. Williams*, 96-1023 (La. 1/21/98), 708 So.2d 703;[25] *State v. Comeaux*, 514 So.2d 84 (La. 1986). Thus, counsel must tread carefully while seeking to elicit whether a prospective juror is capable of remaining impartial in the case at hand to the extent that counsel makes any references to what he anticipates the evidence will show.

Here, defendant contends the trial court erred by granting the state's *Witherspoon* challenges against Celestine Kooney, Gussie Coleman, and Linda Griffin because their answers showed they could consider a death sentence.

Celestine Kooney. Defendant asserts the trial court erred by granting the State's cause challenge against Celestine Kooney because Kooney stated that although she would be uncomfortable imposing a death sentence, she would consider the death penalty if necessary. A review of the transcript shows that Kooney raised her hand when the court asked whether any panel members would be unable to consider imposing the death penalty. The following exchange transpired:

COURT: Okay. You couldn't consider the death penalty?

KOONEY: I don't want to be responsible for making that decision.

COURT: So, under any circumstances you would not be able to consider the death penalty?

[25] In *Williams*, this Court held that "when a potential juror indicates his or her attitude regarding the mitigating circumstances would substantially impair his or her ability to return a death penalty, then that juror is properly excludable for cause," and the Court found further that, after a full reading of voir dire, two prospective jurors who initially indicated theoretical support for the death penalty ". . . .could not have returned a death verdict because of the defendant's age" and were therefore unfit to serve on a capital jury. Specifically, one juror indicated she "would have a very hard time saying [the death penalty] was appropriate," and that it would "'bother' her to return a death verdict against an 18-year-old defendant." The other expressed few reservations about the death penalty in general, but later indicated that "'. . . . if they're young, to me, I think they should get life, not the death penalty.'" *Williams*, 96-1023, pp. 8–10, 708 So.2d at 712–14.

KOONEY: I don't think so; no.

COURT: Okay. Well, when you say you don't think so; meaning, would you be able to listen to the evidence that's put forth by the state and, if the defense chose to put any evidence forth, would you be able to listen to that evidence and then make a determination rather [sic] or not you feel the defendant should receive death -- should receive the death penalty or life imprisonment?

KOONEY: I think if—I mean, if I absolutely had to, I mean, I would have to be impartial. But I don't think I could live with myself and make that decision. It's not something I'm comfortable doing.

COURT: But if you had to consider it, you would consider the death penalty?

KOONEY: I guess I would have to.

When questioned further, Kooney explained her final response to the judge's questions as affirming that she understood that if chosen as a juror she "would have to make that decision" but stated her "viewpoint would influence [her] decision." Kooney verified that she does not "believe in the death penalty in the abstract" and that her beliefs regarding the death penalty "would impair" her ability to vote for the death sentence. Defendant stresses that Kooney stated "I can't say that I would automatically—that my mind would be made up." However, he fails to note that Kooney concluded that statement with "[b]ut, I think I would definitely be influenced by the belief that I have about the death penalty" which would substantially impair her ability to impose it.

The State challenged Kooney for cause, and the defense objected, arguing that Kooney indicated she could consider the death penalty. The court called Kooney for further questioning on whether she could consider imposing a death sentence if she felt it was the appropriate penalty in this case. Kooney answered: "I don't think I could do that. My responsibility—I—I don't know if I could make that decision." Further in response to the court's question, she replied, "I don't know if I would say

I would automatically [vote for life]" but that "it would be difficult for me to make that decision to end somebody's life." When pressed by the court, Kooney ultimately concluded that "[i]f I have to say yes or no, then I would have to go with no, I couldn't consider it." In light of this exchange, we find the trial court did not err in granting the State's cause challenge as to prospective juror Kooney.

Gussey Coleman. Defendant contends the court erred by striking Coleman because although she admitted that she would be uncomfortable imposing a death sentence, she repeated multiple times that she would be able to consider it.

Contrary to defendant's position, Coleman was clear that she opposed the death penalty.[26] When the State asked juror Coleman about her feelings regarding the death penalty, she voiced uncertainty about whether she would be able to vote for death and concluded "I have thought about it in the past and I always said, oh no; I couldn't do that. But then we're here and we have a duty and I just don't know." She stated in part:

> I'm not in favor of [the death penalty] and I do know there are situations where it has happened. But, just to say I am in favor of somebody dying, it doesn't matter what they did or how they did it, it's just not something I, in my heart, is in favor of. But I do understand the law of the land and the laws were set up for a certain reason. I do understand that. But, whether or not when I am at that point, I don't know.

Id.

When asked if she could vote for death, she replied, "I just don't know how I could do that. I really don't," and when asked yet again if she could vote for it if she thought it was appropriate, Coleman replied, "No, I'm not sure I could do that." During the defense's examination of Coleman, counsel asked her if she could conclude what an appropriate sentence is, in her mind, and impose that life or death sentence. She answered affirmatively.

[26]Although the defendant quotes some of the voir dire transcript in his brief, the record reflects Coleman made numerous additional statements indicating she would not be able to vote for the death penalty.

The State challenged Coleman for cause, arguing that she indicated she could not impose the death penalty. Although she had answered affirmatively when the defense asked, "could she consider the evidence, could she consider life and death, and then . . . determine what the appropriate penalty is . . . and then impose that penalty," the State asserted this question did not rehabilitate Coleman because the defense never asked "if you find the death penalty to be appropriate could you impose it?"

The defense countered by arguing that as required by the law, Coleman had answered that she could consider both life and death and impose the sentence she determined to be appropriate. Defendant argues that the State's position—that jurors must agree they could impose the death penalty—was an improper outcome-determinative statement, according to the defendant. After the State pointed out that Coleman previously said she could not impose the death penalty even if she believed it was the appropriate penalty, the judge further questioned Coleman:

COURT: If you felt that the death penalty was the appropriate sentence, based on all of the evidence that's presented, could you vote to impose the death penalty?

COLEMAN: No.

COURT: Under no circumstances would you be able to vote to impose the death penalty?

COLEMAN: No.

COURT: But you would listen to all the evidence that's presented in the case, ma'am?

COLEMAN: Yes.

The court then granted the State's cause challenge and dismissed Coleman.

Here, the transcript reflects that Coleman clearly, unequivocally, and repeatedly stated she could not impose the death penalty, even if she believed it to be the appropriate penalty. As such, we find the trial court did not err by granting the State's cause challenge as to prospective juror Coleman.

Linda Griffin. Defendant claims the trial court erred by granting the State's cause challenge against Linda Griffin, because Griffin stated she could be a fair juror and that while she would struggle with the death penalty, she would strongly consider sentences of both life imprisonment and death.

The transcript reveals that when the State first asked the panel whether there was anyone who could not or would not consider all mitigating and aggravating evidence before deciding whether to impose a sentence of life imprisonment or the death penalty, Linda Griffin raised her hand. She explained that, "[y]es, I would be able to listen to the information that's presented, but I would honestly struggle with the imposition of the death penalty. That would—I know that would be an issue for me." Griffin's answers to the State's follow-up questions included: "Well—I'm not convinced that the death penalty is the final, is the finality. I strongly—I know that it's imposed and it's been carried out, carried out in our country, but I do not believe that I could vote for a death penalty." She also stated:

> Well, I just can't say that—even though, record-wise or evidential-wise, may show that it's a sentence, but I'm not sure that I can say that it is the sentence because, straight out, I'm not a proponent of the death penalty . . . . But, I will, I am capable [of listening to the evidence]. I know that I am capable of listening. But to impose the death penalty would be an issue for me.

Griffin affirmed that she has a "strong opposition to the death penalty," explaining "[w]ell, I can consider listening to the information that's presented, and yes, I could consider it, but as I indicated earlier because of my feelings or opinions as it relates to the death penalty I would have a struggle with imposing that as a penalty."

The State issued a cause challenge as to Griffin on the grounds that her beliefs about the death penalty would substantially impair her ability to make an impartial decision, per La.C.Cr.P. art. 798(2)(b).[27] As with Coleman, the defense argued that

[27] La. C.Cr.Pr. art. 798 provides:

Griffin had answered that she could consider both life and death and impose what she believed to be the appropriate sentence. Because she had not specifically answered whether she could impose the death penalty if she believed it was appropriate, the court called Griffin for further questioning. Griffin answered that she could consider both the death penalty and a sentence to life imprisonment, after she had listened to all the evidence as well as the aggravating and mitigating circumstances. However, when asked whether she could impose the death penalty if she felt it was the most appropriate sentence, Griffin replied:

> GRIFFIN: I would still—I would have—I would consider it. I would strongly consider it, but I know that I would struggle with agreeing to a death sentence.
>
> COURT: When you say struggle with agreeing to a death sentence, what do you mean by that, ma'am?
>
> GRIFFIN: I mean if—I mean if that—if the death penalty was, I guess, the outcome, then I would—I would consider everything that has been presented and I would consider it and I'm not going to say one hundred percent but I know that I would still have a problem with imposing the death penalty.
>
> COURT: So you are telling me that even if you felt that the death penalty was the appropriate penalty, you could not impose, you could not vote to impose the death penalty?
>
> GRIFFIN: Yes, that's what I'm saying.
>
> COURT: But can you sit and listen to all the evidence that's presented in the case?

It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
(1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;
(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known:
(a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him;
(b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath; or
(c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or
(3) The juror would not convict upon circumstantial evidence.

GRIFFIN: Yes, I can.

COURT: Take in all the aggravating and all the mitigating circumstances or factors that may or may not – that may be presented in the case?

GRIFFIN: Yes.

The court then dismissed Griffin and granted the State's cause challenge without further comment. Despite defendant's arguments to the contrary, our review of the record reveals Griffin consistently expressed an inability or unwillingness to impose the death penalty, and her final response on individual questioning was that she could not vote to impose the death penalty. Consequently, we find the trial court did not err by granting the State's cause challenge as to prospective juror Griffin.

C. The trial court erred by granting the State's cause challenges to jurors whose voir dire reflected that they would be fair, unbiased, and fully qualified to serve on defendant's jury. (Defendant's Assignments of Error 21-22)

Defendant asserts that under La.C.Cr.P. art. 797, the trial court erred by granting the State's cause challenges to prospective jurors Adam Edmunson and Jessica Starns, arguing that the totality of voir dire revealed they could consider aggravating and mitigating circumstances, both life and death sentences, and that they had made no pre-determined decision about defendant's case.

Adam Edmunson. According to defendant, prospective juror Adam Edmunson voiced reservations about convicting a defendant entirely on the basis of circumstantial evidence but that he would consider both sides fairly.

The record shows that the State challenged Edmunson because he said he could not convict based strictly upon circumstantial evidence. The court summoned him twice for further questioning after extensive discussion between the court and the parties regarding the appropriate standard for consideration of circumstantial evidence. The first time he approached the bench, Edmunson explained that if the

case were entirely circumstantial, it would be difficult for him to conclude the State had proven the case beyond a reasonable doubt. The second time the court called Edmunson, he answered "[i]t's my belief I could find the defendant guilty based on circumstantial evidence if every reasonable hypothesis of innocence has been disproved." However, Edmunson then stated that he was not sure he could, because he "struggle[s] with 'every reasonable hypothesis of innocence,'" specifically emphasizing the word "every." After dismissing Edmunson, the court granted the State's cause challenge, stating:

> Based on Mr. Edmonson's [sic] response to the court and his hesitation in answering the question to the court, and his body language in responding to the court, the court does not believe that Mr. Edmonson [sic] would be able to convict on circumstantial evidence.

Given Edmunson's consistent and ongoing reservations about convicting on the basis of circumstantial evidence, we find the trial court did not abuse its discretion in granting the State's cause challenge. *See* La.C.Cr.P. art. 798(3) (refusal to convict upon circumstantial evidence is grounds for a cause challenge by the state).

Jessica Starns. Defendant argues that the court erred by granting the State's cause challenge against Jessica Starns on the grounds that Starns had violated the court's sequestration order by discussing the case with others. Defendant contends that Starns expressed her ability to be a fair and impartial juror despite her outside knowledge of the case, and the court's reasons for granting the cause challenge are not grounds for a cause challenge under La.C.Cr.P. art. 797.

The transcript shows that Starns disclosed in a sidebar discussion that she had seen media coverage of the case and that her boyfriend, who works at East Baton Rouge Parish Prison, had told her defendant's behavior as an inmate is "a problem." Subsequently, another prospective juror, Matthew Chaisson, disclosed in a bench conference that Jessica Starns, with whom he was good friends, had discussed the case with him and told him the prosecution involved the killing of a child. Initially,

the defense issued cause challenges against both Starns and Chaisson, but the court deferred ruling on the challenges until the conclusion of the death qualification questioning.

