11/29/93 State of Louisiana v. Nathaniel Robert Code

627 So. 2d 1373 (1993) | Cited 0 times | Supreme Court of Louisiana | November 29, 1993

PUBLIC DOMAIN CITE: State v. Code, 91-0998 (La. 11/29/93); 627 So. 2d 1373

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT FOR THE PARISH OF CADDO, STATE OF LOUISIANA. HONORABLE GAYLE K. HAMILTON, PRESIDING JUDGE

APPELLATE judges:

WATSON[1]

DECISION OF THE COURT DELIVERED BY THE HONORABLE JUDGE WATSON

A Caddo Parish grand jury indicted Nathaniel Robert Code, Jr. on five counts of first degree murder. The indictment charged Code with the August 31, 1984, first degree murder of Deborah Ann Ford (count one), the Ford homicide, and with the July 19, 1985, first degree murders of Billy Joe Harris, Jerry Culbert, Carlitha Culbert and Vivian Chaney (counts two-five), the Chaney homicides. Prior to trial, this court severed count one, the Ford homicide. State v. Code, 535 So.2d 736 (La. 1989). The state amended the indictment to charge Code with the Chaney homicides as counts one-four. In a separate indictment, Code was charged with the August 5, 1987, first degree murders of William T. Code, Joe Robinson and Eric Williams.

A jury found defendant Code guilty of first degree murder on all four counts of the Chaney homicides. The jury unanimously recommended the death sentence because of aggravating circumstances. The trial Judge sentenced the defendant to death in accordance with the recommendation of the jury. This is the direct appeal of Code's conviction and sentence.

On appeal, Code relies on twenty-eight (28) assignments of error for the reversal of his conviction and sentence. In a capital case, this Court reviews all assignments of error and reviews the record for all possible error. See State v. Bay, 529 So.2d 845, 851 (La. 1988). This opinion will treat the serious issues presented in Code's assignments of error regarding the use of other crimes evidence and an unassigned error involving opinion testimony about defendant's guilt. The opinion will also review the sentence. The defendant's remaining assignments involve legal issues governed by established principles of law and will be treated in an unpublished appendix, which will comprise part of the official record in this case. Finding no reversible error, we affirm Code's conviction and sentence.

FACTS

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Ford Homicide: August 31, 1984

Deborah Ford was a 25-year-old single mother who lived at 315 East 74th Street in the Cedar Grove area of Shreveport with her two daughters, Nicki (then 9 years old) and Shawn (then 5 years old). The house they lived in was a small shotgun-style home. Because she had been burglarized, Ford had her father nail the back door shut and nail outside screens over all the windows.

On August 30, 1984, Ford took her daughters shopping for school clothes with Shawn's father, Danny Ware. They returned to 315 East 74th Street at approximately 9:30 p.m. While Danny Ware and Ford spoke outside, Nicki retrieved a stuffed animal to take to her grandmother's house, where the girls were going to spend the night. Leaving the house, Nicki noticed the bathroom window was open and closed it, placing a wooden stick vertically above the frame to keep it shut. The window had no lock other than a nailed screen. The stick could be dislodged by jiggling the window. Danny Ware drove the two girls to their grandmother's house.

Ford spoke briefly to her friends who lived across the street, Gussy Bell and her daughter, Juanita Parks, but returned home sometime before 10:00 p.m. Michael Bell, Gussy Bell's brother, visited Ford in her home until sometime after 11:00 p.m. Ford talked to a friend, Gregory Bell, three times between 8:00 p.m. and 12:30 a.m. Following her usual routine, she slept in the living room on the couch.

Sometime between 12:30 a.m. and 8:00 a.m. on August 31, 1984, an intruder pried the screen loose from the bathroom window and pulled it away from the house. The intruder raised the window and blocked it open with a piece of metal. In entering the house, the intruder left a smudged partial footprint in the bathtub immediately beneath the window and knocked paint debris and dirt into the bathroom and outside the window.

During the intruder's assault on Deborah Ford, furniture was knocked over and the couch cushions were disarranged. Ford bruised her hands defending herself.

The intruder had cut electrical cord from a box fan in the kitchen and used it to tie Ford's hands behind her back. The cord was anchored firmly around her left wrist and then looped around her right wrist, leaving a space in between, like a handcuff. The loose end was tied to the cord on the left wrist. Ford was gagged with clothing. While she was bound and gagged, the intruder stabbed Ford on the couch, then dragged her body to the floor where she was stabbed again. Ford was stabbed nine times in the chest, two times on the left side and seven times on the right side. Some of the wounds were deep enough to enter her lungs. Finally, moving her body to the middle of the room, the intruder cut her throat six times from right to left, cutting through her jugular vein, carotid artery, larynx and esophagus, almost to the spinal column. Despite her chest injuries, Ford was still alive when her throat was cut. She died from cumulative loss of blood. Forensic investigation established that the entire attack lasted from fifteen to thirty minutes.

Ford's body was discovered at 8:00 a.m. the next morning by her friend, Brenda Greggs. Greggs had walked over to use the telephone and discovered the front door ajar and the stereo playing. When her body was discovered, Ford was wearing only her nightgown turned inside out.

When police arrived at the Ford residence that morning, a small crowd gathered. Nathaniel Code, who lived in the neighborhood, was part of the crowd and talked to others about the murder.

Dr. George McCormick, the Caddo Parish Coroner, testified the crime was the work of one person and was clearly a signature crime. McCormick informed police the crime was the work of a serial killer who would kill again. McCormick noted four signature elements: the perpetrator's total control over the victim; the perpetrator's use of a knife to both stab and cut; the binding of the victim with an electrical cord; and the unique ligature used by the perpetrator. McCormick stated the killer was right-handed.

Investigation of the crime scene revealed three latent palm prints and a thumbprint on the bathroom window, window sill and inside wall below the window. The position of the recent prints was consistent with someone opening the window from the outside. All three palm prints and the thumbprint were later identified as matching those of Nathaniel Code.

Chaney Homicides: July 19, 1985

A few blocks from the Ford home in Shreveport, at 213 East 72nd Street, Vivian Chaney lived with her boyfriend, Billy Joe Harris. Also living in the house was Chaney's brother, Jerry Culbert, and her three daughters, Carlitha Culbert, Tomika Chaney and Marla Chaney. Vivian Chaney, Carlitha Culbert and Jerry Culbert were sight impaired. Tomika and Marla Chaney are mentally retarded.

Some time between 11:30 p.m. on July 18, 1985, and 6:00 a.m. the next morning, the back door to the Chaney residence was forced open. Jerry Culbert, Billy Joe Harris, Carlitha Culbert and Vivian Chaney were murdered. Each victim was found in a separate room. The youngest girls, Tomika, then 10 years old, and Marla, then 7 years old, were uninjured.

Twenty-nine year old Billy Joe Harris was killed in his front bedroom bed. He was shot twice in the left side of the head through a pillow. He was also shot twice in the chest. After being shot, he was still alive: his throat was cut. His hands were tied behind his back with shoelaces. His right wrist was tied tightly and a loop was made for the left wrist in a handcuff ligature. His ankles were also tied together with shoelaces. A telephone cord was used to tie his hands to his ankles. He was fully clothed.

Twenty-five year old Jerry Culbert was fatally shot once at close range in the left side of his head. He was found in his bed, still in his bedclothes, in the back bedroom of the house. There was no sign of a struggle; he was apparently killed while he slept. There were no ligatures on this victim.

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Fifteen year old Carlitha Culbert was found in the living room. She was lying on her stomach with her hands tied behind her with an electrical cord cut from an iron found in the house. The cord was wrapped tightly around her left wrist and then looped around her right wrist in the handcuff ligature. The electrical cord was loosely wrapped around her left ankle, as if there had been an attempt to hog-tie her. There was an untied piece of shoestring draped over her left leg. She had been gagged with silver duct tape. The shorts she was wearing were inside out.

Her throat was cut. Her body was then moved slightly. While still alive, she was almost decapitated. Two large pools of blood were found by her body. One area of blood near her left knee contained a blotted semicircle. A second pool of blood was found by her neck, where she finally bled to death.

Thirty-seven year old Vivian Chaney was found slumped over the bathtub. Her hands were tied behind her with a telephone cord. The cord came around the front of her waist and then down between her legs to tie her ankles. The bonds would have allowed her a hobbling walk. There was evidence that another ligature had been used around her neck to control her and to lead her around.

The back of Vivian's dress had a large amount of Carlitha's blood over the buttocks area and the lower hem, indicating that Vivian sat in the pool of blood caused by the initial cutting of her daughter's neck. There was evidence of both manual and ligature strangulation. She had been beaten violently about the head. She died from a combination of manual strangulation and bathtub drowning.

The bodies were discovered at 6:00 a.m. on July 19, 1985, by Shirley Culbert, the sister of Vivian Chaney and Jerry Culbert. She had just arrived from out of town and hoped to surprise the family. There was no answer to her knock at the front door, but she heard the stereo playing. She walked around to the back door, which opened when she knocked, and entered the house. She found Tomika and Marla asleep in a bed. It was very difficult to wake them. When she succeeded, the girls were hysterical. She took them out of the house and called the police. Relatives later discovered several items missing from the house, including Jerry Culbert's wallet, a jar of loose change, food stamps, a food stamp identification card, pictures of the girls and a striped tote bag. No money was found in the house, although Vivian Chaney had cashed a check for over $ 100 the day before.

Despite the number and viciousness of the murders, Dr. McCormick testified that the crimes were the work of one person. In his opinion, the crimes were committed by a serial killer working alone. Serial killers not only kill repetitively, but their crimes escalate. McCormick thought that this crime was an escalation of the Deborah Ford murder committed by the same person. The serial killer probably lived in the neighborhood and would be among the crowd gathered at the scene.

The scene indicated a logical progression as the sole murderer moved among the victims. The teenager, Carlitha, and a gun were used to control the adults.

McCormick theorized that the killer threatened Carlitha's life to immobilize Vivian Chaney and Billy Joe Harris. Vivian Chaney was tied so she could walk; Carlitha's hands were tied. After binding Billy Joe Harris, the killer shot him through a pillow to prevent disturbing the sleeping Jerry Culbert. Jerry Culbert was shot while he slept. The murderer next cut Carlitha's throat but did not kill her. He made Vivian Chaney sit down in her daughter's blood before taking Vivian to the bathroom and killing her by strangling and drowning. When the killer returned to the living room, Carlitha had either moved or the murderer moved her. He finished killing Carlitha by trying to decapitate her. At some point, the killer returned to Billy Joe Harris and stabbed him in the neck.

Investigative officers found pieces of duct tape consistent with the type used to gag Carlitha Chaney in the alley behind the Chaney house. Processing of the crime scene revealed three latent left palm prints on the bathtub over which Vivian Chaney's body was draped. McCormick theorized that the right-handed killer had used his dominant hand to hold her head under water while he steadied himself with his left hand. Testimony established that the fresh prints had been left after the tub had last been cleaned. The palm prints were later matched with Nathaniel Code's left palm print.

Oscar Washington, a National Guard member, was jogging that morning at approximately 2:15 a.m. in the area where Henderson Street intersects with 72nd and 73rd Streets. As Washington jogged south on Henderson, he saw Nathaniel Code, whom he knew from the neighborhood. The men spoke for a few minutes, Code telling Washington that he was going to tend to some business. Washington noticed Code had a little brown paper bag rolled up under his arm. Washington continued his run. Code headed north on Henderson, towards East 72nd Street.

About forty-five minutes later, Washington had turned around and was jogging north on Henderson. He again saw Code, this time between 73rd and 74th Street. Code, covered with blood, was heading south on Henderson. When Washington asked what had happened, Code stated he and someone had "got into it" and that "he had come out on top" and had "gotten even". Code now carried a peppermint striped bag. Code tried to sell Washington various things in the bag, including a knife Washington described as a dagger with a seven to eight inch blade, a hand gun, credit cards, food stamps and some marijuana. Washington noted the food stamps were smeared with blood.

Several days later, Washington again ran into Code. Code asked him, "What did you see me do?" When Washington told Code he did not know what Code was talking about, Code gritted his teeth and balled his fists. Washington testified Code made the same gesture when Code saw Washington sworn in as a witness. Although Washington heard about the Chaney homicides after they occurred, he did not know the details and did not immediately connect seeing Code that evening.

A neighbor, Ernest Demming, saw Code standing on the corner of Henderson and 72nd Street and staring at the Chaney house at 5:30 a.m. on July 19, 1985, before the bodies were discovered.

Code had been employed by a plumber from March 12 through the first week of July in 1985. A series

of witnesses established that Code had never rented the residence at 213 East 72nd Street and had never done plumbing work in the house. Duct tape found in the alley behind the Chaney residence and the duct tape used to gag Carlitha Culbert were found to be chemically identical to duct tape later found at Code's house. The pieces of tape either originated from exactly the same roll or from separate rolls made by the same company. It was professional grade tape used by plumbers and other professionals, unavailable at retail stores.

The two survivors of the murders did not testify. Both Marla and Tomika were examined by doctors prior to trial and found to be mildly mentally retarded. Tomika was interviewed several times by the police and by doctors. Sodium pentothal was administered in an effort to retrieve information about what she may have witnessed. She gave conflicting stories. The majority of the time she stated one killer broke in the back door carrying a knife with holes in it and a rope. Tomika's drawing of the knife matched the description of a knife missing from Deborah Ford's house. She also gave other statements about the killer and "ladies" breaking in that night and putting flies and spiders on the face of Billy Joe Harris. Officers arriving on the scene found flies on Billy Joe Harris; the coroner found evidence of post-mortem roach bites on his face. Marla was generally withdrawn. By joint stipulation, the state and defense agreed not to call the girls as witnesses. Testimony regarding Tomika's differing statements and a videotape of Tomika's interview were admitted in evidence.

William Code Homicides: August 5, 1987

Nathaniel Code's 73-year-old grandfather, William T. Code, lived at 641 West 66th Street in Shreveport. On August 4, 1987, William Code worked in his yard with the two grandsons of a friend, Enamerteen Williams. The two boys, 8-year-old Eric Williams and 12-year-old Joe Robinson, were seen working with William Code in his yard as late as 8:00 p.m. Mrs. Williams gave telephone permission for the boys to spend the night with William Code, as they had done in the past.

Mrs. Williams became concerned when the boys did not return home the next morning and went to William Code's residence that afternoon. The doors were locked, and steel burglar bars on the windows and doors kept her from gaining entrance. There was no sign of forced entry. Although no one answered her knocking, she heard music playing. It was later discovered the television was on. Through the window she could see the bound foot of Joe Robinson. Mrs. Williams went home, called the police and returned with her brother, niece and granddaughter to William Code's house. After using her key to open the burglar bars on one of the windows, Mrs. Williams and her brother discovered the bodies of William Code and the two boys. All three victims were found in separate rooms.

Joe Robinson was found lying face down on the living room couch. He had been struck in the forehead with a blow severe enough to have dazed him. He had bruises on the shoulders beneath the skin and over both collarbones. His ankles were tied with a white plastic cord. Each end of the cord was tied around an ankle and there was a gap in between. A length of the same cord had been used to

tie his hands together behind his back, with one end of the plastic cord tied to one wrist and the other end tied to the other wrist like handcuffs. A loose length of cord around his neck held a gag; a doubled length of the cord was used to strangle him. The boy was only wearing a pair of underwear which had been turned inside out.

Eric Williams was found lying face down between two twin beds in a small bedroom where he had been dragged from one of the beds. Plastic rope held a gag around his neck. His hands had been tied identically to the way the other boy's hands were tied, in a handcuff ligature. One ankle was tied with this cord, but then it ran out. The killer then took electrical cord to finish binding the boy's ankles together. A second length of electrical cord was used to strangle the boy. There were no signs that a struggle took place. The boy was wearing a pair of underwear.

William Code was found lying face down on his bed, dressed in a dressing gown. His ankles were bound with electrical cord, then the cord was brought up the front of his legs and tied to his wrists. His hands were tied behind his back with electrical cord in the handcuff ligature. A telephone cord around his neck held a gag in place.

The autopsy showed William Code had been struck a very heavy blow to the side of his head which alone could have caused his death. Hemorrhages in his brain were consistent with being beaten about the head with a fist. He had been stabbed five times in the chest, seven times in the back, and once in a major artery of the right upper arm with a long knife. Several of these wounds would have been fatal, but William Code died of their cumulative effect. Pat Wojtkiewicz of the North Louisiana Crime Lab testified that medium velocity blood spatter was found on the wall in William Code's bedroom where he was killed.

