NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 1012

STATE OF LOUISIANA

VERSUS

GARY L. COPP

Judgment rendered December 23, 2008.

* * * * * *

Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 412974
Honorable Peter J. Garcia, Judge

* * * * * *

HON. JAMES D. (BUDDY) CALDWELL
ATTORNEY GENERAL
TERRI R. LACY
EMMA J. DEVILLIER
ASSISTANT ATTORNEYS GENERAL
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

JAMES E. BOREN
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
GARY L. COPP

* * * * * *

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs.

PETTIGREW, J.

Defendant, Gary L. Copp, was originally charged by bill of information with second degree battery, a violation of La. R.S. 14:34.1. Defendant entered a plea of not guilty.[1] An amended bill of information was filed, charging defendant with aggravated second degree battery, a violation of La. R.S. 14:34.7.[2] Defendant entered a plea of not guilty to the amended bill of information and was tried before a jury. The jury determined defendant was guilty. Defendant subsequently filed a motion for new trial, which was denied by the trial court.

The trial court sentenced defendant to a term of ten years at hard labor, but suspended the sentence and placed defendant on probation for a period of five years with special conditions of probation, which included: serving six months in the parish jail; a two-year period of home incarceration; a fine of $10,000.00; five hundred hours of community service; and attendance at anger management classes.

Defendant appeals, citing the following as error:

> 1. Failure to timely disclose [404(B)] evidence – the State did not disclose the evidence or testimony of the alleged "Mandeville Mayor Fix" until after *voir dire*, jury selection, and opening arguments, and because of this untimely notice, the State should have been precluded from using the testimony or evidence of the purported "fix" for any purpose.
>
> 2. Copp's conviction must be reversed because the State's late notice of its intent to introduce 404(B) evidence of the "Mandeville Mayor Fix" denied Copp the opportunity to expose bias or prejudice on the part of the jury panel regarding the controversial Mandeville Mayor.
>
> 3. The State failed to "Reveal the Deal" with key witness Officer Lambert; further, the trial court deprived Copp of his Sixth Amendment right of confrontation by prohibiting Copp's defense from cross-examining Officer Lambert about the possibility that the State had leverage over Lambert due to Lambert's alleged participation in the "Mandeville Mayor Fix."
>
> 4. The trial court erred in denying Copp's motion for new trial; evidence available post-trial indicated Officer Lambert's testimony as to a "fix" was false.
>
> 5. The trial court's failure to record two conferences concerning the "Mandeville Mayor Fix" precludes adequate appellate review.

---

[1] Walter Reed, the District Attorney for the Twenty-Second Judicial District, was granted an order of voluntary recusal. This case was subsequently prosecuted by the Louisiana Attorney General.

[2] The amended bill of information alleges defendant used his shoe as a dangerous weapon.

6. The evidence presented by the State was insufficient to convict Copp of aggravated second degree battery – Copp lacked the specific intent to inflict "serious bodily injury" on the victim – additional medical expert testimony unavailable to Copp at trial would have supported a "not guilty" verdict.

7. The trial court should have granted Copp's motion for new trial based on false expert testimony and newly discovered medical evidence from both a neurosurgeon and the victim's treating neurologist.

For the reasons that follow, we affirm defendant's conviction and sentence.

FACTS

At approximately 4:00 p.m. on February 22, 2006, Mary Brown arrived at the Mandeville home of Paula Rome (the victim). Brown and Rome had initially become acquainted through their mutual business dealings in the healthcare field, and over time, developed a personal friendship. Because Brown was involved in meetings in the New Orleans area, Rome suggested Brown stay at her home due to the scarcity of hotel space following Hurricane Katrina.

Rome arrived at her home shortly after Brown and, after preparing dinner for her two teenage children, the two women decided to go out to dinner at a local restaurant in Mandeville. During dinner, Rome consumed one glass of wine and ordered a second, but only drank a few sips before leaving the restaurant. Although their initial plan was to return to Rome's residence, the women decided to go to the Cru Wine Bar in Mandeville, where they could have a drink and visit. They arrived around 7:00 p.m. and each ordered a glass of wine.

At approximately 10:00 p.m., defendant, accompanied by his long-time friend, David Cefalu, entered the Cru Wine Bar. The two men had just attended a jazz concert at Fountainbleau High School and decided to stop afterwards at the bar for a drink and to visit with each other. As defendant and Cefalu approached the bar to order their drinks, there was some type of verbal exchange between defendant and Rome. Rome testified that she could not remember the exact comment, but claimed defendant said something "very bizarre" and "not nice" to her.[3] Brown testified that Rome responded to defendant's

[3] Defendant testified that as he entered the bar, Rome immediately approached him and told him that he "walked in here like [he] had a stick up [his] ass."

comment to her by referencing that defendant was wearing a toupee. However, Brown stated that Rome did not direct her comment towards defendant, rather, she only complained about defendant to Brown. Nevertheless, defendant overheard Rome's comment and interjected that he was not wearing a toupee, grabbed his hair and asked Rome if she wanted to feel it. Rome replied, "No thank you, that's gross."

Rome testified that this initial exchange made her uncomfortable around defendant, so while Cefalu engaged Brown in conversation, she walked a few feet over to where Shawn Hare and Ansley Pair, the owners of the bar, were seated. Hare testified that Rome spoke with him for approximately fifteen to twenty minutes and stated she was trying to get away from defendant because he would not leave her alone. Both Hare and Pair testified that Rome described defendant as an "asshole." Yet, both Hare and Pair also testified that Rome never asked them to take any action against defendant for inappropriate behavior, nor did they witness any inappropriate behavior by defendant toward Rome.