After questioning the panel regarding their views on the death penalty, the State issued a cause challenge against Starns on the grounds that she was opposed to the death penalty, and because she had read articles about the case, discussed the case with her boyfriend who worked at the parish prison, and discussed the case with prospective juror Matthew Chaisson. Although the defense had not withdrawn its previously-issued cause challenge against Starns because of her pre-trial exposure to the case, the defense objected to the State's cause challenge on those grounds and argued that Starns stated she could consider the death penalty if appropriate. The trial court granted the State's cause challenge, ruling:

> My one concern about Ms. Starns is that she did not mention to the court that she knew Mr. Chaisson, or not so much she knew him, but she had stated something to Mr. Chaisson in reference to this trial. So looking at the totality, I'm not certain Ms. Starns is being totally forthcoming with the court about all her communication and contact and know [sic] about any—as it relates to this particular case. I won't accept the challenge for cause of death, but for other reasons, the court will accept the challenge for cause on Ms. Starns.

Our review of the transcript establishes the trial court did not abuse its discretion in granting the cause challenge against Starns. Although Starns stated that she could be a fair juror, she also informed the court that she had heard personal, outside, extremely negative information about defendant and his conduct in parish prison from her boyfriend, and she had shared that information with another member of the venire. We find the trial court properly granted the State's cause challenge in this instance. *See* La.C.Cr.P. art. 787.[28]

[28] La. C.Cr.P. art. 787 provides: "The court may disqualify a prospective petit juror from service in a particular case when for any reason doubt exists as to the competency of the prospective juror to serve in the case."

D. The trial court abused its discretion in denying the defendant's cause challenges to jurors who would not consider relevant mitigating circumstances. (Defendant's Assignments of Error 23–27)

Defendant argues the court erred by denying defendant's cause challenges to prospective jurors Robert Lambert, Joseph Carlock, Eric Mitchen, Keri Jackson-Parker, and Gayle Davis, asserting that they were unwilling to consider specific unenumerated mitigating circumstances which are not found in La. C.Cr.Pr. art. 905.5.[29]

Robert Lambert. The defense challenged Robert Lambert for cause, arguing that Lambert stated that he could not consider "any other relevant mitigating factor." The State objected, noting, "[y]our honor, he could fully consider (a) through (g). And (h) is left to the juror's discretion. If they find it to be a relevant mitigating circumstance they consider it; if they don't, they don't. He certainly indicated he would consider all the statutory mandated mitigating circumstances." The trial court responded, initially noting that prospective juror Lambert stated he could consider the statutory mitigating factors, and further, section (h) of La. C.Cr.P. art. 905.5 is exclusive to mitigating factors presented by the defense.

After additional argument, the court brought Lambert back for more questioning:

> COURT: Mr. Lambert, in the event that you are chosen to serve on this particular trial as has been explained to you, there is a potential for this trial to be in two phases, the first phase

[29] La.C.Cr.P. art. 905.5 provides:

> The following shall be considered mitigating circumstances:
>
> (a) The offender has no significant prior history of criminal activity;
> (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
> (c) The offense was committed while the offender was under the influence or under the domination of another person;
> (d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
> (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
> (f) The youth of the offender at the time of the offense;
> (g) The offender was a principal whose participation was relatively minor;
> (h) Any other relevant mitigating circumstance.

being the guilt phase. And if and only if the jury finds by unanimous vote that the defendant is guilty of first degree murder, we go to the second phase, which is the penalty phase. In the penalty phase, the aggravating factors that was [sic] listed on the board that comes out of the Code of Criminal Procedure 905.5, that A through H. Do you need to see them again, sir, or do you remember?

LAMBERT: I remember it, yeah.

COURT: Would you be able to consider those factors as mitigating factors to determine whether or not a life imprisonment sentence should be imposed or a death sentence should be imposed?

LAMBERT: Sure. I think the question was – may I just say, I think the last one they listed on the list was kind of like an open-ended one, whatever they would bring up.

COURT: Yes, sir.

LAMBERT: I might consider it, but I think Mr. Kroenke brought up a few that I didn't think was relevant to me, okay. I don't know if I answered that question, but the open-ended one, I guess is whatever they brought up. But that was three that I didn't agree with.

COURT: But outside of what Mr. Kroenke may have brought up, that H, kind of like the catch-all one—

LAMBERT: Correct.

COURT: —would you keep an open mind and listen to all the evidence that's presented in the guilt phase—I mean, I'm sorry, in the penalty phase, and even in the guilt phase, if we get to the penalty phase, and any relevant factor that you deem is mitigating, would you consider that to be mitigating and base your decision on voting for life or death after you have considered not only what A through G says, but also H in terms of any other factors that you deem are relevant to mitigate?

LAMBERT: Yeah, I could.

COURT: Okay. All right. And you wouldn't — would you make up your mind as to the death penalty prior to the conclusion of all the evidence and testimony given in the penalty phase, if we get to that phase?

LAMBERT: I would listen to it all.

COURT: Before making up your mind in terms of what to vote for?

LAMBERT: That's correct.

The court thereafter denied the cause challenge, and the defense objected.

Joseph Carlock. The defense immediately challenged Joseph Carlock on the same grounds as Lambert, similarly because Carlock "could not consider any other factor, any other relevant mitigating factor" beyond the enumerated factors. The State objected to the defendant's challenge, and the trial court denied the challenge for cause, ultimately finding prospective juror Carlock indicated he could consider all the statutory mitigating factors that he deemed relevant.

Eric Mitchen. Eric Mitchen initially stated that he would consider all of the enumerated mitigating factors. During defense questioning, Mitchen stated he did not think he could consider a harsh or abusive childhood as mitigation because he had family members who came from abusive homes but were not, themselves, abusive. Mitchen said that depending on the specific circumstances, he could consider a suicide attempt as mitigating. When asked whether he would consider "having mental disorders" as mitigating, Mitchen stated that it would be difficult for him because he believed mental illness is used as an excuse to justify behavior; he himself received a mental health diagnosis, as did other family members, and thus, he doubted that he would "buy it."

The defense challenged Mitchen for cause due to his unwillingness to consider abuse as a mitigating factor. The State objected on the grounds that Mitchen stated he would consider all enumerated mitigating circumstances. The trial court denied the defense's cause challenge, finding Mitchen agreed to consider any other relevant mitigating circumstance.

Keri Jackson-Parker. Defendant finally contends the trial court erred by failing to grant a cause challenge for Keri Jackson-Parker because she indicated that she could not consider any mitigating factors. The court brought Jackson-Parker back for additional questioning after defendant issued the cause challenge, and asked

whether she could consider mitigating circumstances in determining whether to sentence defendant to life or death. The following exchange took place between the court and prospective juror Jackson-Parker:

COURT: No. Let me understand what—make sure I understand when you say, change your mind. Are you saying, if the defendant is found guilty of first degree murder—

JACKSON-PARKER: Uh-huh.

COURT: —then your mind is going to be made up, at that point, that he should receive the death penalty?

JACKSON-PARKER: No, sir.

COURT: Okay. So, if you—you have already voted guilty on first degree murder—

JACKSON-PARKER: Uh-huh.

COURT: —can you promise this court that the next day when the guilt—I mean when the penalty phase starts — that you are not going to have a preconceived notion that this defendant should get a death sentence, or a life sentence?

JACKSON-PARKER: Correct.

COURT: You will listen to the evidence that comes from this witness stand and determine whether or not the state has proved aggravating circumstance [sic] and any mitigating circumstance that you feel are mitigating—

JACKSON-PARKER: Yes.

COURT: —you would consider those and determine whether or not to impose a life sentence or a death sentence?

JACKSON-PARKER: Yes, sir.

COURT: And—and one more thing on mitigating.

JACKSON-PARKER: Uh-huh.

COURT: Are you telling me that for mitigating circumstances that you will listen to all of them that's presented and—and determine which one or which ones you deem is appropriate mitigating circumstances for this particular case?

JACKSON-PARKER: Yes. Yes, sir.

COURT: So, you wouldn't—so, you would—so, you would consider mitigating circumstances, but some of them you may not deem satisfactory enough for you to vote—

JACKSON-PARKER: Exactly; Yes, sir.

COURT: —to vote for—for life? Is that what you—

JACKSON-PARKER: Yes, sir.

COURT: All right. Okay.

Upon further questioning by the State and defense, Jackson-Parker answered that she could meaningfully consider factors such as a brutal childhood, abusive parents, alcoholic parents, and mental disorders. The trial court denied the defendant's cause challenge, ruling as follows:

> [b]ased on Ms. Parker's answer to the court, to the State, and to the defense, the court feels like her answers were that she could consider mitigating factors; some she may not believe to be enough to change her mind one way or another, but she would consider all mitigating factors and the court is not going to excuse her for cause.

In this instance, we find the defendant fails to show the trial court abused its discretion in denying these cause challenges. *See State v. Blank*, 04-0204, p. 25 (La. 4/11/07), 955 So.2d 90, 113, citing *State v. Cross*, 93-1189 (La. 6/30/95), 658 So.2d 683, 686–687 ("A trial court is vested with broad discretion in ruling on challenges for cause, and these rulings will only be reversed when a review of the voir dire record as a whole reveals an abuse of discretion."). Although the challenged individuals did not promise to accord a specific weight to the particular unenumerated factors defendant proposed, each stated that they could consider, or contemplate, all of the enumerated mitigating factors of La.C.Cr.P. art. 905.5, and further, they each appropriately indicated they would consider any other mitigating factor they deemed relevant for purposes of La.C.Cr.P. art. 905.5(h).[30]

[30] *See generally Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (as cited in *Nelson v. Quarterman*, 472 F.3d 287, 295 (5th Cir. 2006)) (the Court rejecting a state appellate court's application of a heightened-relevance standard to the mitigating evidence, noting that while the sentencer can "determine the weight to be given relevant mitigating evidence," the sentence

We note that there is a distinction between considering a factor and determining what weight, if any, to give that particular listed factor. In other words, for purposes of La. C.Cr.P. art. 905.5, to "consider" something requires a juror to focus or reflect upon a mitigating factor but does not dictate their arriving at a particular conclusion. Here, rather recognizing that jurors would "think carefully" about the mitigating factors, defendant appears to be seeking a commitment from these jurors to grant special consideration to the mitigating factors he would be presenting. Such an interpretation of La. C.Cr.P. art. 905.5 is prohibited. *Cf. Williams*, 96-1023, pp. 8-10, 708 So.2d at 712-14 (citing *State v. State v. Bourque*, 622 So.2d 198, 227 (La.1993), *rev'd on other grounds by, State v. Comeaux*, 93–2729 (La.7/1/97), 699 So.2d 16, the Court finding that when determining whether or not a juror should be dismissed for cause, the trial judge should consider the potential juror's answers as a whole and not merely consider "correct" answers in isolation.) Upon our review of the entire voir dire process in this case, we do not find any reversible error in the trial court's rulings in this regard.[31]

E. The defendant was denied his right to a jury drawn from a fair-cross-section of the community and therefore suffered an Equal Protection violation. (Defendant's Assignments of Error 28, 29)

In these assignments of error, defendant asserts he was denied a jury comprised of a fair-cross-section of his community in violation of his constitutional and

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"may not give it no weight by excluding such evidence from [its] consideration." *Id.* at 115, 102 S.Ct. 869); *See also, Heiney v. Florida*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984) (Brennan, J., dissenting, noting that "*Eddings* and *Lockett* [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] entitle a defendant to a sentencer who can consider *all* mitigating circumstances, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no 'objective' formula. Once a mitigating circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation to impose death.")

[31] We find defendant's claim regarding Gayle Davis is moot. Although the trial court denied defendant's cause challenge because of her reluctance to consider mitigating circumstances, the trial court later granted defendant's cause challenge as to Davis on the grounds that she would want a defendant to testify in his own defense and because she has a "passion for kids."

statutory rights, arguing that black men are systematically under-represented in East Baton Rouge Parish jury pools. He contends that black men constitute a distinct group for purposes of the United States Supreme Court's three-part test found in *Duren v. Missouri*[32] because of "their shared experiences and attitude and their immutable characteristics." He argues that black males have a unique experience of discrimination in the criminal justice system, in employment, and in housing. Defendant further asserts that the distinctiveness of a group is determined by lived experience, rather than fixed characteristics. He also posits that the presence of black men on a jury has been associated with lower likelihood of a death sentence for black defendants, because jurors empathize more readily with members of their own demographic group.[33]

As an initial matter, it appears defendant raised this issue untimely. Defendant first raised the issue in a motion for new trial filed on June 30, 2010. However, motions to quash a general or petit jury venire on the basis that the venire was improperly drawn, selected, or constituted must be filed within three days before trial or, with the court's permission, before the commencement of trial. *See* La. C.Cr.P. art. 532(9); La. C.Cr.P. art. 535 cmt. c(2) ("This objection is waived unless it is urged before trial by a motion to quash the venire. . . ."). Nonetheless, the trial court heard the issue at the Motion for New Trial hearing on July 7, 2010. The State argued that defendant's fair-cross-section claim did not constitute grounds for a Motion for New Trial per La.C.Cr.P. art. 851. Specifically, the State asserted there is no jurisprudence to support defendant's contention that black males constitute a

[32] *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

[33] These arguments relate to the ultimate petit jury composition, which is not subject to the fair cross-section requirement. *See Lockhart v. McCree*, 476 U.S. 162, 173 (1986) ("We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large").

distinctive group for purposes of the fair-cross-section claim, and further, both the venire and petit jury were a fair balance of race and gender. After hearing substantive argument from the defense and State consistent with their written briefs, the trial court denied that claim without elaboration.

