NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1038

STATE OF LOUISIANA

VS.

JIMMIE DARNELL DIXON

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JUDGMENT RENDERED: DEC 2 3 2008

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ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 09-06-1058, SECTION 1,
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

THE HONORABLE ANTHONY MARABELLA, JUDGE

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Appellant

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ

Hughes, J., concurs

McDONALD, J.

The defendant, Jimmie Darnell Dixon, was charged by amended bill of information with two counts of attempted first degree murder (counts I and II), violations of La. R.S. 14:27 and 14:30, and two counts of second degree kidnapping (counts III and IV), violations of La. R.S. 14:44.1. He initially pled not guilty but, thereafter, changed his plea to not guilty and not guilty by reason of insanity. Following a jury trial, he was found guilty as charged on all counts. Eleven of the twelve jurors voted to convict the defendant on count I. The verdicts on counts II, III, and IV were unanimous. He moved for a post-verdict judgment of acquittal, but the motion was denied. On count I, he was sentenced to twenty years at hard labor without benefit of probation, parole, or suspension of sentence to run consecutively with the sentence imposed on count II.[1] On count II, he was sentenced to fifty years at hard labor without benefit of probation, parole, or suspension of sentence. On count III, he was sentenced to twenty years at hard labor without benefit of probation, parole, or suspension of sentence to run concurrently with the sentence imposed on count I, but consecutively with the sentences imposed on counts II and IV. On count IV, he was sentenced to twenty years at hard labor without benefit of probation, parole, or suspension of sentence to run concurrently with the sentence imposed on count II. He now appeals, designating the following eight assignments of error:

1. The defendant was convicted by a non-unanimous verdict in violation of the United States and Louisiana Constitutions.

2. The trial court erred in denying the defense's challenge for cause of prospective juror Donna Jolly.

3. The trial court erred in denying the defense's challenge for cause of

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[1] The sentencing minutes are inconsistent with the sentencing transcript. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

prospective juror Stephen Triche.

4. The trial court erred in denying the defense's challenge for cause of prospective juror Denis Deshon.

5. Because the State had not provided pretrial notice of its intent to introduce the inculpatory statement, the trial court erred by permitting the State to admit evidence that the defendant told S.D. to bring J.D. with her to visit him on the occasion that he harmed them.

6. The trial court erred in failing to declare a mistrial after the State referenced in its opening statement to the jury a comment allegedly made by the defendant to S.D. instructing her to bring J.D. with her when she came to visit him.

7. The evidence is insufficient to support the verdicts because the preponderance of the evidence established that the defendant was insane at the time of the offenses.

8. The trial court erred in denying the motion for post-verdict judgment of acquittal.

For the following reasons, we affirm the convictions and sentences on all counts.

FACTS

The defendant and S.D.[2] were married on August 5, 2000, in Baton Rouge. They had dated for approximately two years prior to the marriage and had a child together during that time. On November 29, 2000, they moved to Junction City, Kansas, close to the army base at Fort Riley where the defendant was stationed. While in Kansas, S.D. became pregnant with the couple's second child. After the birth of the child, the couple moved onto the army base at Fort Riley. S.D. felt the defendant was too controlling and left the defendant and returned to Baton Rouge, giving him one month to show her that the marriage was worth saving. While the couple was separated, the defendant was deployed to Iraq for the first time.

Before the defendant returned from Iraq in April 2004, S.D. told him she was pregnant by another man, and the defendant agreed to take care of the baby if they reconciled. On August 23, 2004, S.D. gave birth to J.D., her daughter by

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[2] We reference the victims only by their initials. See La. R.S. 46:1844(W).

another man. S.D. and the defendant reconciled, and they briefly lived together at Fort Riley. Before J.D. was three months old, however, S.D. left the defendant again and moved back to Louisiana.

In February 2006, after the defendant returned from his second deployment to Iraq, he and S.D. reconciled. The defendant told S.D. he wanted to move to Dallas, Texas, to study to become a pharmacy technician. The couple and two of the children lived together in Dallas from February through May. The third child stayed in Louisiana with his grandmother so that he could complete the school year.

