NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 2281

STATE OF LOUISIANA

VERSUS

BRANDON BRUE

Judgment Rendered: May 7, 2010

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On Appeal from the 18th Judicial District Court
In and For the Parish of Pointe Coupee
Trial Court No. 73,624-F

Honorable James J. Best, Judge Presiding

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Richard J. Ward, Jr. District Attorney Antonio Clayton Elizabeth A. Engolio Assistant District Attorneys New Roads, LA	Counsel for Appellee State of Louisiana
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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

Welch J. concurs in result

HUGHES, J.

The defendant, Brandon Brue, was charged by grand jury indictment with second degree murder (count one), attempted second degree murder (count two), and possession of firearm or carrying concealed weapon by a convicted felon (count three), violations of LSA-R.S. 14:30.1, LSA-R.S. 14:27, and LSA-R.S. 14:95.1. The defendant entered a plea of not guilty. Upon a trial by jury, the defendant was found guilty as charged. On count one the defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. On count two the defendant was sentenced to fifty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. On count three the defendant was sentenced to fifteen years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence and to pay a fine of one thousand dollars. The trial court ordered that the sentences be served consecutively. The defendant now appeals, assigning errors to the admission of other crimes evidence, hearsay testimony, Yarnell Brue's written statement, and the sufficiency of the evidence. For the following reasons, we affirm the convictions and sentences.

FACTS

During the early morning hours of June 9, 2007, a shooting occurred at the residence of Yarnell Gage Brue, the defendant's wife and deceased victim herein, in Pointe Coupee Parish.[1] Yarnell Brue suffered a gunshot wound to the pelvic area and died of exsanguination. Christopher Gremillion was present at the time of the shooting and suffered four gunshots wounds, specifically one to the left chest wall, one to the right buttock, and two to the right forearm, but survived. After

[1] The status of the marriage of the defendant and the deceased victim was not clearly established during the trial. Testimony seemingly indicated that the couple were estranged and not living together for a period of time leading up to, and at the time of, the offenses.

interviewing Gremillion, the police determined that the defendant was the suspect in the shooting. The defendant was ultimately arrested and convicted.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth assignment of error, the defendant contends that the evidence was insufficient to support the guilty verdicts. The defendant contends that he was convicted solely upon the single unsworn and uncorroborated videotaped statement of Christopher Gremillion in response to police questioning. The defendant contends that Gremillion's statement was contradicted by eyewitness testimony and physical evidence found at the scene. The defendant argues that since the veracity of Gremillion's statement could not be tested due to his refusal to testify or answer questions, the evidence could not have been believed by any rational or reasonable juror. While not disputing that Yarnell Brue was killed and Gremillion was shot, the defendant disputes that he was the person who committed the acts, and disputes the State proved that he was in possession of a firearm. The defendant argues that several reasonable hypotheses of innocence remain. The defendant specifically hypothesizes that Gremillion arrived at the home of Yarnell Brue and found Yarnell with a third man, with whom a fight and gunfire ensued. The defendant further hypothesizes that Gremillion and Yarnell Brue were sexually involved. The defendant concludes that no rational juror could have found that the State proved beyond a reasonable doubt that he was guilty of any of the crimes charged.

When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The sufficiency claim is reviewed first because the accused may be entitled to an acquittal under **Hudson v. Louisiana**, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with LSA-C.Cr.P. art. 821 and **Jackson v. Virginia**, 443

U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proven beyond a reasonable doubt. When the entirety of the evidence, including inadmissible evidence that was erroneously admitted, is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion by the court of the trial error issues as to that crime would be pure dicta since those issues are moot.[2] On the other hand, when the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial. If the reviewing court determines there has been trial error (which was not harmless) in cases in which the entirety of the evidence was sufficient to support the conviction, then the accused must receive a new trial, but is not entitled to an acquittal even though the admissible evidence, considered alone, was insufficient. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992).

When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Louisiana Revised Statutes 14:30.1, in pertinent part, defines second degree murder as the killing of a human being when the offender has a specific intent to

[2] Alternatively, the accused could be entitled to a reduction of the conviction to a judgment of guilty of a lesser and included offense. LSA-C.Cr.P. art. 821(E); **State v. Byrd**, 385 So.2d 248, 251 (La. 1980).

kill or to inflict great bodily harm. To support a conviction of attempted second degree murder, the State must prove that the defendant tried to (1) kill a human being, (2) when he had the specific intent to do so. LSA-R.S. 14:30.1(A)(1) and LSA-R.S. 14:27(A). Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. LSA-R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting the circumstances. **State v. Cummings**, 99-3000, p. 3 (La. App. 1 Cir. 11/3/00), 771 So.2d 874, 876. Specific intent to kill is easily inferred if a gun is pointed and fired at the victims. See **State v. Noble**, 425 So.2d 734, 736 (La. 1983). The elements of possession of a firearm by a convicted felon are (1) possession of a firearm, (2) conviction of an enumerated felony, and (3) absence of the ten-year statutory period of limitation. LSA-R.S. 14:95.1(A).