McCormick testified that one person was responsible for the murders. The two boys were tied in the same way, gagged in the same way and killed in the same way. Materials from the house were used to tie William Code. McCormick testified the victims were probably killed in the order in which they were found. Since there was no sign of forced entry, Robinson probably let the murderer in the front door. Robinson was subdued by a strong blow to the head, then gagged, tied and strangled. Williams, who was in the front bedroom, was probably surprised as he slept. There was no sign of a struggle. Williams was then tied and killed.

McCormick testified that the focus of the murders was William Code. There was no element of overkill in the two boys and no knife was used on them. By contrast, William Code was beaten repeatedly over the head and rolled front and back to be stabbed many more times than would have been necessary to kill him. McCormick theorized that this showed an emotional relationship between the victim and the murderer.

No money was found in the residence, although William Code had cashed checks totaling between $ 400 and $ 600 the day before he was murdered. A small caliber pistol was missing as well.

Investigators found a knife and a set of keys in a storm drain approximately 600 feet from the residence. The knife was similar to a set found in William Code's kitchen; the keys fit the victim's door.

Donald Ray Johnson, William Code's neighbor, testified he saw Nathaniel Code exit William Code's residence sometime after 8:00 p.m. the night of the murders. Johnson saw Code shut the inner door and the iron bars, check to make sure they were locked, then walk out to a vehicle. Code drove down the street toward Johnson and stopped to say hello through the car window. Code introduced the female passenger in the car as his new wife, then the two drove off. Johnson thought the situation unusual because William Code always walked guests to the door to make sure the security doors were locked and because he knew William Code would not allow Nathaniel Code into his house. Johnson had been present two weeks before when William Code had refused to loan any more money to his grandson because Nathaniel Code had not paid him back.

John Huckabee, an electrician who installed security lighting at the Code residence, testified about a conversation he had with William Code in which William Code stated he was afraid of his grandson and told of Nathaniel Code's attempt to borrow money from him in the past. William Code had refused to lend his grandson the money.

After the bodies were found, Nathaniel Code approached investigating officers and introduced himself as the victim's grandson. Code stated he had received a call from William Code on the evening prior to the murders at approximately 10:30 p.m. or 11:00 p.m. in which William Code asked him to come to his residence complaining there were people hanging around his house. Code stated he went to his grandfather's house at approximately 2:00 a.m. on the morning of August 5. Nathaniel Code stated that after his grandfather let him into the house, he checked the house and the surrounding area for suspicious persons, then left on his bicycle. He returned once to check the outside again, then rode his bicycle home.

Nathaniel Code agreed to accompany police to the station to give a statement since he was, apparently, the last person to see his grandfather alive. Investigators became suspicious of Code because he stated he touched the vacuum, fan, humidifier and phone while at his grandfather's house; these were the items from which the electrical cord was cut to bind the victims. Code agreed to allow the police to seize the clothes and shoes he had worn the day before.

His finger and palm prints were matched to the latent palm prints found at the Chaney homicide. Code was informed of his constitutional rights, questioned and arrested for the Chaney homicides. Later, Wojtkiewicz of the crime lab located a medium velocity blood spatter on the tennis shoes worn by Code. Although the crime lab determined the blood was human, there was an insufficient amount to do any further typing.

Later, the police obtained consent from Code's wife to search their residence. Among other items,

police seized several cut electrical cords and professional grade duct tape.

Testimony was adduced that Nathaniel Code had approached several people seeking a loan just prior to the murders. The day before the bodies were found, Nathaniel Code had approached Shreveport narcotics officers and offered his services as a paid confidential informant. He indicated that he knew of persons who were dealing drugs and needed $ 100 to pay one of them.

The day the bodies were found, Nathaniel Code called his cousin, Beatrice Holmes, and invited her to his house. The two shared a gram of cocaine which Code supplied and then went to a liquor store where Code purchased beer. On the way home, he purchased a second gram of cocaine. Holmes and Code were shooting this cocaine when they were interrupted by a phone call informing them of William Code's death. Holmes testified that a gram of cocaine sold for $ 150 at that time.

USE OF "OTHER CRIMES" EVIDENCE

The defendant contends it was reversible error for the trial court not to exclude evidence concerning the Ford homicide and the William Code homicides in the guilt and sentencing phases of his trial. He argues the state did not establish that the evidence had an independent relevance and failed to sufficiently prove the defendant was involved in the perpetration of the other crimes.

Guilt Phase

In general, evidence of other crimes is inadmissible in the guilt phase of a criminal trial for several reasons. Admission of evidence that the defendant may have committed other crimes creates the risk the defendant will be convicted of the present offense simply because he is a "bad person." Juror confusion may occur where collateral issues are introduced. In addition, a defendant may not be prepared to face such attacks. State v. Bourque, 622 So.2d 198, 233 (La. 1993); State v. Prieur, 277 So.2d 126, 128-30 (La. 1973).

Statutory and jurisprudential exceptions exist to this rule where the state offers evidence of other crimes for purposes other than to show the character of the defendant. State v. Jackson, 608 So.2d 949 (La. 1993). La. Code of Evid. art. 404(1) provides:

Except as provided in Article 412 [not relevant here], 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, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

State v. Prieur outlined the procedure to be used when the state intends to offer evidence of other criminal offenses. The Prieur decision dealt with LSA-R.S. 15:445 and 446, now-repealed statutes

detailing the admissibility of other crimes evidence. La. Code of Evid. art. 1103 provides that the notice requirements and evidence standards of Prieur and its progeny have not been overruled by the new Code of Evidence. Under Prieur, the state is required to give a defendant notice that evidence of other crimes will be offered and which exception to the general exclusionary rule the state is relying upon. Prieur, 277 So.2d at 130. In addition, the state must prove by clear and convincing evidence that the defendant committed the other crimes. Prieur, 277 So.2d at 129.

Case law has established an exception to the general inadmissibility of other crimes evidence to include evidence showing modus operandi. See State v. Henry, 436 So.2d 510 (La. 1983); State v. Talbert, 416 So.2d 97 (La. 1982); State v. Hatcher, 372 So.2d 1024 (La. 1979). Several factors must be met for evidence to be considered as evidence of modus operandi:

(1) there must be clear and convincing evidence of the commission of the other crimes and the defendant's connection therewith; (2) the modus operandi employed by the defendant in both the charged and the uncharged offenses must be so peculiarly distinctive that one must logically say they are the work of the same person; (3) the other crimes evidence must be substantially relevant for some other purpose than to show a probability that the defendant committed the crime on trial because he is a man of criminal character; (4) the other crimes evidence must tend to prove a material fact genuinely at issue; and (5) the probative value of the extraneous crimes evidence must outweigh its prejudicial effect.

Hatcher, 372 So.2d at 1033 (citations omitted); see also State v. Henry, 436 So.2d at 513; Talbert, 416 So.2d at 99-100.

Prior to trial, the state notified the defendant of its intent to use evidence of the Ford homicide and William Code homicides in the guilt phase "for the purpose of showing motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident" under La. Code of Evid. art. 404B. In addition, the state claimed the evidence of the William Code homicides had independent relevance constituting an integral part of the acts and transactions regarding the Chaney homicides.

At a pretrial hearing, the state introduced evidence to show the connection between the defendant and the Ford homicide. The point of entry into the Ford residence was determined to be the bathroom window. Fingerprints left on the window were consistent with someone entering the house from the outside and were inconsistent with someone standing in the bathroom and touching the window. The fingerprints had been left very recently. The fingerprints were matched to the defendant.

The state introduced evidence to show the connection between the defendant and the William Code homicides. The defendant placed himself at the elderly Code's residence the night he and the two boys were murdered. The defendant acknowledged touching each electrical appliance and phone

from which cords were taken to bind the victims. The defendant was seen leaving the Code residence. William Code did not follow his usual practice of walking visitors out and checking the security doors. The defendant left the residence and drove down the street in the direction where Code's house keys and a knife were discovered the next day. There was no sign of forced entry into the house, implying the victims knew their killer. William Code was afraid of the defendant and would not have let him into his house: Joe Robinson probably admitted him. No money was found in the house despite the fact William Code had between $ 400 -- $ 600 dollars in cash. Prior to the murders, the defendant had tried to borrow money from several persons, including William Code, and was refused. On the day the bodies were found, the defendant had several hundred dollars. Medium-velocity blood spatters were found in William Code's bedroom. A medium-velocity blood spatter was found on the shoe the defendant wore the night of the murders.

In addition to this evidence, the state presented the expert testimony of Dr. McCormick, the coroner for Caddo Parish. McCormick testified all three crime scenes were signature crimes of one person. He believed one person committed all the murders because the harm was done in a sequential manner and there were similarities in how the persons were handled and killed. The signature aspects found by McCormick were the handcuff-type bindings with electrical cord, the use of a knife to stab or cut and the immobilization of the victims.

Supervisory Special Agent Douglas of the FBI testified as an expert in the field of criminal investigative analysis. He explained the difference between the "modus operandi" and the "ritual aspects" of a crime. Modus operandi is learned behavior which can change as a criminal learns, modifies and adapts his behavior to fit a particular situation. Ritual aspects of a crime do not change and are linked to the criminal's internal need to do certain things. Douglas was convinced the murders were the work of one person.

Douglas acknowledged that these crimes had modus operandi dissimilarities in point of entry, weapons used and time sequence between killings. However, the crimes had several identical ritual aspects, the most important being the distinctive handcuff ligature. Douglas had never seen this type of ligature before, nor had any crime enforcement personnel he consulted. In addition to the unique way the ligatures were tied, Douglas noted the use of electrical appliances from inside the residences. So unique were the bindings that he stated "if you would put all those cases together in one pile, you would look and say, 'This all happened at one case. This is one instance.'" He noted Vivian Chaney and William Code were tied in an identical manner.

Another ritual aspect of the murders Douglas recognized was the killer's need for manipulation, domination and control over his victims. Placing the victims in different rooms was consistent with this ritual. The positioning of Deborah Ford and Carlitha Chaney was almost identical.

Douglas also noted the aspect of overkill present in each crime scene, i.e., the victims were not just stabbed, they were almost decapitated. Another ritual aspect was the predominant use of a knife. So

prevalent were the cases' ritual aspects that Douglas testified "it is not even a difficult case for us, we believe, to show the signature aspect." Each law enforcement officer that visited the three crime scenes was convinced the murders were the work of the same person.

After hearing this evidence, the trial court ruled the evidence admissible. The trial court concluded that the state met the requirements of Prieur and those of art. 404by clear and convincing evidence. The trial court held the probative value of the evidence was not substantially outweighed by unfair prejudice.

We find no error in the trial court's ruling. The state showed by clear and convincing evidence the commission of the other crimes and the defendant's connection to them. The expert testimony established that these were signature crimes. The ritual aspects of the Chaney homicides, the Ford homicide and William Code homicides were so distinctive as to lead to the Conclusion they were the work of the same person. The issue of identity was genuinely at issue in this case. The other crimes' probative aspect on the identity issue outweighed their prejudice to the defendant.

Sentencing Phase

The defendant also argues it was reversible error for the trial court to allow evidence of these unadjudicated other crimes in the sentencing phase of the trial. In the bifurcated sentencing phase of a first degree murder trial, the character of the defendant is automatically at issue, whether the defendant has placed his character at issue or not. State v. Bourque, 622 So.2d 198, 245 (La. 1993); State v. Jackson, 608 So.2d 949, 953 (La. 1992); La. C.Cr.P. art. 905.2. "This court has previously determined the enumerated aggravating circumstances of La. C.Cr.P. art. 905.4 should not be considered as limiting the scope, or controlling the admissibility, of the sentencing hearing's inquiry into a defendant's character." Bourque, 622 So.2d at 246. Evidence of unadjudicated other crimes is relevant and probative evidence of the defendant's character and propensities. Jackson, 608 So.2d 949 at 954-56; State v. Brooks, 541 So.2d 801, 813 (La. 1989).

In Brooks, this court held such evidence of unadjudicated crimes admissible during the sentencing phase after the trial court determines "1) the evidence of defendant's connection with commission of the unrelated crimes is clear and convincing; 2) the proffered evidence is otherwise competent and reliable; and 3) the unrelated crimes have relevance and substantial probative value as to the defendant's character and propensities, which is the focus of the sentencing hearing under La. C.Cr.P. art. 905.2." Brooks, 541 So.2d at 814.

The Brooks holding was further limited in Jackson "to that [evidence] which involves violence against the person of the victim," and "to that conduct for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for the first degree murder for which he is being tried." Jackson, 608 So.2d 949 at 955.

The record shows the state gave notice of its intent to use evidence of the Ford and William Code homicides at the sentencing phase of the trial to show the defendant's character and propensities. After the Prieur hearing was held, and the evidence was ruled admissible in the guilt phase, the trial court held the state had also met the Brooks' requirements for introduction of the evidence in the sentencing phase.

We find no error in the trial court's ruling. The state showed by clear and convincing evidence the defendant's connection with the unrelated crimes. The evidence of the Ford and William Code homicides was otherwise competent and reliable and had relevant and probative value as to the defendant's character and propensities. Jackson, 608 So.2d 949 at 955 ("crimes of violence against the person indicate moral qualities and character traits pertinent to the propensity to commit first degree murder"). The Jackson limitations as to the type of evidence admissible were also met. In addition, evidence of these other crimes was not the only information given to the jury. Much testimony was devoted to the defendant's psychological makeup; other information was introduced as to his character and propensities. There was no focus on the other crimes evidence which might have shifted the jury's focus from a determination of an appropriate penalty for the Chaney homicides. Compare State v. Bourque, 622 So.2d 198 (La. 1993).

UNASSIGNED ERROR

This Court's review of the record of a capital defendant includes a review for record error. Two expert witnesses opined that the defendant was the perpetrator of the Chaney homicides. Sgt. L. L. Jackson, a fingerprint expert, stated he positively believed the palm prints left by the defendant on the Chaney's bathtub were left when the defendant drowned Vivian Chaney. Tr. 4048, 4069-70. Detective Mark Rogers, an expert in fingerprint and crime scene analysis, testified that the palm prints lifted from the bathtub, which had been matched to the defendant's, were left by the perpetrator of the crime. Tr. 4126. No contemporaneous objection was raised to this testimony. The lack of contemporaneous objection or assignment of error as to this issue does not preclude this Court's review in a capital case. State v. Smith, 554 So.2d 676 (La. 1989).

When defense counsel did object to the general nature of this testimony during the testimony of another expert witness, the trial court sustained the objection and requested that the state rely on hypothetical questions which would avoid suggestiveness in the answers.

La. C.Cr.P. art. 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.

This Court has held it is reversible error for an expert witness to testify as to an ultimate issue of the

defendant's guilt, even when couched in terms of a hypothetical situation. State v. Jones, 558 So.2d 546 (La. 1990): State v. White, 450 So.2d 648 (La. 1984); State v. Montana, 421 So.2d 895 (La. 1982). Sgt. Jackson's opinion that the defendant left his palm print on the bathtub when he killed Vivian Chaney expressly violated the prohibition against expert testimony on an ultimate issue of fact. The testimony of Detective Rogers implicitly violated the rule as well.

Finding this error, however, does not necessarily end our analysis. The Supreme Court has implied the harmless error analysis is available for trial errors which may deprive the jury of its factfinding role. In Carella v. California, 491 U.S. 263, 109 S. Ct. . . 2419, 105 L. Ed. 2d 218 (1989) (per curiam), the United States Supreme Court remanded for a determination of whether a harmless error analysis applied where the jury was erroneously instructed as to the applicability of a mandatory conclusive presumption. The Court noted "the Due Process clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Jury instructions relieving States of this burden violate a defendant's due process rights. Such directions subvert the presumption of innocence accorded to accused persons, and also invade the truth-finding task assigned solely to juries in criminal cases. " Carella, 109 S. Ct. . . at 2420 (citations omitted and emphasis supplied). The mandatory directions at issue in Carella directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offense with which the defendant was charged. See also Pope v. Illinois, 481 U.S. 497, 107 S. Ct. . . 1918, 95 L. Ed. 2d 439 (1987) (case remanded for lower courts to determine application of harmless error analysis to jury instruction containing misdescription of an element of the crime which deprived jury of its factfinding role).