To the merits of defendant's argument, the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial. *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Under La.C.Cr.P. art. 419(A):

> A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race.

In this instance, there is no presumption that irreparable injury occurred due to alleged under-representation of black males on the venire. The burden of proof "rests on defendant to establish purposeful discrimination in the selection of grand and petit jury venires." *State v. Lee,* 559 So.2d 1310, 1313 (La. 1990); *State v. Loyd,* 489 So.2d 898, 903 (La. 1986); *State v. Liner*, 397 So.2d 506, 516 (La. 1981); *State v. Manning*, 380 So.2d 54, 57 (La. 1980); *State v. Sheppard*, 350 So.2d 615, 651 (La. 1977). Further, *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979), provides that:

> [i]n order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show: 1) that the group alleged to be excluded is a 'distinctive' group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that the under-representation is due to systematic exclusion of the group in the jury selection process.

Courts typically evaluate the degree of under-representation using the "absolute disparity" measure (the difference in the percentage of the group in the jury pool and the percentage of the group in the jury-eligible population), the "comparative disparity" measure (the ratio of the absolute disparity to the distinctive

group's representation in the jury-eligible population), or a standard deviation analysis. However, the jurisprudence has not established a specific qualifying degree of under-representation. *Berghuis v. Smith*, 559 U.S. 314, 329, 130 S.Ct. 1382, 1393, 176 L.Ed.2d 249 (2010). Additionally, defendants must demonstrate the mechanism by which the jury selection process works to systematically exclude the distinct group; defendants cannot "make out a prima facie case merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation." *Berghuis*, 559 U.S. at 332; 130 S.Ct. at 1395 (emphasis in original).

Here, defendant argues that black men constitute a distinctive group for *Duren* purposes because they are uniquely subjected to systematic racial discrimination such as disproportionate police brutality, economic hardship, and limited social mobility. However, defendant points to no jurisprudence to support his argument that these characteristics support establishing black males as a group "sufficiently numerous and distinct" that would require separate parsing from the larger demographic of African-Americans generally under the Sixth Amendment's fair-cross-section requirement. *See Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690 (1975) (the Court holding that although petit juries "must be drawn from a source fairly representative of the community, we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population," and although defendants are not entitled to a jury of any particular composition, "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.")[34]

[34] The *Taylor* court also held:

Even accepting *arguendo* that black men constitute a distinctive group for purposes of the fair-cross-section requirement, defendant's disparity argument does not appear to rest on correct or applicable data. According to defendant, data from the 2008 American Community Survey census shows that the jury-eligible population of East Baton Rouge Parish is approximately 18% African-American men and that the 2009 voter registration roll for East Baton Rouge Parish maintained by the Secretary of State indicates East Baton Rouge Parish's population is 16.6% African-American men.

In his brief, defendant posits that "[i]n the venire of 102 jurors actually subject to voir dire, there were only seven African-American men, or 6.8%," and defendant thus claims a 62% comparative disparity in the representation of black men in his general venire. However, the record in this case establishes that in fact twelve (12) venire members were black males. As such, it would appear that approximately 12% of *defendant's* venire were black males, resulting in a comparative disparity of approximately 33%.[35] Regardless, as defendant only provides data regarding his

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> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. *Duncan v. Louisiana*, 391 U.S., at 155—156, 88 S.Ct., at 1450—1451. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . (T)he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting).

Taylor v. Louisiana, 419 U.S. at 530-31, 95 S.Ct. at 697-98.

[35] The "absolute disparity" measure is the difference in the percentage of the group in the jury pool and the percentage of the group in the jury-eligible population, whereas the "comparative

own venire, it is impossible to determine whether the proportion of black males in defendant's venire is representative of East Baton Rouge Parish venires generally. Defendant asserts without explanation or support that the disparity results "from the operation of the jury summons and selection system," thereby allegedly demonstrating that black males are systematically excluded from East Baton Rouge Parish jury pools for purposes of the aforementioned *Duren* test. However, defendant acknowledges that East Baton Rouge jury pools are selected randomly from a combination of voter registration rolls and Department of Motor Vehicles records. Defendant does not demonstrate, or even speculate, about how this method of venire selection would systematically exclude black males. As such, we find the defendant fails to show "systematic exclusion" of a distinct group, and consequently, there is no reversible error in this regard. *State v. Turner*, 16-1841 (La. 12/5/18), 263 So.3d 337, 394, *reh'g denied* (1/30/19); *see, e.g., Moore v. Cain*, No. CV 14-0297-JJB-EWD, 2017 WL 4276934, at *8 (M.D. La. Sept. 7, 2017), *report and recommendation adopted*, No. CV 14-297-JJB-EWD, 2017 WL 4275903 (M.D. La. Sept. 26, 2017) (unpub'd) ("The mere fact that one particular jury venire may exhibit disproportionality does not in any sense amount to proof that the State's system of constituting its central jury pool is unconstitutional or leads to the systematic exclusion of any particular group from the jury-selection process.").[36]

Equal protection violation. Defendant makes the related argument that "Louisiana's system for selecting a petit jury venire violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and this

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disparity" measure is the ratio of the absolute disparity to the distinctive group's representation in the jury-eligible population. *Berghuis*, 559 U.S. at 323.

[36] In defendant's "Reply Brief" filed on October 1, 2019, defendant argues for the first time that East Baton Rouge Parish draws its jury pools from a flawed computer database, citing *State v. Cannon*, 19-0590 (La. 4/18/19), 267 So.3d 585, 586. However, the computer error addressed in *Cannon* did not occur until after 2011, after the conclusion of defendant's trial. As such, the error had no impact on defendant's jury pool.

Court must order a new trial." Defendant supports this claim with a combination of grand jury jurisprudence and statistics from 2012–2017 relating to the prosecution's use of challenges to remove prospective jurors. Notably, these statistics do not encompass defendant's trial, which took place in 2010. Moreover, defendant did not raise a *Batson*[37] challenge at trial, nor does he allege the prosecution exercised its peremptory strikes in a discriminatory manner in the instant case.

Regardless, the record shows that defendant's 12-member jury consisted of five black females, two white females, and five white males. The alternates were a white female and a white male. Our review of the record reveals no equal protection violation, and thus, this assignment of error is without merit.

F. The trial court erred in denying defendant's proposed questions on the jury questionnaire and violated his right to a full voir dire examination under Article I, § 17 of the Louisiana Constitution. (Defendant's Assignment of Error 35)

In this assignment of error, defendant asserts he was deprived of his right to a full voir dire examination under Article I, § 17 of the Louisiana Constitution because the trial court denied his request to include in the jury questionnaire several specific questions regarding the reasonable doubt standard, views on the death penalty, and the question "[h]ave you or anyone close to you ever undergone sudden or drastic change in behavior or personality?" Defendant contends the questions were necessary because many jurors do not genuinely understand the concepts of reasonable doubt and the burden of proof. Moreover, defendant argues, the questions were pivotal to evaluating the jurors' receptivity to mitigating evidence. In contrast, the State argues that voir dire in this case was comprehensive, and

[37] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (setting forth a three part process to determine if there is racial discrimination in the voir dire process, the Supreme Court held that it is an equal protection violation for the State to exercise its peremptory strikes to remove jurors from the venire panel solely on the basis of the juror's race).

defendant's arguments are unsupported by any facts or jurisprudence.

Here, the trial court addressed the questions to be included on the jury questionnaire at a motions hearing and heard argument regarding the proposed questions from the State and defense. The court ultimately excluded the questions about reasonable doubt, finding that the questions would require more background information to obtain a valid answer, and those issues would be covered at length during voir dire, as well as in the court's instructions to the jurors. The court also excluded several questions regarding views on the death penalty, reasoning that the questions sought answers regarding their views on what sentence was appropriate for murder without providing relevant information about the offense and the law. The court further found that the questions required the venire members "to commit to why they think a person ought to be put to death. The code provides aggravating circumstances, and that's what they have to go on." The trial court also excluded the question "[h]ave you or anyone close to you ever undergone sudden or drastic change in behavior or personality?" after the State objected on the grounds that it was an inappropriately fact-based question that potentially implied an issue in the case, and, thus, it was more properly suited to voir dire than the court's questionnaire.

We do not find anything in these rulings indicating the trial court abused its discretion or impinged upon defendant's right to a full voir dire. Although defendant may have preferred to include specific questions in the written questionnaire, he does not show how the trial court's ruling prejudiced him. In fact, we cannot detect any attempt by defense to include the questions regarding sudden changes in personality during full voir dire. As such, there is no reversible error in this regard and this assignment of error is without merit.

G. Death qualification process leads to a jury predisposed to impose the death penalty, and disproportionately excludes black jurors (Defendant's Assignments of Error 44–45)

In these assignments of error, defendant contends that the death qualification process has a racially discriminatory impact. Specifically, defendant argues that the disqualification process violates his Sixth Amendment right to an impartial jury, unfairly leads to a death-prone jury, and deprives him of a fair-cross-section of the community available to individuals charged with non-capital offenses.

In *State v. Odenbaugh*, 10-0268 (La. 12/6/11), 82 So.3d 215, this Court addressed this same argument that Louisiana's death qualification process is unconstitutional. The Court explained:

> [T]here should be no question of the constitutional validity of LSA–C.Cr.P. art. 798 since it was drafted to conform to the constitutional requirements set forth in [*Witherspoon*]; see also, [*Witt*]. In *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), the Supreme Court held that the Constitution does not prohibit excluding potential jurors under *Witherspoon* or that "death qualification" resulted in a more conviction-prone jury. Likewise, this Court has repeatedly rejected the claim that the *Witherspoon* qualification process results in a death-prone jury. *State v. Robertson*, 97–0177, pp. 19–20 (La.3/4/98), 712 So.2d 8, 25–26; *State v. Sullivan*, 596 So.2d 177, 186–87 (La. 1992); *State v. Lindsey*, 543 So.2d 886, 896 (La. 1989); *State v. Brown*, 514 So.2d 99, 103–04 (La. 1987); *State v. Bates*, 495 So.2d 1262, 1272 (La. 1986); *State v. Ford*, 489 So.2d 1250, 1259 (La. 1986); *State v. Ward*, 483 So.2d 578, 582–83 (La. 1986); *State v. Jones*, 474 So.2d 919, 927 (La. 1985); *State v. James*, 431 So.2d 399, 402 (La. 1983). This Court finds no need to revisit this longstanding principle of law.

Odenbaugh, 10-0268, p. 48 (La. 12/6/11), 82 So.3d 215, 248–49.[38]

Defendant does not explain why the reasoning in *Odenbaugh* does not apply to his case nor why this Court's jurisprudence should be disturbed. Therefore, this assignment of error fails.

In sum, a review of the voir dire in this record as a whole reveals no error

[38] *See also State v. Turner*, 16-1841, p. 88-9 (La. 12/5/18), 263 So.3d 337, 394-5.

whatsoever by the trial court. As this Court has stated before, we defer to the trial judge's great discretion in this area, which we have deemed paramount. Specifically, we have found:

> [t]he trial judge has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning by the parties' attorneys. Such expressions and intonations are not readily apparent at the appellate level where review is based on a cold record. Furthermore, to the extent he or she believes it necessary or desirable to do so, the trial judge has the benefit of the ability to directly participate in the examination of the members of the jury venire. As such, we are reluctant to reverse a ruling of the trial judge on a challenge for cause where it does not appear from a review of the record as a whole that the trial judge has somehow abused his discretion.

State v. Lee, 93-2810 (La. 5/23/94), 637 So.2d 102, 108.[39]

Our review of this record as a whole reveals this trial judge was actively engaged in the voir dire process, and his rulings did not constitute an abuse of discretion. *See State v. Draughn*, 05-1825, p. 28 (La. 1/17/7), 950 So.2d 583, 604 (concluding the trial judge correctly ruled regarding a *Batson* challenge, the Court noted that "in making our determination, we note the prosecution's use of a peremptory challenge cannot be separated from the context in which the challenge arises, a context which the trial judge is in the best position to evaluate. This record shows that the trial judge, prosecutor and defense counsel were all actively engaged in a full and complete voir dire.") Finding no reversible error during the voir dire phase of trial, we now turn defendant's assignments of error related to trial.

IV. Trial (Assignments of Error 1–2, 6–14, 30–34, 36, 39)

A. The State's introduction of DNA evidence was irrelevant, prejudicial, and misleading, and denied defendant due process and a fair trial. (Defendant's Assignments of Error 1-2)

Defendant argues the lower court erred by permitting the State to introduce DNA

[39] *See also State v. Tart*, 93-0772, p. 16 (La. 2/9/96), 672 So.2d 116, 124 (citing *Lee*, *supra*).

evidence because the evidence was not relevant to proving any of the elements of the charged offense. Specifically, defendant submits he was prejudiced by DNA analyst Julia Naylor's testimony that the swab from the victim's penis did not yield a sufficient profile to include or exclude defendant because DNA evidence carries a disproportionate weight with juries. Thus, defendant asserts, the mere introduction of DNA evidence carries an association of sexual assault.[40] Defendant also re-urges the argument, previously raised in his first motion for new trial, that Ms. Naylor's trial testimony erroneously failed to exclude him as a contributor to the swab taken from the victim's penis. He argues this prejudicially misled the jury by insinuating that defendant had sexually abused the victim.