Jason Alcott, who was also seated at the bar in the vicinity of defendant and Rome, testified that Pair asked him if there was a situation between defendant and Rome. According to Alcott, he had observed defendant and Rome engaging in some "weird flirting," which he likened to children interacting on a playground who say one thing, yet mean something different. Alcott assured Pair there was no problem between defendant and Rome.

After speaking with the owners, Rome returned to where Brown was seated at the bar and sat on the other side of Brown, near Joel Miller. Although Brown was conversing with Cefalu and defendant, Rome wanted to avoid interacting with defendant, so she asked Miller if he wanted to sit with her in the foyer of the bar. Miller admitted that he had earlier observed Rome and defendant "bickering" at each other, so he agreed and they went to that area, which was separated from the main bar by a set of double doors.

Miller and Rome spent approximately one hour talking in this area. Miller testified that Rome initially complained that defendant was "rude" and had an "attitude." However, Miller suggested to Rome that she simply "leave things alone." At

approximately 11:00 p.m., Jason Riley, the bartender, indicated to Rome and Miller that it was closing time. Miller and Rome walked back into the main bar area where Miller paid his tab, and Rome told Brown it was time to go home. Brown agreed and indicated she was going to use the restroom.

As Rome and Miller waited near the entrance between the foyer and main bar, Rome told Miller that she was going to tell defendant "one more thing" before she left for the evening. Rome then set her purse down on the sofa near the door and approached defendant, who was standing near Cefalu at the bar. Rome's last recollection of being in the bar was when she told Brown it was time to go and watched as Brown picked up her purse and went to the restroom. Rome testified that the next thing she remembered was a red flashing light and being told by a doctor that she was being taken to another hospital to see a neurosurgeon.

Miller testified that after Rome put her purse down, he told her to "leave it alone" before she began walking towards defendant with a cigarette in her hand. Miller testified he looked in another direction and the next thing he knew, Rome was "flying to the floor." Miller ran over to help her and saw defendant stomp his foot two times in Rome's face.

Cefalu, who was standing next to defendant at the time of the incident, testified he was aware Rome had walked back into the bar and made a "beeline" towards defendant. According to Cefalu, Rome was "in [defendant's] face with smoke" and acting in an adversarial and aggressive manner toward defendant. Cefalu testified that although he looked away when Rome approached defendant, it appeared defendant pushed her away, then stood over her and placed his foot on her torso to hold her down. Cefalu testified that he did not see defendant's foot touch Rome's head. Immediately following this incident, Cefalu grabbed defendant and they left the bar.

Hare testified that he noticed a disturbance and saw defendant "sling" Rome down. Hare heard Rome hit a coffee table, and as she was lying on the floor on her back, defendant immediately took two steps and stomped on Rome's face five or six times with the heel of his shoe. Prior to this incident, Hare had no indication there was about to be a

confrontation, such as hearing raised voices or seeing changes in the posture of defendant or Rome.

Pair testified that just prior to the incident, she heard defendant and Rome "bickering" back and forth. Pair then heard the sound of a barstool moving on the tile floor and looked over and saw Rome on the floor. She then observed defendant moving from the bar and standing over Rome for a brief period before he stomped her approximately three times on her face.

Angel Hernandez, who was seated at the bar, also heard a loud noise and cursing. When she looked up, she saw defendant push Rome, who fell to the floor. Hernandez testified defendant then moved over Rome while she was on the floor and, using the heel of his cowboy boot, stomped on her head twice.

Jason Alcott was seated two barstools to the right of defendant. Just before the incident, Alcott had his back turned as he spoke to Pair. Alcott testified he saw defendant pushing Rome off a barstool and she fell backwards. Defendant then moved toward her and kicked Rome two times in her rib area and delivered three stomps to her face.

Riley was closing out the register when he heard an altercation, turned around, and saw defendant "viciously" striking Rome with his foot. Riley came from behind the bar, restrained defendant, and pushed him outside. Riley testified that prior to this incident, he had no indication anything was about to occur. Riley described defendant as "furious" and "in a state of rage" during the incident.

Defendant was escorted out of the bar by Riley. Hare testified that he heard Cefalu state, "I'm so sorry, I don't know what set him off." Once in the parking lot, defendant and Cefalu left in their respective vehicles.

Meanwhile, Rome lay on the floor of the bar, bleeding from her mouth. According to Hare, she was in and out of consciousness. When the paramedics arrived, Rome was transported to St. Tammany Parish Hospital. Because the CT scan taken at St. Tammany Parish Hospital revealed Rome had some bleeding in her brain, she was transferred to West Jefferson Hospital to be evaluated by a neurosurgeon. Rome was released the following day.

Dr. Richard Inglese, who was accepted as an expert in internal medicine, reviewed Rome's medical records. According to Dr. Inglese, Rome sustained an occipital skull fracture (back of head), a left posterior rib fracture, two frontal brain contusions, a subdural hematoma, lacerations on her arm and lip, subarachnoid hemorrhage, four parietal hemorrhages deep within her brain, and two bruises on her chest.

Dr. Inglese opined that these injuries indicated three to four "tremendous impacts" that cannot be attributed to a single fall against a table; rather these injuries were consistent with striking a table during a fall and then being kicked or stomped repeatedly. Dr. Inglese further testified that with the type of injuries Rome sustained, she could have "long-standing problems" including post-concussive syndrome. Dr. Inglese explained the three most common symptoms of post-concussive syndrome include headaches, memory loss, and concentration problems.

Rome's testimony reflected that she could not remember anything that occurred from the time she told Brown she wanted to go home until she was in the emergency room at St. Tammany Parish Hospital. Rome also testified that she still suffers from headaches, has trouble concentrating, and has lost her sense of smell since this incident. Mike Ronsiek, who was dating Rome at the time of the incident and remains a friend, testified when he saw Rome in the hospital the following day, she appeared as if she had been "beaten to a pulp." Ronsiek also testified that Rome had trouble with her memory and concentration since sustaining these injuries. Brown also testified as to observing Rome's continuing memory problems following this incident.