As noted, in this case the defendant does not contest the fact that the murder and attempted murder occurred, but instead challenges his identity as the perpetrator and his possession of a firearm. Where the key issue is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification in order to carry its burden of proof. **State v. Smith**, 430 So.2d 31, 45 (La. 1983); **State v. Long**, 408 So.2d 1221, 1227 (La. 1982).

Evidence of the defendant's prior felony conviction was presented during the testimony of the first State witness, Lance Snell of State Probation and Parole, West Baton Rouge District. The defendant had been previously charged with aggravated assault with a firearm (a violation of LSA-R.S. 14:37.4) and illegal use of weapons or dangerous instrumentalities (a violation of LSA-R.S. 14:94). According to the bill of information in the State's exhibit, the charges regarded an

incident occurring on or about July 17, 2005 involving Cody Wells. As discussed herein, Wells also testified at trial. The defendant pled guilty to illegal use of a weapon or dangerous instrumentalities, and the remaining charge was nol-prossed.

State witness Sheena Joseph lived in Jackson Plaza, across the street from the deceased victim. On the evening in question, she looked outside when she thought she heard a door being slammed. She saw a person running from the deceased victim's home. Joseph stated that the person appeared as if he were putting his shirt on while running. Joseph became afraid, closed her door, and called 911. The recording of Joseph's 911 telephone call was played during the trial. During the recording, Joseph stated she heard gunshots and saw a black male run across the yard of Yarnell and Brandon Brue with a white T-shirt in his hand, trying to put it on. At some point, either before or after the 911 telephone call, Joseph looked out her window and saw someone on the victim's porch who she did not believe was the same individual who ran from the home. Joseph responded positively when asked during cross-examination if she heard more gunshots after the person on the porch went back into the home. Joseph testified that the police arrived within fifteen minutes of her 911 telephone call. Joseph could not identify the individuals because she could not see them well. Joseph stated that she heard an approximate total of six gunshots, but could not remember how many were before or after her 911 telephone call.

Detective Lester Jarreau of the Pointe Coupee Parish Sheriff's Office responded to the scene of the shooting. He noted blood on the floor and one black female lying on her side with a single gunshot wound through her hip. The female victim was in the bedroom on a bed, and there was "a lot of blood in the front of the bed" and two projectiles (.357 or .38 caliber bullets) on the floor. Detective Jarreau further testified that the two projectiles possibly struck Christopher Gremillion and exited his body before coming to rest on the floor. Further,

Detective Jarreau testified regarding a third projectile that appeared to have struck Yarnell Gage Brue, exited her body, and traveled through the mattress of the bed and the floor beneath.[3] Detective Jarreau stated that there was a blood trail outside the house, including the porch. There was a footprint on the door and other signs of forced entry or that the door was kicked open. Photographs of the scene showed that the female victim was wearing a T-shirt and underwear when the police arrived, a condom was located on the floor next to the bed, and more condoms had been disposed of in the trash. Detective Jarreau testified that the condoms were not used.

After speaking with the surviving victim, Christopher Gremillion, the police began looking for the defendant. The police checked with the defendant's family members, obtained an arrest warrant, and had media broadcasts that included the offer of a reward in an attempt to locate the defendant. Almost three months later, the police received information regarding the defendant's whereabouts in Dallas, Texas.

At trial, although he refused to answer questions regarding the incident, Gremillion confirmed that he was truthful during his videotaped interview by the police. During the interview, Gremillion stated that he went to the deceased victim's home to have her braid his hair. All of a sudden, Gremillion heard a loud "kick" on the door and after jumping up saw the defendant standing about two feet away from him with a .357 Magnum pointed toward his chest. According to Gremillion, the defendant shot him first in the chest and he fell. Yarnell was pleading with the defendant to stop. Gremillion used his right arm to cover his face and the defendant shot him two times in the arm and in his backside as he turned over. The defendant then shot Yarnell before leaving the house. Gremillion

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[3] The three projectiles, examined at the Louisiana State Police Crime Lab by forensic scientist Jeff Goudeau, were fired from the same unknown firearm, were most consistent with .38 caliber, and could have been fired from a .357 caliber revolver.

looked at Yarnell and observed that she was unable to speak. He stood up and ran out of the house to a nearby relative's residence and was rushed to the hospital. Gremillion stated that he was sure it was the defendant who shot them and that he was able to see the defendant clearly. He had known the defendant for about five years and saw him on a daily basis before the shooting. Gremillion also stated that the defendant's father is married to Gremillion's aunt.