The proper analysis for determining harmless error is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, U.S., 113 S. Ct. . . 2078, 2081, 124 L. Ed. 2d 182 (1993) (emphasis in original).

Prior to the Supreme Court's Sullivan opinion, which replaced the earlier harmless error analysis of Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), Justice Scalia suggested a separate harmless error analysis when reviewing an error which deprives the jury of its fact-finding role. See Carella, J. Scalia concurrence, joined by Justices Brennan, Marshall and Blackmun. Justice Scalia suggests the following analysis:

When the predicate facts relied upon in the instruction, or other facts necessarily found by the Jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed. The error is harmless because it is "beyond a reasonable doubt" that the jury found the facts necessary to support the conviction.

Carella, 109 S. Ct. . . at 2423 (J. Scalia, concurrence, internal citation omitted).

Under either the Sullivan harmless error analysis or the separate analysis suggested by Justice Scalia in Carella, the record of this case shows the error at issue here was unmistakably harmless. The state called five expert witnesses who testified the palm prints recovered from Vivian Chaney's bathtub matched the defendant's prints and were left on the recently cleaned bathtub near the time of the murder. Expert testimony made clear the prints were left as a result of forceful pressure downward and were inconsistent with those that would be left by someone getting in or out of the bathtub. Expert testimony established the palm prints were in such a position that they could only have been left by someone who held Vivian Chaney over the bathtub. The position of Vivian Chaney's body draped over the bathtub supported this Conclusion. The state presented extensive evidence to show the defendant had never rented the Chaney house and had never worked there as a plumber.

In addition, the trial court instructed the jury that it alone was to determine ultimate issues:

It is the duty of the jurors to consider the opinions of an expert together with all the other testimony in the case and to give them such weight as they deem proper. However, experts are not called into court for the purpose of deciding the case. You, the jurors, are the ones who, in law, must bear the responsibility of deciding the case. The experts are merely witnesses, and you have the right to either accept or reject their testimony and opinions in the same manner and for the same reasons for which you may accept or reject the testimony of other witnesses in the case.

Tr. 5381.

Considering the admissible evidence concerning the palm prints, no rational juror could find those facts without also finding the ultimate fact of the defendant's guilt. It is beyond doubt the guilty verdict in this case was unattributable to the erroneous testimony.

CAPITAL SENTENCE REVIEW

This Court reviews every death sentence to determine if it is excessive. LSA-C.Cr.P. 905.9. Under Supreme Court Rule 28, the factors reviewed include: (1) whether the sentence was imposed under the influence of passion, prejudice or other arbitrary factors; (2) whether the evidence supports the finding of one or more statutory aggravating circumstances; and (3) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS

There is no evidence that passion, prejudice or any other arbitrary factors influenced the jury in its recommendation of the death penalty. Defendant and all of his victims are African-Americans.

AGGRAVATING CIRCUMSTANCES

Three aggravating circumstances were found: (1) Code was engaged in an armed robbery; (2) he killed more than one person; and (3) at least three of the murders were committed in a heinous and cruel manner, involving unnecessary pain and torture.

There was direct and circumstantial evidence that Code broke into the home of the victims, armed with a knife and a gun, and robbed them. The evidence establishes beyond any reasonable doubt that Code murdered the four members of the Chaney household, Vivian Chaney, Carlitha Culbert, Jerry Culbert and Billy Joe Harris.

Jerry Culbert was shot once in the head while sleeping. The jury correctly found that Jerry Culbert's murder was not heinous. Billy Joe Harris bled to death after his throat was slashed, and he was also shot. Vivian Chaney was severely beaten, dragged by a neck cord, partially strangled and drowned in her bathtub. Vivian Chaney sat in her daughter's blood while Code slashed at her daughter Carlitha's throat. Carlitha was bleeding to death when Code slashed her throat again, nearly decapitating her. The jury correctly concluded that three of the charged murders were committed in an especially cruel manner involving torture and unnecessary pain.

PROPORTIONALITY

Nathaniel Robert Code, Jr. was born March 12, 1956, and was 29 years of age when he committed the Chaney murders on July 19, 1985. Code was given extensive testing. The tests revealed no organic brain disorder. Code has normal intelligence. He can distinguish right from wrong and was able to cooperate intelligently in his own defense. He has no apparent mental or physical impairments. Code was diagnosed in 1975 as a paranoid schizophrenic, but the medical experts who examined him in connection with this trial questioned that diagnosis.

In the opinion of Dr. Mark Vigen, a psychologist, Code is not schizophrenic. Dr. Paul Ware, a psychiatrist, testified that the 1975 diagnosis of paranoid schizophrenia was erroneous. Dr. Ware said that Code has an antisocial personality disorder. Another psychiatrist, Dr. Kenneth Ridder, agreed that Code has a borderline personality disorder. According to Dr. Mark Zimmerman, a clinical psychologist, Code has a borderline personality disorder and will decompensate into paranoid schizophrenia under stress. Dr. Richard Rappaport, a forensic psychiatrist, testified that Code suffers from a borderline personality disorder but could have been psychotic when he committed the murders.

The statutory mitigating circumstances are set forth in LSA-C.Cr.P. art. 905.5:

Art. 905.5 Mitigating circumstances

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.

None of the statutory mitigating circumstances are present here. Code's work history is sporadic. He served 15 years at hard labor for attempted aggravated rape. There is no evidence that any other person was involved in the crimes. Code's crimes are not mitigated by youth. See Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. . . 869, 71 L. Ed. 2d 1 (1982), and Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. . . 2934, 106 L. Ed. 2d 256 (1989). Code does not have a deficient mentality or other handicap which would weigh in favor of a lesser sentence.

The Louisiana statute allowed the jury to consider all relevant mitigating evidence. Compare Johnson v. Texas, U.S.(1993).

Since January 1, 1976, there have been no comparable murders in Caddo Parish. A death sentence was imposed on Glenn Ford in State v. Glenn Ford, 489 So.2d 1250 (La. 1985), cert. granted and judgment vacated at 479 U.S. 1077, 107 S. Ct. . . 1272, 94 L. Ed. 2d 133 (1987), on remand, 503 So.2d 1009 (1987). The only aggravating circumstance was armed robbery. The victim was shot once through the head, and the murder was not heinous.

There are other multiple murder cases in Louisiana. A death sentence was imposed in State v. Deboue, 552 So.2d 355 (La. 1989), cert. denied, 498 U.S. 881, 111 S. Ct. . . 215, 112 L. Ed. 2d 174 (1990), reh. denied, 498 U.S. 993, 111 S. Ct. . . 541, 112 L. Ed. 2d 550 (1990), where two children, ages six and eleven, were killed during an armed robbery by having their throats slashed with razor blades and a

knife. The death sentence was also rendered in State v. Perry, where Perry killed five family members and the aggravating circumstance was a risk of death to more than one person. State v. Perry, 502 So.2d 543 (La. 1986), cert. denied, 484 U.S. 872, 108 S. Ct. . . 205, 98 L. Ed. 2d 156 (1987), reh. denied, 484 U.S. 992, 108 S. Ct. . . 511, 98 L. Ed. 2d 511 (1987). There was a death sentence in State v. Lowenfield, 495 So.2d 1245 (La. 1985), cert. denied, 476 U.S. 1153, 106 S. Ct. . . 2259, 90 L. Ed. 2d 704 (1986), reh. denied, 478 U.S. 1032, 107 S. Ct. . . 13, 92 L. Ed. 2d 768 (1986), where five people were shot and the aggravating circumstance was a risk of death to more than one person.

Death penalties were imposed in State v. Wingo, 457 So.2d 1159 (La. 1984), cert. denied, 471 U.S. 1030, 105 S. Ct. . . 2049, 85 L. Ed. 2d 322 (1985), reh. denied, 471 U.S. 1145, 105 S. Ct. . . 2691, 86 L. Ed. 2d 708 (1985); and in State v. Glass, 455 So.2d 659 (La. 1984), cert. denied, 471 U.S. 1080, 105 S. Ct. . . 2159, 85 L. Ed. 2d 514 (1985), reh. denied, 472 U.S. 1033, 105 S. Ct. . . 3516, 87 L. Ed. 2d 645 (1985). Wingo and Glass bound and gagged their two elderly victims and shot each of them once in the head. The jury found the same three aggravating circumstances that the jury found in this case. On appeal, the question of whether the murders were especially heinous, atrocious and cruel was pretermitted.

Death sentences have generally been imposed where there were multiple murders. Only in State v. Wingo and State v. Glass did the jury find the same three aggravating circumstances. The heinous aspect of Code's crimes is much clearer than it was in the Glass-Wingo murders. Considering Code's character and record, and the circumstances of the offenses, Code's death sentence is not disproportionate to that imposed in similar cases in Louisiana.

For the reasons assigned, the conviction and sentence of defendant, Nathaniel Robert Code, Jr., are affirmed for all purposes, except that this judgment shall not serve as a condition precedent to execution as provided by LSA-R.S. 15:567 until:

(a) defendant fails to petition the United States Supreme Court timely for certiorari;

(b) that court denies his petition for certiorari;

(c) having filed for and been denied certiorari, defendant fails to petition the United States Supreme Court timely under their prevailing Rules for rehearing of denial of certiorari; or

(d) that court denies his application for rehearing.

AFFIRMED.

UNPUBLISHED APPENDIX

Assignment of Error #1

11/29/93 State of Louisiana v. Nathaniel Robert Code

627 So. 2d 1373 (1993) | Cited 0 times | Supreme Court of Louisiana | November 29, 1993

The defendant argues the trial court erred in denying three pretrial motions: Motion to Sever, Motion to Require the State to Show Pretrial Prima Facie Case of Aggravating Circumstances and Motion to Quash Aggravating Circumstances.

Motion to Sever

The defendant was initially indicted on five counts of first degree murder joined in a single indictment: the Ford homicide (count one), and the Chaney homicides (counts two-five). The defendant moved to sever the charges; this Court eventually granted relief. State v. Code, 535 So.2d 736 (La. 1989), recon. denied, 537 So.2d 1159 (La. 1989). The state amended the indictment, charging the defendant with the Chaney homicides in counts one-four. Thus, the defendant's argument is moot; he was granted relief from this Court.

As to the substantive aspects of this claim, the defendant argues the effect of the severance was subsequently eroded by the state using the evidence of the Ford and William Code homicides as other crimes evidence. La. C.Cr.P. art. 495.1 provides:

If it appears that a defendant or the state is prejudiced by a joinder of offense in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief Justice requires.

There is nothing in the procedural article which limits the later use of the severed offense as evidence. The granting of severance by this court did not preclude the admissibility of the other crimes evidence. Instead, the admissibility of "other crimes" evidence is controlled by distinct evidentiary law concerning the quantum of proof offered, the relevance of the evidence, and the potential for unfair prejudice to the defendant. As found in the opinion, the trial court correctly found the evidence of the Ford and William Code homicides admissible at trial.

Motion to Require the State to Show Pretrial a

Prima Facie Case of Aggravating Circumstances

The defendant filed a motion to require the state to reveal the evidence it was relying on to seek the death penalty in the Chaney homicides, particularly the murder of Jerry Culbert. This motion did not request a pretrial showing of aggravating circumstances under La. C.Cr.P. art. 905.4, but rather argued the state could produce no evidence to support its allegations under LSA-R.S. 14:30(1) and (3). The state had previously supplied these aggravating factors in answer to a motion for bill of particular. Evidently, the defense was concerned that no aggravating factors could be shown in the Jerry Culbert murder, whose death did not exhibit elements of overkill or torture present in the others, and that his murder should have properly been charged as second degree murder. The defense argued once a "death-qualified" jury was empaneled, he would be prejudiced thereby.

The record shows the state did specifically respond to the defense request for designation of aggravating circumstances it was to rely on under LSA-R.S. 14:30. Challenges to jurors under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. . . 1770, 20 L. Ed. 2d 776 (1968), were properly available to the state.

Motion to Quash

(Motion to Restrict Aggravating Circumstances)

In response to a discovery request, the state informed the defendant it was relying on the following aggravating circumstances in seeking the death penalty:

1) C.Cr.P. Art. 905.4(1). The offender was engaged in the perpetration or attempted perpetration of armed robbery, simple robbery, first degree robbery and aggravated burglary.

2) C.Cr.P. Art. 905.4(4). The offender knowingly created a risk of death or great bodily harm to more than one person.

3) C.Cr.P. Art. 905.4(7). The offense was committed in an especially heinous, atrocious or cruel manner.

The defendant moved to restrict the aggravating circumstances relied on, specifically La. C.Cr.P. art. 905.4(7), arguing the statute is overbroad and vague. In brief, the defendant argues this aggravating circumstance was inapplicable to the murder of Jerry Culbert and that, without a limiting instruction, the statute violates Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. . . 1853, 100 L. Ed. 2d 372 (1988). Further, the defendant argues La. C.Cr.P. art. 905.4(1), when considered with LSA-R.S. 14:30(1), constitutes an improper "double counting."

The record shows the jury did not find art. 905.4(7) applicable to the murder of Jerry Culbert, but instead found the existence of two other aggravating circumstances, either of which support the conviction for first degree murder and the imposition of the death penalty. See LSA-C.Cr.P. arts. 905.4(1) and (4); LSA-R.S. 14:30(1) and (3).

Contrary to the defendant's assertions, Louisiana law does provide a limiting instruction for use with La. C.Cr.P. art. 905.4(7). In State v. Deboue, 552 So.2d 355, 367 n.11 (La. 1989), cert. denied, 498 U.S. 881, 111 S. Ct. . . 215, 112 L. Ed. 2d 174 (1990), this Court approved the trial court's limiting instruction which informed the jury that in order to find this aggravating circumstance applicable, the jury must find "some degree of torture or pitiless infliction of unnecessary pain on the victim of the first degree murder. Generally, physical abuse is necessary with death being brought about in a particularly painful and inhuman matter [sic]." The Court delivered a limiting instruction in this case consistent with Deboue.

The "double counting" argument, that including an element of first degree murder which is duplicated as an aggravating circumstance for imposition of the death penalty makes the death penalty unconstitutional, has been rejected by this Court and the U.S. Supreme Court. Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. . . 546, 98 L. Ed. 2d 568 (1988); State v. Lindsey, 543 So.2d 886 (La. 1989), cert. denied 494 U.S. 1074, 110 S. Ct. . . 1796, 108 L. Ed. 2d 798 (1990). The trial court properly denied this motion.

Assignment of Error #2

The defendant argues it was reversible error for the trial court to deny his motion to suppress. While at the police station to give an informational statement following the William Code homicides, the defendant gave police permission to search his residence to obtain the clothes he was wearing on the night of the homicides. The police search took place August 5-6, 1987, between 11:55 p.m. and 12:05 a.m. At the residence, the police obtained an additional written consent by Vera Code, the defendant's wife. In addition to the defendant's clothing, the police seized two knives.

Subsequent searches of the defendant's residence took place on August 6 and September 3; both were conducted pursuant to written consent of Vera Code. During these searches, police obtained pieces of electrical cord and professional duct tape which were offered in evidence at the defendant's trial. On August 7, the police seized body samples from the defendant, including blood, hair, urine, saliva and photographs.

The defendant filed a motion to suppress all items seized except his clothing, urging the written consents to search executed by Vera Code were invalid. The trial court suppressed the two knives seized in the first search as outside the scope of the defendant's initial consent. Further, the trial court was not clear that Vera Code understood she was expanding on the original consent to search executed by her husband. In all other respects, the motion to suppress was denied.

The defendant urges Vera Code is mildly mentally retarded and was not mentally or emotionally capable of giving consent to search. The defendant also argues police officers misled Vera Code as to the purpose of the searches.

A search conducted without a warrant issued upon probable cause is per se unreasonable subject to a few specifically established and well-delineated exceptions; one of which is a search conducted pursuant to consent. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. . . 2041, 36 L. Ed. 2d 854 (1973); State v. Pautard, 485 So.2d 909 (La. 1986). The state has the burden of proving consent is freely and voluntarily given when consent is relied upon to justify the lawfulness of a search. Pautard, 485 So.2d at 912. Voluntariness is a fact question to be determined by the trial Judge under the facts and circumstances of each case. This factual determination is entitled to great weight on review. State v. Edwards, 434 So.2d 395 (La. 1983).