The defense presented testimony from Dr. Sherif Sakla, who was accepted as an expert in emergency room medicine and trauma. Dr. Sakla reviewed the medical records regarding Rome's injuries, including the ambulance records, the hospital records from St. Tammany and West Jefferson, the x-ray reports, and the actual films taken of Rome's head. In Dr. Sakla's opinion, alcohol played a major role in how this trauma occurred. Dr. Sakla specifically noted that approximately four hours following this incident, Rome's blood alcohol level was measured at .143 gram percent. Dr. Sakla estimated an alcohol burn off of 15-20 percent per hour and estimated that her blood alcohol level at the time

of the event exceeded .2 grams percent. Dr. Sakla noted that on the CT scan, he observed the lower part of Rome's brain appeared shrunken, which is indicative of chronic alcohol abuse.

In Dr. Sakla's opinion, Rome's injuries were caused by a single event, i.e., a fall against the table. In support of his opinion, Dr. Sakla pointed to the West Jefferson Hospital records, which failed to indicate Rome had any bleeding in the brain, and the fact she was released within twenty-four hours with no restrictions. Dr. Sakla also relied upon the St. Tammany Parish Hospital records, indicating that Rome remained awake and alert during examination. According to his review of the medical information, Dr. Sakla found no evidence of fractures in the facial bones, blood in the sinuses, or any indication Rome sustained soft tissue swelling. Moreover, Dr. Sakla opined that Rome's subdural hematoma was caused by the same force that caused her skull fracture, because the injuries were on the same vector. Finally, Dr. Sakla opined that the bruising noted on Rome's torso was likely caused by the cervical collar attached by the ambulance crew when she was transported.

Dr. John Hamide, who was accepted as an expert in radiology, testified on behalf of defendant. Dr. Hamide reviewed all of the radiological documentation of Rome's injuries. In Dr. Hamide's opinion, Rome's injuries were caused by a single fall. Dr. Hamide echoed Dr. Sakla's opinion that because Rome's skull fracture and subdural hematoma were along the same line or vector, they were caused by the same event. Dr. Hamide noted that there was no evidence of facial trauma or dental injures on any of the images he reviewed. Dr. Hamide also noted that Rome's CT images indicated she had cerebella atrophy, which is a characteristic of alcoholics, although he admitted that this condition could be associated with a birth defect. Finally, Dr. Hamide disagreed with the West Jefferson Hospital radiologist's report in that he opined the four areas identified as deep bleeding in Rome's brain, were more likely areas of gliosis, which were not caused by any trauma, but by diabetes, or high blood pressure, which evidenced someone not living well.

Defendant also testified at trial. Defendant testified, on the night in question, he and Cefalu arrived at the Cru Wine Bar after attending a jazz concert at Fontainebleau High School. According to defendant, soon after they entered the bar and ordered drinks, Rome approached him and told him "you walked in like you had a stick up your ass." Defendant testified he merely responded "I don't think so," and began talking to Cefalu. A short time later, as defendant stood at the bar, Rome kicked him behind his knee and stated "I'm going to take you out." Defendant claimed he found this action "aggravating" because six months previously he underwent a procedure to drain his knee, so he moved closer to the bar. Defendant stated that Rome was acting as if something was wrong with her, and denied he did anything to provoke her. Defendant testified that after some time, Rome got up, whereupon he introduced himself to Miller who was seated at the bar, and they spoke for a while.

Defendant testified that later in the evening, he saw Rome seated at the side of the bar near the register, speaking with the owner and pointing at him. Defendant claimed he was not confronted by the owners/managers of the bar about what was occurring, nor was he asked to leave. As he was standing near Cefalu, defendant testified that Rome approached him and stated, "[W]hy don't you get your ass and your wig out of here." Defendant explained that he attempted to humorously diffuse the situation by responding that his hair was real as he tugged on it. Because Rome stopped talking, he figured he alleviated the situation.

When closing time arrived, he observed Rome, Brown, and Miller leaving. After shaking hands with Miller, he saw the group head toward the foyer of the bar. Approximately five to ten minutes later, as he was leaning back against a bar stool, Rome reappeared, walking right up to him, and stopping about ten inches from him. According to defendant, Rome inhaled a drag of her cigarette, blew smoke in his face, and asked, "How'd you like that?" Defendant testified that he told Rome not to do that again, and

then she appeared to be inhaling the cigarette again and her arm began to move down.[4] Defendant explained that he was fearful Rome may have armed herself, so he "reacted" and came off the barstool and pushed Rome with both hands.

According to defendant, he felt threatened and wanted to leave the bar, except the only way to leave was to walk past Rome. Defendant stated that he was brought forward by the force of his push and he wound up standing over Rome. He testified that he placed his left foot on Rome in an effort to hold her down, at which point Cefalu grabbed him and took him to the parking lot.

Defendant denied that he kicked or stomped on Rome, and further denied that he had any intention of hurting Rome. Defendant explained that he felt threatened and his use of force was justified under the circumstances. Defendant testified he drove straight home and fell asleep watching television, but was awakened by a phone call from the Mandeville Police requesting that he come to the police station regarding the incident. Defendant waived his **Miranda** rights and provided an oral statement, which was not recorded.

The State called Dr. Inglese on rebuttal. Dr. Inglese took issue with the opinions of Drs. Sakla and Hamide that Rome's cerebella atrophy was caused by chronic alcohol abuse. According to Dr. Inglese, alcohol abuse would not only cause cerebella atrophy, but also cerebral atrophy, which Rome did not have. Dr. Inglese testified there were no other signs that Rome was a chronic alcoholic, such as anemia or GI bleeding. Dr. Inglese also testified that the absence of blood in Rome's sinuses or fractures of facial bones was not dispositive of whether she had sustained any trauma to her head.