Trooper Daryl Derosin of the Louisiana State Police, Troop A, had investigated a complaint by the deceased victim on June 2, 2007, seven days before her murder. Trooper Derosin stated that the victim was supposed to bring him a statement regarding the complaint, but did not do so. The victim's mother, who testified that she found the statement in the victim's glove compartment and that it was in her handwriting, ultimately gave Trooper Derosin the statement purportedly written by the victim. The letter stated that the defendant called her place of employment and verbally threatened to kill her and that he was very abusive. The letter further stated that the defendant ransacked her home and put clothes in her tub and doused them with Clorox and lighter fluid.

Revious Harrington testified regarding a January 29, 2005 shooting incident involving the defendant. Harrington stated that he and the defendant had a misunderstanding and the defendant shot a gun upward in the air after Harrington turned his back to walk away. Harrington also stated that no one was hurt, his friendship with the defendant was rekindled, and criminal charges were not pursued. Harrington assumed that the defendant shot in the air and not at him because he was not struck.

Cody Wells testified regarding a July 17, 2005 incident. Wells stated that he did not clearly remember the incident, but stated, "I think we got in a fight or something." Wells remembered completing a police statement. When confronted with the language of a portion of the statement indicating that the defendant went

to his vehicle and retrieved a gun after Wells "got the best" of the defendant, Wells indicated that his statement must have been true, but he could not recall the incident. Wells stated that he had been shot at several times in his life, and could not remember a shooting incident involving the defendant. During the trial the defendant did not testify or present any witnesses. As noted, the defendant does not contest the validity of his prior felony conviction or that the instant shootings and murder occurred. Thus, the identity of the shooter is the only contested issue.

While Gremillion refused to answer questions related to the event during the trial, in his recorded interview with the police, he unequivocally and convincingly stated that the defendant shot him and the victim. Gremillion had a clear view of the defendant and knew the defendant well. During the trial, Gremillion stated that he told the truth during the interview. Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Hayes**, 94-2021, p. 4 (La. App. 1 Cir. 11/9/95), 665 So.2d 92, 94, writ denied, 95-3112 (La. 4/18/97), 692 So.2d 440. We are convinced that the evidence presented negated any reasonable probability of misidentification. Specific intent to kill in this case is easily inferred from the fact that a gun was pointed and fired at the victims. Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder, attempted second degree murder, the defendant's identity as the perpetrator of the offenses, and that the defendant, a convicted felon, possessed and used a firearm. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v.**

Calloway, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). For the above reasons, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that other crimes evidence admitted during the trial was not admissible pursuant to LSA-C.E. art. 404(B). The defendant notes that the State presented evidence of a conviction for illegal discharge of a firearm, another accusation of an illegal discharge of a firearm offense that was dismissed, and a statement allegedly written by Yarnell Brue before her death accusing the defendant of threats and criminal damage to property. The defendant contends that the evidence of the illegal discharge of firearm offenses was not relevant. The defendant argues that based upon the testimony and facts of the prior cases, he has a history of standing up for himself and scaring people who cross him, not killing them. On this basis, the defendant contends that to say the prior alleged crimes show his system or *modus operandi* is incorrect.

The defendant further argues that identity is the issue in this case and the fact that he previously discharged a firearm on two separate occasions does not tend to prove he was the person with specific intent to kill Yarnell Brue or Gremillion. The defendant notes that multiple gunshots were fired in the instant case and that he had not been accused of shooting anyone in the past. The defendant additionally argues that even if the evidence of the prior offenses is found to be somewhat relevant, the probative value is outweighed by the prejudicial effect. The defendant concludes that a new trial should be granted.

Generally, evidence of other crimes committed by the defendant is inadmissible due to the "substantial risk of grave prejudice to the defendant." To admit other crimes evidence, the State must establish that there is an independent and relevant reason for doing so, i.e., to show 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. See LSA-C.E. art. 404(B)(1). Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. **State v. Millien**, 2002-1006, p. 10 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 513-14. Prejudicial effect limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. See **Old Chief v. United States**, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). **State v. Jarrell**, 2007-1720, pp. 10-11 (La. App. 1 Cir. 9/12/08), 994 So.2d 620, 629-30.

