NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0329

STATE OF LOUISIANA

VERSUS

ERIC L. BOLTON

Judgment Rendered: SEP 14 2011

* * * * * * * * * *

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 484145 "I"

Honorable Reginald T. Badeaux, III, Judge Presiding

* * * * * * * * * *

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

Defendant, Eric L. Bolton, was charged by bill of information with attempted second degree murder, second degree robbery, and second degree kidnapping, violations of LSA-R.S. 14:27 and 14:30.1, LSA-R.S. 14:64.4, and LSA-R.S. 14:44.1, respectively. He pled not guilty. Following a trial by jury, the defendant was found guilty as charged of second degree robbery and second degree kidnapping. On the charge of attempted second degree murder, the defendant was found guilty of the responsive offense of attempted manslaughter, a violation of LSA-R.S. 14:27 and 14:31. Thereafter, the state filed a habitual-offender bill of information seeking to enhance the sentence on the attempted manslaughter conviction pursuant to LSA-R.S. 15:529.1.[1]

The defendant admitted the allegations of the habitual-offender bill of information, and was adjudicated a fourth-felony habitual offender. The trial court sentenced him to life imprisonment at hard labor, without benefit of probation or suspension of sentence, on the attempted manslaughter conviction. The trial court also sentenced the defendant to forty years at hard labor on the second degree robbery conviction, and to forty years at hard labor, without benefit of parole, probation, or suspension of sentence, on the second degree kidnapping conviction. The sentences were made concurrent with each other. The defendant now appeals, designating one counseled, and eight pro se assignments of error. For the following reasons, we affirm the defendant's convictions, habitual-offender adjudication, and sentences.

[1] All citations in this opinion to LSA-R.S. 15:529.1 are made to that provision as it existed prior to its amendment by 2010 La. Acts No. 911, § 1 and No. 973, § 2. The predicate convictions set forth by the state in the habitual-offender bill of information were: (1) a February 23, 2000 conviction for simple escape, 22nd Judicial District, case number 99-CR1-77014; (2) a May 30, 1996 conviction for simple robbery, 22nd Judicial District, case number 96-CR1-64097; (3) a May 30, 1996 conviction for simple kidnapping, 22nd Judicial District, case number 96-CR1-64097; (4) an October 12, 1993 conviction for attempted first degree robbery, 22nd Judicial District, case number 93-CR1-54513; and (5) an October 12, 1993 conviction for purse snatching, 22nd Judicial District, case number 93-CR1-54374.

ASSIGNMENTS OF ERROR

Counseled Assignment of Error:

1. The evidence is insufficient to support the defendant's conviction for second degree kidnapping.

Pro Se Assignments of Error:

1. The trial court erred in denying the defendant's motion for continuance, depriving him of his constitutional right to prepare and present a defense.

2. The trial court erred in denying the defendant's motion for continuance, depriving him of his constitutional right to compulsory process.

3. The trial court erred in allowing hearsay testimony to be admitted at trial.

4. The trial court violated LSA-C.Cr.P. art. 793 and allowed repetitive evidence when it permitted the jury to examine written evidence on two occasions during deliberations.

5. The trial court erred in allowing impermissible "other crimes evidence."

6. The state committed discovery violations by failing to comply with LSA-C.Cr.P. art. 716, and by failing to provide the defendant with certain telephone records.

7. The trial court erred in denying the defendant's motion for new trial based on newly discovered evidence.

8. The defendant is prevented from obtaining a full appellate review because the record is incomplete, which is a violation of LSA-C.Cr.P. art. 843.

FACTS

Sometime in 2009, Louise Mayeaux befriended the defendant after meeting him in a church prayer group in Avoyelles Parish where she was a guest speaker. They spoke on the telephone regularly. From conversations with the defendant, Ms. Mayeaux believed that he was at times homeless and unemployed. At some point, the defendant asked her for financial assistance, and she attempted to help him on numerous occasions over a period of months because she believed it was her Christian duty. On one occasion, she enlisted the aid of her daughter and son-

in-law, Melissa and Kevin Deterres, to provide a deposit and two months rent for a trailer for the defendant to live in. When the defendant lost occupancy of the trailer after several months, Ms. Mayeaux allowed him to stay at her home in Simmesport, Louisiana for a brief period of time. On other occasions when the defendant obtained employment working offshore, Ms. Mayeaux drove him to his pickup location. At some point in November 2009, Ms. Mayeaux and the Deterreses decided to give the defendant a used vehicle, because they believed his lack of transportation hindered his ability to maintain steady employment. In exchange, the defendant was to perform odd jobs around the Deterreses' home in Mandeville, Louisiana.

In addition to performing this work, the defendant was also invited to join the family for Thanksgiving Day. Accordingly, Ms. Mayeaux and the defendant left Simmesport on November 12, 2009, intending to travel to a part-time residence Ms. Mayeaux maintained in Covington, Louisiana. Ms. Mayeaux was to spend the weekend there, before returning to work in Simmesport. The defendant was to remain at Ms. Mayeaux's Covington house while he was performing the work for the Deterreses. However, en route to Covington, the defendant requested that Ms. Mayeaux drop him off at a friend's house in Baton Rouge. It was understood that he would later find his own way to her house in Covington.

At approximately 11:00 to 11:30 p.m. that evening, the defendant telephoned Ms. Mayeaux and requested that she pick him up from a restaurant in Hammond, which she agreed to do. As they were arriving back at the Covington residence sometime after midnight, Ms. Mayeaux told the defendant that her ex-husband was upset about the family inviting the defendant over for Thanksgiving Day. Her ex-husband was concerned that they did not know anything about the defendant and that he might steal from or harm them. The defendant merely responded, "Is that

so?"