Evidence is relevant if it has any tendency to make a fact at issue more or less probable than it would be without the evidence. La. C.E. art. 401. Article 402 of the Louisiana Code of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Louisiana, this Code of Evidence, or other legislation." However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. La. C.E. art. 403; *State v. Brown*, 395 So.2d 1301, 1314 (La. 1981). The erroneous introduction of irrelevant evidence is subject to harmless-error review. *State v. Small*, 11-2796, p. 26, (La. 10/16/12), 100 So.3d 797, 815. An error is harmless if the verdict is "surely unattributable" to the error. *State v. Johnson*, p. 14 (La. 11/27/95), 664 So.2d 94, 100, citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

[40] Julia Naylor testified at trial that she performed DNA analysis on three swabs from the victim's body: an oral swab, an anal swab, and a penis swab. She also tested samples from defendant's penis, underwear, and cheek. The victim's penis swab showed a mixture of two DNA contributors, one major and one minor. The victim could not be excluded as the major contributor, but because of "the limited amount of DNA from the minor contributor" she could not determine whether defendant could be included or excluded as the minor contributor. For the victim's oral and anal swabs, the DNA was all consistent with the victim, and no foreign DNA was detected. Ms. Naylor testified that of the samples taken from defendant, none included DNA from the victim.

Prior to trial in this case, defendant sought to exclude the State's DNA evidence on relevance grounds. On February 9, 2010, the defense filed a motion to preclude admission of the DNA evidence as irrelevant, which the trial court denied without elaboration after a hearing on February 23, 2010. Defendant re-urged the motion at a hearing on March 10, 2010, and the court again denied the motion. He sought review at the court of appeal, followed by this Court, arguing the DNA evidence should be excluded because it was not relevant to any of the facts at issue. Both courts denied his writ applications without comment. *State v. Holliday*, 10-0401 (La. App. 1 Cir. 3/3/10) (unpub'd), *writ denied*, 10-0495 (La. 3/5/10), 28 So.3d 997.

After his conviction, defendant filed a Motion for New Trial on June 30, 2010, arguing in part that the State presented irrelevant, prejudicial, and misleading information by suggesting defendant's DNA may have been present on the victim's penis, while also re-urging his pre-trial arguments for excluding the DNA evidence. In support of his motion, defendant submitted a report from biologist Dr. Norah Rudin, obtained after his conviction, opining that defendant was excluded as the contributor to the minor profile on the swab taken from Darian's penis. The court held a hearing on July 7, 2010, and, after hearing argument from the defense and the State, denied the Motion for New Trial without elaboration.

According to her report, Dr. Rudin conducted a review of the Louisiana State Crime Lab's DNA analysis and concluded that based on the information provided to her, defendant could be excluded as a contributor to the DNA swab from the victim's penis. Notably, Dr. Rudin's report was qualified with the statement that "[a]s I was not provided with the transcript of the testimony of Julie D. Naylor I am unable to comment on the accuracy of the notes of her testimony as provided to me." Dr. Rudin further stated:

> [a]s I was not provided with full standard discovery, including, but not limited to, electronic data, I have not had an opportunity to perform an independent analysis. Any opinions provided in this document might or

> might not change as a result of performing a complete independent review of the DNA data and other supporting documents.

In light of Dr. Rudin's own testimony that she was not provided Ms. Naylor's transcript or related evidence, it is impossible for this Court to afford any weight to her opinion.

Regardless, even assuming the DNA results were not relevant or were otherwise erroneously admitted, the verdict is surely unattributable to the alleged error. Even without the DNA evidence, as noted above, the evidence that defendant beat the victim to death was more than adequate to support defendant's conviction. Consequently, we find that any error in admitting the evidence in this instance is harmless. *Johnson*, 664 So.2d at 100, 102 (the court holding that introduction of other crimes evidence is subject to a harmless error analysis and the verdict rendered was not surely attributable to the error). Thus, we find this assignment of error to be without merit.

B. Improper admission of evidence and arguments regarding sexual assault relieved the State of its burden of proof and violated defendant's rights to a fair trial and reliable sentencing. (Defendant's Assignments of Error 9 and 36)

Relatedly, defendant contends that his right to due process was violated by the State's insinuations that he sexually abused the victim and the State's introduction of evidence and testimony regarding injury to the victim's anus and penis. He reasons that the evidence constitutes inadmissible other crimes evidence of sexual abuse in violation of La.C.E. 403[41] and La.C.E. art. 404(B).[42] Defendant further

[41] La. C.E. art. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

[42] La. C.E. art. 404(B) provides:

> B. Other crimes, wrongs, or acts. (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

argues the evidence was introduced solely to prejudice him and depict him as a man of bad character, as there was no evidence to support sexual abuse in this case, and the testimony was not relevant to the charged offense. The State counters that it never asserted that defendant committed sexual assault on the victim. Notably, during opening statements and closing arguments, the prosecutor reminded the jury that defendant was not charged with sexual assault; moreover, throughout trial the prosecutor repeatedly asserted that she could not prove sexual assault.

As an initial matter, there is no indication defendant objected to any of the complained-of testimony on these grounds, and as such, this claim is not preserved for review. La.C.Cr.P. art. 841.[43] Regardless, the complained-of testimony and evidence here does not constitute "other crimes" evidence per La.C.E. art. 404(B). The testimony in question relates to the victim's injuries at the time of his death, and thus, is directly relevant to the charged offense of first-degree murder. Any and all

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> preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.
>
> (2) In the absence of evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged, evidence of the victim's prior threats against the accused or the accused's state of mind as to the victim's dangerous character is not admissible; provided that when the accused pleads self-defense and there is a history of assaultive behavior between the victim and the accused and the accused lived in a familial or intimate relationship such as, but not limited to, the husband-wife, parent-child, or concubinage relationship, it shall not be necessary to first show a hostile demonstration or overt act on the part of the victim in order to introduce evidence of the dangerous character of the victim, including specific instances of conduct and domestic violence; and further provided that an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible.

[43] La. C.Cr.P. art. 841 provides:

> A. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.
> B. The requirement of an objection shall not apply to the court's ruling on any written motion.
> C. The necessity for and specificity of evidentiary objections are governed by the Louisiana Code of Evidence.

injury inflicted on the victim in conjunction with his death is probative of whether defendant had the specific intent to kill or inflict great bodily harm on the victim pursuant to La. R.S. 14:30, and probative of the aggravating factor of second-degree cruelty to a juvenile pursuant to La. R.S. 14:93.2.3. Importantly, defendant cites no authority for the proposition that otherwise relevant evidence of a victim's injuries is inadmissible if the injuries could indicate an uncharged offense.

Even assuming the evidence constitutes other crimes evidence under La. C.E. art. 404(B), evidence of the victim's injuries would certainly be admissible as "an integral part of the act or transaction that is the subject of the present proceeding." *See also State v. Taylor*, 01-1638 (La. 1/14/03), 838 So.2d 729, 741 (Other crimes are admissible as integral acts when they are related and intertwined with the charged offense to such an extent that the state cannot accurately present its case without reference to the other crimes.).

Defendant also repeatedly argues there is no evidence indicating the victim was subjected to sexual abuse. Defendant reasons that Dr. Corrigan testified that although the victim's anus was "distended and dilated" the tissues were not perforated. Moreover, Dr. Stephen Guertin, a pediatrician defendant consulted after the conclusion of trial, endorsed Dr. Corrigan's testimony over that of Dr. Murrill and Nurse Williams, both of whom had testified at trial that the victim's anus showed indications of injury and/or sexual abuse. Dr. Guertin based his opinion on a review of the medical testimony and autopsy photographs, and concluded that the victim did not suffer "anal sexual injury." Defendant contends that neither Dr. Murrill nor Nurse Williams were qualified as experts in sexual assault, so their opinions on the victim's injuries were inadmissible.

Notably, like Dr. Murrill and Nurse Williams, Dr. Guertin had not been qualified as an expert in sexual assault. Regardless, the absence of anal sexual injury is not proof that defendant never abused the victim. Even assuming *arguendo* that the

State's witnesses Dr. Murrill and Nurse Williams were incorrect in concluding the victim had anal tearing or other injury, defendant acknowledged in his second statement to police that he inserted his finger in the victim's anus, and the victim's penis had an injury of unknown cause visible in the autopsy photographs. For these reasons, we do not find any due process violation in this regard, and therefore, this assignment of error is without merit.

C. Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments were violated by the introduction of his custodial statements at trial. (Defendant's Assignments of Error 10-11)

Defendant states the trial court erred by denying his motions to suppress his waiver of rights forms and the two statements he made to police, arguing that the police continued to interrogate defendant after he repeatedly requested a lawyer in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). He further contends the police failed to honor his limited request for counsel, in accordance with *Connecticut v. Barrett*, 479 U.S. 523, 527-30, 107 S. Ct. 828-832, 93 L.Ed. 2d 920 (1987) (a defendant's request for counsel in the event that he had to give a written statement was limited to that situation and did not serve as a general invocation of the right to counsel prohibiting subsequent police-initiated questioning). Specifically, in his first motion to suppress, defendant argued that his statements were involuntary because police did not honor his requests for an attorney, and in his second motion to suppress, defendant asserted that he did not knowingly waive his rights before giving his statement.

When an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). A defendant

may invoke his right to counsel for limited purposes, however, without triggering the rule of *Edwards. See also, Barrett, supra*.

As a general matter, before inculpatory statements may be admitted into evidence, the State has the burden of affirmatively showing that they were made freely and voluntarily and not under the influence of fear, duress, intimidation, menace, threats, inducements, or promises. *See* La. R.S. 15:451; *State v. West*, 408 So.2d 1302, 1307 (La. 1982); *State v. Dewey*, 408 So.2d 1255, 1258 (La. 1982). If the statement was made during custodial interrogation, the State must show that the defendant was advised of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Petterway*, 403 So.2d 1157, 1159 (La. 1981); *State v. Sonnier*, 379 So.2d 1336, 1355 (La. 1979). The admissibility of such statements is a question for the trial judge, whose conclusions on the credibility and weight of testimony relating to the voluntariness of a confession for the purpose of admissibility should not be overturned on appeal unless they are not supported by the evidence. *State v. Jackson*, 381 So.2d 485, 487 (La. 1980). Improper admission of a coerced statement is subject to harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

At the motions hearing, Detective Ross Williams testified that on May 14, 2007, the night the victim died, he and Detective Brian Watson transported defendant to the police station from the scene. Before questioning defendant, they informed him of his *Miranda* rights, defendant acknowledged and appeared to understand them and thereafter signed a waiver of rights form. Det. Williams further testified that defendant's entire statement was video recorded, defendant did not appear to be under the influence of alcohol or drugs, and the detectives did not threaten him or promise him anything in return for the statement. Det. Williams indicated that defendant was generally "forthcoming," but during the interview when the police

requested a DNA sample, defendant requested an attorney to advise him regarding his consent to providing the DNA. Because defendant was vacillating on whether to consent to providing a DNA sample, later that evening police obtained a warrant authorizing them to obtain the DNA sample and then retrieved the sample by swabbing defendant's cheek with the help of Crime Scene Investigator Mindy Stewart. After defendant gave his statement and police obtained the DNA sample, the police brought him home.

Det. Williams testified that the next morning, defendant spontaneously called him and asked to attend the autopsy to discuss his theories about the victim's cause of death. Det. Williams told defendant that he could not attend the autopsy but agreed to send an officer to give defendant a ride to the police station so he could offer his theories. When defendant arrived, Det. Williams again advised him of his rights, and defendant signed another waiver of rights form, prior to giving a second video-recorded statement. At the conclusion of his second statement, defendant was placed under arrest.

After Det. Williams testified at the hearing, the defense objected to the admission of defendant's statements and waiver forms, arguing the State failed to prove defendant had knowingly and voluntarily waived his rights before giving his statements. Specifically, defendant argued that the State failed to clearly establish which officer had signed defendant's waiver of rights forms. The State countered that Det. Williams testified at both hearings that he was present when defendant was advised of his rights, that he saw defendant sign the form, and that Det. Williams, Det. Watson, and defendant all signed each waiver of rights form before defendant began his statements. The trial court ultimately concluded that defendant's signed waiver-of-rights forms were admissible based upon Det. Williams' testimony.