The procedure to be used when the State intends to offer evidence of other criminal offenses was previously dictated by **State v. Prieur**, 277 So.2d 126 (La. 1973). Prior to its repeal by 1995 La. Acts, No. 1300, § 2, LSA-C.E. art. 1103 provided that the notice requirements and clear and convincing evidence standard of **Prieur** and its progeny were not overruled by the Code of Evidence. Under **Prieur**, the State was required to give a defendant notice, both that evidence of other crimes would be offered against him, and of which exception to the general exclusionary rule on which the State intended to rely. Additionally, the State had to prove by clear and convincing evidence that the defendant committed the other crimes. **Millien**, 2002-1006 at p. 10, 845 So.2d at 514. However, 1994 La. Acts, 3d Ex. Sess., No. 51, added LSA-C.E. art. 1104, which provides that the burden of proof in pretrial **Prieur** hearings, "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." The burden of proof required

by Federal Rules of Evidence Article IV, Rule 404 is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of LSA-C.E. art. 1103 and the addition of LSA-C.E. art. 1104. However, numerous Louisiana appellate courts, including this court, have held that burden of proof to now be less than "clear and convincing." **Millien**, 2002-1006 at p. 11, 845 So.2d at 514.[4]

Herein, a **Prieur** hearing was held before the trial, giving notice of the State's intent to present evidence of prior shooting incidents involving the defendant and bad acts involving the deceased victim herein. At the hearing, Major James Johnson of the District Attorney's Office and Sheriff's Office in West Baton Rouge Parish testified regarding a January 29, 2005 incident that led to the defendant being charged with aggravated assault and illegal use of a weapon. The incident involved a disagreement regarding money and consisted of an altercation between the defendant and Rivious Harrington. During this incident the defendant shot at Harrington twice. It occurred at the same home as the instant offenses. Major Johnson could not confirm whether the gun had been seized, but stated that Harrington described the gun. Major Johnson did not personally investigate the incident. Harrington did not pursue the case and the charges were dropped.

[4] In **Huddleston v. U.S.**, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988), the Supreme Court stated that, for purposes of Federal Rule of Evidence 404(b), other act evidence should be admitted if there is sufficient evidence to support a finding by a jury that the defendant committed the similar act. The **Huddleston** court rejected the suggestion that an other act was required to be proven by clear and convincing evidence and held that the preponderance of the evidence standard was applicable. Louisiana courts of appeal have ruled in accordance with **Huddleston v. U.S.**, with respect to LSA-C.E. arts. 404(B) and 1104. See **State v. Schleve**, 99-3019, pp. 13-14 (La. App. 1 Cir. 12/20/00), 775 So.2d 1187, 1198, writ denied, 2001-0210 (La. 12/14/01), 803 So.2d 983, writ denied, 2001-0115 (La. 12/14/01), 804 So.2d 647, cert. denied, 537 U.S. 854, 123 S.Ct. 211, 154 L.Ed.2d 88 (2002); **State v. Langston**, 43,923, p. 20 (La. App. 2 Cir. 2/25/09), 3 So.3d 707, 719, writ denied, 2009-0696 (La. 12/11/09), 23 So.3d 912; **State v. Crawford**, 95-1352, pp. 16-17 (La. App. 3 Cir. 4/3/96), 672 So.2d 197, 207, writ denied, 96-1126 (La. 10/4/96), 679 So.2d 1379; **State v. Brown**, 2001-0230, p. 6 (La. App. 4 Cir. 2/28/01), 782 So.2d 136, 141, writ denied, 2001-0884 (La. 6/29/01), 794 So.2d 811; **State v. Dauzart**, 2002-1187, pp. 8-9 (La. App. 5 Cir. 3/25/03), 844 So.2d 159, 165.

Harrington's trial testimony indicated that the defendant fired a gun after they had a misunderstanding.

Major Johnson further testified as to a July 17, 2005 incident leading to a 2006 guilty plea by the defendant to an illegal use of weapons or dangerous instrumentalities charge for getting into a fight with Cody Wells in front of the Acadiana Grocery Store. The original charges in this incident were aggravated assault with a firearm, a violation of LSA-R.S. 14:37.4, and illegal use of weapons or dangerous instrumentalities, a violation of LSA-R.S. 14:94. Major Johnson stated that the defendant admitted to firing a gun at Wells over a dispute involving a female. They had a fistic encounter and the victim got the best of the defendant. The defendant went to his vehicle, retrieved a firearm, and came back and started shooting. Major Johnson was not the original investigating officer in that case. He testified that the incident was on videotaped surveillance. The State introduced the bill of information and the minute entry for the guilty plea. Wells could not recall the facts of the incident during his trial testimony, but remembered having a fight with the defendant and completing a police statement.