However, upon walking through the door into the house, Ms. Mayeaux felt a hard blow to her face and fell to the floor. The defendant stood over her, telling her not to move or talk. He struck her again and she "blacked out" for a time. After she regained consciousness lying in a pool of blood, she requested medical assistance to no avail. The defendant told her that he was going to kill her and then kill himself. He pulled a small vial from his pocket, told her it was for crack cocaine, and that he was an addict who was unable to overcome his addiction. At one point, the defendant grabbed her from behind and twisted her neck back and forth as though he was trying to break it.

Ms. Mayeaux continued talking to the defendant, pleading with him not to kill her. Ultimately, he told her that he would tie her up instead so that he would have time to escape. He then tied her legs together and her arms behind her back using a telephone cord and the cord from an electric iron. Before leaving, the defendant took money from Ms. Mayeaux's wallet and demanded the keys to her car. She asked him not to take her car as it was her only means of transportation. He told her that he would leave the car on North Rampart Street in New Orleans and that he would call 911 for her when he got there.

After the defendant left, a substantial period of time elapsed before Ms. Mayeaux freed herself. The first thing she did was attempt to call the defendant on his cellular phone, but he did not answer. She explained that she wanted to ask the defendant "not to kill himself because I knew his soul was important to God...." At approximately 4:00 a.m., she called the Deterreses' house and told her son-in-law that the defendant had attacked her. He responded by calling 911.

Ms. Mayeaux was initially taken to Lakeview Regional Medical Center where it was discovered that she had sustained serious facial trauma, two lacerations on her face requiring stitches, and "fairly significant" brain trauma that

resulted in a blood clot on the outside of the brain. As a result of the potentially life-threatening brain injury, she was transferred to Ochsner Hospital in New Orleans. When she was released, she convalesced at her daughter's house for several weeks. She was finally able to return to work sometime in January, 2010.

The defendant was apprehended in Baton Rouge several days after the attack. Shortly thereafter, Ms. Mayeaux's car was recovered in the parking lot of a business located in Baton Rouge.

INSUFFICIENCY OF THE EVIDENCE

In his sole counseled assignment of error, the defendant argues that the evidence was insufficient to support his conviction for second degree kidnapping because the state failed to prove the essential element that Ms. Mayeaux was physically injured either during or as a result of being imprisoned by the defendant. While the defendant does not dispute that Ms. Mayeaux sustained injuries, he asserts that the injuries were inflicted prior to her restraint and resulting imprisonment.

In reviewing claims challenging the sufficiency of the evidence, an appellate court must consider whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier-of-fact could conclude that the state proved the essential elements of the crime and the defendant's identity beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. The **Jackson v. Virginia** standard of review incorporated in LSA-C.Cr.P. art. 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the fact-finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Riley**, 91-2132 (La. App. 1st

Cir. 5/20/94), 637 So.2d 758, 762.

Louisiana Revised Statutes 14:44.1A(3) & B(3) provide, in pertinent part, that second degree kidnapping is the imprisoning of any person "wherein" the victim is "[p]hysically injured." It is not necessary for a conviction that there be movement of the victim, or that the imprisonment exists for any minimum period of time. See LSA-R.S. 14:44.1B(3); **State v. Tabor**, 2007-0058 (La. App. 1st Cir. 6/8/07), 965 So.2d 427, 434, writ denied, 2010-0283 (La. 2/18/11), 57 So.3d 323. In order to support his conviction for second degree kidnapping, the defendant argues that Ms. Mayeaux must have been physically injured while being tied up or as a result thereof. We disagree. The defendant attempts to isolate the commission of the kidnapping to the single act of Ms. Mayeaux being tied up. In fact, her restraint by the defendant was merely the last in a series of events that began with him brutally hitting her several times and knocking her to the floor. The beating inflicted upon Ms. Mayeaux facilitated her imprisonment by weakening her ability to resist. Moreover, the evidence of her severe physical injuries was overwhelming. This evidence included both medical testimony and the victim's description of the extreme pain she endured. The state also introduced photographs depicting extensive bruising to her face, neck, and arms. The fact that the defendant originally may have initiated the attack with the intent of killing the victim, rather than imprisoning her, does not alter the fact that he engaged in a course of conduct culminating in her severe injury and imprisonment.

After a thorough review of the record, we find that the evidence supports the guilty verdict for second degree kidnapping. The victim identified the defendant as the perpetrator who attacked and imprisoned her. This testimony, combined with the medical evidence and photographs depicting her injuries, is sufficient to satisfy the physical injury element of second degree kidnapping. See LSA-R.S. 14:44.1A(3); **State v. Fontana,** 35,826 (La. App. 2d Cir. 6/12/02), 821 So.2d 571,

576, writ denied, 2002-2072 (La. 6/27/03), 847 So.2d 1251.

This Court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **Lofton**, 691 So.2d at 1368. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder 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 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Thus, we are convinced that viewing all of the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of second degree kidnapping. This assignment of error is without merit.

MOTION FOR CONTINUANCE

In his first and second pro se assignments of error, the defendant argues that the trial court abused its discretion in denying his motion for continuance, which he sought in order to allow time for returns to be made on several subpoenas duces tecum issued at his request. The defendant asserts that the denial of the continuance prevented him from obtaining documents supporting his defense, thereby resulting in a deprivation of his constitutional rights to due process and compulsory process, as well as his right to prepare a defense. In particular, the defendant notes that the subpoenas were issued only one week before trial, even though they allowed thirty days for a return to be made thereon.