In May 2006, S.D. drove to Louisiana to pick up the third child. She stayed longer than expected because while she was in town, her cousin passed away and she wanted to stay for the funeral. The defendant, however, repeatedly telephoned S.D. and told her to return, so she returned to Dallas with the third child and a niece prior to the funeral. After she returned to the defendant, she found a piece of paper in his wallet with a woman's name and telephone number. When she questioned the defendant about the paper, he told her that since she had not come home when she was supposed to, he considered their marriage over, and the woman was going to braid his hair.

When S.D. woke up the next day, the defendant had left the home and the telephones and telephone wires had been removed from the house. When the defendant returned, an argument ensued, and during the argument S.D. bumped into the defendant's laptop, knocking it off a table. The defendant picked up S.D. by the neck, slammed her to the ground, and twisted her arm, fracturing her neck and back. S.D. told her niece to get help, and the defendant told S.D. that if she tried to get help, "watch and see what happens." S.D. wanted to return to Louisiana, but the defendant was scared she would report him to the police. The

defendant told S.D. if she called the police, he would hurt someone very close to her. J.D. was the person closest to S.D. The defendant told S.D. that the only way he would let her go home would be if he drove her home and brought all of the kids back with him. Even though S.D. had neck and back pain, the defendant refused to take her to the hospital for treatment. When S.D.'s neck and back pain worsened overnight, however, the defendant agreed to take her to the hospital on the condition that she tell the doctors and nurses that she had been in a car accident. A few days later, after S.D. promised not to get the police involved, S.D. convinced the defendant to let her go home to Louisiana with the children.

On August 4, 2006, in a telephone conversation, S.D. told defendant that she was not coming back to him. The defendant told S.D. that they could never get back together because if they did, he would pull out a gun and shoot them both. Thereafter, S.D. obtained a restraining order against the defendant. The defendant told S.D. he would not take care of her or J.D., but would support his sons.

On September 22, 2006, following a court hearing, the defendant was ordered to pay $850.00 monthly child support for all three children and $50.00 monthly spousal support for S.D. He was also ordered to surrender the family vehicle to S.D.

After the court hearing, the defendant telephoned S.D. and asked to see the kids "for one last time" because he was going back to school the next day. He also indicated he would surrender the vehicle to her at that time. The defendant called S.D. back and told her to bring J.D. because he missed her and loved her too. S.D. drove her sister's car with the children to see the defendant. The defendant immediately sent his sons into the house and took J.D. from S.D. When the boys came back out, the defendant sent them back into the house again. The defendant was sweating, and told S.D. they should sit in the car.

S.D. sat in the car with the defendant and J.D., but kept her feet on the ground outside. The defendant asked S.D. why she did not tell him he needed a lawyer for the hearing. The defendant also asked S.D. what he had been ordered to do, and she explained his support obligations. The defendant's mother also approached the car, and he tapped the glass indicating she should go into the house. The defendant then sped off, with S.D. still partially out of the vehicle and with J.D. in his lap. He ran a red light and drove up onto the interstate. S.D. became frightened and told the defendant that they could resolve their problems some other way, that he did not have to worry about paying anything, and that he could just let her and J.D. out on the interstate. The defendant told S.D. "to shut the f. up." S.D. continued to try to talk to the defendant and he continued to tell her "to shut the f. up." The defendant repeatedly told S.D. to put her seat belt on, but she did not comply. S.D. tried to call for help on her cellular telephone. The defendant asked S.D. what she was doing, but before she could answer, a Sheriff's Deputy pulled ahead of them in traffic. S.D. tried to get out of the vehicle and alert the Sheriff's Deputy that she and J.D. had been kidnapped, but the defendant pulled her back and held her with one hand, while he reached into the back of the vehicle and retrieved a large butcher-type knife. He then started stabbing S.D. S.D. fought with the defendant, trying to grab the knife. The defendant eventually released his grasp of S.D., but then started stabbing J.D. S.D. managed to get out of the vehicle, but was unable to open the doors of any other vehicles due to the injuries to her hands. After S.D. escaped from the defendant, he got out of the vehicle with J.D. and stabbed her until his knife became stuck in her head. A motorist eventually opened the door to a van for S.D. and drove her down to the Sheriff's vehicle. While S.D. was standing next to the Sheriff's vehicle, the defendant rammed her with his vehicle, knocking her into the air. The defendant

then exited off the interstate, striking cars, light poles, small trees, and a building. He told the emergency responders that came to help him that he had just hurt his wife and baby. He further stated, "I know I did wrong, but please get me out of here." An additional knife and a small gasoline can containing gasoline were also later recovered from the vehicle.