The seizure of the defendant's clothes is not at issue here; neither is the seizure of the two knives which were suppressed by the trial court. With regard to the body samples seized from the defendant, defense counsel at the suppression hearing asked only that the court make an investigation into the warrant to determine whether there was probable cause to support it. As none of this evidence was admitted at trial, the defendant can point to no prejudice stemming from this seizure. The only items contested are the electrical cords, none of which was traced to any crime scene, and a speaker with duct tape later found consistent with the type used to gag Carlitha Culbert.

Despite expert testimony concerning Vera Code's mild mental retardation and apparent inability to understand the language level used in a consent to search form based on her first grade reading ability, the record supports the trial court's ruling denying the motion to suppress. Vera Code demonstrated she was able to understand questions on direct and cross examination both at the suppression hearing and at trial. She could recall with specificity events occurring at the time of the Chaney homicides. She responded directly, intelligently and appropriately to questions asked by both defense and prosecution. She acknowledged that police officers told her she could refuse the search or stop it at any time and she understood this. She told police officers she knew nothing of the murders. The police were free to search the residence because she had nothing to hide. The police informed her when the defendant became a suspect in the murders. In the subsequent searches, police officers told her they were searching for evidence as to the charges pending against her husband.

Each officer who participated in the consent searches testified Vera Code appeared to understand what she was being told, was cooperative, did not appear under the influence of alcohol or drugs, appeared cognizant of her surroundings and answered and acted appropriately to the situation. The officers also all testified that they did not coerce, threaten or promise her anything in exchange for her consent to search. Vera Code specifically confirmed this fact. Thus, it does not appear that the trial court erred in finding that Vera Code "had the ability to understand what she was doing at the time the consents to search were executed [with the exception of the first search]."

Assignment of Error #3

The defendant argues the trial court erred in denying three pretrial motions: Motion to Quash the Indictment, Motion for Change of Venue and Supplemental Motion for Change of Venue.

Motion to Quash the Indictment

The defendant filed a motion to quash the indictment on two general grounds. First, the defendant argued that the grand jury and petit jury venires in Caddo Parish were not drawn from a representative cross-section of the community, but only from voter registration rolls which failed to represent or underrepresented certain groups of persons. Specifically, the defendant noted the practice of using voter registration rolls would not include persons similarly situated to himself

whom he described as "student age, a black male from a lower income area who was at one time or another . . . listed on the utility company lists."

The defendant called the Registrar of Voters for Caddo Parish and the Clerk of Court to testify at the hearing on the motion to quash. These officials testified the list of eligible voters in the parish, then 119,251, is given to the Clerk of Court without deleting any names and without discrimination toward any voter. From this list, 800 names are drawn to constitute the general venire. From this 800, 100 names are randomly drawn to constitute the grand jury. The defense presented no other evidence.

La. C.Cr.P. art. 419(a) provides:

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.

The defendant bears the burden of proving the grounds for setting aside the venire. State v. Lee, 559 So.2d 1310 (La. 1990), cert. denied, U.S., 111 S. Ct. . . 1431, 113 L. Ed. 2d 482 (1991). That burden requires more than the under-representation of a specific group in order to prove a systematic exclusion of that group. Id.; State v. Manning, 380 So.2d 54 (La. 1980). Absent a demonstration that the practice discriminates against a certain class of people that results in an nonrepresentative cross-section of the community, voter registration rolls have been held constitutionally acceptable to draw a venire list. State v. Loyd, 489 So.2d 898 (La. 1986), cert. denied, 481 U.S. 1042, stay granted, 491 So.2d 1348, cert. denied, 481 U.S. 1042, 107 S. Ct. . . 1984, 95 L. Ed. 2d 823 (1987).

The defendant did not demonstrate that any significant group was underrepresented as a result of the parish's exclusive use of voter registration polls as a source for compiling the grand jury. The trial court did not err in denying the defendant's motion to quash the indictment on this ground.

The second basis for the motion to quash attacked the procedures mandated by Louisiana law for first degree murder prosecutions. Specifically, the defendant argues the Louisiana Death Penalty Statute: (1) violates the constitutional prohibition against cruel, excessive and unusual punishment; (2) provides no standard for juries to assess aggravating and mitigating circumstances; (3) unconstitutionally holds the sentencing hearing directly after a finding of guilt; (4) improperly focuses on the defendant's character and propensities in the sentencing phase; (5) improperly eliminated the directed verdict; (6) contains a lack of guidelines and standards for determining death penalty issues; and (7) fails to protect against overcharging when no genuine basis exists for the charge or penalty.

In argument at the motion hearing, defense counsel acknowledged that these issues had already been determined adversely to him in prior decisions by both the U.S. Supreme Court and this Court. This

Court has upheld the constitutionality of the Louisiana first degree murder statutes and capital sentencing scheme on several occasions, most notably in State v. Welcome, 458 So.2d 1235, 1251-52 (La. 1983), cert. denied, 470 U.S. 1088, 105 S. Ct. . . 1856, 85 L. Ed. 2d 152 (1985). In the wake of Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. . . 2909, 49 L. Ed. 2d 859 (1976), the Louisiana legislature amended the first degree murder statutes several times before settling on the requirement of one of several aggravating elements as an essential element of the offense. See LSA-R.S. 14:30. This "discretion-narrowing" feature thus makes the death penalty unavailable in most specific intent killings. Welcome, 458 So.2d at 1251-52.

In addition, the legislature implemented a bifurcated sentencing procedure under which the death penalty may be considered only if specific aggravating circumstances are found beyond a reasonable doubt. See La. C.Cr.P. art. 905-905.9. This procedure is similar to the one approved of by the Supreme Court in Gregg.

This bifurcated procedure allows a jury to consider mitigating circumstances relevant to sentencing. A jury's discretion is thus "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189. Within this narrowed class of capital-eligible cases, the jury has total discretion to make a binding recommendation of life imprisonment. Welcome, 458 So.2d at 1252.

Far from being the standardless procedure decried by the defendant, "the present Louisiana capital sentencing system contains so many safeguards and checks on arbitrariness, in comparison to systems in other states, that a comparative proportionality review clearly is not constitutionally required." Welcome, 458 So.2d at 1252. Yet this Court reviews each death penalty case to determine whether the penalty under review is disproportionate to the penalty imposed on other persons who committed first degree murder under similar circumstances. Id.

In the absence of any argument based on constitutional, statutory or jurisprudential authority, the trial court did not err in denying the defendant's motion to quash the indictment on these vague and general grounds.

Motions for Change of Venue

The defendant filed motions for a change of venue asserting extensive news coverage made it impossible for him to select a jury which would afford him a fair trial. In support of this assertion, the defendant introduced various newspaper clippings and television video, as well as the testimony of an expert in public opinion measurement and analysis. This expert testified that it would be extremely difficult for the defendant to draw as a jury those who either were not aware of the case or who did not show a significant likelihood of presuming guilt. The trial court denied the motions.

La. C.Cr.P. art. 622 provides:

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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.

In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at trial.

Although the trial Judge is given broad discretion in ruling on a motion for a change of venue, this Court must conduct an independent review of the facts "to ensure that the trial was conducted fairly and in a non-prejudicial environment." State v. Lee, 559 So.2d 1310, 1312 (La. 1990), cert. denied, U.S., 111 S. Ct. . . 1431, 113 L. Ed. 2d 482 (1991). To ensure a fair trial, it is not required that the jurors be totally ignorant of the case. In order to prevail on a motion for change of venue, the defendant bears the burden of proving that "there exists a prejudice in the collective minds of the community that would make a fair trial impossible." Lee, 559 So.2d at 1313; State v. Comeaux, 514 So.2d 84, 90 (La. 1987).

The public opinion expert testified that of 414 people polled, 42% were aware of the case and 58% were unaware of the case. The poll indicated whether persons aware of the case believed the defendant was innocent (1%), were leaning toward believing he was guilty (11%), felt strongly that the defendant was guilty (7%), had no feeling about his guilt or innocence (14%) or chose not to respond to the question (7%). The poll also questioned both those aware and unaware of the case of their opinions after hearing a local law enforcement officer express his opinion that the defendant was a serial killer. The expert admitted the poll showed 72% of all persons questioned had not formed an opinion regarding the defendant's guilt or innocence (number of persons who knew nothing about the case plus those who had no opinion).

With well over half those polled responding they knew nothing of the case, and considering the majority of those who knew about the case either believed in the defendant's innocence, had not formed an opinion about his guilt or innocence or would not commit to an answer, it is difficult to find support for the expert's Conclusion that it would be difficult for the defendant to obtain a fair and impartial jury. The defendant did not bear his burden of showing a prejudice in the minds of the community which would prevent him from receiving a fair trial. The trial court did not err in denying the motions for change of venue.

Assignment of Error #4

The defendant filed a Motion for Exclusion of News Media and Public from Pre-Trial Hearings asserting that closed pretrial hearings and voir dire were necessary to preserve his constitutional right to a fair trial. The motion was opposed by the state and representatives of the media. After a hearing, the trial court denied this motion. Writs were refused by the Second Circuit Court of Appeal

and this Court. See State v. Code, 526 So.2d 810 (La. 1988).

In State v. Birdsong, 422 So.2d 1135 (La. 1982), this Court was presented with a defendant's pretrial request to close a suppression hearing to the public and the press based on the defendant's assertion that his right to a fair trial would be prejudiced. This Court established two tests for determining whether a pretrial hearing should be closed. Prior to trial, a defendant "should only have to show a reasonable likelihood of substantial prejudice to his right to a fair trial by the dissemination of his confession, if proven inadmissible, throughout the community." Birdsong, 422 So.2d at 1138. Post-trial, however, "requiring a defendant to show actual prejudice resulting from the denial of a closed pretrial suppression hearing and that alternate methods of protecting himself from the adverse effects of pretrial publicity would not have assured a fair trial is an appropriate standard." Id.

Subsequent to Birdsong, the U.S. Supreme Court recognized that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings and that preliminary hearings "cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 13-14, 106 S. Ct. . . 2735, 92 L. Ed. 2d 1 (1986) [Press-Enterprise II], citing Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. . . 819, 78 L. Ed. 2d 629 (1984) [Press-Enterprise I]. Press-Enterprise I recognized a qualified First Amendment right of access to the jury selection process.

If the interest asserted in closing the hearing is the right of the accused to a fair trial, "the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." Press-Enterprise II, 478 U.S. at 14.

In support of his motion, the defendant offered a portion of the newspaper clippings and videotapes of the television coverage of the case. The newspapers offered a complete file of all newspaper clippings. The last article published about the case was dated September of 1987, six months prior to the March 26, 1988, hearing date. At the time of the hearing, no motion to suppress had been filed.

Based on the showing made, the defendant did not show there was a substantial probability that his right to a fair trial would be prejudiced by failure to close all pretrial hearings and the voir dire in this case. In addition, there was no showing made that reasonable alternatives to closure did not exist. Indeed, Press-Enterprise II, 478 U.S. at 15, noted that through a proper voir dire "a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." The trial court did not err in denying the defendant's motion.

Assignment of Error #5

11/29/93 State of Louisiana v. Nathaniel Robert Code

627 So. 2d 1373 (1993) | Cited 0 times | Supreme Court of Louisiana | November 29, 1993

In discovery motions, the defendant requested police reports and information concerning a triple homicide which occurred in the Shreveport area known as the Grissom homicides, and other murders containing the elements of ligature or knife wounds, while the defendant was in jail awaiting trial, asserting such information would be favorable to the defense. The state opposed these motions and submitted the police reports regarding the Grissom homicides to the trial Judge for in camera inspection.

The trial Judge denied the defendant's motion with written reasons, finding "the evidence leads us to conclude that in comparing the Code and Grissom cases there is almost no likelihood that the two sets of crimes could be connected or committed by the same person or persons."

The state filed a motion in limine to prohibit the defense from referring to the Grissom homicides during voir dire or trial which was granted by the trial court.

The defendant argues the trial court committed reversible error in denying his motions for discovery of this evidence favorable to the defense and in granting the state's motion in limine. In doing so, the defendant argues the trial court denied him the right to present a defense.

The state may not suppress evidence which is favorable to the accused and material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. . . 1194, 10 L. Ed. 2d 215 (1963); State v. Ortiz, 567 So.2d 81 (La. 1990). Favorable evidence includes both exculpatory evidence and impeachment evidence. United States v. Bagley, 473 U.S. 667, 105 S. Ct. . . 3375, 87 L. Ed. 2d 481 (1985); Giglio v. United States, 405 U.S. 150, 92 S. Ct. . . 763, 31 L. Ed. 2d 104 (1972). Evidence is material, and thus discoverable, "if there is a reasonable probability, sufficient to undermine confidence in the outcome, that the evidence, if disclosed to the defense, would have changed the outcome of the proceeding or created a reasonable doubt that did not otherwise exist." State v. Knapper, 579 So.2d 956, 959 (La. 1991).

A review of the records of the Grissom homicides filed in this Court under seal supports the trial court's Conclusion. On November 6, 1989, the bodies of 24 year-old Julie Grissom, her father, William Grissom, and her 8-year-old son Sean Grissom, were found at 2011 Beth Lane in Shreveport. Although this triple homicide shared with the Chaney homicides the similarities of multiple victims, use of a knife and some indication of gagging and restraining the victims, the Grissom murders exhibited none of the ritualistic aspects of the Chaney homicides. In his written reasons, the trial Judge touched on a few of the many dissimilarities he found in his review. The victims in the Grissom case were white and lived in a white neighborhood, the wounds were precise and there was no evidence of overkill, the crime involved a sexual assault directed at Julie Grissom, and the killer cleaned up the crime scene. The Grissom murders lacked the ritual aspects of the distinctive ligature and overkill. Although there was an indication that duct tape had been used to bind Julie Grissom and possibly her son, only a small piece of duct tape was found at the scene. The Grissom killer went to the extent of washing some of Julie Grissom's clothing in an attempt to clean the crime scene. The

police reports of the Grissom homicides did not contain evidence material or favorable to the defendant; the trial court did not err in denying the defendant's motion for the discovery pertaining to the Grissom homicides.

A defendant has a constitutional right to present relevant evidence in his own defense. U.S. Const. Sixth Amendment; La. Const. Art. I, § 16 (1974); State v. Vigee, 518 So.2d 501 (La. 1988). "Relevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." La. Code Evid. art. 401. "Evidence which is not relevant is not admissible," yet even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time." La. Code Evid. arts. 402, 403.

The trial court's ruling on the state's motion in limine was correct. Evidence of the Grissom homicides was not relevant to the case at issue and was properly excluded from the jury. The right to present a defense does not include the unfettered use of evidence of completely unrelated crimes of third persons. Inclusion of this evidence would have resulted in substantial confusion of the issues and would have misled the jurors.

Although the defense was not allowed to discuss the Grissom homicides at voir dire or during trial, it should be noted the defense cross-examined Dr. McCormick regarding two homicides in the Shreveport area that had been committed subsequent to 1987. One involved the binding of the victim with electrical cord cut from the victim's lamp; the other involved a decapitation case. These cases had some similarity to the ritual aspects of the Chaney homicides, unlike the Grissom homicides. Dr. McCormick testified, however, that the bindings in the one case were totally unlike those in the Ford, Chaney and William Code homicides; the decapitation case had been the clean work of an assassin, not the jagged wounding present in the Ford and Chaney cases. Thus, the defense was not prevented from presenting evidence to the jury of "similar" other crimes which were committed in the area while the defendant was incarcerated, as long as the other crimes were truly similar.

Assignment of Error #6

The defendant again argues the trial court erred in denying his motion to quash the indictment, discussed in Assignment of Error #3, on different grounds. By this assignment, the defendant makes a general attack on the procedure for allowing the state to "death-qualify" a jury under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. . . 1770, 20 L. Ed. 2d 776 (1968). He argues of the general unconstitutionality of the aggravating circumstances listed at La. C.Cr.P. art. 905.4 and specifically notes art. 905.4(7), whereby a jury finds the offense was committed in an especially heinous, atrocious or cruel manner, should be accompanied by a limiting instruction. Finally, the defendant argues there is not general application of presenting the character and propensities of a defendant in the sentencing phase of a first degree murder trial. As noted earlier, defense counsel admitted at the

motion hearing that his arguments are contrary to settled federal and Louisiana jurisprudence.

In Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. . . 1758, 90 L. Ed. 2d 137 (1986), the Supreme Court held that, in a bifurcated trial process, the exclusion of prospective jurors under Witherspoon, did not violate a defendant's Sixth Amendment rights even assuming that "death qualification" results in juries that are more conviction prone than "non-death qualifying" juries. This Court has rejected similar arguments. State v. Ward, 483 So.2d 578 (La. 1986), cert. denied, 479 U.S. 871, 107 S. Ct. . . 244, 93 L. Ed. 2d 168 (1986).

The defendant's general arguments concerning the unconstitutionality of Louisiana's capital-sentencing scheme are addressed in Assignment of Error #3. Further, the record shows that a limiting instruction was given to the jury regarding their consideration of La. C.Cr.P. art. 905.4(7). See Assignment of Error #1. None of the defendant's arguments present cause for reconsideration of settled jurisprudence. The trial court correctly denied the motion to quash the indictment on these grounds.

Assignment of Error #7

In several discovery motions, the defense requested the "FBI profile" it claimed was in the Shreveport police's possession in addition to any evidence of similar murders, including the Grissom homicides. The state contended it did not have an FBI profile. Evidence regarding the Grissom homicides was submitted for in camera inspection and is discussed in Assignment of Error #5. The trial court agreed with the state and denied the defense's motion for the profile.

Under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. . . 1194, 10 L. Ed. 2d 215 (1963), the state is not required to furnish a defendant with information which he already has, nor can it logically be required to furnish a defendant with information which does not exist. Testimony at the motion hearing established that after the Chaney homicides, FBI Agent Watson visited Shreveport police and was taken to the crime scene. Based on the little evidence available at that time, Agent Watson gave as his "off the cuff" opinion that the killer was a left-handed white male. This statement was repeated in certain police reports, which is how the defense came to know of the statement. Agent Watson qualified his statement by stating officials at Quantico, Virginia, would probably find totally the opposite when they reviewed all the evidence.

The defendant claims this profile, if it exists, would be exculpatory, since the defendant is a right-handed African-American male. Testimony established Shreveport police officers sent some evidence to FBI headquarters at Quantico but never received an official profile because they failed to send in necessary paperwork. After Code was arrested, there was no attempt to complete a profile. Instead, FBI agents concentrated on determining whether the three homicide scenes exhibited ritual aspects which linked Code to them. Agent Douglas, who completed this work, testified Agent Watson was unqualified to give an opinion on a profile with the lack of evidence then available.

The testimony at the motion hearing established there was no FBI profile and no written notes by Agent Watson. The defense knew of Agent Watson's statement through the police reports, and these pretrial hearings, and used the information during cross-examination at trial. Thus, the information was presented to the jury for its consideration. The trial court did not err in denying the defendant's motions.

Assignment of Error #8

The defendant filed a subpoena duces tecum directed to Alan Prater of the Shreveport Police Department requesting the incident address and signal tape broadcasts relative to District Nine, the Cedar Grove area where the Ford, Chaney and William Code homicides took place for the months of June, July and August for the years 1984 through 1987. The defendant wanted to use this evidence to show that the Cedar Grove area was a high crime area with many burglaries and homicides and that the Ford, Chaney and William Code homicides were committed by other persons. The state filed a motion to quash the subpoena, arguing it was unduly burdensome. After a hearing, the trial court agreed with the state and quashed the subpoena duces tecum. The trial court made clear, however, that it would consider a less burdensome request.

La. C.Cr.P. art. 732 provides:

A subpoena may order a person to produce at the trial or hearing, books, papers, documents, or any other tangible things in his possession or under his control, if a reasonably accurate description thereof is given; but the court shall vacate or modify the subpoena if it is unreasonable or oppressive.

In State v. Graham, 422 So.2d 123 (La. 1982), appeal dismissed, 461 U.S. 950, 103 S. Ct. 2419, 77 L. Ed. 2d 1309 (1983), this Court found a subpoena properly quashed where the request came one week before trial and would have entailed almost three months of work and several thousands of dollars to retrieve the information requested.

At the hearing on the motion to quash, the state presented the testimony of the police personnel in charge of the storage of oral and written records. Testimony established the Communications Records section consists of information received by police call-takers from citizens based on citizen complaints, reports of accidents, etc. These records go to radio dispatchers for assignment to police field units and are kept for only two years. None of these records were available to satisfy the subpoena duces tecum.

The Central Records section is a repository of offense reports and accident reports and are housed on a permanent basis. The Shreveport Police were in the process of putting these records into the computer at the time of the May 16, 1990, hearing. Prior to 1990, the records are kept on hard copy or microfiche only. Information is not stored by district, so to satisfy the subpoena, the police would have had to look at each incident report for those years and determine which district it was from; this

would be approximately 50,000 records for each year. Testimony established complying with the request as written would take hundreds of man-hours. A request for homicides involving bondage, or anything having a Uniform Crime Report offense code, however, would be relatively easy to do and would involve looking at 50 to 60 reports for each year. Police personnel also stated a department policy not to give out reports of unsolved crimes because suspects are listed on the reports.

The defense argues these records would not have been that difficult to find, basing this argument on trial testimony of Detective Pittman that statistical information was readily available and not difficult to obtain. Cross-examination revealed, however, that Detective Pittman was speaking only of statistics from 1990 to the present which are on computer. Detective Pittman acknowledged that records prior to 1990 would have to be searched manually.

The record shows the trial court did not err in quashing the subpoena duces tecum. The subpoena duces tecum, as written, requested incident addresses and reports for all crimes against persons and property, without limiting the request to certain crimes which would have made manual searching less oppressive. The trial court made clear to defense counsel that a more tailored request would be considered, however, the defense never made a second or narrower request.

By this assignment, the defendant also complains of the trial court's denial of his motion to quash trying to exclude from the jury's consideration the aggravating circumstance of La. C.Cr.P. art. 905.4(7). He claims the statute, which states the aggravating circumstance that the offense was committed in an especially heinous, atrocious or cruel manner, is unconstitutionally void because it does not give adequate guidance to the jury. This argument was discussed and found to be without merit in Assignment of Error #1.

Assignment of Error #9

The defendant filed two motions directed to prohibit the state from presenting evidence of the defendant's character and propensities, including a prior conviction, during either the guilt or sentencing phases of the trial: Motion to Exclude and/or Restrict Use of Character and Propensities Evidence and Motion in Limine (Motion to Restrict Impeaching Evidence and/or Suppress Prior Conviction Record). The defendant did not testify during the guilt phase so evidence of his prior conviction was not introduced, although evidence of the Ford and William Code homicides was presented.

Immediately prior to the penalty phase, defense counsel argued against the introduction of prior convictions and other crimes evidence to show the defendant's character and propensities. The trial court agreed with the state that such evidence could be admitted under State v. Brooks, 541 So.2d 801 (La. 1989).

The defendant now contends it was error for the trial court to allow the state to present testimony of

the underlying facts of his prior conviction pursuant to La. C.Cr.P. art. 905.2 in the sentencing phase of trial and the other crimes evidence of the Ford and William Code homicides. He argues La. C.Cr.P. art. 905.2 violates the Eighth and Fourteenth Amendments because it fails to channel the jury's discretion and is unconstitutionally vague and overbroad. He argues he did not place his character at issue, that the sentencing phase is governed by the rules of evidence and that under the rules of evidence the testimony of his prior conviction could not be used to impeach his character unless he placed it at issue.

Insofar as this assignment presents the issue of whether evidence of the Ford and William Code homicides could be presented at the sentencing phase, the issue is discussed, and found to be without merit, in the main opinion. Thus, the issue presented for review is the penalty phase evidence of the defendant's 1975 conviction for attempted aggravated rape.

La. C.Cr.P. art. 905.2 provides:

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

In State v. Sawyer, 422 So.2d 95 (La. 1982), the Court upheld the introduction of a defendant's unrelated conviction for crimes other than those specifically enumerated as aggravating circumstances in La. C.Cr.P. art. 905.4, finding that such convictions are relevant to the issue of a defendant's character. This focus on character "is one of the statutory means of channeling the jury's sentencing discretion." Sawyer, 422 So.2d at 104 n.18. In Brooks, the Court upheld the statute against charges of vagueness, finding the statutory language to have "generally accepted meanings which give the jury adequate notice of the concept being described and intended by the legislature." Brooks, 541 So.2d at 811. Evidence of prior convictions could, thus, be used as evidence of the defendant's character and propensities.

In State v. Jackson, 608 So.2d 949 (La. 1992), the Court reaffirmed the basic holding in Sawyer that a conviction of first degree murder puts the defendant's character at issue in the sentencing hearing and that evidence of the defendant's character may be introduced whether the defendant places his character at issue or not. "As long as one statutory aggravating circumstance is proved, the prosecutor can introduce other evidence relevant to and probative of the circumstances of the murder and the character and propensities of the murderer." Jackson, 608 So.2d at 954. Jackson noted the "linchpin for admissibility is relevance." Id.

Jackson, 608 So.2d at 954, held "evidence of convictions of serious unrelated crimes is extremely probative of and relevant to the character and propensities of the defendant and may be useful for the jury to evaluate in performing its awesome task of deciding whether or not to recommend execution." Recognizing that evidence of every conviction may tend to interject an arbitrary factor into the hearing, the court set limitations on the type of prior conviction evidence that may be introduced. Evidence of prior convictions was limited to felonies and the proof of those prior convictions was limited to "the document certifying the fact of conviction and to the testimony of the victim or of any eyewitness to the crime." Jackson, 608 So.2d at 954. Important to the issue under review in this case, Jackson further stated "we specifically prohibit evidence of the original charge when the conviction is for a lesser offense." Id.

Gloria Campbell, the victim of the defendant's 1975 sexual assault, testified at the sentencing hearing. She related how, on the evening of June 30, 1975, the defendant entered her house by the kitchen window, surprised her in her bed, attempted to gag her, ordered her to remove her clothing and raped her in front of her two children while holding a knife to her side and threatening to kill her and her children. Campbell saw the defendant two weeks later in the neighborhood, called the police and identified him as the rapist. The defendant was charged with aggravated burglary and aggravated rape but pleaded guilty to the charge of attempted aggravated rape.

At the time of the defendant's October 7, 1990, sentencing hearing, Brooks and Sawyer were controlling as to the introduction of evidence of prior convictions in the penalty phase. Campbell's testimony violates the newer restrictions placed on such testimony by this Court's subsequent decision in Jackson, i.e. the prohibition against evidence of the original charge.

It is unnecessary to decide the question of the retroactivity of Jackson to this case, however. A defendant on direct review would be entitled to the benefit of any new constitutional rule announced prior to the review of his case. Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. . . 708, 93 L. Ed. 2d 649 (1987); see State ex rel. Taylor v. Whitley, 606 So.2d 1292, 1296 (La. 1992), cert. denied, 113 S. Ct. . . 2935, 124 L. Ed. 2d 684 (1993). Although La. C.Cr.P. art. 905.2 is presumed to be constitutional, Brooks, 541 So.2d at 811 ("statutes are presumed to be valid, and the constitutionality of a statute should be upheld whenever possible"), the evidentiary limitations placed on evidence introduced pursuant to the statute are jurisprudential only and are intended to protect defendants from the injection of arbitrary factors into their sentencing hearings. See Jackson, 608 So.2d at 954 ("since the statute contains no defined limitations, it is appropriate for this court to set limitations").

A review of the record is convincing that no arbitrary factors were injected by Campbell's testimony. Both her direct and cross-examination testimony constitutes nine pages of the transcript of what was a three-day sentencing hearing, and only two of which concern the actual aggravated rape. The state did not dwell on the original charge brought against the defendant for the sexual assault. Given the brevity of the testimony, and that a connection was shown to other more serious crimes alleged to have been committed by the defendant, it cannot be said Campbell's testimony interjected an

arbitrary factor into the sentencing proceedings. Thus, the purpose behind the evidentiary limitation in Jackson was not violated.

Assignment of Error #10

During trial, the defendant filed a Motion to Prohibit Cross-Examination Relative to Other Crimes Evidence, requesting that he be allowed to take the stand in his defense on the Chaney homicides without being subject to cross-examination as to the Ford and William Code homicides. The trial court denied the request. The defendant argues this ruling violated his Fifth and Sixth Amendment rights.

La. Code of Evid. art. 611provides in pertinent part:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

The Comments to this section states "there is no intent to change the rule that a defendant who takes the witness stand in a criminal case is regarded as any other witness and is subject to examination on the whole case as was provided under former R.S. 15:462." See also State v. Jones, 408 So.2d 1285 (La. 1982); State v. Garrison, 400 So.2d 874 (La. 1981). The trial court did not err in denying the defendant's motion.

In addition, the state offered to grant complete use immunity to the defendant as to the Ford and William Code homicides, promising that any testimony by the defendant regarding those crimes would not be used in any subsequent prosecution of those murders. The defendant declined to accept this offer of immunity and did not testify. Thus, the defendant was not exposed to the usual hazards of self-incrimination regarding the other pending homicides.

Assignment of Error #11

Defense counsel concedes that all issues raised in this assignment were satisfied at trial or are raised in Assignments of Error #1, 9. Since those assignments have been found to be without merit, and all other issues were satisfied at trial, there is nothing left to determine in this assignment of error.

Assignment of Error #12

This assignment is discussed in the main opinion.

Assignment of Error #13

During trial, the prosecutor asked Sgt. L. L. Jackson of the substance of a conversation he had during

the investigation of the Ford crime scene with the coroner, Dr. McCormick. Sgt. Jackson responded:

Well, upon entry into the house and once we got to a position close enough to the body to denote the violence that had been done to this particular complainant, we come [sic] to the Conclusion in our Discussion that there was an extremely large amount of violence done to this particular woman. And the disarray of the living room, it had been quite a struggle, quite a fight. And we come [sic] to the Conclusion that this person was very cold-blooded and would kill again.

Tr. 3383

Defense counsel objected to the characterization of the killer as "cold-blooded" and the opinion that he "would kill again," arguing Sgt. Jackson was testifying as to the behavioral aspects of the murder for which he was unqualified. After the jury had been removed, defense counsel requested a mistrial based on the objected-to testimony. The trial court sustained the objection, denied the motion for a mistrial and admonished the jury to disregard the witness's remark because he had not been qualified as a behavioral expert.

Defendant contends it was reversible error for the trial court to deny his motion for mistrial, arguing that an admonition could not cure the prejudice of the police officer's testimony.

A mistrial is mandatory where 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 certain matters so prejudicial an admonition is insufficient to prevent a mistrial." La. C.Cr.P. art. 770. In certain cases, however, an admonition is the proper remedy for prejudicial remarks. La. C.Cr.P. art. 771 provides in pertinent part:

In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:

(2) When the remark or comment is made by a witness or person other than the Judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770 [which sets out the bases for a mistrial based on prejudicial remarks].

In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

The ordering of a mistrial is a drastic remedy and, unless mandated by La. C.Cr.P. art. 770, should be left to the sound discretion of the trial court.

State v. Burdgess, 434 So.2d 1062 (La. 1983). Although the testimony of a police officer should receive close scrutiny, a police officer is not a court official within the meaning of La. C.Cr.P. art. 770. State v. Watson, 449 So.2d 1321 (La. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. . . 939, 83 L. Ed. 2d 952 (1985). A discretionary mistrial should be ordered only where the trial court determines an admonition is inadequate to assure a fair trial. La. C.Cr.P. art. 771.

Considering the jury heard the description of the crime scene through eyewitnesses, reports and photographs, Sgt. Jackson's testimony that the killer appeared "cold-blooded" could not have prejudiced the defendant in any significant way. In subsequent testimony, Dr. McCormick, who was qualified as an expert in the behavioral aspect of murder investigations, testified to the conversation he had with police investigators without objection as follows:

I told [the police investigators] that number one, this appeared to be, what, in the trade, we would call, a cold-blooded killing.

But that [this] was this typical sort of a murder scene where a murder is inflicted by one who more probably than not enjoys killing; and that as, in that respect, should be thought of to be the work of a serial killer; that is, a person who commits violent crimes separated by space in [sic] time; and that as such should be viewed as one crime which would occur again.

Tr. 35O5-6.

Considering the testimony was properly presented, and unobjected-to, by an expert in the behavioral aspects of the crime, the defendant can show no prejudice arising from Sgt. Jackson's statement. The trial court did not abuse its discretion in denying the defendant's motion for mistrial.