On May 6, 2010, the defendant filed five pro se motions requesting the issuance of subpoenas duces tecum seeking the following information: (1) a subpoena directed to Best Western Richmond Suites in Lake Charles, Louisiana requesting billing and registration information in Louise Mayeaux's name; (2) a subpoena directed to Offshore Services of Acadiana requesting employment records for the defendant; (3) a subpoena directed to the United States Postal Service requesting all records regarding a change of address form in the defendant's name; (4) a subpoena directed to Brouillette Water Works requesting billing and termination of service information for a Marksville, Louisiana address; and (5) a subpoena directed to the Holiday Inn in Baton Rouge, Louisiana requesting billing and registration information in the names of Louise Mayeaux and the defendant. At a pretrial conference held on June 4, 2010, defense counsel adopted the pro se motions for issuance of the subpoenas. However, it was not until June 14, 2010 that the subpoenas, each allowing thirty days for a return, were actually signed by the trial judge and issued. The next day defense counsel filed a motion to continue the scheduled June 21, 2010 trial date, alleging that the delayed issuance of the subpoenas prevented the defense from obtaining crucial documents in time for trial.

At the beginning of trial, the trial court conducted a hearing on the motion to continue. Defense counsel stated that he had assumed the subpoenas had gone out weeks earlier, and had only learned otherwise during the previous week. Therefore, he argued that additional time was needed to obtain the information sought in the subpoenas, which he claimed was critical for cross-examination and impeachment purposes. Specifically, he argued that the hotel information would support the defendant's claim that Ms. Mayeaux was lying when she denied her romantic relationship with the defendant and that they had spent nights together in hotels. He further asserted that the change of address information would support

the defendant's claim that he was planning to move in with Ms. Mayeaux. According to defense counsel, the information from the water company and the defendant's former employer would further weaken Ms. Mayeaux's credibility by showing that she lied about the defendant being homeless and unemployed.

When the trial court inquired at the hearing as to whether defense counsel had made any efforts to obtain the information independent of the subpoenas, defense counsel indicated that he had not done so. Thereafter, the trial court denied the continuance on the basis that: (1) it believed the subpoenas were frivolous because the information sought had "little or no evidentiary value," and (2) defense counsel had made no independent efforts to obtain the information. The trial court further observed that this matter had previously been continued and defense counsel, who was aware of its priority setting, had assured the court at the pretrial conference that the defense would be ready by the scheduled trial date.

Under LSA-C.Cr.P. art. 712, a timely filed motion for continuance "may be granted, in the discretion of the court, in any case if there is good ground therefor." The decision whether to grant or refuse a motion for a continuance based on this provision rests within the sound discretion of the trial court, and a reviewing court will not disturb such a determination absent a clear abuse of discretion. **State v. Reeves**, 2006-2419 (La. 5/5/09), 11 So.3d 1031, 1078-79, cert. denied, ____ U.S. ____, 130 S.Ct. 637, 175 L.Ed.2d 490 (2009). Additionally, even when an abuse of discretion is shown, the denial of a motion for continuance generally is not reversible absent a showing of specific prejudice. **Reeves**, 11 So.3d at 1079.

We find no error in the denial of the defendant's motion for continuance. First, the defendant has not shown that the continuance was necessary in order to obtain the information sought. At the time of the hearing on the motion to continue, the defendant had already received a return on the subpoena directed to the Best Western Richmond Suites in Lake Charles. The defendant actually

introduced a receipt from that hotel into evidence at trial in support of his contention that he was romantically involved with Ms. Mayeaux. Additionally, the prosecutor indicated that she was willing to stipulate to the fact that the defendant had changed his address to Ms. Mayeaux's residence, purportedly because the defendant had indicated to her that he had nowhere else to receive his mail. The fact that defense counsel chose not to present evidence of this stipulation at trial does not alter the fact that it was available to him. See LSA-C.Cr.P. art. 710. Moreover, during cross-examination of Ms. Mayeaux regarding her prior testimony that the defendant was homeless, defense counsel indicated that he had water bills dating back to August demonstrating that the defendant had his own residence.

Therefore, as of the time of trial, it appears that the only information sought by the subpoenas that the defendant had not already obtained was his employment records and registration/billing information from the Holiday Inn in Baton Rouge. We agree with the trial court that defense counsel failed to establish that he was unable to obtain this information without subpoenas. The fact that defense counsel filed the motion for continuance on June 15, 2010, demonstrates that he had at least four workdays from the time that he discovered the delayed issuance of the subpoenas until trial. Despite his contention that the information was crucial, he made no attempt to obtain the information independently. Thus, the defendant failed to show that he was unable to obtain his personal employment records and hotel registration information (listed jointly in his name) by request.

Under the circumstances, the trial court did not abuse its sound discretion in denying the motion to continue. Further, even if an abuse of discretion did occur, the defendant failed to establish any specific prejudice he suffered as a result. Absent a showing of specific prejudice, the erroneous denial of a motion to continue is not reversible. See **Reeves**, 11 So.3d at 1079. These assignments of

error are without merit.

HEARSAY TESTIMONY

In his third pro se assignment of error, the defendant asserts that the trial court erred by allowing prejudicial hearsay testimony into evidence.