At the hearing the prosecution argued that the evidence at issue would show motive, system, and plan, stating, "the way he operates, the whole nine yards." The prosecution also specifically stated, in pertinent part, "this is his signature. He's Michelangelo, these are his paintings. He brings a gun, he shoots folks. The law tells us that we can bring in here prior acts to show the way he operates." The State reiterates the *modus operandi* argument on appeal, arguing that the defendant's prior crimes show that his *modus operandi* is to scare people by brandishing guns.

We note that the evidence regarding the defendant's conviction of illegal use of weapons or dangerous instrumentalities for the shooting incident involving Cody Wells is not inadmissible other crimes evidence. This evidence is

independently relevant because it satisfies an element of LSA-R.S. 14:95.1, a previous felony conviction within ten years. **State v. Johnson**, 98-604, p. 19 (La. App. 5 Cir. 1/26/99), 728 So.2d 901, 911, writ denied, 99-0624 (La. 6/25/99), 745 So.2d 1187. Only the admissibility of the evidence regarding the incident involving Harrington remains at issue.

Louisiana jurisprudence allows the use of other crimes evidence to show *modus operandi* (i.e., system) as it bears on the issue of identity. To be admissible, the extraneous offense must meet several tests: (1) there must be clear and convincing evidence[5] 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 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. In order to assure that system evidence involving other crimes does not become a means of introducing character evidence prohibited under LSA-C.E. art. 404(B), the transactions must be closely analyzed to determine whether they exhibit "such peculiar modes of operations to distinguish them as the work of one person." **State v. Hills**, 99-1750, pp. 5-7 (La. 5/16/00), 761 So.2d 516, 520-21.

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[5] In **State v. Hills**, the supreme court recognized that it has not yet addressed to what extent LSA-C.E. art. 1104 and the burden of proof required by the federal rules, as interpreted by **Huddleston v. United States**, has affected the burden of proof required for the admissibility of other crimes evidence (i.e. whether the standard applied at the **Prieur** hearing should be clear and convincing or a preponderance of the evidence); however, the court declined to address the issue since the other crimes evidence in that case was found inadmissible on other substantive grounds. See **State v. Hills**, 99-1750, pp. 5-8 n.6, n.8 (La. 5/16/00), 761 So.2d 516, 520-22 n.6, n.8.

Motive evidence reveals the state of mind or emotion that influenced the defendant to desire the result of the charged crime. To have independent relevance, the motive established by the other crimes evidence must be more than a general one, such as gaining wealth, which could be the underlying basis for almost any crime; it must be a motive factually peculiar to the victim and the charged crime. **State v. McArthur**, 97-2918, p. 3 (La. 10/20/98), 719 So.2d 1037, 1041.[6]

Plan can refer to a plan conceived by the defendant in which the commission of the uncharged crime is a means by which the defendant prepares for the commission of another crime (such as stealing a key in order to rob a safe), or it may refer to a pattern of crime, envisioned by defendant as a coherent whole, in which he achieves an ultimate goal through a series of related crimes (such as acquiring a title by killing everyone with a superior claim). **McArthur**, 97-2918 at p. 3, 719 So.2d at 1042.

We find that the evidence of the prior shooting involving Harrington was prohibited under LSA-C.E. art. 404(B). Assuming that the State met its burden of proving that the defendant committed the prior shooting involving Harrington, this prior shooting and the instant offenses do not possess what might be termed peculiarly distinctive features. There was, for example, no evidence that the same caliber of gun was used in the crimes. Also, the earlier shooting incident was too remote in time from the instant offenses to be distinctively similar to show system. We reject the suggestion that other crimes evidence was admitted to reveal a system by this defendant. Moreover, motive is not an element of the charged offenses; the State was not required to establish motive to meet its burden of proof for either of the instant offenses. See **State v. Johnson**, 324 So.2d 349, 353 (La.

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[6] **McArthur** is superseded by LSA-C.E. art. 412.2 only with respect to other crimes evidence of sexually assaultive behavior. See **State v. Brown**, 2003-1747, p. 13 (La. App. 3 Cir. 5/12/04), 874 So.2d 318, 326-27, writ denied, 2004-1413 (La. 11/8/04), 885 So.2d 1118.

1975). At any rate, in this case the evidence of the prior incident did not tend to show motive for committing the instant offenses. Clearly, the evidence in this case fails to meet the plan exception. Rather, it showed that the defendant had a violent temperament in general, and that he had a tendency to use his gun when provoked to anger. As such, the testimony was inadmissible character evidence.