SUFFICIENCY OF THE EVIDENCE

In this assignment of error, defendant argues the evidence is insufficient to support his conviction for aggravated second degree battery. Defendant argues the

[4] Defendant explained that some twenty-five years previously, he had been stabbed in the back by a stranger as he lit fireworks on the New Orleans Lakefront, and as a result, suffered life-threatening complications. Defendant further testified that approximately a year and a half prior to this incident, he underwent heart surgery and had to take Coumadin, an anticoagulant, which required that he exercise great caution regarding his safety and health.

evidence fails to prove he had the specific intent to inflict serious bodily injury on the victim. Defendant further argues that additional medical expert testimony, which was unavailable to him at trial, would have supported a "not guilty" verdict.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The **Jackson v. Virginia** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Defendant argues that the State's evidence that he intended serious bodily injuries was presented mainly through the questionable and unreliable testimony of Dr. Inglese. Defendant asserts that Dr. Inglese's testimony should not have been relied upon by reasonable jurors because he testified outside the scope of his expertise as an internal medicine specialist, and is not an emergency room physician or radiologist.

Louisiana Revised Statues 14:34.7 provides in pertinent part as follows:

> A. (1) Aggravated second degree battery is a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury.
>
> (2) For purposes of this Section, "serious bodily injury" means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

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

failure to act. La. R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503, p. 13 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La.1982).

The jury was presented with two conflicting versions of how this incident occurred and the cause of Rome's injuries. The State presented several eyewitnesses who testified that although Rome and defendant may have bickered at times, there was no indication their verbal sparring would lead to the use of force by defendant. The State's eyewitnesses all stated that after pushing Rome to the floor, defendant walked directly toward her and began kicking and stomping her as she was on her back, until he was pushed away by the bartender. The witnesses who were in the bar following this incident described Rome as being in and out of consciousness.

The State presented further testimony that Rome sustained a subdural hematoma and bruising on her brain as a result of defendant stomping on her head. According to the testimony of Dr. Inglese, such injuries could lead to post-concussive syndrome. Rome's own testimony indicated that even at the time of trial (nearly two years following the incident), she still suffered from memory loss, headaches, and difficulty in concentration, which are all consistent with post-concussive syndrome.

In stark contrast, the defense presented evidence indicating defendant felt Rome was acting strangely toward him throughout the time he was at the bar and had even threatened him.[5] According to defendant, he feared Rome had retrieved a weapon when she approached him just before the incident, and he felt his actions were in self-defense.

Defendant denied stomping or kicking Rome after she was on the floor, and claimed he placed his foot on her to keep her down. In support of the defendant's contention that he did not stomp or kick Rome, two experts testified that Rome's injuries were consistent with a single episode of falling and striking her head on the coffee table.

---

[5] Despite defendant's testimony, there was no evidence presented that indicated defendant complained about Rome, or that he sought any assistance or intervention in keeping her away from him prior to this incident.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932. Moreover, the testimony of a victim may present sufficient evidence to establish that the victim sustained serious bodily injury, without the testimony of any expert. **State v. Odom**, 2003-1772, p. 6 (La. App. 1 Cir. 4/2/04), 878 So.2d 582, 588, writ denied, 2004-1105 (La. 10/8/04), 883 So.2d 1026.

Viewing the evidence in the light most favorable to the prosecution, we find the jury clearly had a rational basis to conclude the State satisfied its burden of proof on all of the elements of this offense. The jury clearly chose to accept the testimony of the State's eyewitnesses and reject the defendant's version of the events. It is also obvious that the jury was persuaded that defendant did, in fact, stomp on Rome, thereby causing her to sustain head injuries from which she still suffers. Our review of the record indicates that although Dr. Inglese provided opinion testimony that Rome's injuries were caused by being kicked or stomped on her head after she was pushed and struck the coffee table, there was overwhelming direct evidence by the State's eyewitnesses that this did, in fact, occur, and direct evidence by Rome of the effects she suffered from this event. Defense counsel conducted a thorough cross-examination of Dr. Inglese regarding whether he could make such conclusions based on his position as an internist, and presented testimony from its own experts in emergency room medicine and radiology to dispute Dr. Inglese's opinions. Under the facts and circumstances of this case, we cannot say the jury's decision to accept the testimony presented by the State's witnesses and reject the defense's version of the incident was irrational. The jury clearly had a reasonable basis to conclude defendant pushed Rome to the floor, then stood over her and repeatedly stomped on her, causing head injuries from which she suffers long-term effects.

Based on our review of the record, we find the evidence sufficiently supports the defendant's conviction for aggravated second degree battery. This assignment of error is without merit.

FAILURE TO TIMELY DISCLOSE 404B EVIDENCE

In his first assignment of error, defendant argues the State did not disclose evidence of the alleged "Mandeville Mayor Fix" until after voir dire, jury selection, and opening statements. Defendant asserts that the State should have been precluded from using the testimony or evidence of the purported "fix" for any purpose.

During the defendant's testimony, he indicated that following the incident at the Cru Wine Bar, he returned home and fell asleep while watching television. According to defendant, he was awakened a short time later by a phone call from Corporal Randy Lambert, of the Mandeville Police Department, who requested that he come to the police station. Defendant agreed, and went to the station where he waived his **Miranda** rights and provided a statement. Defendant explained his willingness to cooperate arose from his feeling that he had not done anything wrong.

In response to a question by his own counsel regarding whether he was aware of allegations of improprieties regarding the investigation of this incident, defendant admitted he was. Defendant went on to explain that the day after the incident, he became aware he was going to be charged with a felony. Defendant stated that he contacted Mandeville Mayor Eddie Price, an acquaintance, in an effort to get an introduction to Police Chief Thomas Buell. Defendant testified he wanted to provide the police with the names of witnesses who would corroborate his version of the incident. Defendant denied he requested anything improper regarding the fact he was initially issued a misdemeanor summons for simple battery in the hours following the incident.