Detective Steven Chaisson of the St. Tammany Parish Sheriff's Office testified as a state witness. While being questioned by the prosecutor, defense counsel raised a hearsay objection to his testimony, as follows:

> Q. Okay. Now, did you get any information - - I know they talked about putting [the defendant's] photo up in parishes almost all the way to Texas. Did you get any information from people from the photo BOLOs that went out? From anybody that knew him or had seen him?
>
> A. Well, that morning, we got together and we sent news articles to all of the media outlets to get the car and the person put out there going west. A few days, I want to say, maybe Tuesday or Wednesday, I received a phone call from a lady in Lafayette, that said that she had met the defendant over there.
>
> [Defense counsel]:
>
> I'm going to object, Your Honor. This is hearsay. He's going to state what the lady said.
>
> [Assistant District Attorney]:
>
> She'll be here, too. She'll be here tomorrow morning.
>
> The Court:
>
> Overruled.
>
> Q. Now from talking to Ms., her name is Susan Holt. Is that familiar? From talking to her, did she identify the picture that you – all put up identified by the family?
>
> A. Yes, she did.
>
> Q. Do you recall, I know we talked about November 13th. Where did she last see him and how close to the date of Ms. Louise Mayeaux's attack?
>
> A. It was either the Tuesday or Wednesday before.
>
> Q. Thursday is - -

A. Thursday and then Friday morning. So either Wednesday or Thursday, and she didn't know who he was. She saw his picture on the news. She recognized him. She didn't call us. She went back to the Lafayette Police Department and **said the guy I filed a complaint against - - They put him on the news.**

Q. So that was the last place that she saw him would have been in Lafayette, or somewhere else?

A. Yes.

Q. Okay. Now, had she learned of any locations he may be going the last time she talked to him, whether it be Baton Rouge, or St. Tammany?

A. No.

Q. So with her information, he would have been in Lafayette about November 12th or November 11th?

A. Yes.

[Emphasis added.]

Despite the prosecutor's assertion to the court, Ms. Holt was never called as a witness and, therefore, was not subject to cross-examination by defense counsel. Nor did the state cite any hearsay exception to justify the admission of the testimony regarding the statement she made to Detective Chaisson.

A hearsay statement is a statement, other than one made by the declarant while testifying at the present trial or hearing, that is offered in evidence to prove the truth of the matter asserted. LSA-C.Cr.P. art. 801C. Normally, hearsay is not admissible except as specifically provided by law. See LSA-C.Cr.P. art. 802. However, under certain circumstances, a police officer's testimony may refer to statements made to him by others when these statements are admitted, not to prove the truth of the statements, but to explain the officer's actions or the sequence of events leading to the defendant's arrest. **State v. Watson**, 449 So.2d 1321, 1328 (La. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 952 (1985); **State v. Veal**, 583 So.2d 901, 903-06 (La. App. 1st Cir. 1991). Nevertheless, although it may be relevant to explain his conduct, the fact that a

police officer acted on information received in an out-of-court assertion should not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule. **State v. Harold**, 603 So.2d 731, 737 (La. 1992); **State v. Wille**, 559 So.2d 1321, 1331 (La. 1990), cert. denied, 506 U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992).

In the instant case, the steps taken in the police investigation were not an issue at trial. Further, Detective Chaisson did not testify as to any action he took in response to the information provided by Ms. Holt, which concerned events that occurred prior to the instant offenses. The information she provided to him was unnecessary to present an overview of the investigation or to describe the events leading to the defendant's arrest. In fact, the relevance of the information she provided was not clearly established. It appears that the disputed testimony may have been presented to establish the truth of the matters asserted therein, *i.e.*, that the defendant was in Lafayette on November 11th or 12th and that Ms. Holt filed an unspecified complaint against him. As such, it constituted hearsay that should have been excluded. The trial court erred in overruling defense counsel's hearsay objection.

Nevertheless, the erroneous admission of the hearsay testimony does not require a reversal of the defendant's convictions because this error was harmless beyond a reasonable doubt. See LSA-C.Cr.P. art. 921; **Wille**, 559 So.2d at 1332. An error is considered to be harmless when the guilty verdict actually rendered in the trial was surely unattributable to the error. **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 100.

In the instant case, while the reference to a police complaint being filed against the defendant was potentially prejudicial, it was not unduly so. No details were given regarding the nature of the complaint, and the reference was brief. The disputed testimony neither implicated the defendant in the instant offenses nor

placed him at the crime scene. Moreover, our review of the record indicates that the evidence presented by the state, particularly the medical evidence regarding Ms. Mayeaux's severe injuries, the photographs depicting her injuries, and her testimony identifying the defendant as the perpetrator of the offenses, was so strong that it overwhelmingly indicates that the guilty verdicts were correct and surely unattributable to the improper admission of the hearsay testimony. Accordingly, since no prejudice resulted to the defendant, the error was harmless beyond a reasonable doubt. This assignment of error is without merit.

WRITTEN EVIDENCE IN JURY ROOM

In his fourth pro se assignment of error, the defendant contends that the trial court violated LSA-C.Cr.P. art. 793B by allowing written evidence into the jury room on two occasions during deliberations. The defendant argues that the trial court therefore violated the prohibition against allowing the jury access to written evidence during deliberations, as well as the prohibition against the repetition of evidence.

Louisiana Code of Criminal Procedure article 793 provides, in pertinent part, that:

> **[A] juror** ... **shall not be permitted** to refer to notes or **to have access to any written evidence. Testimony shall not be repeated to the jury**. Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict. [Emphasis added.]