The erroneous admission of other crimes evidence is subject to harmless-error analysis. **State v. Morgan**, 99-1895, p. 5 (La. 6/29/01), 791 So.2d 100, 104 (per curiam). The test for determining harmless error is whether the verdict actually rendered in the case was surely unattributable to the error. **Morgan**, 99-1895 at p. 6, 791 So.2d at 104. See also **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). After reviewing the record in its entirety, we conclude that the jury's verdicts were based on the pretrial interview of Gremillion wherein he positively identified the defendant as the shooter. These particular verdicts were surely unattributable to the erroneously introduced evidence. Accordingly, while we agree that other crimes evidence was erroneously introduced at trial, we find that its introduction was harmless and does not constitute reversible error.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that inadmissible hearsay evidence was allowed, specifically the videotaped statement of Chris Gremillion. The defendant contends that the videotaped statement was not inconsistent with Gremillion's trial testimony and, therefore, not admissible pursuant to LSA-C.E. art. 801(D)(1). The defendant specifically argues that Gremillion's refusal to testify is not equivalent to an inconsistent statement. The defendant contends that the defense counsel did not have adequate opportunity to cross-examine Gremillion since he refused to answer questions, and notes that the videotaped statement was taken under police directive in an unsworn statement.

The defendant concludes that his right to confront his accuser under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and Article I, Section 16 of the Louisiana Constitution was violated when he was deprived of his right to cross-examine the substance of the videotape.

When called to testify, upon questioning, Gremillion stated that he did not want to testify. Specifically, when asked if he was with the deceased victim on the morning in question Gremillion stated, "I don't wanna testify." He admitted to providing a videotaped interview to the police and confirmed that he told the truth during the interview. Before the videotape was played, the defense objected but did not provide a basis for the objection. The defense asked if a basis or specific objection could be provided at a later time and the trial court granted the request. Arguably, the provisions of LSA-C.Cr.P. art. 841(A), which require a contemporaneous objection *and the grounds therefor* to preserve appellate review of a trial error, were not satisfied. See also LSA-C.E. art. 103(A)(1). The grounds of counsel's objections must be sufficiently brought to the attention of the trial judge to allow him the opportunity to make the proper ruling and correct any claimed prejudice to the defendant. Herein, the ground for this objection was not provided until the jury retired for deliberation. Nonetheless, we find that the evidence in question did not constitute hearsay.

Louisiana Code of Evidence article 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible except as otherwise provided by the Louisiana Code of Evidence or other legislation. LSA-C.E. art. 802.

Louisiana Code of Evidence article 801(D)(1)(c), Louisiana's counterpart of Fed. R. Evid. 801(d)(1)(C), provides that a prior statement by a witness is not hearsay if the declarant testifies at trial and is subject to cross-examination and the

statement offered is one of identification of a person made after perceiving the person. A prior statement by a witness that is one of identification of a person made after perceiving the person may be used assertively, as substantive evidence of guilt even if the witness denies making an identification or fails or is unable to make an in-court identification. **State v. Stokes**, 2001-2564, p. 1 (La. 9/20/02), 829 So.2d 1009, 1010 (per curiam); **State v. Jones**, 41,299, pp. 19-20 (La. App. 2 Cir. 11/9/06), 942 So.2d 1215, 1230, writs granted in part, denied in part, 2006-3025, 2006-2905 (La. 8/31/07), 963 So.2d 381, 382; **State v. Tumblin**, 2002-1643, p. 6 (La. App. 4 Cir. 9/17/03), 857 So.2d 1045, 1049. See **United States v. Brink**, 39 F.3d 419, 426 (3rd Cir. 1994) ("'If at trial the eyewitness fails to remember or denies that he made the identification, the previous statements of the eyewitness can be proved by the testimony of a person to whom the statement was made, and the statement can be given substantive effect.'") (quoting Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence, § 801(d)(1)(C)[01], at 801-222 (1993)). See also **State v. Wright**, 98-0601, pp. 6-8 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 489, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 2000-0895 (La. 11/17/00), 773 So.2d 732 (prior identification made of the defendant by the witness in his testimony before a grand jury was admissible when the witness testified at trial that he could not identify the defendant).

Specifically, LSA-C.E. art. 801(D)(1)(c) provides:

A statement is not hearsay if:

> . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> * * *
>
> (c) One of identification of a person made after perceiving the person; . . . .