S.D. suffered thirteen stab wounds during the attack, some of which severed nerves and tendons in her hands. She also suffered injuries from landing on, and sliding across, the interstate after the defendant struck her with the car.

J.D. suffered seven stab wounds, including a stab wound to her abdomen that left part of her small intestine protruding from her body. She was also stabbed almost completely through her head, with the knife lodging in her head and causing brain damage.

SUFFICIENCY OF THE EVIDENCE

The defendant combines assignments of error numbers seven and eight for argument. He argues the evidence was insufficient to convict him of attempted first degree murder and second degree kidnapping because the preponderance of the evidence established he was insane at the time of the offenses. He relies upon the testimony of his expert witnesses. He also argues that the facts of the offenses, i.e., that they were committed in the view of a host of eyewitnesses, in rush-hour traffic, within the view of a police vehicle, and where there was no real opportunity for escape, suggest that he was not behaving as someone who understood that his conduct was wrong and should be concealed.

Insanity at the time of the offense requires a showing that because of mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question. See La. R.S. 14:14.

The law presumes a defendant is sane and responsible for his actions. La. R.S. 15:432. The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence. La. C.Cr.P. art. 652. The State is not required to offer any proof of the defendant's sanity or to offer evidence to rebut the defendant's evidence. Instead, the determination of whether the defendant's evidence successfully rebuts the presumption of sanity is made by the trier of fact viewing all the evidence, including lay and expert testimony, the conduct of the defendant, and the defendant's actions in committing the particular crime. The issue of insanity is a factual question for the jury to decide. Lay testimony concerning defendant's actions, both before and after the crime, may provide the jury with a rational basis for rejecting even unanimous medical opinion that a defendant was legally insane at the time of the offense. **State v. Thames**, 95-2105, p. 8 (La. App. 1st Cir. 9/27/96), 681 So.2d 480, 486, writ denied, 96-2563 (La. 3/21/97), 691 So.2d 80. Louisiana does not recognize the defense of diminished capacity. A mental disease or defect short of insanity cannot serve to negate an element of the crime. **State v. Pitre**, 2004-0545, p. 24 (La. App. 1st Cir. 12/17/04), 901 So.2d 428, 444, writ denied, 2005-0397 (La. 5/13/05), 902 So.2d 1018.

In reviewing a claim of sufficiency of evidence in regard to a defense of insanity, we must apply the test set forth in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant had not proven by a preponderance of the evidence he was insane at the time of the offense. **Thames**, 95-2105 at pp. 8-9, 681 So.2d at 486.

The defense presented testimony at trial from Tulane University School of Medicine Forensic Psychiatrist Sarah Deland. Dr. Deland evaluated the defendant "on a number of occasions" while he was in the East Baton Rouge Parish Prison after

the commission of the crimes. She also reviewed the defendant's records and spoke to people who knew him. She did not see any evidence of malingering, i.e., manufacturing symptoms for secondary gain.

In the opinion of Dr. Deland, the defendant suffered from a major mental illness, i.e., post traumatic stress disorder (PTSD) and, due to the symptoms of the disease, was unable to distinguish right from wrong at the time of the offense. When asked what she thought of the defendant stabbing a baby while in five o'clock rush-hour traffic, Dr. Deland noted that committing that offense in plain view of everyone, without any hope of significant escape, and also with a law enforcement vehicle very close by indicated unplanned, bizarre behavior. She conceded she did not know exactly what happened, but indicated her impression was that the defendant was extraordinarily stressed, had a break with reality, and just became very paranoid and frightened. Dr. Deland also indicated she did not believe the incident fit a pattern of escalating domestic violence because it seemed "to be out of the blue."

On cross-examination, Dr. Deland conceded that the defendant's flight from the scene could have simply been an attempt to escape. She also conceded that, while she had claimed in her report that the defendant's psychosis began in his court hearing in Livingston Parish, the transcript of the hearing did not reflect that the defendant did not understand why he was at the hearing.