The defense also called Mayor Price as a witness. Mayor Price denied that he took any action on defendant's behalf at any point in time so that defendant would only be charged with a misdemeanor rather than a felony. Mayor Price admitted that he spoke with defendant at some point, but only provided him the number of Chief Buell.

The defense also called Chief Buell as a witness. Chief Buell testified that no one asked him to do anything improper regarding this incident nor did any of his officers report any irregularities in the handling of the investigation.

The State presented rebuttal evidence from Corporal Randy Lambert, who responded to the incident at the Cru Wine bar. According to Corporal Lambert, when the police were trying to contact defendant, Mayor Price called the station and spoke with Sergeant David Hurtsell, who was the shift supervisor at the time. Although Corporal Lambert did not personally take part in the phone discussion, Sergeant Hurtsell made him aware that the Mayor had just spoken to defendant and indicated he would get defendant to go to the police station and provide a statement if they issued defendant a misdemeanor summons. Corporal Lambert testified that prior to this call, the police were going to arrest defendant for aggravated battery (a felony) based on statements from the witnesses at the bar and what he observed of Rome's condition. Corporal Lambert further testified that when defendant arrived at the police station, he indicated it was his understanding he was only going to be issued a misdemeanor summons. Corporal Lambert testified that he was directed by Sergeant Hurtsell to write up the incident as a simple battery.

Officer Perry Otillio was another Mandeville police officer who responded to the incident at the Cru Wine Bar. The State called Officer Otillio in its rebuttal case. Regarding his testimony about the "Mandeville Mayor Fix," Officer Otillio testified that Corporal Lambert told him about the involvement of the Mayor. However, Officer Otillio also testified that, in his opinion, probable cause to charge defendant with aggravated battery did not exist until after the police obtained further information from the hospital. Officer Otillio pointed out that a warrant charging defendant with aggravated battery was issued the following day after more information was obtained regarding Rome's condition.

Officer Dwayne Gulino of the Mandeville Police Department was also called as a rebuttal witness. Officer Gulino assisted Corporal Lambert at the scene of the incident. Officer Gulino recalled Corporal Lambert being upset that defendant was only issued a misdemeanor summons.

Sergeant Hurtsell was also called as a rebuttal witness by the State. Sergeant Hurtsell testified that he did not recall a conversation on the night of the incident with the Mayor. According to Sergeant Hurtsell, in the first hours after the incident, there was only probable cause to issue defendant a misdemeanor summons for simple battery and he noted defendant was not a flight risk. As part of his investigation into the incident, Sergeant Hurtsell contacted the hospital to determine the extent of Rome's injuries. When he learned of the seriousness of her condition, he relayed the information to the next shift and the investigators, because he knew a warrant for a felony should be obtained. Sergeant Hurtsell denied there was any "fix" involving the Mayor, or that the Mayor did anything improper. Sergeant Hurtsell also testified that he had no recollection that Corporal Lambert had ever complained on the night of the incident of the way the investigation was handled.

Following completion of the State's rebuttal case, defense counsel made a motion for mistrial. In support of the motion for mistrial, defense counsel argued there was a **Brady** violation on the part of the State concerning the discovery of the 404B evidence and that a mistrial was appropriate because of the failure to provide the appropriate **Prieur** notice and hearing.

The trial court reiterated that this evidence did not fit under La. Code Evid. art. 404B and **Prieur**, because it may not have been another crime. The trial court subsequently ruled that there was no **Brady** violation, because the State disclosed this evidence as soon as it became available. Finally, the trial court denied defendant's motion for mistrial.

On appeal, defendant argues the trial court's ruling allowing evidence of the "fix" to be presented on the State's rebuttal case put the defense in a worse position than had the trial court allowed the evidence during the State's case-in-chief. Defendant argues that such a ruling effectively insulated the evidence from attack and prevented the defense from disputing the State's case. Defendant relies upon **State v. Ghoram**, 290 So.2d 850, 853 (La. 1974), to support his contention that other crimes evidence, even when introduced on rebuttal, must still be subject to the **Prieur** procedural safeguards.

Generally, evidence of other acts of misconduct is inadmissible; however, there are statutory and jurisprudential exceptions to this exclusionary rule, when the evidence of other acts tends to prove a material issue and has independent relevance other than showing that the defendant is a man of bad character. Even if independently relevant, the probative value of such evidence must be weighed against its prejudicial effect. One statutory exception to the general rule of exclusion is other crimes evidence used to prove knowledge when proof of such is required to establish guilt. La. Code Evid. art. 404B(1).[6] It has been found that in this sense, guilty knowledge is used to negate an innocent explanation for an undoubtedly unlawful act, as possibly done unknowingly. **State v. Silguero**, 608 So.2d 627, 629 (La. 1992).

On direct examination, defendant sought to show that he voluntarily cooperated with the police following the incident at the Cru Wine Bar because he felt that he had done nothing wrong, and had acted in self-defense. This defense directly placed his "guilty knowledge" at issue and made evidence of other crimes or bad acts relevant to rebut that issue. As referenced in **State v. Silguero**, 608 So.2d at 630, if a defendant creates a genuine issue, the prosecution may, under certain circumstances, use other crimes or bad acts evidence to rebut the issue.

Defendant advanced his defense by calling Mayor Price and Chief Buell as witnesses in an effort to negate any evidence that improprieties occurred during the investigation of this incident. During the State's rebuttal case, officers from the Mandeville Police Department testified regarding the circumstances of defendant's initial appearance at the police station. However, we also note that only one of those officers, Corporal Lambert, provided testimony that directly rebutted defendant's assertions that he had voluntarily agreed to appear at the police station.