Accordingly, when in the instant case Gremillion failed to make an in-court identification, his prior statement was rightfully used as substantive evidence of the

defendant's guilt. Gremillion's statement consisted of an identification of the defendant as the perpetrator of the instant offenses made after perceiving the defendant. Accordingly, the trial court did not err in overruling the defense's objection to the admissibility of this evidence.[7] Assignment of error number two is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, the defendant argues that the statement allegedly written by Yarnell Brue a week before her death was erroneously admitted after a **Prieur** hearing. The defendant contends that the statement by Yarnell contains completely uncorroborated evidence. The defendant further contends there was no evidence that Yarnell actually wrote the statement or firsthand knowledge from any witness that anything in the letter is true. The defendant notes that the statement was never filed with the police. The defendant also notes that the statement claims that the defendant cut all the electrical cords of all her appliances seven days before the murder, although the victim was watching television the night of the murder. The defendant argues that the State failed to meet the burden of proving, by clear and convincing evidence, that the prior bad acts in this particular instance occurred. The defendant further argues that the

[7] In the instant case, Christopher Gremillion was called to testify at trial and was sworn in as a witness. Gremillion answered some questions, but failed to answer others; he was available for cross-examination. However, when Gremillion was tendered to counsel for defendant for cross-examination, defense counsel addressed him as follows: "Good afternoon. . . . I take it you don't want to testify with me asking you questions, either?" Gremillion replied, "I don't wanna testify to nothing dealing with none of this." Defense counsel then thanked Gremillion and the court allowed Gremillion to leave the stand. This court does not deem this interchange as establishing that the witness was unavailable for cross-examination for purposes of LSA-C.E. art. 801(D)(1)(c). Gremillion was not accused of a crime. He did not, nor was he entitled to invoke his privilege against self-incrimination in justification of his failure to respond to questioning at trial. Moreover, defense counsel did not attempt to cross-examine the witness. If cross-examination had been attempted and Gremillion had refused to answer defense counsel's questions, counsel for defendant could have asked the trial court to instruct the witness to testify. Continued failure to answer defense questions could have been addressed through the contempt process. See LSA-C.Cr.P. arts. 20, 21(4), 22, and 25. See also LSA-R.S. 15:276; **State v. Dominguez**, 228 La. 284, 297-98, 82 So.2d 12, 16-17 (1955); **State v. Gray**, 225 La. 38, 72 So.2d 3 (1954); **State v. Rodrigues**, 219 La. 217, 223-24, 52 So.2d 756, 758 (1951).

statement was inadmissible hearsay. The defendant concludes that a new trial should be ordered on this basis.

At the pretrial **Prieur** hearing, Major Johnson testified regarding a handwritten statement by the victim. He testified that on June 2, 2007, prior to the murder on June 9, the victim contacted the police because she found her clothes scattered over the floor, telephone lines and electrical cords cut, food on the floor, and her bathtub filled with clothes covered with bleach and lighter fluid. Major Johnson also stated that the victim was in fear for her life and she wrote the statement in question regarding the incident. We note that prior to deliberations, the trial court gave the jury a limiting instruction regarding evidence of other crimes.

As heretofore discussed, evidence of other crimes committed by the defendant is generally inadmissible. However, such evidence may be admitted if the State establishes an independent and relevant reason for doing so, i.e., to show motive or identity. See LSA-C.E. art. 404(B)(1). In some instances evidence of prior acts is admissible to establish the volatile nature of the relationship between a defendant and a victim, as such evidence tends to show the defendant's motive for commission of a crime of violence. See **State v. Rose**, 2006-0402, p. 15 (La. 2/22/07), 949 So.2d 1236, 1245; **State v. Welch,** 615 So.2d 300, 302-3 (La. 1993); **State v. Walker**, 394 So.2d 1181, 1184-85 (La. 1981). However, in contrast to those cases, in the instant case the unsworn, unverified handwritten document allegedly prepared by the Yarnell before her death is insufficient to satisfy the proof required by LSA-C.E. arts. 404 and 1104, i.e. that the defendant committed the other acts.

Furthermore, Yarnell's unsworn, unverified handwritten statement is inadmissible hearsay pursuant to LSA-C.E. art. 803. Louisiana Code of Evidence article 803(3), in pertinent part, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> **(3) Then existing mental, emotional, or physical condition.** 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.