Under this provision, jurors are permitted to inspect written evidence for the sole purpose of a physical examination of the document itself to determine an issue that does not require examination of the verbal contents of the document. **State v. Perkins**, 423 So.2d 1103, 1109 (La. 1982); **State v. Pooler**, 96-1794 (La. App. 1st Cir. 5/9/97), 696 So.2d 22, 52, writ denied, 97-1470 (La. 11/14/97), 703 So.2d 1288. However, this provision generally has been interpreted as prohibiting any

access by jurors to written evidence for purposes of assessing its verbal content, as well as prohibiting the repetition of any testimony to jurors during deliberations. **State v. Brooks**, 2001-0785 (La. 1/14/03), 838 So.2d 725, 727 (per curiam). Nevertheless, a violation of Article 793 does not mandate an automatic reversal of a defendant's conviction. Rather, such a violation constitutes trial error that is subject to a harmless error analysis. See **State v. Zeigler**, 40,673 (La. App. 2d Cir. 1/25/06), 920 So.2d 949, 956, writ denied, 2006-1263 (La. 2/1/08), 976 So.2d 708; **State v. Johnson**, 97-1519 (La. App. 4th Cir. 1/27/99), 726 So.2d 1126, 1134, writ denied, 99-0646 (La. 8/25/99), 747 So.2d 56.

The record reveals that after the jury retired to deliberate, it sent a written note to the trial court requesting the three defense exhibits introduced at trial. The trial court complied with the request, and provided the jury with the requested exhibits through the bailiff.[2] The court minutes do not reflect that defense counsel raised any objection to the trial court's action.[3] The exhibits consisted of: (1) a teletype reporting the recovery of Ms. Mayeaux's vehicle in Baton Rouge on November 17, 2009; (2) a June 11, 2009 hotel receipt from the Best Western Richmond Suites in Lake Charles, Louisiana, in Ms. Mayeaux's name; and (3) a June 11, 2009 police report detailing a complaint made by Ms. Mayeaux during her stay in Lake Charles that she had loaned her vehicle to a friend and that he had not returned it. The defendant had introduced the hotel receipt and police report into evidence at trial in support of his claim that, contrary to Ms. Mayeaux's testimony, he was involved in a romantic relationship with her. He asserted that the receipt,

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[2] The record does not support the defendant's allegation that the trial court sent written evidence into the jury room on two occasions. However, in addition to requesting the defense exhibits, the jury on a separate occasion sent the trial court a written question that caused the court to realize that the jury had been provided with an incorrect verdict form. At that point, the trial court, without objection, sent the proper verdict form into the jury room and informed the jury to disregard the original verdict form. The defendant may mistakenly be referring to this occasion as an incidence where the trial court provided the jury with written evidence.

[3] The parties may agree to waive the statutory prohibitions contained in LSA-C.Cr.P. art. 793. However, such an agreement must be in clear, express language and must be reflected in the record. See **State v. Adams**, 550 So.2d 595, 599 (La. 1989).

which reflects charges for two people and a movie, demonstrates the fact that he stayed with her at the hotel in Lake Charles and that they watched a pornographic movie together during that stay. Defense counsel made this argument to the jury during closing argument.

Considering the nature of the exhibits in light of the defense arguments, it appears probable that the jury sought to examine the written exhibits for their verbal content. However, even assuming that this was the case, any error by the trial court in allowing the jury to examine the exhibits during deliberations was harmless. Each of the exhibits was introduced into evidence by the defense, rather than the state. Since the exhibits were considered by the defendant to be advantageous evidence that he wished the jury to consider, he can hardly complain that he was prejudiced by the trial court allowing the jury to examine these exhibits during deliberations. Moreover, contrary to the defendant's assertions, allowing the jury to examine these written exhibits cannot be construed as a prohibited repetition of testimony within the meaning of Article 793. The exhibits did not constitute "testimony" within the plain meaning of that word. See **Brooks**, 838 So.2d at 727-28. Considering these circumstances, the convictions surely were not attributable to any trial error that occurred as the result of a violation of LSA-C.Cr.P. art. 793. The alleged error was harmless beyond a reasonable doubt. See LSA-C.Cr.P. art. 921. This assignment of error is without merit.

"OTHER CRIMES" EVIDENCE

In his fifth pro se assignment of error, the defendant contends that the trial court erred in overruling the defense's objection and in failing to grant a mistrial based on inadmissible other crimes evidence introduced by the state. Specifically, the defendant complains that the state presented a police teletype referring to a stolen vehicle and an armed robbery, and that Detective Chaisson testified regarding those offenses even though the defendant was not charged with them.

Generally, evidence of other crimes, acts, or wrongs is not admissible due to the substantial risk of grave prejudice to the defendant. See LSA-C.E. art. 404B; **State v. Jarrell**, 2007-1720 (La. App. 1st Cir. 9/12/08), 994 So.2d 620, 629. Upon motion of a defendant, LSA-C.Cr.P. art. 770(2) provides that a mistrial shall be granted when a remark or comment is made within the hearing of the jury by the judge, district attorney, or a court official during trial or in argument and that remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. **Pooler,** 696 So.2d at 31-32. In the instant case, no motion for mistrial was made by the defendant. Furthermore, the record does not support the defendant's assertion that the state introduced inadmissible other crimes evidence. The police teletype was actually introduced not by the state, but by defense counsel. On cross-examination, Detective Chaisson was asked by defense counsel whether he was aware that Ms. Mayeaux's stolen vehicle was used in an "armed robbery." When Detective Chaisson responded that he was not, defense counsel introduced the teletype from the Baton Rouge Police Department. The narrative portion of the teletype, dated November 17, 2009, indicated that the vehicle was recovered in a parking lot in Baton Rouge and that the officer involved was advised that the vehicle was stolen and had been "used in a [sic] armed robbery at 0030 Hrs. on this date." Upon re-direct examination, the prosecutor asked Detective Chaisson whether he was familiar with the teletype. He responded:

> This is a teletype, as part of a stolen vehicle and the warrants that were put in by NCIC. One of the charges was [a] warrant for aggravated robbery. Aggravated robbery and armed robbery are similar, so I mean, the NCIC operator types it up [as] an armed robbery, but it's part of this case. That was the vehicle that was used by the defendant to go to Baton Rouge. That's all this is. It's just the way it's typed up.