The defense also presented testimony from Dr. Marc L. Zimmerman, a psychologist. Dr. Zimmerman saw the defendant on July 11, 2007 and July 25, 2007. Dr. Zimmerman tested the defendant to determine whether he was malingering cognitive ability and found a very low probability of malingering. Dr. Zimmerman indicated the defendant had symptoms of, or symptoms that could be, PTSD. The defendant reported seeing things, hearing things, and memory difficulty, but was not delusional. Testing performed by Dr. Zimmerman on the defendant indicated he had

anxious arousal, intrusive experiences, and depression. Dr. Zimmerman also found that the defendant's ability to stay focused in reality was "somewhat questionable." Dr. Zimmerman conceded that none of the results from the tests he administered to the defendant indicated that the defendant had PTSD on the day of the incident.

The defense also presented testimony from Dr. Robert Blanche, a psychiatrist. Dr. Blanche first saw the defendant on October 24, 2006, but indicated his assistant, Christy Perry, a psychiatric nurse practitioner, had seen the defendant on October 3, 2006. On October 3, 2006, the defendant claimed to have no memory of the incident. On October 24, 2006, the defendant appeared very anxious, fearful, and somewhat paranoid. He had sweaty palms and had trouble speaking. He also claimed to be having a recurrent dream in which an Iraqi girl gradually approached him with a red beacon in her hand. The defendant claimed that in the dream he told the girl to stop, but she kept approaching him until he saw a flash of light, which could have been an explosion or muzzle flash. Dr. Blanche felt that the defendant had a form of PTSD and was psychotic. Dr. Blanche did not feel as though the defendant was malingering and noted that his anxiety and sleeplessness improved with treatment. Concerning his experiences in Iraq, the defendant claimed he was sent back to Iraq within nine months of the birth of J.D., and "it was like walking through the valley of the shadow of death." The defendant claimed he had to kill men, women, and children with his weapon and saw numerous dead bodies and decapitations. He also indicated, however, that when S.D. became pregnant by another man, he was devastated more than anything he had experienced in Iraq.

In rebuttal, the State presented testimony from Dr. Donald Hoppe, a clinical psychologist. Dr. Hoppe reviewed the defendant's prison medical record, his army mental health treatment and service records, his arrest records, the record of the Livingston Parish proceeding that resulted in a temporary restraining order being

issued against the defendant, the reports of Drs. Deland and Blanche, and the psychological testing records of Dr. Zimmerman. He was also present in court for the testimony of the witnesses, including the expert witnesses. He also interviewed the defendant on July 20, 2007.

Dr. Hoppe read the definition of PTSD from the diagnostic and statistical manual of the American Psychiatric Association. The primary symptom of the mental disorder was anxiety. In order to be diagnosed with the condition, the patient would have to have been exposed to a traumatic event in which he experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious bodily injury, or which threatened the physical integrity of the person or others, and to which the person responded with intense fear, helplessness, or horror. Further, the traumatic event would have to be persistently experienced through: recurrent and intrusive distressing recollections of the event; recurrent, distressing dreams of the event; acting or feeling as if the traumatic event were recurring; or intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event. Additionally, the patient would persistently avoid stimuli associated with the trauma and there would be numbing of his general responsiveness that was not present before the trauma as indicated by three or more of the following: present efforts to avoid thoughts, feelings, or conversations associated with the trauma; efforts to avoid activities, places, or people that arouse recollections of the event; inability to recall important aspects of the trauma; diminished interest or participation in activities; feelings of detachment or estrangement from others or restricted range of affect; and a sense of foreshortened future. The patient would also have to have persistent symptoms of increased arousal that were not present before the trauma with at least two of the following symptoms: difficulty sleeping, irritability, difficulty concentrating,

hypervigilance, and exaggerated startle response. Lastly, the patient's symptoms would last more than a month and cause distress or impairment in social, occupational, or other important areas of functioning.