A state-of-mind declaration is non-hearsay if offered only to circumstantially prove the decedent's state of mind prior to the homicide. However, that state of mind must be at issue or relevant to prove a fact at issue. See **State v. Brown**, 562 So.2d 868, 878-79 (La. 1990). See also LSA-C.E. art. 403. A state-of-mind declaration is relevant if it has a tendency to make the existence of any consequential fact more or less probative than it would otherwise be without the evidence. See LSA-C.E. art. 401. Nevertheless, a relevant declaration may be legally inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misapplication by the jury. See LSA-C.E. art. 403; **Brown**, 562 So.2d at 878.[8]

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[8] In **State v. Brown**, although the decedent's state of mind was not an ultimate issue at trial, it became an indirect, but material fact at issue. Testimonial and photographic evidence indicated the decedent's death was preceded by unwanted sexual advances. Testimonial evidence suggested the decedent willingly accompanied the defendant to and from the Prescott Place apartments on the day of her death. It also revealed that she was sexually active, as she was eighteen years old, unmarried, pregnant, and had had sexual intercourse with several men in the days immediately preceding her death. Evidence of harmonious interactions between the defendant and the decedent in the hours preceding her death, coupled with the evidence of her sexual permissiveness and of her partial disrobement, indirectly placed her state of mind at issue. The State needed to respond to the implication that the decedent's and the defendant's interactions would remain harmonious under all circumstances. The decedent's extrajudicial declaration, therefore, became probative as direct evidence of her wish not to have intercourse or sexual relations with the defendant, and as circumstantial evidence that, if the opportunity arose, she would reject his sexual advances. (The decedent had told a friend that the defendant wanted to have sex with her, but that she did not want anything to do with him.) In finding the statement admissible, the supreme court reasoned that by communicating her perception that the defendant "wanted her," the declaration contained an inadmissible hearsay component. The court went on to find that the significance of the assertion overshadowed any resulting prejudice. The court stated that the assertion of the defendant's desire was necessary to properly construe the decedent's statement that she didn't want anything to do with him. The court further found: "It does not improperly refer to past beliefs or acts, or predict future conduct. Nor does it imply Brown has committed or will commit inflammatory or culpable acts." **State v. Brown**, 562 So.2d at 880.

In the case before the court, the relevancy of Yarnell's state of mind preceding her death was not established. Her handwritten statement reflected her belief that the defendant had committed acts of violence against her and intended to do so again. Yarnell's statement demonstrates her state of mind was one of fear of continued violence by the defendant.

Declarations of fear and revulsion characteristically contain both admissible and inadmissible hearsay components through referencing past acts, predictions of defendant's future conduct, or statements of decedent's beliefs. Consequently, the admissibility of such statements must be determined by a careful balancing of their probative value against their prejudicial effect. The relevancy of the admissible portion of the declaration must be weighed then against the inadmissible portion, and the court's task is to balance the need for the evidence, when used for the proper purpose, against the danger of the evidence being used by the jury for an improper purpose. **State v. Brown**, 562 So.2d at 879.

Declarations of fear or revulsion either take the form of direct evidence of the mental state ("I am afraid of defendant") and, as such, are hearsay offered to prove their contents. Or, they take the form of evidence circumstantially probative of the declarant's state of mind ("Defendant threatened to kill me."). Technically, the latter assertions are not hearsay because they are not offered to prove the truth of what was said, but to circumstantially show the declarant's state of mind toward defendant and, hence, are not hearsay. Declarations of fear, however, should be distinguished from declarations of revulsion, because declarations of fear consistently reflect upon defendant's past or future aggressive actions, defendant's culpability, or the dispositive issue of the case. Therefore, the risk of prejudicial effect and improper use of the evidence of fear increases. Correspondingly, the need for the declaration, used for its proper purpose, must be great as when the evidence is relevant to a material issue of the case. Thus, in homicide cases,

evidence of the victim's fear may be limited to situations where defendant has made the criminal character of the death an issue, by raising defenses of self-defense, suicide, or accident. Decedent's declaration of fear, then, is relevant to circumstantially rebut the defense's theory. To protect against misapplication of the extrajudicial declaration, its opponent is entitled to a limiting instruction, directing the jury to consider the declarant's statement as evidence only of the declarant's state of mind rather than for the truthfulness of any express or implied allegations contained within the statement. **State v. Brown**, 562 So.2d at 879.

After careful consideration of the issue, we conclude that any relevancy of the evidence at issue, tending to establish Yarnell's state of mind, was outweighed by the inadmissible aspect of the statement; i.e. that it was true that the defendant intended to, and therefore did, harm Yarnell. However, because of the overwhelming weight of Gremillion's positive identification of the defendant as having shot him and Yarnell, we determine that the verdict actually rendered in this case was surely unattributable to any error associated with the admission of Yarnell's handwritten statement. Accordingly, we find that the introduction of this evidence was harmless and does not constitute reversible error.

CONVICTIONS AND SENTENCES AFFIRMED.