---

[6] Louisiana Code of Evidence article 404B(1) provides in pertinent part:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident ... or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Upon motion of the defendant, within a reasonable time before trial the State must furnish defendant with a statement in writing of the criminal acts or offenses it intends to offer at trial. **State v. Prieur**, 277 So.2d 126, 130 (La. 1973); La. Code Crim. P. art. 720. Absent evidence that the State evaded **Prieur** notice requirements by deliberately reserving its other crimes evidence for cross-examination or rebuttal, the **Prieur** notice requirements do not apply where, as here, defendant through his own testimony makes the other crimes relevant. **State v. Silguero**, 608 So.2d at 630.

Defendant argues the State failed to timely disclose this evidence and relies upon **State v. Ghoram**, in support of its contention that although the evidence of the "fix" was presented during the State's rebuttal case, the procedural safeguards of **Prieur** apply to other crimes evidence used on cross-examination and rebuttal.

We disagree. First, we find defendant's reliance on **State v. Ghoram** to be misplaced under the circumstances of this case. In **Ghoram**, the court extended the procedural rules governing admissibility of other crimes evidence to include the use of such evidence on cross-examination or rebuttal. However, **Ghoram**, addressed a situation wherein the prosecutor admitted his trial tactics were a calculated effort to circumvent the **Prieur** guidelines. **State v. Ghoram**, 290 So.2d at 852. In contrast, as previously discussed, defendant himself put the matter of his cooperation with the police at issue. Second, defendant fails to point to any evidence in the record indicating the prosecutor deliberately reserved such evidence for its rebuttal case.[7]

Accordingly, we do not find the record reveals the State withheld using the other crimes evidence in its case-in-chief to circumvent **Prieur** notice requirements. Thus,

[7] The prosecutor explained that she initially learned of the incident involving defendant and Mayor Price when she met with Corporal Lambert on the Friday preceding the start of trial the following Monday. According to the prosecutor, she was not aware of her ability to use that information, and was hesitant to use it because of Corporal Lambert's discomfort. It was not until defense counsel gave his opening statement referencing defendant's cooperation with the police on the night of the incident that she realized such information was useful to the case. After defense counsel's opening statement, the prosecutor was able to meet with Corporal Lambert again, after which she advised the trial court and defense counsel of the substance of this interview. Corporal Lambert's testimony corroborates that he only revealed the involvement of Mayor Price on the eve of trial.

under the circumstances, the evidence of the "Mandeville Mayor Fix" was admissible without **Prieur** notice.

Moreover, even if the trial court erred in allowing evidence of the "fix" to be presented without a **Prieur** hearing, such an error in the erroneous admission of other crimes evidence is subject to the harmless error analysis. See **State v. Johnson**, 94-1379, p. 15 (La. 11/27/95), 664 So.2d 94, 101. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); **State v. Morris**, 99-3075, pp. 6-7 (La. App. 1 Cir. 11/3/00), 770 So.2d 908, 915, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220.

In support of his position that this error was not harmless, defendant maintains that his credibility was central to his theory that he acted in self-defense. Defense counsel argues that in his opening statement, he told the jury that defendant voluntarily went to the Mandeville Police Department and received a summons.

We disagree. First, we note that despite the objections and argument concerning evidence of a "fix," there was only one witness who testified that there was, in fact, some involvement on the Mayor's part. That witness was Corporal Lambert, who admitted that he had not personally spoken with the Mayor, but the substance of that conversation was relayed to him by Sergeant Hurtsell. However, Sergeant Hurtsell testified that he recalled no conversation involving the Mayor on the night of this incident, and further testified he did not think any improprieties occurred during this investigation. In support of this, Sergeant Hurtsell testified how the charges against defendant were going to be upgraded when the police learned of the seriousness of Rome's condition shortly after defendant provided his initial statement and received the misdemeanor summons. An arrest warrant was sworn the following day charging defendant with a felony.

While we agree that defendant's credibility was at issue, we note Mayor Price himself testified consistently with defendant in that he admitted defendant spoke to him about the matter, but that it was not in the hours immediately following the incident.

Defendant's credibility was also bolstered by the testimony of Chief Buell, who stated that although he had spoken with the Mayor, improprieties had not occurred during the investigation and defendant was ultimately charged with a felony in this matter.

Second, we note that despite any erroneous admission of the "fix," the verdict was unattributable to such evidence. The State presented eyewitness testimony from Hare, Brown, Pair, Alcott, Miller, and Rome, which failed to establish that Rome was acting in any type of threatening manner towards defendant at any point during the evening. Moreover, even Cefalu, who testified that immediately prior to the incident, Rome approached defendant in an aggressive and antagonistic manner, admitted he looked away when the incident occurred. Clearly, there was a basis for the jury to conclude that Cefalu did not think defendant was in the position of being threatened with physical harm.

As to the incident itself, the State presented eyewitness testimony from Hare, Hernandez, Pair, Alcott, Miller, and Riley, who all consistently testified how defendant either kicked or stomped on Rome multiple times after he pushed her to the floor. Clearly, the jury found the testimony of these eyewitnesses more persuasive of defendant's guilt, than the testimony disputing whether his initial appearance at the police station was purely voluntary or made with the knowledge he was only going to be issued a misdemeanor summons for his involvement in the incident. Finally, there was ample testimony that within hours of learning of Rome's condition, the charge against defendant was upgraded and defendant, in fact, continued to cooperate in the investigation.

Based on our review of the record, we find the verdict was unattributable to any alleged erroneous admission of the alleged "fix" involving defendant contacting Mayor Price.

This assignment of error is without merit.