Dr. Hoppe agreed with most of the descriptions of the defendant's behavior and the psychological testing and interpretations. However, he had "serious questions" about the conclusions and the diagnosis that had been made on the basis of the evidence that was presented. Dr. Hoppe did not believe that the data in the records and reports necessarily supported a diagnosis of PTSD. He noted that the defendant had told him that the defendant primarily played Nintendo and watched television in Iraq. The defendant claimed that during his first deployment in Iraq, he had a desk job that consisted primarily of answering the telephone. He claimed he played video games and watched television when the phones were not ringing. He claimed his only involvement with combat was when he heard gunfire inside a mosque. In regard to his second deployment in Iraq, the defendant claimed he was in charge of communication and fixed roads, ran telephone lines, and maintained equipment. He reported being shot at as his only combat experience during the deployment. Dr. Hoppe indicated that the defendant appeared preoccupied with S.D.'s infidelity and the fact that she had a child with another man. Dr. Hoppe indicated it was "very questionable" whether the defendant's combat experiences would meet the guidelines for PTSD because the defendant had not described events that created horror or fear in him in which his life was particularly threatened. Dr. Hoppe also noted that the defendant did not report any mental health problems while being treated in the emergency room on the day of the incident.

It was Dr. Hoppe's opinion that the fact that S.D. became pregnant by a man other than the defendant was the trauma in the defendant's life, and that trauma was insufficient to diagnose PTSD because it was not a life-threatening trauma. Dr.

Hoppe also indicated that the defendant's obsession with S.D. did not suggest a break with reality, i.e., that the defendant could not tell right from wrong. On the basis of the facts of the crime and the testimony he had heard, Dr. Hoppe did not see any evidence that the defendant was psychotic or had broken with reality, but rather saw a man who was angry and vengeful, who felt like he was losing control, and who responded with aggressive, angry action. Dr. Hoppe concluded that the testimony he had heard and the records he had reviewed showed no indication that the criteria for PTSD were fully met in the defendant's case.

After a thorough review of the record, we are convinced a rational trier of fact could have found the defendant failed to rebut his presumed sanity at the time of the offenses. Contrary to the assertions of the defendant, the defendant's medical history and the expert testimony at trial did not sufficiently establish that the defendant was unable to distinguish between right and wrong at the time of the offenses. Evidence contrary to that conclusion was presented through the testimony of Dr. Hoppe, as well as the testimony of the State witnesses concerning the defendant's actions at the time of the offenses. The verdicts returned indicate that the jury credited this testimony while rejecting the testimony of the defense witnesses. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385, p. 9 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p. 32 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. 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, p. 14 (La. 11/29/06), 946 So.2d 654, 662. While the defendant argues that he

did not behave as someone who understood that his conduct was wrong and should be concealed, the record indicates that he did his best to kill both victims and successfully escaped from the crime scene after stabbing S.D. thirteen times and striking her with his car and after cutting open J.D. and leaving a knife stuck in her head.

These assignments of error are without merit.

CONVICTION BY NON-UNANIMOUS VERDICT

In assignment of error number one, the defendant argues, on count I, he was convicted by a non-unanimous verdict in violation of the United States Constitution. He argues La. C.Cr.P. art. 782(A) is unconstitutional under **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

Louisiana Constitution article I, § 17(A) and La. C.Cr.P. art. 782(A) provide that cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. The punishment for attempted first degree murder is necessarily confinement at hard labor. La. R.S. 14:27(D)(1)(a) and 14:30(C) (prior to amendment by 2007 La. Acts No. 125, § 1). The instant case was tried before a twelve person jury, eleven of whom voted to convict the defendant on count I.

Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. **State v. Caples**, 2005-2517, p. 15 (La. App. 1st Cir. 6/9/06), 938 So.2d 147, 157, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684.

The defendant's reliance upon **Ring, Apprendi**, and **Jones** is misplaced. Those decisions do not address the issue of the constitutionality of a non-unanimous jury verdict; rather, they address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. **Caples**, 2005-2517 at pp. 15-16, 938 So.2d at 157. They stand for the proposition that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See **Apprendi**, 530 U.S. at 490, 120 S.Ct. at 2362-63; **Caples**, 2005-2517 at p. 16, 938 So.2d at 157. Nothing in the referenced decisions suggests that the jury's verdict must be unanimous for a defendant's sentence to be increased. **Caples**, 2005-2517 at p. 16, 938 So.2d at 157. Accordingly, La. Const. art. I, §17(A) and La. C.Cr.P. art. 782(A) are not unconstitutional and, hence, not violative of the defendant's Sixth Amendment right to trial by jury.