Assignment of Error #14

The defendant called Detective Wilson of the Shreveport Police Department to testify as to the investigation of suspects other than the defendant in the Ford homicide, particularly the investigation of Michael Bell and Gregory Bell. The following exchange occurred during the prosecutor's cross-examination:

Q: Now, were both Michael and Gregory Bell eliminated as suspects through the investigation?

A: By me, yes.

Q: They gave you hair samples, didn't they?

A: I believe both of them were submitted -- hair, body fluid, and everything.

Q: They gave blood samples?

A: Yes.

Q: They gave fingerprints?

A: Yes.

Q: Did they have any other examinations that cleared them?

A: Well, a polygraph test.

Tr. 4949-50.

Defense counsel objected and moved for a mistrial. The trial court denied the motion for a mistrial but admonished the jury to disregard the remark concerning the polygraph. The defendant urges La. C.Cr.P. art. 775 requires the ordering of a mistrial in this case.

La. C.Cr.P. art. 775 provides that a "mistrial may be ordered, and in a jury case the jury dismissed, when . . . prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial." "The results of a lie detector test remain inadmissible in Louisiana when offered by either party, either as substantive evidence or as relating to the credibility of a party of a witness." State v. Davis, 407 So.2d 702, 706 (La. 1981); State v. Titus, 358 So.2d 912, 915 (La. 1977). "Likewise inadmissible is the willingness or unwillingness of a person to submit to such an examination." Titus, 358 So.2d at 915. "To admit such test results usurps the jury's prerogative on a question involving credibility." Davis, 407 So.2d at 706; State v. Vinet, 352 So.2d 684, 690 (La. 1977). If such evidence is admitted, however, reversal will be required only if the defendant has been prejudiced by its introduction in evidence. Titus, 358 So.2d at 915.

While the reference to the polygraph examination by Detective Wilson was clearly in error, the record shows the trial court did not abuse its discretion in denying the mistrial and admonishing the jury to disregard the remark. There was simply no evidence linking either of the Bells to the Ford homicide, a Conclusion which had been made clear prior to this objected-to testimony. By contrast, there was direct and circumstantial evidence linking the defendant to the Ford homicide, the fact that his finger and palm prints were found at the point of entry and the signature aspects of the crime. The defendant can point to no prejudice this remark engendered which denied him a fair trial.

Assignment of Error #15

The issue presented by this assignment is the same as presented in Assignment of Error #10, previously found without merit.

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Assignment of Error #16

The defendant argues it was reversible error for the trial court to deny his request to deliver Special Jury Charges Nos. 1, 5, 15, 20, and 22 during the guilt phase of his trial. La. C.Cr.P. art. 807 provides:

The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.

A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

In Requested Jury Charge No. 1 the defendant requested the following definition of reasonable doubt be given:

If upon the whole case you have a reasonable doubt as to the defendant's guilt, you should find him Not Guilty. If you have a reasonable doubt of the grade of offense that has been proved by the State as to the defendant's guilt, you should give the benefit of the doubt to the defendant and find him guilty only of that grade of offense you find has actually been proved beyond a reasonable doubt.

Furthermore, if you find a reasonable doubt as to any element of the statute charged, you should find the defendant Not Guilty unless you are satisfied that the State has proved the defendant's guilt beyond a reasonable doubt as to a lesser included offense. If you are satisfied that the State has proved only guilt of a lesser included offense to the offense charged, then it is your duty to find him guilty only of the lesser included offense which has been proved.

The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, one for which you could give good reason. You may ask yourself whether a better case could have been proved in deliberating the existence of a reasonable doubt, and if after hearing all the evidence, if you actually doubt that the defendant is guilty, or doubt that the State has proven his guilt beyond a reasonable doubt, then you should acquit him.

You may consider for the creation of a reasonable doubt, that the evidence shows that the offense could have been committed in another manner than as alleged by the State or could have been committed by another person than the accused.

You may consider the lack of evidence adduced at the trial as to any of the essential elements of the offense. The lack of evidence may be relied upon as the basis for the establishment of a reasonable doubt

Although much shorter, the trial court's general charge fairly covered the concepts expressed in the defendant's requested instruction:

While the State must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is doubt based on reason and common sense and is present when, after you have carefully considered all the evidence, you cannot say that you are firmly convinced of the truth of the charge.

Where the evidence shows beyond a reasonable doubt that defendant committed an offense, but the evidence establishes a reasonable doubt as to the degree of offense committed, the defendant may be convicted only of the lesser degree of offense charged in the indictment as the evidence shows was committed. The lack of evidence in the testimony adduced at trial may be relied upon as the basis for the establishment of reasonable doubt. The jury is not restricted to the evidence adduced from the witness stand for the creation of a reasonable doubt.

Requested Jury Charge No. 5 concerned a definition of "specific intent" and its application:

A specific intent to kill or inflict great bodily harm contemplates a carefully thought out design, scheme or plan and no one may be held to have acted with a specific intent to kill or inflict geat [sic] bodily harm unless the evidence shows beyond a reasonable doubt that the defendant actually intended such design, scheme or plan to be accomplished by his acts.

The defendant's requested charge was not wholly correct. The trial court included a correct definition of this issue in its general charge pursuant to LSA-R.S. 14:10:

Specific criminal intent is that state of mind which exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act.

Requested Jury Charge No. 15 concerned the defense of alibi:

An alibi is a legitimate defense.

An alibi is evidence of the fact that the defendant at the time the crime is charged to have been committed was at another place, and, therefore, could not have committed the crime. Hence, as a defense, it involves the impossibility of the defendant's presence at the scene of the offense at the time of its commission. The range of the evidence as to the time and place should be such as to reasonably exclude the possibility of such presence.

The rule that the burden of proof never shifts, in criminal cases, applies to the defense of an alibi, which need only be proven so as to raise a reasonable doubt as to whether or not the accused was present when the crime was committed.

In other words, where an alibi is a defense, the evidence in support of it should be consdiered [sic] in connection with all of the other evidence in the case; and, if on the whole evidence, there is a reasonable doubt of the defendant's guilt, he should be acquitted.

The trial court included a charge on alibi in its general instruction to the jury:

An alibi may be considered as a legitimate defense. Where evidence of alibi is presented as a defense, such evidence should be considered in connection with all other evidence in the case and, if, on all of the evidence, there is reasonable doubt of the guilt of the defendant, he should be found not guilty.

Requested Jury Charge No. 20 requested that the trial court deliver the following charge on "motive":

Motive is the condition of mind which excites to action, and can be established by external facts. The prosecution may stop with the proof that the crime was committed, and, need not prove motive; but where accused shows facts tending to show absence of motive, that is a circumstance in his favor, but it is exclusively for the jury to decide whether it is a strong or weak circumstance in his favor.

The jury is instructed that in its deliberations upon the question of the defendant's guilt or innocence, it may consider the lack of motive to commit the crime charged.

The trial court declined to give this instruction and did not include any instruction on motive in its general charge. In State v. Mart, 352 So.2d 678 (La. 1977), this Court held that a defendant was entitled to a charge on motive, which included an instruction that lack of motive may be properly considered as a circumstance mitigating against specific intent, in order to complete a general charge on motive which did not contain that provision. If no general charge on motive is given, however, the trial court is free to deny requested charges on this issue as not pertinent. State v. Tolbert, 390 So.2d 510 (La. 1980).

Requested Jury Charge No. 22 requested a charge concerning "reasonable doubt" and its affect on circumstantial evidence:

A person should not be convicted of an offense based on circumstantial evidence unless the evidence excludes, to a moral certainty, every reasonable hypothesis except that of the guilt of the defendant

No matter how strong the circumstances may be, they do not measure up to the requirements of our law if they can be reasonably reconciled with the theory that the defendant is presumed to be innocent

Where part of the evidence is circumstantial, this evidence can be the basis of a conviction just the same as direct evidence. Circumstantial evidence can be given the same weight as direct evidence where it leaves no other reasonable hypothesis than that the defendant is guilty.

If the conduct of the defendant, upon a reasonable hypothesis, is consistent with his innocence, then he would be entitled to an acquittal. If after considering all the evidence in the case -- the direct evidence and circumstantial evidence -- there should spring up in your mind, or the mind of any individual juror, a reasonable doubt or a probability of innocence of the defendant, then, of course, he could not be convicted under the evidence.

As stated previously, the trial court gave a charge defining reasonable doubt. It also gave the following definition of circumstantial evidence:

Circumstantial or indirect evidence is evidence which, if believed, proves a fact, and from that fact you may logically and reasonably conclude that another fact exists.

Thus, the issues presented in this requested jury charge were included in the general charge. In addition, the defendant's requested charge contained an error of law in defining "reasonable doubt" as excluding, "to a moral certainty," every reasonable hypothesis of innocence. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. . . 328, 112 L. Ed. 2d 339 (1990), disapproved on other grounds, Estelle v. McGuire, U.S., 112 S. Ct. . . 475, 116 L. Ed. 2d 385 (1991).

Since all the requested jury charges were either included in the general instruction or contained errors of law, the trial court did not err In failing to give the requested charges.

Assignment of Error #17

The defendant argues it was reversible error for the trial court to deny his request to deliver Special Jury Charges Nos. 1-7 in the sentencing phase of his trial.

Requested Charge No. 1 requested the trial court to give the following explanation of mitigating circumstances:

I have previously read to you a list of mitigating circumstances which you may consider if you find any of them to be established by the evidence. However, the mitigating circumstances which I have read for your consideration are given to you merely as examples for deciding not to impose a death sentence upon the defendant. You should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other relevant circumstances relating to the case or to the defendant as reasons for not imposing the death sentence.

The trial court instructed the jury in more detail concerning mitigating circumstances than was requested by the defendant. The requested instruction was wholly included in the trial court's charge:

You are required to consider the existence of aggravating and mitigating circumstances in deciding which sentence should be imposed.

Before you decide that a sentence of death should be imposed, you unanimously must find beyond a reasonable doubt that at least one statutory aggravating circumstance existed . . . .

Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed. The law specifically provides certain mitigating circumstances . . . .

[the trial court then read the list of statutory mitigating factors]

However, in addition to those specifically provided mitigating circumstance, you must also consider any other relevant mitigating circumstance. You are not limited only to those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the penalty to be imposed.

In deciding whether to sentence defendant to death or to life imprisonment without the possibility of parole, probation, or suspension of sentence, you are allowed to extend sympathy and mercy to the defendant if you see fit to do so based upon the evidence presented about this case or about defendant's background, character or history, or based on your observations of the defendant

Requested Charge No. 2 requested an instruction that the jury must find an aggravating circumstance beyond a reasonable doubt:

Before you consider any fact as an aggravating circumstance, you must find that such aggravating circumstance has been established by the evidence beyond a reasonable doubt. You may not consider any reason for choosing to impose the death sentence unless you are satisfied beyond a reasonable doubt and to a moral certainty that such reason is true, correct and justified.

The trial court specifically included this instruction, except the "moral certainty" language which may have been an incorrect statement of law under Cage v. Louisiana (see second paragraph of trial court charge in Requested Jury Charge No. 1, Assignment of Error #16).

Requested Charge No. 3 sought to restrict the jury's consideration to only those aggravating circumstances listed by the court:

I have previously read to you the aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

The trial court refused to give this instruction but included in the general charge only the three aggravating circumstances sought by the state. The requested charge is an incorrect statement of law, as the jury could consider evidence regarding the circumstances of the crime and the defendant's character and propensities as provided in La. C.Cr.P. art. 905.2. The trial court correctly charged the jury:

It is your duty to consider the circumstances of the offense(s) and the character and propensities of the defendant in determining the sentence to be imposed. You may consider the evidence adduced at the guilt-determination trial.

Requested Charges Nos. 4 and 5 requested the jury be instructed to "weigh" the aggravating circumstance against the mitigating circumstances:

(4) In deciding whether the defendant should be sentenced to death or to life in prison, you should weigh the mitigating circumstances against the aggravating circumstances that you find to be established by the evidence. The fact that you have found the defendant guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.

(5) In order to impose a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweigh any mitigating circumstances. If you are not convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you must return a verdict of life imprisonment without parole, probation or suspension of sentence.

As stated previously (in Requested Charge No. 1), the trial court instructed the jury that they must find one of the three aggravating circumstances unanimously and beyond a reasonable doubt before determining whether death was appropriate. The trial court also instructed the jury that it must consider the existence of aggravating and mitigating circumstances. The jury was also informed that, even if it found an aggravating circumstance, it could still impose a life sentence.

The defendant's requested charge was an incorrect statement of law with regard to whether the jury "weighs" aggravating versus mitigating circumstances. State v. Welcome, 458 So.2d 1235 (La. 1983), cert. denied, 470 U.S. 1088, 105 S. Ct. . . 1856, 85 L. Ed. 2d 152 (1985). The requested charge would actually inure to the benefit of the state, not the defense.

Requested Charge No. 6 requested the jury be instructed that it could extend sympathy and mercy to the defendant:

Members of the jury, I have previously instructed you that sympathy was not to play any part in your determination of whether the defendant was guilty of the crimes charged. However, we are now at the penalty phase of the trial where sympathy and mercy for the defendant are proper considerations.

If a mitigating circumstance or an aspect of the defendant's background or character, called to your attention by the evidence or your observation of defendant, arouses sympathy or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a punishment of life without parole on that basis.

In deciding whether to sentence defendant to death or life without the possibility of parole, you are allowed to extend sympathy and mercy to the defendant if you see fit to do so based upon the evidence presented about this case or about defendant's background, character or history, or based on your observations of the defendant.

As stated above (in Requested Charge No. 1), this concept was clearly included in the general instruction.

Requested Charge No. 7 presented a "standard of doubt" for the jury:

Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty. The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered.

Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether defendant actually killed the victim. Lingering or residual doubt is defined as the state of mind between reasonable doubt and beyond all possible doubt

Thus, if any individual juror has a lingering or residual doubt about whether the defendant actually killed the victim, he or she must consider this as a mitigating factor and assign to it the weight you deem appropriate.

The trial court rejected this standard of proof, which has no statutory or jurisprudential basis. Instead, the trial court correctly instructed the jury that they could only recommend the death penalty based on a unanimous finding, beyond a reasonable doubt, of at least one aggravating circumstance and only after due consideration of all relevant mitigating circumstances (see Discussion of Requested Charge No. 1).

Assignment of Error #18

The defendant moved for a post-verdict judgment of acquittal under La. C.Cr.P. art. 821 and filed a motion for a new trial on the basis that the evidence, viewed in a light most favorable to the state, did not reasonably permit a finding of guilt. While the defendant concedes his palm print was found on the bathtub over which Vivian Chaney's body was draped and shows his presence in the house, the

defendant argues there is no evidence that he committed the murder of Vivian Chaney and nothing connects him with the murders of the other three persons in the house. He points out there is no eyewitness testimony linking him to the murders. Finally he argues he had a strong alibi defense.

"Due process requires that a criminal defendant be convicted only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." State v. Tassin, 536 So.2d 402, 409 (La. 1988), cert. denied, 493 U.S. 874, 110 S. Ct. . . 205, 107 L. Ed. 2d 159 (1989); In re Winship, 397 U.S. 358, 90 S. Ct. . . 1068, 25 L. Ed. 2d 368 (1970); LSA-R.S. 15:271. In reviewing the sufficiency of the evidence supporting a conviction, this Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. . . 2781, 61 L. Ed. 2d 560 (1979). Credibility choices of the jury are not immune from review, but must be viewed as if made by a rational trier of fact. State v. Mussall, 523 So.2d 1305 (La. 1988). Irrational choices must be discarded. Id.

The state was held to prove that the defendant caused the death of another while specifically intending to kill or cause great bodily harm to more than one person or in the perpetration or attempted perpetration of an aggravated burglary, armed robbery, first degree robbery or simple robbery. LSA-R.S. 14:30(1) and (3).

Based on the mass of evidence recited in the main opinion, we find the state proved each element of first degree murder beyond a reasonable doubt for each of the four victims in the Chaney household and excluded any reasonable hypothesis of innocence. The defendant, in narrowing the state's evidence against him to only the palm print in Vivian Chaney's bathtub, fails to include the substantial circumstantial evidence against him. Even if the only evidence against him was the palm print, his argument would still be meritless. A fingerprint, in and of itself, can be enough to prove a crime beyond a reasonable doubt if it is so placed as to have no other rational explanation for its presence. State v. Lee, 524 So.2d 1176 (La. 1988), appeal after remand, 559 So.2d 130, cert. denied, 111 S. Ct. . . 1431, 113 L. Ed. 2d 482 (1991); State v. Pryor, 306 So.2d 675 (La. 1975).