Defense counsel then objected, stating, "I object to the nature of this testimony. That's not true. Armed robbery is armed robbery. My client wasn't charged with

armed robbery." The trial court overruled the objection.

It appears that defense counsel was objecting to the detective's conclusion that the armed robbery mentioned in the teletype was the same robbery that the defendant was charged with in this matter.

As noted, it was defense counsel who first questioned Detective Chaisson as to the "armed robbery" mentioned in the teletype, and who introduced that document into evidence. To the extent that the teletype raised any inference that the defendant committed another crime, that evidence was elicited by defense counsel. The state cannot be charged with evidence elicited by defense counsel implying that the defendant had committed other crimes, and the defendant cannot claim reversible error on the basis of evidence that he elicited. See **State v. Tribbet**, 415 So.2d 182, 184 (La. 1982); **State v. Marshall**, 479 So.2d 598, 604 (La. App. 1st Cir. 1985).

Furthermore, since the clear import of Detective Chaisson's testimony was that the robbery mentioned in the teletype was one of the instant offenses, it did not constitute an unambiguous reference to another crime. Nor was the mention of the victim's stolen vehicle impermissible other crimes evidence, even though the defendant was not charged with that offense. Louisiana Code of Evidence article 404B(1) provides that evidence of other crimes is admissible "when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." In this case, the victim testified that the defendant took her vehicle to escape in, even though she begged him not to do so. Thus, the taking of the vehicle was part of the res gestae of the instant offenses. This assignment of error is without merit.

DISCOVERY VIOLATIONS

In his sixth pro se assignment of error, the defendant argues that the state committed discovery violations. In particular, the defendant contends that the state

failed to comply with LSA-C.Cr.P. art. 716 because it neither provided the defense with a copy of a statement the defendant gave to Detective Chaisson, nor gave the defense notice of the state's intention to use the statement at trial. The defendant argues that the state also failed to fully comply with his discovery motion by failing to provide him with copies of telephone records for the date of the offenses.

Louisiana Code of Criminal Procedure article 716 provides that, upon motion of the defendant, the defense should be allowed to inspect or copy any written or recorded statements of the defendant, and the state should give notice of any oral statements of the defendant that it intends to offer at trial The record reflects that the defendant was given open file discovery in this case, which included a copy of the recorded audio statement given by the defendant to Detective Chaisson on November 16, 2009, as well as the police report documenting the statement. Moreover, in accordance with LSA-C.Cr.P. art. 768, defense counsel was given notice of the state's intention to introduce the defendant's statement on the first day of trial prior to opening statements.[4] The prosecutor indicated that she intended to rely on Detective Chaisson's testimony to establish the substance of the defendant's statement, rather than introducing the recorded statement itself, which contained several references that normally were inadmissible.[5] Thus, the record establishes that the state complied with the

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[4] The notice of intent indicated that the state would present the following statement made by the defendant:

> "DAMM WHY DID I MESS UP LIKE THIS, IM JUST A GUY THAT HOOKED ON CRACK, HOOKED ON CRACK FOR YEARS,
> I CAN'T SHAKE IT, IF I COULD GET OFF IT I WOULD BE GOOD"
>
> HE GETS ON BINGES, "I WISH I WERE DEAD, B/C I KNOW WHAT'S AHEAD OF ME, IM A VERY INTELLIGENT GUY VERY GOD FEARING, I STILL PRAY EVERY DAY, I HAD A TASTE I HAD FREEDOM, I HAD NO CHARGES ON ME, I DID NOT HAVE TO DODGE POLICE OR NOTHING, THE CHOICES WE MAKE CAN BE LIFE ALTERING, I WISH I COULD TAKE BACK THE LAST THREE OR FOUR DAYS, THE CHOICES WE MAKE, ITS OVER FOR ME"

[5] Under LSA-R.S. 15:450, a confession used against a defendant should be used in its entirety, unless the defendant waives this requirement. See **State v. Blank**, 2004-0204 (La. 4/11/07), 955 So.2d 90, 131, cert. denied, 552 U.S. 994, 128 S.Ct. 494, 169 L.Ed.2d 346 (2007). In the present case, defense counsel

requirements of Articles 716 and 768.

Moreover, although defense counsel filed a motion to suppress the defendant's statement, he withdrew the motion upon learning that the prosecutor intended to present Detective Chaisson's testimony rather than the recorded statement itself. Therefore, even if the state had failed to comply with Article 716, the defendant cannot raise this issue for the first time on appeal since he did not challenge the admissibility of the statement on this basis in the trial court.[6] See LSA-C.Cr.P. art. 841A; LSA-C.E. art. 103A(1); **State v. Brown**, 594 So.2d 372, 392 (La. App. 1st Cir. 1991).