This assignment of error is without merit.

CHALLENGES FOR CAUSE

In assignment of error number two, the defendant argues the trial court erred in denying the defense challenge for cause against prospective juror Donna Jolly because she did not understand the defense of not guilty by reason of insanity and could not properly follow the law in regard to that defense. In assignment of error number three, the defendant argues the trial court erred in denying the defense challenge for cause against prospective juror Stephen Triche because his responses reflected an inability to follow the law with regard to the insanity defense. In assignment of error number four, the defendant argues the trial court erred in denying

the defense challenge for cause against prospective juror Denis Deshon because his comments as a whole reflected that he was biased.

The State or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality, or on the ground that the juror will not accept the law as given to him by the court. La. C.Cr.P. art. 797(2) and 797(4).

In order for a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.[3] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. **State v. Taylor**, 2003-1834, pp. 5-6 (La. 5/25/04), 875 So.2d 58, 62. A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law reasonably may be inferred. However, the trial court is vested with broad discretion in ruling on a challenge for cause; its ruling will not be disturbed on appeal absent a showing of an abuse of discretion. **State v. Henderson**, 99-1945, p. 9 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 754, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

A law enforcement officer is not automatically excluded from service on a criminal jury. **State v. Ballard**, 98-2198 (La. 10/19/99), 747 So.2d 1077. Rather,

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[3] The rule is now different at the federal level. See **United States v. Martinez-Salazar**, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

the trial judge should determine on a case-by-case basis whether the prospective juror can serve impartially. **Ballard**, 98-2198 at p. 4, 747 So.2d at 1080.

Donna Jolly, Stephen Triche, and Denis Deshon were on the second panel of prospective jurors. In response to questioning by the court, Jolly indicated she could not think of any reason why she would not be fair if she was selected to serve on the jury. The State explained the insanity defense and that the judge would instruct the jury that it had to evaluate the testimony and demeanor of every witness, including experts, and that the determination of whether there was a mental disease or defect was up to the jury. Jolly indicated she understood. Jolly also indicated that in determining whether a person could tell right from wrong, she would "probably have to see" some of their prior actions, what their past was like, and if they had engaged in other criminal activity or actions that would prove that they did not know right from wrong. The State asked whether she believed that an expert, because of their training and experience, would be in a better position to answer whether the defendant knew right from wrong. Jolly replied she had a very hard time being able to see how a person who did not know, "was not there," and was not with the person during the previous twenty-four hours, could conclude that the person did not know right from wrong. In response to questioning by the defense, Jolly indicated she believed that a mental health expert could possibly determine whether "you were in your mind," but she was not sure she believed that they could determine that someone "totally [did not] know right from wrong." She indicated she did not take issue with the law, but rather with psychology. In regard to "temporary insanity," Jolly indicated she would have to be convinced that it was a possibility in society in general. Jolly accepted post-traumatic stress disorder as a plausible disorder that could cause some mental illness.

The defense challenged Jolly for cause, arguing that she had indicated she had problems with an expert "talking about someone knew right from wrong." The State argued that the standard was whether the prospective juror could give a fair hearing and be a fair juror, not whether they would automatically believe what an expert told them. The State argued Jolly understood the law and was very adamant that she would consider all of the evidence including the experts. The trial court denied the challenge for cause against Jolly, finding that her answers taken as a whole, while indicating she had reservations and concerns about the insanity defense, indicated she could be fair and reasonable. The defense used its sixth peremptory challenge against Jolly before exhausting all of its peremptory challenges.

The trial court did not abuse its broad discretion in denying the challenge for cause against Jolly. Jolly demonstrated a willingness and ability to decide the case impartially according to the law, and the evidence and her responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred. Further, contrary to the defendant's argument, Jolly's responses as a whole did not reflect that she did not understand the defense of not guilty by reason of insanity and could not properly follow the law in that regard.