The defendant also asserts he had a strong alibi defense based on the testimony of Mrs. Hart, his neighbor, who testified that he was eating dinner with her and her husband, or house-sitting their house, the evening of the William Code homicides. This testimony conflicted with that of Donald Johnson, William Code's neighbor, who saw the defendant leave William Code's house that evening and spoke to Code. This testimony also conflicts with Code's own admission that he was at his grandfather's house that evening. In this case, given the credibility choices available, we cannot say crediting Johnson's testimony and Code's admission was an irrational choice.

Insofar as the defendant's Motion for New Trial was based on trial court actions which form the subject of other assignments of error, we find the trial court did not err in denying the defendant's Motion for New Trial for the reasons previously stated.

Assignment of Error #19

The defendant argues the trial court erred in sentencing the defendant to death, once again raising previous arguments dealing with the state's use of evidence of the Ford and William Code homicides and evidence of a prior conviction to show his character and propensities in the penalty phase of trial. These arguments have been considered in the main opinion and in Assignment of Error #9 and found to be without merit.

Assignment of Error #20

During the testimony of Juanita Parks, relating to the Ford homicide, the prosecutor asked her to describe the defendant's deterioration in appearance between 1984 and the time of his arrest. After stating various changes in his appearance, the following interchange took place:

Q: What kind of impression did you have when you saw him as time went on and he got to looking like that?

A: Like something was wrong or he was full of dope. I don't know.

Tr. 3282-3283.

Defense counsel objected to this characterization outside the presence of the jury and asked for an admonishment. The prosecutor explained the witness would be asked about a specific incident where she saw the defendant smoke marijuana and pointed out that defense counsel had already described the defendant's marijuana and cocaine use on opening statement. The trial court refused to admonish the jury, explaining any remark would only draw attention to the characterization, but explained to the witness she was not to give opinions.

The defendant argued the trial court erred in refusing to give an admonition to the jury under La. C.Cr.P. art. 771. He also contends this statement referred to the commission of other crimes.

First, it should be noted this statement, although it may have referred to "other crimes," was clearly a descriptive phrase based on the witness's actual observance. As such, the statement may not have been inadmissible per se. La. C.Cr.P. art. 701 provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness; and

(2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Even assuming error, the trial court did not abuse its discretion in denying the defendant's request for an admonition. Following the objected to colloquy, Parks went on to explain that she had seen Ford and the defendant smoking marijuana in Ford's yard sometime in 1984. No objection was raised. The state also presented other unobjected-to evidence of the defendant's drug use during this period of time. A neighbor of Ford's testified she saw Ford and the defendant smoking marijuana in Ford's yard. Subsequent testimony referred to the defendant's use of marijuana and cocaine, and his practice of renting out a room of his house where people could shoot cocaine. Police officers testified as to the defendant's effort to act as a confidential informant in order to pay a debt to a drug dealer. In light of these numerous references in testimony to the defendant's drug use to which no objection was lodged, the defendant cannot show the remark created prejudice against him. La. C.Cr.P. art. 771.

Assignment of Error #21

The defendant argues the state used three of four peremptory challenges to strike African-American males who were approximately the same age as the defendant, in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. . . 1712, 90 L. Ed. 2d 69 (1986). See also State v. Collier, 553 So.2d 815 (La. 1989).

In Batson, the Supreme Court held that an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of that person's race. A three-step process was outlined for evaluating claims.

First, the defendant must show he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Batson, 476 U.S. at 96-97. Here, the defendant is an African-American male claiming that other African-American males were removed from the venire. In each case, however, the trial court found that other African-Americans were already seated as members of the jury. The trial court implicitly found the defendant failed to make the initial showing of a Batson violation. Despite this, the prosecutor offered a race-neutral explanation for each peremptory challenge. Where that occurs, and the trial court rules on the ultimate issue of whether intentional discrimination occurred, the preliminary issue of whether the defendant made a prima facie showing becomes moot. Hernandez v. New York, U.S., 111 S. Ct. . . 1859, 114 L. Ed. 2d 395 (1991).

Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. This showing need not rise to the level justifying exercise of a challenge for cause but the prosecutor may not merely assert good faith or deny a discriminatory motive. Batson, 476 U.S. at 97-98. "The neutral explanation must be one which is clear, reasonably specific, legitimate and related to the particular case at bar." Collier, 553 So.2d at 820.

Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Batson, 476 U.S. at 98. To do so, "the trial court must assess the weight

and credibility of the explanation." Collier, 553 So.2d at 820. This fact finding is entitled to great weight on review.

The jury which determined the defendant's conviction and sentence was composed of eight white and four African-American members.

Anthony Bagley

Bagley is an African-American male, married, with no children. He drives a truck for AT&T despite a degree in mechanical engineering technology. He stated he left his religious affiliation blank because he had not decided yet. He admitted he had a prior conviction for disturbing the peace, explaining the incident arose when he touched a woman with his finger and she fell back. He related his wife and her uncle were both previously convicted of manslaughter. When questioned whether he had ever been a victim of crime, Bagley related how his car was stolen and burned. He did not report this incident to police. The record shows Bagley requested clarification of the concept of circumstantial evidence and frequently spoke so softly the attorneys had to request that he speak louder.

The prosecutor gave the following explanation for challenging Bagley:

We noted that he looked bored. He seemed unfocused during the questioning. His demeanor, we found to be inappropriate. During the time that I was questioning Mr. Bagley, I found that there was no rapport between he and myself. He acted like to me that he did not want to be present during the Voir Dire process, although he did indicate otherwise. His body language indicated to me that he was not satisfied being present.

Additionally, Your Honor, the man had been convicted after having a trial of disturbing the peace; he felt compelled to explain his conviction of disturbing the peace. And his explanation seemed to be unreasonable and showed a dissatisfaction with the system. Your Honor, I did note that he got a rather steep sentence for disturbing the peace of forty-five days in jail, which indicates to me that the incident was more severe than he gave reasons for. His wife -- and if I understood his reasons correctly or his statement correctly -- also an uncle had been convicted of manslaughter. The entirety of his statements to me during the Voir Dire process seemed to me to be antagonistic toward the system and myself as a representative of this state. As evidence by the fact that his car was stolen and burned, he did not call police in that incidence. He seemed more attentive to the defense side. When I got up to question him on redirect examination very briefly, he made a face like he was tired and didn't want to hear anymore.

I felt like during the initial exchange, he felt that he wanted to volunteer information sometimes and interject into other jurors' answers. I felt that he would be a disruptive influence. Additionally, he left blanks on questionnaire. He was undecided as to his religious preference, which I believe is a very basic moral issue that there needs to be a firm decision on. It is for those reasons that we based our

peremptory challenges.

Tr. 1866-67.

While defense counsel objected on the basis of Batson, he stated he was making the objection only for the record so that if a trend of peremptory challenges against African-American males later developed, he would not be prejudiced for having failed to object. Thus, it appears no initial showing was made. Since the prosecutor placed the state's neutral reasons for challenge on the record, and the trial court implicitly found them acceptable, the fact that an initial showing was not made is moot. Hernandez v. New York, supra.

The reasons given by the prosecution for challenging Bagley do appear to be race-neutral and are clear, reasonably specific, legitimate and related to the case at bar. Although it is difficult to Judge from a cold record, the record does appear to support the state's position that Bagley was essentially unresponsive to its questions. The record also shows Bagley was much more inclined to be forthcoming in his answers to the defense. The defendant can show no Batson violation with the state's peremptory challenge of this prospective juror.

Sherman Mays

Mays is a 30-year-old African-American male who works at the LSU Medical Center. He had studied electrical engineering at Louisiana Tech for two years and had obtained an associated degree in electronics from Ayers Institute. Although a life-long resident of Shreveport, he was thinking of moving to Dallas for better job opportunities. When asked if he had ever been a victim of crime, he stated he had been burglarized about ten years ago. The state gave the following reasons for challenging him for cause:

First, it was -- I want to place of record the fact that I liked Mr. Mays. And I came very close to accepting him as a juror; however, it concerned me greatly that he was not too enchanted with Shreveport, Louisiana, didn't particularly like Shreveport, Louisiana; talked of moving to Dallas. There are no strong ties whatsoever indicated between Mr. Mays and this community. That caused us some very great concern.

In addition, Mr. Mays is single. He has no children. We are looking for a very good cross-section of the community. In my opinion, since there are children involved as victims in this case, we are looking in particular for parents; we are looking in particular for older people. Mr. Mays, I believe, is in his twenties. It concerned me greatly that during one of my examples of circumstantial evidence he didn't look at me. He looked around the room as if to -- gave me the impression that he was somewhat distracted. Although his answers appeared good, his demeanor, in my view, was not consistent with the substance of what he was saying.

The overall view of Mr. Mays, in my opinion, was, that while I liked him, while I came very close -- and Ms. Bush and I came very close to wanting him on the jury, and we vacillated -- our overall view was, that in light of his age, in light of the fact that he has no real ties to the community, in light of his demeanor, we felt that it was appropriate to excuse Mr. Mays.

We had reached the impression that Mr. Mays was somewhat insincere in some of his answers. And he also did register a response to the name Debra Ford when that name was read. Although he indicated that he didn't know her, his facial response indicated that he did know something about her or about the case with respect to her. That caused us some concern. In addition, the employment record concerned us, but, anyway, those were our reasons that we wanted to place of record.

Tr. 1790-92.

The reasons given by the prosecution for challenging this prospective juror were race-neutral, specific and legitimately related to the state's case. From the record it is difficult to evaluate Mays' demeanor but the state's characterization was not challenged by the defense. The prosecution stated it was looking for older jurors, and the fact that Mays was single and childless particularly related to the state's strategy considering the specific facts of the case. The defendant can show no Batson violation with the state's peremptory challenge of this prospective juror.

Jerry Kellum

Kellum is a 22-year-old African-American male who was unemployed at the time of voir dire. He had graduated from high school two years earlier at the age of 20 and had been unemployed since that time save for a brief summer job. He claimed to be a member of the Church of God and Christ but could not state where the church was located. He subsequently admitted he did not attend this church. Kellum listed his hobby as watching T.V. and stated he spent his days looking for work and watching television.

The state explained its reasons for challenging Kellum:

Your Honor, we believe that the questionnaire reflects his youth, number one; and the fact that he is not employed. Your Honor, although he graduated in 1988, he has been employed only for three months. On his questionnaire, which we have just introduced, he stated that his only hobby was looking at TV. In addition, while he listed on his questionnaire that he attended the Church of God, he could not tell use [sic] where it was located. Other than to say that it was somewhere in the bottoms. He later admitted that he really didn't go. His responses were extremely unclear and muffled. Some of the time he answered in an inaudible fashion, and he covered his mouth when he spoke at all times.

I felt like I could not establish a rapport with this juror. Your Honor, we did also note that his

grammar and his syntax were somewhat different. And at first, I had thought that that was because of his lack of education. During the course of the Voir Dire process, I began to think that Mr. Kellum had a speech impediment which caused him some embarrassment. He covered his mouth whenever he spoke. He seemed reluctant to answer. He was more comfortable when he could answer yes or no in accordance with the other jurors.

Your Honor, this is an extremely complicated case. He will be called upon to place his -- to deliberate if he was a juror on very complicated evidence. I did not feel that he had the capacity to openly contribute to those deliberations and to voice his opinion because of his speech impediment, if that is that is [sic] what it was. Additionally, Your Honor, the nature of the evidence in this case is going to be extremely complex. It is scientific in nature and it requires a juror, who is educated and intelligent and can appreciate and contribute to the deliberations on that evidence.

Additionally, when he was asked about the death penalty, he gave several different responses, and I believe that is also supported by his youth. This was obviously a very difficult question. He was called into jury service. It seemed obvious to me that he had not thoroughly even considered his answers to a point that he could articulate any audible response to my questions. He then gave a no answer and then a yes answer as to whether he could vote for the death penalty. I felt like he really had no definite opinions, had not thought the evidence -- or the issue out thoroughly in his own mind and would not be able to deliberate on that point.

Additionally, Your Honor, his questionnaire indicates that he lives in a high crime gang area. He did indicate that he would have difficulty in the community with a vote of the death penalty, and then he later said that he would not have difficulty. At best, we felt his responses were confusing and that we were not able to develop a rapport at all with this juror.

Tr. 2413-15.

Defense counsel specifically made a Batson challenge in this instance. Stating that the defendant was a young African-American male much like the prospective juror, defense counsel noted that all three of the state's peremptory challenges used to that point had been of young African-American males. The trial court found the burden did not shift to the prosecution because African-American jurors, although women, had been empaneled. The trial court did not think a Batson claim included the issue of whether a particular sex was being excluded, but only dealt with a racial component.

Regardless of whether the defendant showed a prima facie case of discriminatory use of peremptory challenges, the neutral reasons advanced by the state are clearly supported in the record. A review of his entire voir dire establishes that, but for the group "yes or no" responses, Kellum was essentially inarticulate. He often gave confusing and multiple answers to questions. He was evasive on some of the most serious questions, particularly his personal views on the death penalty. The defendant can show no Batson violation with the state's peremptory challenge of this prospective juror.

Assignment of Error #22

The defendant argues the trial court erred in denying his challenges for cause of two prospective jurors. The defendant contends Jo Ann Cross indicated she would give more weight and credibility to police testimony. The defendant asserts Ricky Lee Fike indicated he would require the defendant to take the stand and testify.

The defendant challenged both prospective jurors for cause. The trial court denied the challenges; the defendant thereafter exercised two of his peremptory challenges against them. The defendant did not exhaust his twelve peremptory challenges, but used only eleven during voir dire.

La. C.Cr.P. art. 797 provides in pertinent part:

The state or the defendant may challenge a juror for cause on the ground that:

(2) The juror is not impartial, whatever the cause of his impartiality. 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;

(4) The juror will not accept the law as given to him by the court . . .

"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). Whether sufficient cause has been shown to reject a prospective juror rests with the trial Judge's discretion. Such determinations will not be disturbed on review unless a review of the voir dire as a whole indicates an abuse of discretion. State v. Bourque, 622 So.2d 198, 226 (La. 1993); State v. Jones, 474 So.2d 919 (La. 1985), cert. denied, 476 U.S. 1178, 106 S. Ct. . . 2906, 90 L. Ed. 2d 992 (1986). Where a defendant has not exhausted his peremptory challenges, the defendant must show both that the trial court erred in denying the challenge for cause and that he was prejudiced thereby. State v. Vanderpool, 493 So.2d 574 (La. 1986).

Jo Ann Cross

The record shows that, although Cross initially stated she believed she would give more credence to the testimony of a police officer, she was later rehabilitated by further questioning. She agreed that police officers make mistakes and concluded she would weigh their testimony as she would any other witness's. She stated she could be fair and impartial and could render an impartial verdict according to the law and evidence that she heard. From a reading of her complete voir dire, the trial court did not err in denying the defendant's challenge for cause.

Even assuming error, the defendant is unable to demonstrate any prejudice arising from this ruling. Cross did not sit on the jury. The defendant does not show an objectionable juror was seated for want of peremptory challenges, nor does the defendant show he accepted a questionable juror because he was hoarding remaining challenges. Vanderpool, 493 So.2d at 575.

Ricky Lee Fike

The record shows that, although Fike initially stated he would want the defendant to testify to tell his side of the story and would expect him to present witnesses, he was later rehabilitated by questioning from the court. He stated that, although he would rather hear what the defendant had to say, he would accept the law as given, would draw no negative inference from the defendant's failure to testify and would decide the case based on the evidence presented. A review of Fike's entire voir dire testimony shows he was rehabilitated; the trial court did not err in denying the defendant's challenge for cause.

Even assuming error, however, the defendant does not show prejudice arising from this ruling. See Vanderpool, 493 So.2d at 575.

Assignment of Error #23

The defendant argues the trial court erred in granting the state's challenges for cause of six prospective jurors on the grounds that they were opposed to the death penalty. Relying on La. C.Cr.P. art. 8001, the defendant asks this court to review the trial court rulings to determine if the effect of these rulings was to entitle the state to more peremptory challenges than it would otherwise have under the law.

In Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S. Ct. . . 1770, 20 L. Ed. 2d 776 (1968), the Supreme Court held a capital defendant's rights to an impartial jury under the Sixth and Fourteenth Amendments prohibited the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." A prospective juror may be excluded only when his or her views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. . . 844, 83 L. Ed. 2d 841 (1985). Although the defense cites the applicability of La. C.Cr.P. art. 800as its only support, the Supreme Court has held it is reversible error when a trial court erroneously excludes a potential juror who was qualified for service under Witherspoon, despite the fact that the state could have used a peremptory challenge to exclude the potential juror. Gray v. Mississippi, 481 U.S. 648, 107 S. Ct. . . 2045, 95 L. Ed. 2d 622 (1987).

Consistent with the Supreme Court pronouncements in Witherspoon and Wainwright, La. C.Cr.P. art. 798 provides in pertinent part:

It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

(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 . . . .

The record shows each of the six prospective jurors challenged for cause on Witherspoon grounds was unalterably opposed to the death penalty.

Charles Frazier

Frazier indicated he would automatically be inclined to vote against the death penalty. Upon further questioning, the following response was given:

Q: . . . Do you feel, then, Mr. Frazier, that you would be -- you would be automatically against the death penalty no matter what?

A: I am against it. Ain't no way.

Tr. 1927.

Although defense counsel attempted to rehabilitate the prospective juror, and Frazier stated he could consider both the death penalty and life imprisonment as punishments, he later stated his unequivocal opposition to the death penalty.

Q: All right. Would you be inclined to automatically vote against the death penalty without regard to what the evidence is because of your personal feelings about it?

A: Well, I would still have that automatic incline to vote against it, yes, sir.

Q: I am sorry?

A: I would probably have to vote no, against it - the death penalty.

Q: Would you automatically vote against it because of your personal feelings and beliefs?

A: I would.

Q: And would you automatically vote against it without regard to the evidence because of the way you personally feel about it?

A: Well, I feel I have to vote against it, you know, no matter what the evidence. If the evidence pointed to him being guilty, I would vote against the death penalty. Like I say, I would vote for life imprisonment without probation or parole.

Q: You would automatically vote against the death penalty?

A: I would.

Tr. 1943-44.

Vivian Busy

Busy indicated some indecision over the death penalty:

Q: Would you automatically vote against the death penalty?

A: I really couldn't vote to have someone put to death. I just don't believe in it. I don't believe in it.

Q: Is that --

A: It has nothing to do with my moral or religious beliefs. It is just too final. I don't think I could do it.

Tr. 2050-51

Although Busy stated she knew the death penalty was the law and that she would try to follow the law, she expressed doubt that she would be able to do so.

Q: But the law says you have an option here.

A: Yes.

Q: It says you can vote for death -

A: Oh. I see. I would have an option.

Q: You would have an option. But what I would need to know is, if you would automatically choose this option because of your ingrained beliefs?

A: Oh. Since I have an option, yes.

Q: You would automatically vote for life imprisonment?

A: Yes.

Tr. 2053.

James Coleman

Coleman stated he had religious objections to the death penalty. Coleman stated he understood the law but related:

If I say murder, murdered this person or condemn this person, that it would be like how would I get on my knees and pray when I know that I am a murderer. You know, I did this. and would the Lord forgive me for this, if I was a murderer, and I don't want to put that burden in my heart.

Tr. 2232.

He also said he would automatically be inclined to vote against the death penalty.

Michelle Graves

Graves indicated she was not automatically against the death penalty as a law, but indicated she could not vote to sentence anyone to death.

I believe in the death penalty but I don't think that I could Judge to have that person put to death, because it would be like I would be murdering this person.

Tr. 2236.

She later stated she would automatically vote against the imposition of the death penalty without regard to how severe the circumstances might be. Despite defense attempts to rehabilitate her, she stated, "I don't think I could consider the death penalty." Tr. 2285.

Ibn Abdul Resheed

Resheed stated he was of the Islamic faith and did not believe in the death penalty. He explained:

I feel like there is no gods on this earth, and I feel you can't sentence nobody to no death; ain't nobody got a right to do that.

Tr. 2690.

During the defense's attempt to rehabilitate him, Resheed stated he could not consider the death penalty and would vote against the death penalty regardless of any evidence in the case.

Bobby Kendrick

Kendrick stated she did not believe in capital punishment based on her religion.

Well, I just don't feel that it is right to kill someone. I don't -- I mean, I don't think they should be, you know, punished for doing the killing. I always feel that there is a reason for things being done.

Tr. 2699.

Kendrick stated she was automatically opposed to the death penalty despite defense attempts to rehabilitate.

A review of the record fully supports the trial court's rulings on each of these six prospective jurors. Each indicated that they were unalterably opposed to capital punishment or would not impose the death penalty in any case.

Assignment of Error #24

The defendant argues it was error for the trial court to qualify the state's witness, FBI Agent Douglas, as an expert in the field of criminal investigative analysis. Douglas was offered as an expert in criminal investigative analysis at the Prieur hearing. Defense counsel objected. After further questioning and argument to the trial Judge, the trial court accepted Douglas as an expert. Due to Douglas's unavailability at trial, his prior testimony was read to the jury through stipulation of all parties.

La. Code of Evid. art. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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Trial courts are vested with great discretion in determining the competence of an expert witness. Absent an abuse of discretion, the trial court's rulings on an expert's qualifications will not be disturbed. State v. Bourque, 622 So.2d 198 (La. 1993); State v. Trahan, 576 So.2d 1 (La. 1990).

The record shows Douglas is a Supervisory Special Agent with the FBI assigned to the FBI Academy in Quantico, Virginia. He had been an FBI agent since 1970 and became head of the Criminal Investigative Analysis Program in 1977. He supervises ten agents working directly under him, as well as 125 field agents whose job is primarily to identify cases for submission to the National Center for the Analysis of Violent Crime. This program receives between 800-1000 cases per year from throughout the United States and foreign countries. Douglas participates in the analysis of these cases.

Douglas has earned a Ph.D. in the area of criminal analysis. He has served on several faculties and is visiting lecturer to several universities. Douglas has written sixteen or seventeen articles on criminal analysis, criminal personality profiling and interview interrogation techniques and has published a book, Sexual Homicide Patterns and Motives. He belongs to numerous professional organizations and has made thousands of presentations. Douglas had previously been accepted as an expert in criminal investigative analysis on six occasions.

Douglas's position brings him into contact with every case submitted to the National Center and the Violent Crime Apprehension Program. The center looks for similarities in crimes in order to determine whether they are linked by the perpetrator. While the program looks at victimology, autopsy reports, crime scene photographs and similar information, it specifically avoids reviewing any suspect information. Douglas visited each crime scene in this case and undertook an analysis of all the factors previously listed.

Based on Douglas's "knowledge, skill, experience, training, and education," the trial court clearly did not abuse its discretion in accepting him as an expert in the field of criminal investigative analysis. A review of Douglas's testimony shows he was not involved in compiling a profile of the perpetrator, as argued by the defendant. Douglas testified his sole investigation was to determine whether there were any ritual aspects to the murders. Nor did Douglas invade the province of the jury, as claimed by the defendant. Douglas never ventured to give an opinion on who in particular could have committed the eight murders. Instead, his testimony focused on the similarities in the crimes and his belief that one individual perpetrated all of them.

Assignment of Error #25

Walker Evans, Jr. was called as a prospective juror. During the evening recess of voir dire, Evans left and did not return to the courthouse at 7:00 p.m. as ordered by the court. At 7:25 p.m. he had not returned to the courtroom. It was revealed he had told a bailiff he was leaving, that he lived on the bus line and did not have any other transportation and asked to speak to the Judge, who was

unavailable. The trial court refused to excuse Evans from the jury pool until he had a chance to speak to him.

When Evans appeared the following morning, the trial court allowed both parties to question him regarding his failure to return to the evening session. Evans declined to answer questions put to him by the state regarding his business of "private investigations." Defense counsel declined to examine Evans on this issue. Although the state argued to the court that Evans should be excused because he was "hostile" based on both his testimony of the day before and the recent interchange with the prosecutor, the trial court specifically declined to make that finding, holding:

The Court will disqualify him under Article 787. I do not think I have to characterize it as being hostile. I do not think it is as necessary as it is to know that he will follow the instruction of the Court. And, obviously, he has not followed the instruction of the Court. And if he does not do it now, it is not going to get any better if he should be Voir Dired further or he should be seated as a juror. If he can't get here for returning after supper, it seems to me that he is not going to follow the Court's instructions on other things. And for that reason, the Court will disqualify him under Article 787.

Defense counsel objected to this ruling, believing sufficient grounds had not been laid by the state or the court to disqualify him.

The defendant now argues the trial court erred in disqualifying Evans from jury service. Although not raised at trial, the defendant notes Evans was a young African-American male.

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.

This Court has held that the trial court is within its authority to excuse a prospective juror under the authority of this article on its own motion. State v. Andre, 263 La. 48, 267 So.2d 190 (1972); see also State v. Davis, 411 So.2d 2 (La. 1982). The ruling is reviewed only for an abuse of discretion. Davis, 411 So.2d at 5. "Moreover, since the state did not exhaust its peremptory challenges, an erroneous sua sponte excusal of a prospective juror might not afford the defendant a ground for complaint." Davis, 411 So.2d at 5.

The record does not show the trial court abused its discretion in disqualifying prospective juror Evans based on his inability to follow the court's instructions concerning his return for the evening session of voir dire. In addition, the state argues it would definitely have exercised a peremptory challenge to this juror based on his hostile attitude to the state. Although the defendant mentions the prospective juror's race, he does not make any arguments concerning this issue.

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Assignment of Error #26

During voir dire, the prosecutor asked jurors if they were familiar with the Ford and William Code homicides. Prospective juror William Shea indicated he knew something about the case from what he had read and had formed one opinion based on that information. Shea was then questioned individually and indicated:

What I do know is, it is treated as a signature crime; that there were certain instances that happened at the scene of the crime that they appeared to be all interrelated. And I guess the opinion that I have is, that nothing of this sort has happened since the defendant was incarcerated.

Tr. 2015.

Shea stated further that he did not have any preconceived idea as to the defendant's guilt, that he knew the media may or may not have reported the information correctly and that he was willing to make his decision from the evidence presented in court.

Outside Shea's presence, defense counsel objected to the state's motion in limine which precluded him from referring to the Grissom homicides. The defense argued it was limited from having full and open voir dire by the court's earlier ruling and precluded his intelligent use of peremptory challenges. The state argued the defendant's questioning on the issue of the nature of signature crimes was not limited by the motion in limine, which only prohibited the defense from referring to the Grissom homicides by name. The trial court agreed with the state as to the scope of the previous ruling.

Although the defendant was not allowed to mention the Grissom homicides by name, he was allowed wide latitude in questioning Shea as to whether his opinion would change if there were other circumstances which occurred while the defendant was in jail. Shea stated his previous opinion would change entirely.

Outside of Shea's presence, defense counsel again objected to the previous motion in limine. The trial court ruled the prior decision, prohibiting defense counsel from mentioning the Grissom homicides by name, was in effect. The defendant urges this ruling was error and prohibited him from free and open voir dire.

A defendant is entitled to full and complete voir dire examination and to the exercise of peremptory challenges. La. Const. Art. I, § 17 (1974); State v. Duplessis, 457 So.2d 604 (La. 1984). "The accused's right to intelligently exercise cause and peremptory challenges may not be curtailed by the exclusion of non-repetitious voir dire questions which reasonably explore the juror's potential prejudices, preDispositions or misunderstandings relevant to the central issues of the particular case." Duplessis, 457 So.2d at 606.

A trial Judge in a criminal case does have discretion to limit voir dire examination, however, "as long as the limitation is not so restrictive as to deprive defense counsel of a reasonable opportunity to probe to determine a basis for challenges for cause and for the intelligent exercise of peremptory challenges." Id.; State v. Williams, 457 So.2d 610 (La. 1984). On review, this Court must examine the entire voir dire to determine whether the trial court abused its discretion. Duplessis, 457 So.2d at 606; Williams, 457 So.2d at 613.

A review of the entire voir dire examination of Shea shows the defendant's questioning was not limited to the extent that he was denied the right to intelligently exercise peremptory challenges. The trial court's decision was in keeping with his ruling regarding the Grissom homicides. As discussed in Assignment of Error #5, the trial court's ruling was correct and kept irrelevant information from the voir dire and the jury. Other than prohibiting defense counsel from naming the Grissom homicides, the trial court allowed the defense wide latitude in questioning Shea about his opinion on similar crimes. There was no abuse of discretion in the trial court's ruling.

Assignment of Error #27

During the testimony of Donald Ray Johnson, William Code's neighbor and friend, the following exchange occurred:

Q: All right. Now, you knew Mr. William T. Code well?

A: Yes, I did.

Q: And what was his policy or habit about letting in Nathaniel Code?

A: He would not let him in his house. He didn't like him around there, but he wouldn't stop him -- you know he let him go as far as the porch of his house.

Q: What did he tell you about not letting -- not liking him to be around there?

A: Well, we would say he didn't --

Tr. 4556.

Defense counsel objected; the jury was sequestered. The trial court ruled the state could elicit an answer to show the victim's state of mind. Johnson testified that he was present when the defendant tried to borrow money from William Code and was refused two weeks before the murder. Defense counsel objected when the state asked whether William Code and Johnson discussed the matter after the defendant left. The jury was again sequestered.

After hearing argument, the trial court held Johnson could testify as to what he observed -- William Code's demeanor -- but could not testify as to William Code's statements of fear relating to the defendant. When the jury returned, Johnson testified only as to the change in William Code's voice after the defendant left and the fact that he seemed more tense.

The defendant argues this improper use of hearsay impermissibly attacked his character. The state argues this testimony comes under the state of mind exception of the hearsay rule.

La. Code of Evid. art. 803(3) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or his future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.

This court has previously distinguished between declarations of fear and declarations of revulsion. Declarations of fear, which often "reflect upon defendant's past or future aggressive actions, defendant's culpability, or the dispositive issue of the case," must be limited by the trial court to instances where the defendant has made the criminal character of the death an issue. State v. Brown, 562 So.2d 868, 879 (La. 1990). In contrast, declarations of revulsion "may circumstantially evince declarant's expected reaction to defendant or show the probable nature of their future conduct, without necessarily averting to defendant's aggressive or culpable acts." Id. A trial court need weigh the relevancy and probative value of these statements with any possible prejudice that may result.

Although a decedent's state of mind may not be an ultimate issue at trial, it may be an indirect or material issue. It was so in this case. The defendant claimed his grandfather called him to check his house because he was afraid of persons hanging around his house. The testimony of Johnson showed it was inconsistent for William Code to have acted in this manner. The trial court correctly restricted Johnson from testifying as to William Code's fear of the defendant, but correctly allowed Johnson to describe William Code's demeanor. There was no error in the trial court's ruling.

Assignment of Error #28

The defendant argues the trial court erred in giving an instruction on reasonable doubt in violation of Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. . . 328, 112 L. Ed. 2d 339 (1990), disapproved on other grounds, Estelle v. McGuire, U.S., 112 S. Ct. . . 475, 116 L. Ed. 2d 385 (1991). The defendant also argues the trial court erred in failing to instruct the jury as to the standard of proof it should use in

considering other crimes evidence.

The trial court's instruction on reasonable doubt was as follows:

While the State must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is doubt based on reason and common sense and is present when, after you have carefully considered all the evidence, you cannot say that you are firmly convinced of the truth of the charge.

Tr. 5376.

The trial court's charge does not have the references to "grave uncertainty," "actual substantial doubt," or "moral certainty" found erroneous in Cage.

A review of the extensive instruction delivered on the limited function of "other crimes" evidence shows the trial court properly restricted the jury's consideration of this evidence in considering the guilt or innocence of the defendant for the crimes charged. See State v. Davis, 449 So.2d 466 (La. 1984); see also State v. Prieur, 277 So.2d 126 (La. 1973).

CASE RESOLUTION

AFFIRMED.

APPELLATE judges: FOOTNOTES

1 Pursuant to Rule IV, Part 2, § 3, Calogero, C.J. was not on the panel which heard and decided this case. See the footnote in State v. Barras, 615 So.2d 285 (La. 1993).

1. La. C.Cr.P. art. 800provides: "The erroneous allowance to the state of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise by the state of more peremptory challenges than it is entitled to by law."