The defendant also contends that the state violated **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), in failing to provide the defense with copies of telephone records that were subpoenaed and received from AT&T. The defendant argues that he was prejudiced because he could have used these records to show that he and the victim exchanged numerous telephone calls on the night she was attacked. He further alleges that, during these calls, he heard the victim arguing and wrestling over the phone with her ex-husband. At trial, the defendant presented as a hypothesis of innocence that Ms. Mayeaux's ex-husband was the person who attacked and beat her, supposedly because he was jealous and upset about her romantic relationship with a black man.

The record indicates that when defense counsel asserted that the state had not provided the telephone records, the prosecutor responded that "[t]hat's

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raised no objection to the prosecutor's proposal to have Detective Chaisson testify only to a portion of the statement.

[6] At one point during the testimony given by Detective Chaisson regarding the defendant's statement defense counsel objected, but the objection was based on defense counsel's mistaken belief that the detective had testified that the defendant said he was sorry for what he had done to the victim. Since defense counsel indicated that he did not recall hearing anything similar to that in the defendant's recorded statement, he requested that the court reporter read back the detective's testimony. The trial court denied the request on the basis that no such testimony existed. Further, defense counsel requested that the words "I had a taste of freedom" be redacted from the statement delineated in the state's notice of intent. The trial court granted the request, and Detective Chaisson then testified in accordance with the statement delineated in the notice of intent, omitting the references to the defendant having had a "taste" of freedom and not having to "dodge police."

something the police used," but that the state possessed no such records.[7] The defendant contends in brief that the prosecutor's statement was false, because "there is a statement in the partial discovery that the defense did receive acknowledging that the AT&T Phone Records were received on December 3, 2009, and over 30 of those numbers were contacted on December 4, 2009."

The defendant's contentions lack merit. Defense counsel did not challenge the prosecutor's statement on the grounds that it was inconsistent with the prior discovery received by the defense. The only "phone records" mentioned in discovery that appear in the record involve "pinging" the defendant's phone to locate it. There is nothing in the record that indicates information was obtained by the state concerning the number and duration of calls.

Moreover, the telephone records would not have been of the favorable probative value claimed by the defendant. Ms. Mayeaux acknowledged at trial that she received more than one telephone call from the defendant on the night in question. Further, contrary to the defendant's contentions, even if the records did prove the exact number of telephone calls made and their duration, this fact would be of little or no probative value in establishing that Ms. Mayeaux's ex-husband was present and arguing with her during the telephone calls, particularly since she specifically denied those allegations at trial. This assignment of error lacks merit.

MOTION FOR NEW TRIAL

In his seventh pro se assignment of error, the defendant contends that the trial court erred in denying his pro se motion for new trial based on newly discovered evidence, namely, post-trial letters written by Ms. Mayeaux to the defendant.

Under LSA-C.Cr.P. art. 851(3), the following four requirements must be met before the granting of a motion for new trial based on newly discovered evidence:

[7] The prosecutor did not elaborate on her remark. However, we note that Detective Chaisson testified that during the search for the defendant, the police monitored his cellular phone in an attempt to locate him.

(1) the evidence was discovered after the trial; (2) the failure to discover the evidence before trial was not due to the defendant's lack of diligence; (3) the evidence is material to the issues at trial; and (4) the evidence is of such a nature that it would probably produce an acquittal in the event of retrial. **State v. Prudholm**, 446 So.2d 729, 735 (La. 1984). When ruling on a motion based on Article 851(3), the trial court should not weigh the new evidence as if he or she were a jury deciding guilt or innocence. **State v. Watts**, 2000-0602 (La. 1/14/03), 835 So.2d 441, 448-49. The test to be employed in evaluating whether or not newly discovered evidence warrants a new trial is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that it ought to produce a verdict different than that rendered at trial. **State v. Maize**, 94-0736 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451. Finally, the trial court's denial of a motion for new trial will not be disturbed on appeal absent a clear abuse of discretion. **Maize**, 655 So.2d at 517.

In his pro se motion for new trial, the defendant alleged that he should be granted a new trial based on "love letters" Ms. Mayeaux wrote to him after his conviction stating that she would always love him and asking him to telephone her. The defendant further alleged therein that Ms. Mayeaux had accepted several long distance telephone calls from him since his conviction. The defendant also pointed out that Ms. Mayeaux instructed him in one letter to write to her, but to omit his return address from the envelope.

A review of the attachments to the defendant's motion reveals an unsigned letter purportedly written by Ms. Mayeaux and addressed to him in parish jail. It is suggested in the letter that the defendant telephone the author's cellular phone on a particular day and time, and further states that: "Our talking won't change anything but you're right. We do need to put some closure on this situation. You'll soon be

leaving for Angola and this will be our only chance to talk." It is further suggested in the letter that the defendant omit his return address from any future letters, because the defendant had said very personal things in prior letters and the author believed his/her mail was being opened by someone at the local post office. The closing salutation states "God Bless You."

The defendant also attached a portion of a purported second letter from Ms. Mayeaux. This letter, which is signed only with an initial that is perhaps an "L" states that, "If the truth be told I'll probably never stop loving you but life does go on – with us or without us. In closing, I want to encourage you to be strong in your faith and trust God. For no matter where you go - - He will be there with you."

The defendant argues that these letters, as well as the fact that Ms. Mayeaux accepted long distance telephone calls from him after testifying against him at trial, demonstrate that she lied at trial when she testified she was not involved in a romantic relationship with him. Therefore, he contends a new trial should be granted, since this evidence establishes Ms. Mayeaux was not a credible witness.