Stephen Triche stated that he had a Ph.D. in education. He indicated the fact that he had friends who had been arrested and the fact that he had a friend who had been the victim of rape would not prevent him from being fair. In response to questioning from the State, Triche indicated that because of his research background and experience, when he listened to expert testimony, he would be listening for medical evidence, rather than circumstantial and behavioral evidence, towards mental deficiency. Triche indicated he had come to believe that most mental defects or mental illnesses were physiologically or neurologically caused,

and so he would want to hear neurological evidence on how a mental defect had affected a person's life or caused him to do something out of the ordinary. The State explained the insanity defense and that under the law, the jurors rather than the experts decided whether a defect or disease existed. The State asked Triche if he could conceive of a situation where a person could be seriously mentally ill, but still know the difference between right and wrong. Triche answered affirmatively, indicating he would look for instances of a person's behavior in making that determination and the non-expert witnesses would be the key to his decision. Triche indicated that he did not believe that knowing right from wrong was something that was momentary, so there would have to be a pattern of behavior to that end. Triche also indicated that he had served in the Navy for four years and knew people who had suffered from PTSD. In regard to one of those people, Triche had not seen any indication that the person could not distinguish between right and wrong.

In response to questioning from the defense, Triche indicated that he believed someone could suffer from PTSD after a traumatic event without suffering a physical injury. He also indicated that he disagreed with the idea that someone could not know right from wrong in one instant, when they did know right from wrong minutes earlier or sometime later. He indicated a "pretty heavy burden of evidence" would be required to convince him to change his mind, but acknowledged that the defense only had to prove more probable than not. In response to questioning from the court, he stated that evidence could persuade him to vote that the defense had shown legal insanity if the defense established, more probably than not, that a person did not know the difference between right and wrong, even if it might have been the first occurrence. When asked by the defense, if, given his academic background, it would have an extra burden to convince him, Triche replied, there may be an extra burden, but he would "go with the evidence."

The defense also challenged Triche for cause, arguing his responses indicated he had formed opinions regarding mental health based on his experiences and education and he had stated that the defense would have a higher burden with him than the other jurors. The court denied the challenge for cause against Triche, noting it had questioned him about the issue and, based on his entire voir dire examination, it thought that he would be a fair juror. The defense used its fifth peremptory challenge against Triche before exhausting all of its peremptory challenges.

There was no abuse of the trial court's broad discretion in denying the challenge for cause against Triche. Triche also demonstrated a willingness and ability to decide the case impartially according to the law and the evidence and his responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred.

Denis Deshon indicated that neither the fact that he had been a Terrebonne Parish Deputy Sheriff twenty years earlier, nor the fact that his next-door neighbors had been murdered in their home the previous year, would affect his ability to be fair. In response to questioning by the defense, Deshon indicated that his one and one-half year's experience as a deputy made him biased toward law enforcement. Deshon also responded affirmatively when asked if he would give more credence to what a law officer had to say versus a non-law enforcement officer. He explained that law enforcement officers were trained to "pick up on facts." When asked if his bias toward law enforcement officers would extend to people that work for the State, such as people employed by the district attorney's office, he replied, "not necessarily" and "could be."

The defense challenged Deshon for cause, citing his statement that he would believe police officers over non-police officers. In response to questioning from the court, Deshon indicated if he determined that a police officer who was testifying was

not a thorough investigator, he (Deshon) could accept the fact that the police officer might have made mistakes and might not have done everything he was supposed to do. Deshon also indicated that if testimony at trial from a witness who was not a police officer conflicted with testimony from a police officer, and he (Deshon) believed the non-law enforcement officer was telling the truth, he would not automatically believe the police officer. Deshon stated his bias was toward police officers' abilities to ascertain the facts. Deshon answered negatively when asked whether his bias would extend to a non-law enforcement expert who was presented by the State. He stated he accepted the fact that police officers might lie and make mistakes. He also stated he would not automatically believe a police officer over a regular person if both of them appeared honest and truthful. The defense used its eighth peremptory challenge against Deshon before exhausting all of its peremptory challenges.

The trial court denied the challenge for cause against Deshon, noting that although, taken at face value, Deshon's statements might appear to mean he was biased, upon further questioning, the statements meant only that Deshon recognized that police officers were trained; and he had indicated he would not believe a police officer over someone else just because the person was a police officer.