Similarly, the defense argued that defendant's recorded statements were inadmissible because he requested an attorney multiple times, that the beginning of

the interviews are not shown in the video, and that "it is clear from the tapes that he didn't understand what his rights were," such that defendant did not knowingly, intelligently, or voluntarily waive his rights. In contrast, the State argued that the videos showed defendant's statements were entirely voluntary, emphasizing that defendant himself had requested the second interview. The video showed the detectives did not use any coercive tactics, defendant called the detectives back multiple times when they tried to leave the room, and each time defendant mentioned an attorney, the detectives paused the interview to clarify his request. When it was not entirely clear whether defendant was requesting an attorney, the detectives stopped the interview and stepped out of the room until defendant called them back in to resume the interview. Importantly, because it was not clear whether defendant was consenting to providing a DNA sample, the detectives obtained a warrant before collecting defendant's DNA.

After reviewing Det. Williams' testimony and watching the recordings of defendant's statements, which the court found clearly showed that defendant freely and voluntarily spoke with the detectives, the court ruled that both of defendant's statements were admissible. As to the first statement, the court also noted that, while defendant did request counsel several times, he was clear that the request only related to his consent to providing a DNA sample. The trial court found that defendant otherwise wanted to continue speaking with the detectives. Moreover, each time defendant requested an attorney the detectives stopped the interview until defendant actively re-engaged them.

We find defendant's second recorded interview reveals no violation of defendant's rights, during which, notably, defendant never requested an attorney. Moreover, he initiated this second interview by calling the detectives in an effort to advance his own theories regarding the victim's death. Based upon our review of the record, we specifically find the defendant's second interview is clearly voluntary,

free of coercion, and admissible per *Edwards*.

Regarding defendant's first statement, a review of the video shows that statement was also voluntary and free of coercion. Although defendant requested an attorney initially for the limited purposes of his consent to providing a DNA sample, we find the detectives properly stopped the interview to clarify defendant's request, before resuming non-DNA questioning after he clearly stated his intent. Defendant's first mention of an attorney occurs at approximately 0:06:07 in the first recorded interview, after the detectives first requested that defendant voluntarily provide a DNA sample. Defendant responded:

Defendant: I'll do it, man, but my—I need a lawyer though, cause I don't, I don't, y'all got me somewhere I don't want to be at.

Officer: So you want a lawyer now?

Defendant: I—for the DNA part, everything else, I don't need a lawyer for, cause I don't know nothing about that, I don't know nothing about no DNA.

Officer: Ok, I'm just asking you, do you want an attorney here?

Defendant: Just for the DNA. Everything else—

Officer: So when we swab you for DNA?

Defendant: So I could ask him, so he could know, don't y'all gotta tell him? What y'all swabbing for? I mean, I know y'all telling—

Officer: I tell him the same thing I told you.

Defendant: But, I mean, if he was my lawyer don't y'all gotta tell him like, well, "Look, we found something, the babysitter penetrated, so we want to check DNA on him for that."

Officer: No. Not necessarily.

Officer 2: We never said we found anybody penetrated or nothing, nobody said that.

Defendant: Well that's good.

Officer: There's some fluids on the outside of the boy's body that we need to find out where they came from. That's all we

got, and that's all we wanna know right now. But if you want an attorney here, I'll—

Defendant: I don't want no attorney, man, 'cause I ain't did nothing.

Officer 2: Ok, there you go. So we do your DNA and we finish all that we're doing, and we do whatever that, we move on, and we get this finished with.

Defendant: I don't trust that. I swear man.

Officer: Ok, well that's cool, that's totally up to you. I can't make you do anything you don't want to do.

In this instance, defendant's request for counsel was clearly a limited invocation per *Barrett* and not a general invocation of his right to counsel that would require termination of the interview. Importantly, after defendant asked more questions of the detectives, he distinctly stated that, "I don't want no attorney man, cause I ain't did nothing." He then voluntarily continued the interview by inviting the detectives to ask him more questions.

Defendant's voluntary statement continued until roughly 00:36:00, when the detectives walked out into the hallway for roughly five minutes, and returned with Crime Scene Investigator Mindy Stewart. As Ms. Stewart prepared to take defendant's DNA sample, defendant told them, "I don't care about no DNA, man, but y'all got ta, I need a lawyer so if you say you've got something you gotta tell that lawyer what is y'all checking on me for, I mean you checking my clothes."

From that point forward, the remainder of this first interview primarily consisted of discussion between defendant and the detectives as they attempted to clarify defendant's request for counsel, interspersed with defendant's questions to detectives about the victim's injuries, the evidence they were seeking to test, and the ramifications of the DNA testing. Defendant made no further substantive statements. Despite defendant's claims that he issued numerous individual requests for counsel that the detectives ignored, we find the exchange between the detectives and defendant dictates otherwise. Specifically, the video shows that defendant's

requests for counsel were all part of a continuous exchange in which defendant alternated between making repetitive and ambiguous statements regarding his limited request for counsel, asking the detectives about the DNA testing and evidence, and asking detectives about the victim's injuries. It is clear from the recording that detectives asked defendant no further questions beyond what was necessary to clarify defendant's request for counsel and whether defendant would consent to providing a DNA sample. The detectives never coerced or pressured him to speak and rigorously respected his invocation of his right to counsel,[44] as demonstrated by the following excerpt:

> Defendant: I will take [the DNA test], but I need a lawyer to be present for that. I don't want a lawyer because I have nothing to defend, but if you're coming with this whole DNA, I just want a lawyer because I don't understand this.
>
> Detective: He says he wants a lawyer, let's stop.
>
> Defendant: Don't stop!
>
> Detectives: If you say you want a lawyer, I have to stop until the lawyer gets down here.[45]

We find the video shows that defendant's first statement was also entirely knowing and voluntary. Detectives immediately ceased questioning when defendant asked for counsel, and further, neither defendant's statement nor his DNA were obtained via coercive interview techniques. In sum, defendant's statements here

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[44]The Innocence Network also asserts that defendant's DNA was obtained via improper interrogation techniques. However, as explained herein, we do not find detectives engaged in any coercive tactics whatsoever. Furthermore, because defendant's DNA samples were obtained via a warrant and not his consent, any alleged coercion regarding his providing a DNA sample is moot.

[45]Although defendant and the Innocence Network also contend the detectives coerced defendant by withholding his ability to use the bathroom, the video shows otherwise. After detectives had left defendant alone in the interview room, defendant stood up and walked out of the room. He can be heard off-camera asking whether he could use the bathroom in exchange for consenting to provide a DNA sample without an attorney. The detectives replied that the warrant process was already underway and returned defendant to the interview room. Minutes later, detectives came back into the interview room and brought defendant to use the bathroom. When they returned, defendant again attempted to engage the detective with questions about the victim's death, but the detective told him to "hang tight" because they were "waiting on the judge" and left the room. The remainder of the video shows defendant sitting alone in the interview room.

were not under the influence of fear, duress, or intimidation, and we find no reversible error in their admission. As a result, we find these assignments of error to be without merit.

D. Erroneous admission of gruesome autopsy photographs (Defendant's Assignments of Error 30-31)

Defendant argues that he was unduly prejudiced by the admission of duplicative and gruesome autopsy photographs of the victim. He further argues the court of appeal erred by granting the State's pre-trial writ application and reversing the trial court's ruling excluding some of the photographs.

Before trial, the State initially sought to introduce approximately 114 photographs. After negotiating with the defense, the State agreed to reduce that number to 29. Nonetheless, the defense objected, and on April 30, 2009, filed a motion to preclude admission of the photographs on the grounds that their probative value was outweighed by the danger of unfair prejudice and that the photographs were duplicative, gruesome, and upsetting. The trial court addressed the motion at a hearing on July 15, 2009, and again on August 12, 2009. After hearing argument and reviewing each contested photograph, the trial court ruled that 15 of the photographs were inadmissible.

The State sought review of this ruling, which the court of appeal granted, reversing the district court's rulings and remanding for further proceedings. *State v. Holliday*, 09-1553 (La. App. 1 Cir. 9/28/09) (unpub'd). The court of appeal reasoned that the excluded photographs were not, categorically, unduly prejudicial, and could be necessary to counter a forthcoming defense since it was not yet apparent what defenses would be presented. Ultimately, the State introduced 20 autopsy photographs into evidence in its case-in-chief.

Defendant contends the photographs were not necessary to prove any fact at issue

in the case and that the defense was willing to stipulate to the autopsy results.[46] However, even when the cause of death is not at issue, the State is entitled to the moral force of its evidence, and postmortem photographs of murder victims are generally admissible to prove corpus delicti and to corroborate other evidence establishing cause of death, location, placement of wounds, or positive identification of the victim. *State v. Letulier*, 97-1360, pp. 17–19 (La. 7/8/98), 750 So.2d 784, 794–95; *State v. Robertson*, 97-0177, p. 29 (La. 3/4/98), 712 So.2d 8, 32; *State v. Koon*, 96-1208, p. 34 (La. 5/20/97), 704 So.2d 756, 776; *State v. Maxie*, 93-2158, p. 11, n.8 (La. 4/10/95), 653 So.2d 526, 532. Photographic evidence will be admitted unless it is so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient evidence, *i.e.*, when their probative value is substantially outweighed by the unfairly prejudicial effect. *State v. Broaden*, 99-2124, p. 23 (La. 2/21/01), 780 So.2d 349, 364 (citing *State v. Martin*, 93-0285, pp. 14–15 (La. 10/17/94), 645 So.2d 190, 198); *State v. Perry*, 502 So.2d 543, 558–59 (La. 1986)).

Here, given the strength of the evidence against defendant, it seems unlikely that jurors found him guilty based on the alleged inflammatory nature of the 20 photographs. We find defendant fails to show any error in admitting the photographs, and therefore, this assignment of error is without merit.

E. 911 recording erroneously admitted (Defendant's Assignments of Error 32–34)

Defendant argues that the courts below erred by admitting the recorded 911 call because it was not relevant to any element of the charged offense, the recording was largely unintelligible, and the hysterical screaming of the victim's mother was deeply upsetting. Because his defense was that the victim's death was an

[46] Notably, however, defendant now challenges the victim's cause of death on appeal.

unintentional negligent homicide, defendant contends the unfairly prejudicial effect of the recording outweighed any evidentiary value to counter that defense.

Generally, evidence is relevant and admissible if it has any tendency to make the existence of a fact of consequence more or less probable, but relevant evidence may be excluded if its probative value is substantially outweighed by its unfairly prejudicial effect. *See* La.C.E. arts. 401–403.

Beginning on July 15, 2009, the court held a pre-trial hearing at which it addressed the admissibility of the recording. On August 12, 2009, the court granted defendant's motion to exclude the recording, finding it inadmissible because several unidentified voices were audible, and the unfairly prejudicial effect outweighed the evidentiary value.

The State sought review of this ruling, arguing that the recording is relevant to establish that the victim was not breathing when Ms. Coon arrived at home, that she was the first person to seek medical attention for the victim, and that she, not defendant, made efforts to revive the victim. Additionally, the State argued the recording was relevant to show Ms. Coon's reaction to her child's condition in order to counter the possible defense that Ms. Coon was responsible for the victim's death. The State asserted that each voice in the recording belonged to a known individual who would be called as a witness at trial to identify their own voice.

The court of appeal reversed the trial court's ruling and remanded for further proceedings in the trial court, finding no confrontation or foundation issues because the recording was non-testimonial and the State intended to call all of the parties heard in the recording as trial witnesses. *State v. Holliday*, 09-1553 (La. App. 1 Cir. 9/28/09) (unpub'd). The court of appeal also found that the recording fell under the excited utterance exception to hearsay under La.C.E. 803(2),[47] and further, that the

[47] La. C.E. art. 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule.

recording was relevant to counter any claims by the defense that the victim's mother was involved in the victim's abuse. Defendant sought review of this ruling, which this Court denied.[48] *State v. Holliday*, 09-2355 (La. 1/8/10), 24 So.3d 863.

Here, we find no error in the court of appeal's determination that the recorded 911 call should be admitted. The recording shows that defendant never sought medical attention although the victim was unresponsive and not breathing. As such, it is probative of whether defendant committed second-degree cruelty to juveniles, showing that he intentionally or negligently mistreated or neglected the victim, thereby placing the victim at substantial risk of death. *See* La. R.S. 14:93.2.3. Further, the recording demonstrates that the victim was unresponsive and not breathing at 5:57 p.m. when Ms. Coon made the 911 call. As such, it is also probative to establish causation and a timeline for the victim's death. We also find the call is relevant to counter defendant's argument, raised on appeal, that the State failed to eliminate the reasonable hypothesis of innocence that the victim's injuries were caused by the resuscitation efforts. Consequently, we find this assignment of error without merit.

F. The trial court erred in denying the jury the opportunity to meaningfully consider negligent homicide. (Defendant's Assignment of Error 39)

Defendant argues the trial court denied him due process by denying his request to include negligent homicide as an option on the verdict form. According to defendant, because his defense at trial was that the victim's death constituted negligent homicide, the court's refusal to include that option on the verdict form deprived defendant of a means by which to "provide the jury with a way to find Mr.

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[48] Although the court of appeal's ruling also reversed the trial court's ruling regarding autopsy photographs, defendant expressly omitted that claim from his application to this Court.