DENIAL OF OPPORTUNITY TO VOIR DIRE JURY

In this assignment of error, defendant argues that the late notice of the "Mandeville Mayor Fix" denied him the opportunity to expose bias or prejudice on the part of the jury panel regarding Mandeville Mayor Price. In support of this contention, defendant argues that Mayor Price is a controversial public figure, and the inability of the

defense to question potential jurors regarding any bias or prejudice against the Mayor is reversible error.

At the outset, we note that at no time did defendant present this argument regarding the impact of calling the Mayor as a witness to the trial court. Thus we find this argument has not been adequately preserved for review. See La. Code Crim. P. art. 841(A).

In an abundance of caution, we note defendant relies upon Louisiana Constitution art. I, § 17(A), which provides an accused with a right to full voir dire examination of prospective jurors. Defendant also cites several cases wherein a reviewing court found reversible error when the trial court restricted voir dire regarding the juror's attitudes towards those who may appear as witnesses in the case. See **State v. Boen**, 362 So.2d 519 (La. 1978); **State v. Dyer**, 95-2368, (La. App. 1 Cir. 10/2/96), 682 So.2d 278, writ denied, 96-2570 (La. 3/21/97), 691 So.2d 81; **State v. Sexton**, 477 So.2d 124 (La. App. 4 Cir. 1985).

However, unlike the cases cited by defendant, this is not a case of the trial court's restriction of defendant's ability to conduct voir dire. Mayor Price was subpoenaed as a witness by the defendant to corroborate defendant's testimony regarding his contact with the Mayor. Moreover, despite defendant's assertion in brief that Mayor Price is a controversial figure, we note that defendant's reference to actions taken by the Mandeville City Council occurred after trial in this matter, which would not have affected the jury pool. Finally, we note that Mayor Price was called as a witness by the defense. Although the defense did not initially plan to call Mayor Price as a witness, defense counsel was well aware that there had been no opportunity to voir dire the jury regarding potential bias against the Mayor. Under these circumstances, we cannot say that the failure to conduct voir dire examination regarding a potential witness was erroneous in this matter.

This assignment of error is without merit.

ALLEGED IMMUNITY DEAL WITH CORPORAL LAMBERT

Through this assignment of error, defendant argues that the State failed to "reveal the deal" with Corporal Lambert. Defendant further argues the trial court violated his Sixth Amendment right to confrontation by prohibiting defense counsel from cross-examining Corporal Lambert about the possibility that the State had leverage against him due to his alleged participation in the "Mandeville Mayor Fix."

Defendant asserts that following his conviction, Corporal Lambert was deposed on March 6, 2008, in Rome's civil suit against defendant. Defense counsel obtained an affidavit from one of defendant's civil defense attorneys wherein the attorney stated he heard Corporal Lambert state that between the end of the criminal trial and the deposition, he had been read his **Miranda** rights, interrogated, and told he was being arrested by other Mandeville police officers. According to an affidavit executed by the defendant's civil attorney, the Attorney General's Office intervened and prevented Corporal Lambert from being arrested.

At the hearing on defendant's motion for new trial, the prosecutor stated that she had never discussed any criminal repercussions against Corporal Lambert. Furthermore, as the State's brief points out, any evidence of an arrangement between the State and Corporal Lambert would not be considered **Brady** material, which the State would be required to turn over, even during post-trial proceedings. In other words, whether Corporal Lambert violated the law for his involvement in the alleged "Mandeville Mayor Fix," is irrelevant to defendant's guilt or punishment for the present crime.

Further, our review of the record indicates defense counsel was not prohibited from questioning Corporal Lambert on cross-examination regarding whether the State had any type of leverage against him because of his involvement in charging defendant with a misdemeanor, rather than a felony, in the hours following the incident. The record indicates defense counsel attempted to read the malfeasance statute to Corporal Lambert, and the State objected. In response to the trial court's inquiry of where defense counsel intended to go with such questioning, defense counsel replied that he wanted to determine if Corporal Lambert had received any type of immunity. The trial court

responded, "You can ask him about any of those questions, but I don't think you need to go into the malfeasance statute."

Clearly, the trial court specifically allowed defense counsel to question Corporal Lambert regarding immunity. What the trial court prohibited was defense counsel questioning Corporal Lambert regarding whether he committed specific crimes. Accordingly, we cannot say defense counsel's failure to question Corporal Lambert regarding immunity was the result of an erroneous ruling on the part of the trial court.

This assignment of error is without merit.

FAILURE TO RECORD TWO BENCH CONFERENCES

In this assignment of error, defendant argues his conviction should be reversed because there is not an adequate record on appeal. Specifically, defendant argues the content of two bench conferences, which occurred on Tuesday January 29, 2008, wherein the trial court ruled the State could only use evidence of a "fix" on rebuttal, are not part of the record because they were never recorded.

Louisiana Constitution article I, § 19, guarantees defendants a right of appeal "based upon a complete record of all the evidence upon which the judgment is based." Further, La. Code Crim. P. art. 843 provides:

> In felony cases, in cases involving violation of an ordinance enacted pursuant to R.S. 14:143(B), and on motion of the court, the state, or the defendant in other misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

The Louisiana Supreme Court has never articulated a per se rule either requiring the recording of bench conferences or exempting them from the scope of Article 843. However, in **State v. Hoffman**, 98-3118, p. 50 (La. 4/11/00), 768 So.2d 542, 586, cert. denied, 531 U.S. 946, 122 S.Ct. 345, 148 L.Ed.2d 227 (2000), the court interpreted Article 843's requirement that "objections" and "arguments" be recorded as applying only to objections made in open court and the arguments of counsel in closing, because only these objections and arguments rise to a level of materiality sufficient to invoke Article 843.