The trial court denied the motion for new trial on the basis that "this new evidence is not sufficient to warrant a new trial." We find no error or abuse of discretion in this ruling. First, newly discovered evidence that only affects a witness's credibility will ordinarily not support a motion for new trial. **State v. Cavalier**, 96-3052, 97-0103 (La. 10/31/97), 701 So.2d 949, 951 (per curiam). Second, it was not sufficiently established that the letters, neither of which bore a signature, were written by Ms. Mayeaux.

Finally, even assuming Ms. Mayeaux did write the letters, we disagree with the defendant's assertion that they are "love letters" that prove she lied about being involved in a romantic relationship with him. The tone and content of the letters is not necessarily romantic in nature, but could also be construed as expressing platonic or spiritual concern for the defendant. Thus, neither these letters nor the

alleged acceptance of phone calls from the defendant are inconsistent with Ms. Mayeaux's overall testimony regarding her close relationship with the defendant and her deep-felt Christian beliefs. The fact that Ms. Mayeaux cared for the defendant was clearly demonstrated at trial by her description of the extraordinary lengths to which she went in attempting to help him on several occasions. Considering these circumstances, we find no error or abuse of discretion in the trial court's denial of the motion for new trial. The newly discovered evidence cited by the defendant was not of such a nature that it ought to have produced verdicts different than those rendered at trial. This assignment of error is without merit.

INCOMPLETE RECORD

In his eighth pro se assignment of error, the defendant asserts that an incomplete appellate record prevents him from receiving a proper review of his convictions and constitutes a violation of LSA-C.Cr.P. art. 843. Specifically, the defendant complains that the record fails to include a transcript of the proceedings wherein: (1) the jury requested written evidence during its deliberations; (2) defense counsel made a **Batson** challenge during voir dire and a bench conference was held thereon; and (3) defense counsel made several unspecified objections at trial pursuant to LSA-C.E. arts. 404 and 405, (pertaining to character, reputation and other crimes evidence).

Louisiana Constitution article I, § 19 provides in pertinent part: "No person shall be subjected to imprisonment ... without the right of judicial review based upon a complete record of all evidence upon which the judgment is based." Further, LSA-C.Cr.P. art. 843 requires that all trial proceedings be recorded. Nevertheless, reversal of a defendant's conviction is not mandated in all cases where portions of the trial are missing.

In **State v. Frank**, 99-0553 (La. 1/14/01), 803 So.2d 1, 19-20, the Louisiana Supreme Court explained that, while reversal is required in instances where there

are material omissions from the trial transcript bearing on the merits of an appeal, "inconsequential omissions or slight inaccuracies do not require reversal." Furthermore, a defendant is not entitled to any relief due to an incomplete record absent a showing of prejudice based on the missing portions of the transcripts. **Frank**, 803 So.2d at 20. Under some circumstances, an incomplete record may be adequate for appellate review. See **State v. Hawkins**, 96-0766 (La. 1/14/97), 688 So.2d 473, 480.

In this case, the defendant's assertion that the transcript does not include the portion of the proceedings wherein the jury made a written request for written evidence is correct. However, the defendant's further contention that he was prejudiced by this omission is not supported by the record. The trial minutes establish what transpired when the jury requested the exhibits. According to the minutes, defense counsel did not object to the trial court's granting the jury's request to examine the exhibits. Moreover, given that the requested evidence consisted of defense exhibits, there was no apparent basis for defense counsel to do so. Thus, the record was adequate for this Court to review the defendant's fourth pro se assignment of error regarding this issue, and we have done so herein.

With regard to the defendant's remaining allegations as to missing portions of the record, we note that he previously raised the same complaints regarding an alleged **Batson** challenge and unspecified objections in a pro se motion to supplement the record filed in this appeal. A different panel of this Court denied the motion to supplement. See **State v. Bolton**, 2011-0329 (La. App. 1st Cir. 6/7/11) (unpublished). Based on our review of the record, we agree with the prior ruling. The defendant provided no specific information concerning what the alleged Articles 404 and 405 objections related to or when they were made. He failed to even identify the witness or witnesses whose testimony allegedly led to

the objections or to describe the circumstances during which they purportedly were made.

Similarly, regarding the claim that there was a **Batson** objection made at a bench conference that is not included in the transcript, the defendant does not identify the prospective jurors who were allegedly stricken improperly or specify when the objection was made. Additionally, the transcript contains two bench conferences wherein the entire jury was selected and the trial court requested that the state and defense counsel state any peremptory challenges or challenges for cause. Defense counsel did not object to any of the state's peremptory challenges or mention a previously raised **Batson** claim during either of those two conferences. The minutes also do not indicate that a **Batson** objection was made. Accordingly, the record fails to support the defendant's claim that the court reporter omitted a **Batson** challenge and related bench conference from the transcript.

For the above reasons, the defendant has failed to show that the record was incomplete and/or inadequate to allow full appellate review of his assignments of error. This assignment of error lacks merit.

REVIEW FOR ERROR

Although not designated as an assignment of error, the defendant has requested we review the record pursuant to LSA-C.Cr.P. art. 920. This Court routinely conducts such a review, whether or not such a request is made by a defendant. Under LSA-C.Cr.P. art. 920(2), our review for error is limited to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have discovered no such errors affecting the defendant's convictions. However, we have discovered a sentencing error in that, although the trial court imposed the defendant's habitual-offender sentence without benefit of probation or suspension

of sentence, it failed to impose the sentence without benefit of parole, as required by LSA-R.S. 15:529.1A(1)(c)(ii). Nevertheless, this error requires no corrective action since LSA-R.S. 15:301.1A makes the restriction on parole eligibility self-activating.

CONVICTIONS, HABITUAL-OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.