Holliday guilty of a crime and hold him responsible for the child's death, without 'exonerat[ing]' him."

The record shows that defendant requested the definition of negligent homicide be included in the jury charges, and that the verdict form include the option of negligent homicide. The State objected on the grounds that negligent homicide is not a responsive verdict to first degree murder. The court agreed to instruct the jury regarding the definition of negligent homicide but did not agree to including negligent homicide on the verdict form because negligent homicide is not a responsive verdict to the charged offense.

As the State notes in its brief, La.C.Cr.P. Art. 814(A)(1) provides that the only responsive verdicts to first degree murder are guilty, guilty of second-degree murder, guilty of manslaughter, or not guilty. The verdict form properly included these responsive verdicts, and thereby provided the jury an alternative means of finding defendant guilty of a crime and holding him responsible for the victim's death. Defendant fails to show that the trial court erred by omitting his desired verdict, which was not authorized under the Louisiana Code of Criminal Procedure. Likewise, failure to include a prohibited verdict on the verdict form does not deny defendant due process. We find this assignment of error to be without merit.

G. Prosecutor improperly shifted the burden of proof to the defense during closing argument. (Defendant's Assignment of Error 8)

Defendant contends that the prosecution improperly shifted the burden of proof to the defense during closing argument. Specifically, during closing argument, defense counsel suggested that the State had not met its burden of proof because some of the evidence collected from the scene, such as a comforter, a towel, and the victim's red shirt and gray pants, had not been tested for DNA. Defense counsel stated:

> Around five o'clock we were on DNA evidence. Do you believe it? What was the purpose of it? Do you know? I went through piece by piece. The detective seized the evidence. Garments, towel, comforter. Got it right that time. And other articles of clothing. What was tested? Red shirt, the gray pants, towel, a comforter. And the reason they were not, do I have to say it? You heard it. Ms. Naylor. She testified it was not. The integrity of an investigation when a man's life is on the line suggests to us that all evidence seized at a scene that results in usage that was submitted to the crime lab to be tested. It was not tested.

In her rebuttal argument, the prosecutor responded:

> Oh, the comforter. What would the comforter have proven to you had we tested it? We know who did it. He put himself alone there. All the witnesses put him alone there. We have all the damage to this young man's body. What would the comforter have proven to you? If it had his DNA on it, it had Darian's DNA on it. We would have expected that. It would have been of no probative value. But more importantly, this evidence, it doesn't belong to me. It belongs to the case. If they wanted to test it, they could have had it tested. They could have done that. If they thought it was going to exonerate him, and I don't imagine how, they could have tested it. The same thing with the towel, which was found in a room. It was a nasty towel.

The defense objected and moved for a mistrial, arguing that:

> The defense has no burden. And for her to comment on what we did not test suggests to this jury that we had a burden of proof. That is an inappropriate comment on the right to remain silent and the right not to put on a defense. And so I'm asking that this–This is almost grounds for a mistrial. And I would ask for a mistrial to be declared at this time.

The prosecutor responded that the defendant first raised this defense, and the State was therefore permitted to respond to defendant's argument that the evidence should have been tested. The trial court overruled the objection and the request for a mistrial without elaboration.

The general rule concerning the scope of closing arguments is that they are 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." La.C.Cr.P. art. 774. Rebuttal closing arguments are restricted to answering defendant's argument. *Id.* Generally, Louisiana jurisprudence on prosecutorial misconduct allows prosecutors wide latitude in choosing closing argument tactics. Even if the prosecutor exceeds these bounds, the Court will not reverse a conviction

if not "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *State v. Martin*, 93-0285, p. 18 (La. 10/17/95), 645 So.2d 190, 200; *State v. Jarman*, 445 So.2d 1184, 1188 (La. 1984); *State v. Dupre*, 408 So.2d 1229, 1234 (La. 1982).

Louisiana Code of Criminal Procedure art. 770(3) prohibits a prosecutor from referring to the defendant's failure to testify and violations thereof constitute grounds for a mistrial.[49] When a prosecutor makes an indirect reference to the defendant's failure to take the stand, however, this Court will inquire into the remark's "intended effect on the jury" to distinguish indirect references to the defendant's failure to testify (which are impermissible) from general statements that the prosecution's case is unrebutted (which are permissible). *State v. Johnson*, 541 So.2d 818, 822 (La. 1989); *see also State v. Jackson*, 454 So.2d 116, 118 (La. 1984); *State v. Fullilove*, 389 So.2d 1282, 1284 (La. 1980).

Here, the prosecutor was clearly not referring to defendant's failure to testify but rather making a direct response to defendant's closing argument. As the court found in *State v. Jones*, 15-0123 p. 46, (La. App. 4 Cir. 12/2/15), 182 So.3d 251, 281, *writ denied*, 16-0027 (La. 12/5/16), 210 So.3d 810:

> [the prosecutor's argument] was not directed to what the defense did or did not do during the trial. Rather, it was directed to the content or lack thereof of the defense's closing argument. Therefore, we find this was not a reference by the State to any burden on the defense to come

[49] La. C.Cr.P. art. 770 provides:

> Upon motion of a defendant, a mistrial shall be ordered 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:
> (1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury;
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
> (3) The failure of the defendant to testify in his own defense; or
> (4) The refusal of the judge to direct a verdict.
> 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.

> forward with evidence. It was an answer to [defendant's] closing argument, proper rebuttal under La.C.Cr.P. art. 774."

Based upon this reasoning, we thus find defendant has not presented any reversible error in this regard.

H. The trial court erred in denying a new trial in light of newly discovered evidence fit for the jury's consideration that Darian was not sexually abused. (Defendant's Assignments of Error 6-7)

Defendant contends the trial court erred by denying his motion for new trial pursuant to La. C.Cr.P. art. 851(B)(3), in which he asserted newly discovered evidence, in the form of a letter from pediatrician Dr. Stephen Guertin, established the victim was not sexually abused.

In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing that: 1) the new evidence was discovered after trial, 2) the failure to discover the evidence at the time of the trial was not caused by lack of diligence, 3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it would probably have produced a different verdict. La.C.Cr.P. art. 851(B)(3); *State v. Bell*, 09-0199 (La. 11/30/10), 53 So.3d 437; *State v. Matthews*, 50,838 (La. App. 2 Cir. 8/10/16), 200 So.3d 895, *writ denied*, 16-1678 (La. 6/5/17), 220 So.3d 752.

Under La.C.Cr.P. 851, newly discovered evidence must first be determined to be "material." Evidence is material only if it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed. *State v. Marshall*, 94-0461, p. 16 (La. 9/5/95), 660 So.2d 819, 826 (*citing United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). "A reasonable probability is one that is sufficient to undermine confidence in the outcome" of the trial. *Marshall*, 94-0461, p. 16, 660 So.2d at 826. A district court should ascertain on a motion for new trial "whether there is new material fit for a

new jury's judgment. The only issue is whether the result will probably be different." *State v. Watts*, 00-0602, p. 9 (La. 1/14/03), 835 So.2d 441, 449. The decision of whether to grant or deny a motion for new trial is within the trial judge's sound discretion. *State v. Brisban*, 00-3437 (La. 2/26/02), 809 So.2d 923.

We find defendant's claim fails to satisfy the prerequisites for granting a new trial under La.C.Cr.P. art. 851B(3). Specifically, defendant's motion posits that the letters from Dr. Stephen Guertin, dated March 23, 2011, and April 18, 2011, constitute newly discovered evidence. Dr. Guertin's letters are neither newly discovered evidence, nor do they prove the victim was never sexually abused. Instead, Dr. Guertin's first letter merely voices his assessment of the evidence adduced at trial. Specifically, Dr. Guertin disputes Dr. Murrill's testimony that the autopsy photographs show "unquestionable sexual abuse to the perianal region" and opines that Dr. Corrigan correctly testified at trial that the victim's autopsy photographs do not depict anal sexual injury. In his second letter, Dr. Guertin provides a specific list of the evidence he reviewed in formulating his opinion, including portions of the trial testimony, the coroner's report and autopsy photographs, a crime scene and investigation report, and some of the victim's medical records.

Moreover, this evidence is not material, in that there is no likelihood the result of trial would be different with the addition of Dr. Guertin's opinion. As Dr. Guertin notes in his letter, Dr. Corrigan testified at trial that the victim's anus was not perforated, so Dr. Guertin's assessment of the evidence is merely cumulative. Evidence cumulative of issues addressed at the trial is ordinarily not sufficient to support the grant of a new trial. *See State v. Lavene*, 343 So.2d 185, 188 (La. 1977).

Importantly, defendant was ultimately not charged with any form of sexual abuse; the evidence in question was introduced in relation to the aggravating factor of second-degree cruelty to juveniles. Even absent the evidence regarding the victim's

anus, the charge of second-degree cruelty to juveniles was readily established by the bite mark on the victim's foot and defendant's failure to seek medical attention after he realized the victim was unresponsive and not breathing. The remaining elements of the charged offense were established by the victim's injuries and defendant's statement.

Finally, as noted above, regardless of injury to the victim's anus, defendant told detectives during his second statement that "if y'all did the autopsy, you probably know, I checked for a bowel movement, sticking my finger in his ass trying to check his body temperature." In light of this admission, defendant cannot show that the absence of anal tearing proves he never inserted his finger into the victim's rectum. Thus, we find this assignment of error to be without merit.

V. Penalty Phase (Defendant's Assignments of Error 12-14, 42, 43, 46, 47, 50–52)

A. Defendant's prior conviction was introduced during the penalty phase in violation of *State v. Jackson*, 608 So.2d 949 (La. 1992). (Defendant's Assignment of Error 12–14*)*

Defendant argues that the trial court erroneously permitted the State to introduce evidence of defendant's Missouri guilty plea to one count of First Degree Assault and one count of Armed Criminal Action on August 10, 2000. According to defendant, the convictions were inadmissible because the Missouri court did not properly advise him of his constitutional right against self-incrimination as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2 274 (1969). Defendant further argues that the court erroneously permitted the State to introduce defendant's guilty plea colloquy to the jury, although *State v. Jackson* expressly limits the State's introduction of evidence of prior convictions at the penalty phase of a capital trial to: "the document certifying the fact of conviction and [] the testimony of the victim or of any eyewitness to the crime . . ." 608 So.2d 949, 954 (La. 1992). According to defendant, the erroneous introduction of his previous plea

exposed the jury to the unfairly prejudicial facts underlying his prior conviction. Specifically, the prior conviction arose out of an incident in which defendant poured boiling water on a 16 year-old child's face, neck, and chest.

Regardless of defendant's arguments, any error by the trial court in permitting evidence of the Missouri plea is moot, because defendant's character witness, his aunt, Ms. Jacqueline James, testified that defendant "spent time in jail" for the Missouri conviction, and she explained the conviction was for throwing hot water on a "young man" because of a dispute over a video game. On cross-examination, Ms. James acknowledged the water was boiling.[50] Thus, defendant cannot claim that the State's introduction of the convictions or plea colloquy prejudiced him or introduced an arbitrary factor into the sentencing decision by exposing the jury to the facts underlying the Missouri conviction.

In any event, prior convictions are admissible in the penalty phase of a capital trial. *Jackson*, 608 So.2d at 954. Again, while *Jackson* limits the evidence to a "document certifying the fact of conviction and to the testimony of the victim or of any eyewitness to the crime," *id.*, defendant cites no law to support his argument that a guilty plea colloquy cannot serve as the document certifying the fact of conviction. Likewise, this Court has held that the State may introduce defendant's prior convictions in the sentencing phase without an affirmative showing of compliance with *Boykin*. *State v. Jordan*, 440 So.2d 716, 720 (La. 1983). As a result, we find this claim to be without merit.

B. Duplicate aggravating factors violate the Eighth and Fourteenth Amendments (Defendant's Assignment of Error 42)

Defendant argues that his conviction and sentence are unconstitutional because

[50] The State did not seek to introduce all of defendant's other crimes, including defendant's burglary conviction and jail time in Florida and a conviction stemming from a domestic violence incident. However, Ms. James offered testimony referencing these events.

the aggravating factors supporting his death sentence are elements of his conviction for first-degree murder. Specifically, the jury found as aggravating factors: 1) the offender was engaged in the perpetration or attempted perpetration of second-degree cruelty to juveniles; and 2) the victim was under 12 years of age. *See* La.C.Cr.P. arts. 905.3 and 905.4.[51] Defendant contends the use of the same factors in both the guilt and penalty phases of trial violates the constitutional requirement that the death penalty is narrowly applied to only the most extremely culpable offenders.