We note that defendant points to unrecorded conferences involving the trial court's ruling regarding admissibility of the "Mandeville Mayor Fix" on the State's rebuttal case. We first note this matter was preserved for review because defense counsel lodged objections on the record at trial, and these issues have been raised and addressed on appeal. As for the content of the two specific unrecorded bench conferences, defendant has failed to demonstrate any specific prejudice that he suffered as a result of those conferences not being transcribed or recorded; nor does anything in the record suggest that the conferences had a discernible impact on the proceedings. Because of defendant's failure to illustrate how he has been prejudiced by these unrecorded bench conferences, we find he is not entitled to relief. See **State v. Hoffman**, 98-3118 at 50, 768 So.2d at 587 (finding that where defendant could point to no specific prejudice, the failure to record bench conferences did not constitute reversible error); **State v. Castleberry**, 98-1388, pp. 28-29 (La. 4/13/99), 758 So.2d 749, 772-73, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999), (stating that absence from the record of four unrecorded bench conferences did not deny defendant effective appellate review); **State v. Brumfield**, 96-2667, pp. 14-16 (La. 10/20/98), 737 So.2d 660, 669-70, cert. denied, 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999), (holding that the trial court's failure to have each bench conference and ruling properly transcribed was not reversible error when the defendant failed to show that he was prevented from presenting any relevant evidence and failed to establish that any prejudice resulted from their absence in the record).

This assignment of error is without merit.

MOTION FOR NEW TRIAL

Defendant offers two assignments of error addressing the trial court's errors in failing to grant his motion for a new trial. Defendant's first argument contends that following trial, the defense learned that evidence became available indicating Corporal Lambert's testimony as to the alleged "fix" was false. The second argument asserts that the trial court erred in not granting defendant's motion for a new trial based on false

expert testimony and newly discovered medical evidence from both a neurosurgeon and Rome's treating neurologist.

Applications for new trials on the grounds of newly discovered evidence should be received with extreme caution. **State v. Jefferson**, 305 So.2d 465, 468 (La. 1974). Under Louisiana jurisprudence, in order to obtain a new trial based on newly discovered evidence, the defendant has the burden of showing: (1) the new evidence was discovered after trial; (2) the failure to discover the evidence at the time of trial was not caused by a lack of diligence; (3) the evidence is material to the issues at trial; and (4) the evidence is of such a nature that it would probably have produced a different verdict. The test for determining whether newly discovered evidence warrants a new trial is not simply whether another trier of fact might render a different verdict, but whether the new evidence is so material that it ought to produce a verdict different from the one rendered at trial. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Brooks**, 2001-1138, p. 13 (La. App. 1 Cir. 3/28/02), 814 So.2d 72, 81, writ denied, 2002-1215 (La. 11/22/02), 829 So.2d 1037.

Evidence regarding Corporal Lambert's testimony

In defendant's fourth assignment of error, he argues that he should have been granted a new trial based on telephone records that would have corroborated his and Mayor Price's testimony that there was no "fix." In support of this contention, defense counsel offered telephone records of defendant's cellular phone, and his home and office telephone numbers, which all failed to indicate any call was placed to Mayor Price prior to his arrival at the Mandeville Police Department. Defendant argues these records were unavailable at trial, given the short notice of this issue and the amount of time involved in obtaining the necessary subpoena.

We note that the defense failed to request a subpoena for these records during trial. Furthermore, we also note that defendant obtained instanter subpoenas for Mayor Price and Chief Buell, who testified consistently with defendant's own testimony regarding the lack of any contact or "fix" resulting from any involvement by the Mayor in this investigation. Accordingly, we find this newly discovered evidence to be cumulative of

existing evidence, and defendant failed to exercise due diligence in obtaining these records.

Moreover, this evidence merely affects the credibility of Corporal Lambert, defendant, and Mayor Price. It has been held that newly discovered evidence affecting only a witness's credibility will ordinarily not support a motion for new trial. **State v. Cavalier**, 96-3052, 97-0103, p. 3 (La. 10/31/97), 701 So.2d 949, 951 (per curiam).

Finally, we note the evidence regarding defendant's telephone records fails to reflect actual guilt or innocence of defendant, but merely reveals collateral facts, i.e., defendant's behavior following the incident at the Cru Wine Bar. Longstanding jurisprudence has held that newly discovered evidence affecting collateral facts does not provide the basis for obtaining a new trial. See **State v. Atwood**, 210 La. 537, 27 So.2d 324, 329 (1946); **State v. Posey**, 137 La. 871, 69 So. 494, 496 (1915). Accordingly, we find no merit in this assignment of error.

False Expert Testimony and Newly Discovered Medical Evidence

In defendant's seventh assignment of error, he argues the proffered opinion testimony of Dr. H. Carson McKowen and Dr. Fisher (Rome's treating neurologist) affects the trustworthiness of the trial testimony of Dr. Inglese, the State's expert, and should be considered as a basis for granting a new trial.

We disagree. First, we note there is no basis to find that either Dr. McKowen or Dr. Fisher were unavailable as trial witnesses. Second, we note that the two medical experts who testified on defendant's behalf at trial, Dr. Sakla and Dr. Hamide, both disagreed with the opinions of Dr. Inglese. The jury was well-aware that Dr. Inglese did not have the entirety of Rome's medical records available to form the basis of his opinion, and was also aware that Dr. Inglese was accepted as an expert in internal medicine. Our review of this assignment of error indicates that not only would this proffered testimony be cumulative of evidence already in the record, it would also serve as a further credibility attack on the State's expert, Dr. Inglese. The record indicates Dr. Inglese was extensively cross-examined by defense counsel and the defense also presented divergent opinions

from two medical experts. Accordingly, we cannot say the trial court abused its discretion in denying defendant's motion for new trial on this basis.

This assignment of error is without merit.

CONCLUSION

For the above and foregoing reasons, we find no merit to any of defendant's arguments on appeal and affirm both his conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.