We also find no abuse of the trial court's broad discretion in denying the challenge for cause against Deshon. Deshon demonstrated a willingness and ability to decide the case impartially according to the law and the evidence and his responses as a whole did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred.

These assignments of error are without merit.

DISCOVERY VIOLATION

The defendant combines assignments of error numbers five and six for argument. He argues the State violated pretrial discovery by failing to provide notice of its intent to introduce the defendant's alleged statement to S.D. to bring J.D. with her when she brought the kids to visit him on the day of the incident. He also argues the trial court erred in denying the defense motion for mistrial on the basis of the discovery violation.

Prior to trial, the defense moved for discovery of, inter alia, any oral confession or statement of any kind by the defendant that the State intended to offer into evidence at trial. Further, citing La. C.Cr.P. art. 716, the defense discovery motion stated, "If the oral statement was made by the accused in response to interrogation by any person then known to the accused to be a law enforcement officer, state the substance of the statement." The State responded that the defendant had made statements before, during, and after the commission of the crimes and it intended to use all of the defendant's statements at trial.

In its opening statement, the State indicated that the defendant had wanted to see "the children" before he went back to Dallas, "and he told [S.D.] particularly, make sure you bring my baby girl." The State completed its opening statement without objection by the defense and then presented testimony from its first two witnesses before court adjourned for the day.

The next day, the defense moved for a mistrial. Citing **State v. Francis**, 2000-2800 (La. App. 1st Cir. 9/28/01), 809 So.2d 1029, the defense argued the State had not given notice "with sufficient particularity" of the defendant's alleged statement to S.D., "make sure you bring [J.D.]." The defense argued the State was offering the evidence to show intent and plan, and the defense would be prejudiced by use of the evidence because it had not had an opportunity to speak with S.D. The court denied the motion for mistrial, noting the defense was not entitled to notice of incriminating

statements given to a lay witness and, in any event, the defense had the opportunity to cross-examine S.D. at an earlier hearing. Thereafter, S.D. testified concerning the challenged statement.

Louisiana Code of Criminal Procedure article 716, in pertinent part, provides:

> B. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made.
>
> C. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the substance of any oral statement which the state intends to offer in evidence made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer.

Louisiana Code of Criminal Procedure article 729.5 prescribes sanctions for failure to honor a discovery right, leaving in the trial judge's discretion the decision of whether to order a mistrial or enter any such other order as may be appropriate. As is pertinent here, La. C.Cr.P. art. 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. However, a mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for a mistrial will not be disturbed on appeal without abuse of that discretion. **State v. Berry**, 95-1610, p. 7 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

Further, La. C.Cr.P. art. 768 provides:

> Unless the defendant has been granted pretrial discovery, if the state intends to introduce a confession or inculpatory statement in evidence, it shall so advise the defendant in writing prior to beginning

> the state's opening statement. If it fails to do so a confession or inculpatory statement shall not be admissible in evidence.

The trial court did not abuse its discretion in denying the motion for mistrial. The defendant was not entitled to obtain the contents of his oral statements made by him to a private citizen, even if the State intended to introduce them at trial. La. C.Cr.P. art. 716(B); **State v. Taylor**, 553 So.2d 873, 879 (La. App. 1st Cir. 1989), writ denied, 558 So.2d 600 (La. 1990).

The case of **Francis**, Supra, cited by defendant, is distinguishable. In that case, the State violated La. C.Cr.P. art. 716(C) by failing to disclose an oral inculpatory statement made by the defendant to a detective. In **Francis**, the State also violated La. C.Cr.P. art. 768 by failing to give notice sufficient to permit the defendant a fair opportunity to meet the issue. The instant case, however, does not involve an oral statement made by the defendant in response to interrogation by any person then known by the defendant to be a law enforcement officer. Further, the defendant in this case was given notice sufficient to permit him to meet the argument that he asked S.D. to bring J.D. with her when she came to see him on the day of the incident. As noted by the trial court, S.D. testified at a La. C.E. art. 404(B) hearing over five months prior to trial. At that hearing, the defense cross-examined S.D. concerning whether she and her children had voluntarily gone to the defendant shortly before the incident. S.D. indicated that the defendant had asked to see the kids before he went to Dallas.

These assignments of error are without merit.

CONVICTIONS AND SENTENCES AFFIRMED.