Despite defendant's claim, the United States Supreme Court has found that Louisiana's capital sentencing scheme properly narrows the class of death-eligible defendants during the guilt phase of trial by narrowly defining the categories of murders for which a death sentence could be imposed. The Court concluded that the additional requirement that juries find aggravating factors at sentencing was not part of the constitutionally mandated narrowing process, so "the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." *Lowenfield v. Phelps*, 484 U.S. 231, 246, 108 S.Ct. 546,

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[51] La. C.Cr.P. art. 905.3 provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

La. C.Cr.P. art. 905.4 provides in pertinent part:

> A. The following shall be considered aggravating circumstances:
> (1) The offender was engaged in the perpetration or attempted perpetration of aggravated or first degree rape, forcible or second degree rape, aggravated kidnapping, second degree kidnapping, aggravated burglary, aggravated arson, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, second degree robbery, simple robbery, cruelty to juveniles, second degree cruelty to juveniles, or terrorism.
>
> . . .
>
> (10) The victim was under the age of twelve years or sixty-five years of age or older.

555, 98 L.Ed.2d 568 (1988). Defendant offers no support for his contention that "*Lowenfield*, which was decided 30 years ago, is no longer good law."

In addition, the jury need only find one statutory aggravating circumstance to support a death sentence. La. C.Cr.P. art. 905.3. The jury in this case found two statutory aggravating circumstances: the victim was under 12 years of age, and defendant was engaged in the perpetration or attempted perpetration of second-degree cruelty to juveniles. Either of these is sufficient to support defendant's sentence. *See* La. C.Cr.P. arts. 905.3 and 905.4; *State v. Wright*, 01-0322, p. 15 (La. 12/4/02), 834 So.2d 974, 987 (if jury finds multiple aggravating factors to impose a death sentence, and the reviewing court finds one was based on insufficient evidence, the conviction and sentence may nonetheless stand so long as there is at least one statutory aggravating factor grounded in sufficient evidence); *State v. Martin*, 93-0285 (La. 10/17/94), 645 So.2d 190 ("[T]he failure of one statutory aggravating circumstance does not invalidate others properly found, unless introduction of evidence in support of the invalid circumstances interjects an arbitrary factor into the sentencing proceeding."). We find both aggravating factors are solidly supported by the evidence, as discussed above. As such, we find no merit to this assignment of error.

C. An unacceptable error rate, disproportional racial impact, and evolving standards of decency render the death penalty unconstitutional. (Defendant's Assignments of Error 43, 46)

Defendant argues that the high rate of exonerations among individuals sentenced to death, both nationwide and in Louisiana, render the death penalty unconstitutional. He also argues that a disproportionate percentage of those sentenced to death in East Baton Rouge Parish are black, and, as such, systemic racial discrimination constitutes an unconstitutional arbitrary factor in capital sentencing. Defendant further argues that evolving standards of decency have

rendered the death penalty unconstitutional, as shown by the fact that death sentences have become increasingly disfavored by society, are rarely imposed, and many jurisdictions have eliminated the death penalty altogether.

As Justice Scalia addressed in his concurrence in *Kansas v. Marsh*, 548 U.S. 163, 193,126 S.Ct. 2516, 2535–36, 165 L.Ed.2d 429 (2006), exonerations do not come about "through the operation of some outside force to correct the mistakes of our legal system, [but] rather . . . as a consequence of the functioning of our legal system." Moreover, "[c]apital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed." *Id.*, 548 U.S. at 198, 126 S.Ct. at 2538. Thus, "[r]eversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success." *Id.*, 548 U.S. at 193, 126 S.Ct. at 2536.

Louisiana's bifurcated capital sentencing scheme, modeled on the Georgia statute upheld in *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976), passes constitutional muster under the Eighth Amendment by narrowing the substantive definition of first-degree murder to restrict the class of death-eligible cases and by further providing for a sentencing hearing in which the jury may make a binding decision that the defendant receive a sentence of life imprisonment at hard labor. *State v. Welcome*, 458 So.2d 1235, 1251–52 (La. 1982). Accordingly, we find no merit to defendant's assignment of error in this regard.

D. A finding of intent to inflict great bodily harm to support a capital conviction unconstitutionally obviates the need for the jury to find specific intent to kill. (Defendant's Assignment of Error 47)

Defendant argues that La. R.S. 14:30 unconstitutionally permits a death sentence to be imposed when a defendant merely had the specific intent to inflict great bodily harm. Citing *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140

(1982), defendant contends that the Eighth and Fourteenth Amendments require that a defendant act with the specific intent to kill in order to be subject to the death penalty and that "[s]entencing a defendant to death in circumstances where the defendant did not kill, intend to kill, and had lesser culpability than those who have killed is inconsistent with the Eighth and Fourteenth Amendments."

Defendant did not challenge the constitutionality of La. R.S. 14:30 on these grounds during the proceedings below, and thus, he has failed to preserve this claim for appeal. *See State v. Hatton*, 07-2377, p. 13 (La. 7/1/08), 985 So.2d 709, 718 ("It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below.") (internal citation omitted). Furthermore, defendant's reliance on *Enmund* is misplaced. *Enmund* addressed a capital sentence for felony murder where the defendant participated in the robbery but was not physically present when the victims were killed by his co-perpetrators. The Court held that Enmund's sentence was unconstitutional under the Eighth Amendment because he was sentenced to death in the "absence of proof that Enmund killed or attempted to kill . . . ." *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 3379, 73 L.Ed.2d 1140 (1982). Here, in contrast, defendant was the individual who killed the victim, so no such concern arises, and thus, the holding of *Enmund* does not apply.

As stated previously, in *Lowenfield*, *supra*, the United States Supreme Court found that Louisiana's capital sentencing scheme properly restricts the class of death-eligible defendants to those most culpable, by narrowly defining the categories of murders for which a death sentence could be imposed. Because we find La. R.S. 14:30 applies to defendant in this case, we find this assignment of error without merit.

E. The jury's failure to find that death should be imposed beyond a reasonable doubt violated the Eighth and Fourteenth Amendments. (Defendant's Assignment of Error 50)

Defendant alleges his right to a fair trial and reliable sentencing require the jury to decide beyond a reasonable doubt that death is the appropriate punishment. Defendant appears to acknowledge that this argument is without merit, however, by conceding that this Court has held on several occasions that juries need not reach their sentencing result beyond a reasonable doubt. *See State v. Magee*, 11-0574, (La. 9/28/12), 103 So.3d 285, 335; *State v. Anderson*, 06-2987, p. 61 (La. 9/9/08), 996 So.2d 973, 1015; *State v. Koon*, 96–1208, p. 27 (La. 5/20/97), 704 So.2d 756, 772–73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard."). We find this assignment of error to be without merit.

F. Capital sentence is invalid without open and public executions. (Defendant's Assignment of Error 51)

Defendant contends that Louisiana's prohibition on public execution undermines the deterrent effect of capital punishment, and that public executions are required by the Eighth Amendment in order for society to continually reassess whether it wishes to continue to permit capital punishment. *See* La. R.S. § 15:569(B) ("Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room.")

In the 19th century, executions in the United States became private events and moved from the public square to inside prison walls. *Furman v. Georgia*, 408 U.S. 238, 297, 92 S.Ct. 2726, 2756, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring) ("No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.") This Court has repeatedly rejected

similar demands for a return to the spectacle of public executions in the unpublished appendices of opinions affirming other capital convictions and sentences. *See State v. Dorsey*, 10-0216 (La. 9/7/11), 74 So.3d 603; *State v. Dressner*, 08-1366 (La. 7/6/10), 45 So.3d 127; *State v. Williams*, 07-1407 (La. 10/20/09), 22 So.3d 867. Thus, this assignment of error is meritless.

G. Cumulative error rendered defendant's trial fundamentally unfair. (Defendant's Argument Assignment of Error 52)

Despite fastidious examination of the record and all of defendant's assignments of error, we find no reversible error. This Court has noted that, "the combined effect of the incidences complained of, none of which amounts to reversible error [does] not deprive the defendant of his right to a fair trial." *State v. Copeland*, 530 So.2d 526, 544–45 (La. 1988), quoting *State v. Graham*, 422 So.2d 123, 137 (La. 1982), appeal dismissed, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309 (1983). Although the Court has often reviewed cumulative error arguments, it has continually rejected them. Instead, the Court has consistently found that harmless errors, however numerous, do not aggregate to reach the level of reversible error. *See, e.g.*, *State v. Strickland*, 93-0001, pp. 51–52 (La. 11/1/96), 683 So.2d 218, 239; *State v. Taylor*, 93-2201 (La. 2/28/96), 669 So.2d 364 (unpub'd app'x.); *State v. Tart*, 94-0025, p. 55 (La. 2/9/96), 672 So.2d 116, 164; *State v. Copeland*, 530 So.2d 526, 544–45 (La. 1988) (*citing State v. Graham*, 422 So.2d 123, 137 (La. 1982)); *State v. Sheppard*, 350 So.2d 615, 651 (La. 1977)). Other courts have reached the same conclusion in addressing this issue. *See, e.g.*, *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (court rejects cumulative error claim and finds that "twenty times zero equals zero"); *Foster v. State*, 639 So.2d 1263, 1303 (Miss. 1994) (finding no "near errors" and rejecting cumulative error analysis). This Court did not find any substantive error in the lower court proceedings and therefore no cumulative error warranting

reversal exists. This assignment of error is without merit.

CAPITAL SENTENCE REVIEW

The court imposed a sentence of death, as unanimously recommended by the jury. Under La.C.Cr.P. art. 905.9[52] and La.S.Ct.R. 28, this Court reviews every sentence of death imposed by Louisiana courts to determine whether it is constitutionally excessive. In making this determination, the Court considers whether the jury imposed the sentence under the influence of passion, prejudice, or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender. *State v. Magee*, 11-574, p. 69 (La. 9/28/12), 103 So.3d 285, 331.

For purposes of the capital sentence review, the district court judge is required to file a Uniform Capital Sentence Report ("UCSR") by La.S.C.R. 28 § 3(a). The defense and the State have each filed a Sentence Review Memorandum. These documents, along with the penalty phase testimony of defendant's aunt, Ms. Jacqueline James, show that defendant is a black male who was born on June 21, 1977. Defendant was 29 years old at the time of the offense. He was born in St. Louis, Missouri, where he primarily grew up, but intermittently resided with relatives in Pensacola, Florida as well. Defendant had lived in Baton Rouge for approximately six weeks before the instant offense.

Defendant was one of two children. He did not know his father, and his mother, Sharron Kent, abused him psychologically and physically. By the time defendant was 11, he was removed from his home because he was "incorrigible." He moved among many placements with relatives, in foster homes, and in institutions, and was

[52] La. C.Cr.P. art. 905.9 provides: "The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

removed from each situation because of his violent and aggressive behavior. As noted in his criminal history, defendant attempted to stab a social worker at one placement. Defendant's defiant, violent, and aggressive behavior prevented any long-term placement with family members as well. When at home, he attacked his brother, and he pulled a knife on his grandmother and threatened to kill her. Defendant's aunt arranged for him to live with her mother in Florida, but defendant was sent back to a group home in St. Louis after threatening to murder his caregiver in her sleep. Defendant also sexually molested the seven-year-old son of a caregiver.

According to the UCSR, defendant did not have stable childhood schooling because of his frequent residential changes and because of his severe behavioral problems. Defendant was removed from several schools because of fighting and aggressive behaviors, as well as inappropriate and aggressively sexualized behaviors. According to an evaluation conducted while he was in school, defendant was an average student academically and intellectually, but he was behaviorally disordered. He consistently blamed others for his problematic behavior and claimed he was the victim. The report also noted that defendant did not maintain self-control when problems arose. The UCSR indicates that defendant earned his GED while in the Job Corps.

Defendant married Genise Irving in 2001, but they are separated. They have two living children; a third child died in infancy. Defendant also has another child from another relationship. Defendant's wife reported that he was patient with the children, however he rarely saw them because of his "nomadic lifestyle."

Defendant was not employed at the time of the offense, and has very little employment history. According to the UCSR, defendant was employed by Rally's Hamburgers in St. Louis, Missouri, for a time when he was 18 years old. He was also briefly employed by USA Trucking and All For One Trucking.

Defendant is classified as a third felony offender on the basis of two prior out-of-

state felony convictions from 1998 and 2000. First, in Pensacola, Florida, on November 8, 1996, defendant was convicted of Burglary of an Occupied Dwelling and Grand Larceny and sentenced to concurrent terms of three years imprisonment in Florida state prison on each count. On January 6, 1998, defendant was placed on three years supervised probation, but he absconded to St. Louis in June of 2000, where he committed First Degree Assault and Armed Criminal Action, discussed below. Defendant was re-arrested on June 23, 2002, when he returned to Florida after he was released from incarceration in Missouri. On October 24, 2002, defendant pled no contest and was sentenced to concurrent terms of one year imprisonment in a Florida county jail on each count.

Second, in St. Louis, Missouri, defendant was convicted of First Degree Assault and Armed Criminal Action on August 10, 2000. He was sentenced to concurrent terms of 12 years imprisonment in the Missouri Department of Corrections, suspended, with two years active supervised probation and three years imprisonment in the Missouri Department of Corrections, which was not suspended. Defendant was released on parole on February 9, 2002.

In addition to these convictions, defendant has two misdemeanor convictions. In 2006, he was convicted of misdemeanor Theft of Property in Dallas, Texas. In 2008, defendant was convicted of misdemeanor Battery of a Police Officer in East Baton Rouge Parish. Defendant has also been charged with several offenses that were not prosecuted for various reasons. In 1995, defendant was charged in St. Louis with Unlawful Use of a Weapon, but he absconded to Florida. The State declined to prosecute the charges when he returned to St. Louis. In 2006, defendant was charged with Simple Assault in New Brunswick, New Jersey; the charge was dismissed. Also in 2006, defendant was arrested in Texas for Possession of Marijuana; the charge was rejected. Defendant was arrested in St. Louis in 2006 for Third-Degree Assault, but there is no record of a prosecution. As noted above, while a juvenile in

St. Louis, Missouri, defendant was charged with Third Degree Assault for attempting to stab his social worker with a sharp piece of metal he removed from a ceiling vent. He was placed on supervised probation as a result.

Defendant did not testify at either the guilt or penalty phase of his capital trial. He did give two statements that were introduced at trial, as discussed above. At the penalty phase, the defense presented testimony from defendant's aunt, Ms. Jacqueline James, as well as forensic psychiatrist Dr. Ellen Gandle, and clinical forensic psychologist Dr. Robert Storer. Defendant's aunt, Ms. James, testified that she was married to defendant's uncle. Defendant's mother had three children, one of whom died in infancy, so defendant grew up with one brother. She testified that defendant's father was uninvolved and his mother was "very, very violent" when she drank. James described seeing defendant's mother slap him to the ground, punch him, beat him with an extension cord, and choke him, as well as lock him in a closet because he had not washed the dishes. She testified that defendant's mother was also emotionally abusive, telling defendant that she hated him, he was worthless, and she wished he was never born; defendant's maternal grandmother would tell him the same things.[53] Defendant's mother and grandmother were not abusive to his brother, however, and would take his brother out for activities without defendant because of his problematic behavior. According to Ms. James, when defendant was seven or eight years old, she drove him and his mother to the juvenile justice center to meet with his caseworker. His mother tried to leave him with juvenile justice because "he wasn't listening at home." Regardless, "a couple of weeks" later, defendant "did end up in the system." After that, defendant primarily moved between orphanages and foster homes. Ms. James' attempts to place defendant with relatives in Pensacola were unsuccessful because of defendant's behavior. Back in St. Louis,

[53] According to the UCSR, defendant's grandmother told him this after he drew a knife and threatened to kill her.

defendant's behavior continued to be uncontrollable. When he turned 17 and aged out of juvenile detention, defendant lived in St. Louis with Ms. James' brother, then moved to Pensacola to live with Ms. James. He returned to St. Louis again after serving time in jail for a burglary. While there, defendant met and married Genise Irving, but was also placed in jail again for throwing boiling water on a sixteen year-old during an altercation. When defendant was released from prison, Ms. James arranged an apartment for him and Genise in Pensacola. Soon, however, Genise returned to St. Louis, where her children lived. Ms. James further testified that defendant had a child with Genise that had died, and he had two other children, but she did not know their names and could not remember the circumstances under which the child had died. Ms. James testified that defendant dated a woman named Misty after Genise left, which led to a domestic violence incident and jail time.[54]

Dr. Ellen Gandle, qualified as an expert in forensic psychiatry, testified regarding the effect defendant's tumultuous and abusive childhood had on his adult life. Dr. Gandle evaluated defendant, but did not diagnose him with any mental disease or defect. The defense also called forensic psychology expert Dr. Robert Storer, who testified that he conducted a comprehensive psychological evaluation on defendant. He learned that as a child defendant had been diagnosed with post-traumatic stress disorder, and that defendant had attempted suicide as a child. Dr. Storer's clinical impression was that defendant "may" have bipolar disorder. In rebuttal, the State called Dr. Donald Hoppe, also an expert in forensic psychology. In light of the determination by Dr. Storer that defendant has a severe personality disorder, Dr. Hoppe testified that a personality disorder is not a mental disease or defect that would inhibit defendant's ability to tell right from wrong.

The State presented victim impact testimony from the victim's mother and

[54] It is unclear from the record how the incident James described corresponds to defendant's criminal history recounted in the UCSR.

grandfather, Ms. Coon and Mr. Cleveland Coon. Ms. Coon testified that two and a half year-old Darian loved to play with his big sister Daisha and was excited to start preschool. She also described how Darian's death had affected her and Daisha. Mr. Coon testified about the special, close relationship he had with Darian, and how Darian's death affected him.

Passion, Prejudice, and Other Arbitrary Factors

The victim in this case, Darian Coon, was a two-year-old black male. Defendant is a black male, who was 29 years old at the time of the offense. Five members of the jury were black, the same race as defendant. As noted above, defendant argues that race is a factor in the East Baton Rouge Parish District Attorney's determination whether to seek the death penalty, citing statistics showing a black defendant is more likely to be sentenced to death for killing a white victim than a black victim. As both defendant and the victim are black, race is not an issue in defendant's case.

Defendant did not raise a *Batson* objection during voir dire, and five members of his jury, or 42%, were black. However, as discussed previously, he argues the death qualification process in his case disproportionately excluded black potential jurors and that the venire was drawn in a manner that unfairly excluded black males from the pool. Nevertheless, our extensive review of this record reveals defendant's trial was conducted free of racial discrimination.

Although there was some pretrial publicity, as discussed above, all prospective jurors were questioned about any knowledge they may have possessed about the case, and all those with prior knowledge were either excluded or indicated an ability to set it aside and decide the case based entirely upon the evidence presented in court. The chosen jurors and alternates were all sequestered for the duration of the proceedings, and there is no evidence in this record of any issues related to sequestration during either phase of trial.

Defendant also contends that the State's misleading insinuations of sexual assault, false DNA evidence, gruesome photographs, and penalty phase introduction of the factual basis for his Missouri felony conviction introduced arbitrary factors into his trial and sentencing. However, each of these allegations was addressed above and found meritless. Nothing in the record or UCSR indicates that arbitrary factors contributed to the jury's decision to impose the death sentence. La. S.Ct.R. 28; Rule 905.9.1, sec. 1.

Aggravating Circumstances

The State relied on two aggravating circumstances under La.C.Cr.P. art. 905.4(A) and the jury returned the verdict of death, finding that both aggravating circumstances were supported by the evidence: 1) the victim was under the age of 12 years old; and 2) defendant killed the victim while subjecting him to second degree cruelty to a juvenile. La.C.Cr.P. art. 905.4(A)(1), (10).

The State's guilt phase evidence, which was reintroduced at the penalty phase, established that the 29-year-old defendant punched and beat the two-year-old victim, causing fatal massive internal injuries. He then failed to seek help for the dying child for at least an hour, despite recognizing that the victim was unresponsive and not breathing. The two aggravating circumstances relied upon by the State were clearly supported by the evidence. Consequently, the jury's decision to impose the death sentence is firmly supported by the record.

Proportionality

Although the federal Constitution does not require a proportionality review, *see Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So.2d 692, 710 (La. 1990); *State v. Wille*, 559 So.2d 1321, 1341 (La. 1990); *State v. Thompson*, 516 So.2d 349, 357

(La. 1987). This Court, however, has set aside only one death sentence as excessive under the post-1976 statutes, finding in that one case, *inter alia*, a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier*, 380 So.2d 1, 9 (La. 1979); *see also State v. Weiland*, 505 So.2d 702, 707–10 (La. 1987) (reversed on other grounds; dictum suggested death penalty had been disproportionate).

This Court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation is inconsistent with sentences in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier*, 380 So.2d at 7. The State's Sentence Review Memorandum reveals that, since 1976, jurors in the 19th Judicial District Court, East Baton Rouge Parish, have returned a guilty verdict in 81 capital cases, including defendant's trial. Of those, juries have recommended imposition of the death penalty 30 times. It is appropriate for the Court to look beyond the 19th JDC and conduct a statewide proportionality review. *Cf. State v. Davis*, 92-1623, pp. 34–35 (La. 5/23/94), 637 So.2d 1012, 1030–31.

A statewide review reflects that jurors regularly recommend capital sentences in cases involving the murders of young children. *See State v. Crawford*, 14-2153 (La. 11/16/16), 218 So.3d 13 (defendant smothered his one-year-old son; reversed on grounds unrelated to sentencing proportionality); *State v. Carter*, 10-0614 (La. 1/24/12), 84 So.3d 499 (defendant abducted the five-year-old-son of a former girlfriend and burned him to death); *State v. Reeves*, 06-2419 (La. 5/5/09), 11 So.3d 1031 (defendant abducted, sodomized, and killed the 4-year-old victim by stabbing her numerous times and cutting her throat); *State v. Wright*, 01-0322 (La. 12/4/02), 834 So.2d 974 (defendant admitted to spending 'twenty-four hours a day' with the child, brutally beating the victim "innumerable times" as punishment); *State v. Carmouche*, 01-0405 (La. 5/14/02), 872 So.2d 1020 (defendant killed his girlfriend and two children, aged 15 and two); *State v. Deal*, 00-0434 (La. 11/28/01), 802 So.2d

1254 (defendant killed his two-month-old son by sticking a paper towel down the child's throat to cut off his airway, then picked the child up and threw him against the crib, fracturing the baby's skull.); *State v. Deruise*, 98-0541 (La. 4/3/01), 802 So.2d 1224 (defendant shot and killed an eleven-month-old infant during an armed robbery.); *State v. Langley*, 95-1489 (La. 4/14/98), 711 So.2d 651 (defendant choked a six-year-old boy with his hands and then garroted the victim with nylon line and stuffed a dirty sock into the victim's mouth; on remand from this Court, the district court quashed the grand jury indictment on grounds of racial discrimination in the selection of grand jury forepersons in East Baton Rouge; defendant subsequently received a new trial in *State v. Langley*, 95-1489 (La. 4/3/02), 813 So.2d 356.); *State v. Connolly*, 96-1680 (La. 7/1/97), 700 So.2d 810 (the defendant, a Sunday school teacher, slashed the throat of his nine-year-old victim behind the church after church services; the victim was found alive, in a pool of blood by his father, but died shortly after arriving at the hospital; the State argued that the victim was sexually abused by the defendant based upon the dilation of the victim's anus, although no other evidence supported this claim.); *State v. Sepulvado*, 93-2692 (La. 4/8/96), 672 So.2d 158 (defendant, over a three day period, tied a rope around his six-year-old stepson's neck, threatened to hang him, beat him, put his head in the toilet and flushed, refused to feed him, kicked him from one room to another, and, finally, put him in a tub of scalding water which produced third degree burns over sixty percent of the victim's body.); *State v. Copeland*, 530 So.2d 526 (La. 1988) (defendant and his co-defendant, George Brooks, repeatedly raped an eleven-year-old boy and shot him several times); *State v. Loyd*, 489 So.2d 898 (La. 1986) (25-year-old defendant kidnapped a three-year-old victim, raped her, and drowned her in a ditch. On October 29, 1993, the sentence was vacated by the United States Fifth Circuit on grounds of ineffective assistance of counsel at penalty phase. The State was ordered to sentence the defendant to life imprisonment or retry the sentencing phase.

See State v. Loyd, 96-1805 (La. 2/13/97), 689 So.2d 1321 (commutation instruction mandated by La.C.Cr.P. art. 905.2(B), 1995 La. Acts No. 551, may apply to the defendant's resentencing penalty trial although it was not in effect at the time of the offense.); *State v. Brogdon*, 457 So.2d 616 (La. 1984) (19-year-old defendant and a 17-year-old accomplice lured the 11-year-old victim into their car, drove her to an isolated spot, raped her repeatedly, forced oral sex, and then tortured her by beating her with a brick, shoving sharp objects into her vagina, and cutting her with a broken bottle.).

Although many of these cases involve additional felonies or multiple victims, defendant's sentence does not appear disproportionate given the brutal beating he inflicted on the toddler victim and his failure to seek help as he watched the child dying. In view of the foregoing, the death penalty imposed on defendant, Dacarius Holliday, for the first-degree murder of Darian Coon, is not disproportionate.

CONCLUSION

We have discerned no reversible error at either phase of trial. The evidence fully supports the jury's determination that the 29-year-old defendant acted with the specific intent to inflict great bodily harm on the two-year-old victim under his care when he punched and beat the victim with enough force to lacerate his internal organs and cover his body with more than 75 bruises, even biting the bottom of the child's foot. Further, defendant intentionally mistreated the dying child, causing serious bodily injury (death) when he failed to seek medical attention despite recognizing that the child was unresponsive and not breathing. The evidence supports the charged offense of first degree murder under both R.S. 14:30(A)(1), (5) and R.S. 14:93.2.3, as well as the statutory aggravating circumstances urged by the State and which were properly found by the jury and fully supported by the record. La.C.Cr.P. art. 905.4(A)(1), (10); R.S. 14:93.2.3.

DECREE

Accordingly, the defendant's conviction and sentence are affirmed. In the event this judgment becomes final on direct review when either: (1) the defendant fails to timely petition the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to timely petition the United States Supreme Court, under their prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this Court under La. C.Cr.P. art. 923 of finality of direct appeal and, before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

AFFIRMED.