NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEK by

NUMBER 2011 KA 0935

STATE OF LOUISIANA

VERSUS

JOHNNY DALE COX, II

Judgment Rendered: NOV - 9 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit number 485763

Honorable William J. Burris, Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Whipple, J. concurs in the result.

GUIDRY, J.

The defendant, Johnny D. Cox, II, was charged by bill of information with domestic abuse battery (by strangulation), a violation of La. R.S. 14:35.3(L). He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for a new trial, which was denied. The trial court sentenced the defendant to three years imprisonment at hard labor. The trial court suspended two years of that sentence, and ordered that the defendant be placed on three years of active, supervised probation upon his release from incarceration, with certain conditions of probation. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

The defendant and his girlfriend, Mia Tegtmeier, lived together on Narrow Road in Covington. On January 23, 2010, around 12:30 a.m., the defendant and Mia, who was four-months pregnant, began arguing, because Mia had hidden a videotape of the defendant and an ex-girlfriend, and the defendant wanted it back. The exchange became heated, and Mia left the house. The defendant locked the front door, assuming Mia was then locked out of the house. Mia returned about twenty minutes later, found a spare key outside, and used it to open the door. Angered even more at having been locked out, Mia began hitting the defendant. The defendant moved through the house trying to avoid Mia, but she followed him, while grabbing, holding, and striking him. The defendant then got behind Mia and placed her in a chokehold. The defendant held the stranglehold, which diminishes carotid blood flow to the brain, long enough (at least five seconds) to cause Mia to lose consciousness. Mia also urinated on herself. When Mia regained consciousness, she drove herself to Lakeview Regional Hospital (Lakeview). Mia informed the Lakeview triage nurse about what had occurred. Deputy Corporal

Scott Daussin with the St. Tammany Parish Sheriff's Office was informed about Mia's condition and began investigating the matter. Another deputy from the Sheriff's Office spoke to the defendant about the incident. The defendant was subsequently arrested for domestic abuse battery by strangulation.

Dr. Jay Desalvo was the emergency room physician who examined and treated Mia when she went to Lakeview. Dr. Desalvo testified at trial about the physical signs that indicated she had been strangled. Mia had petechiae, very small red dots on her face, which indicated bleeding as a result of small blood vessels rupturing. She had subconjunctival hemorrhage, which appears as redness in the normally white part of the eye because of ruptured capillaries (caused by increased capillary pressure). Mia also had bleeding in her tympanic membrane. Dr. Desalvo explained that the small blood vessels in the eardrum ruptured as a result of the increased pressure in her head, which was caused from the blood not being able to return back to the heart by occlusion of the neck. Dr. Desalvo also observed ligature marks on Mia's neck. He noted the marks were broadly displayed over the entire neck, which indicated Mia was strangled with something broad, like an arm or piece of clothing, rather than something very narrow, like piano wire. When asked about the degree of potential harm caused by the strangulation, Dr. Desalvo responded that Mia could have died from the injury. Dr. Desalvo also testified that the strangulation of Mia could have potentially put her unborn child at risk.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in finding inadmissible a video clip the defendant sought to introduce into evidence at trial. Specifically, the defendant contends that he should have been allowed to

introduce into evidence a video clip of Mia to attack her credibility and to show her violent character.

Based on testimonial evidence at a Prieur hearing, the trial court allowed the State, pursuant to La. C.E. art. 404(B), to introduce evidence at trial concerning two other altercations (in addition to the instant offense) between the defendant and Mia where, according to the State, the defendant committed misdemeanor batteries on the same victim (Mia). The evidence of the two incidents was introduced mainly by way of Mia's testimony at trial. Mia testified at trial that on December 23, 2009, she and the defendant had access to a single vehicle. The defendant needed to go to work, but Mia also wanted to use the vehicle. An argument ensued, and Mia hid the keys to the vehicle. The defendant looked around the house for the keys. When he looked in the closet, Mia stood in the doorway to prevent the defendant from exiting the closet. The defendant pushed Mia out of the way to get out of the closet. Mia further testified that on the early morning of November 23, 2010, Mia needed the truck to pick up a child she had agreed to babysit. The defendant was sleeping. When Mia tried to wake the defendant to find out where the keys were, the defendant ignored her. Angry, Mia called a friend to pick her up, took the defendant's cell phone and wallet, and went outside with her baby to sit in the truck to wait for her friend. When Mia's friend arrived, the defendant came outside to get his cell phone and wallet. When Mia refused to return his belongings, the defendant blocked Mia from getting out of the truck and a struggle ensued. Mia then elbowed the defendant in his mouth.

In his brief, the defendant argues that he should have been allowed to play for the jury a video clip that showed Mia as the aggressor in one of their altercations. The video clip, according to the defendant, was also admissible to show Mia's violent character and to attack her credibility. See La. C.E. art. 607.

The defendant maintains that, in allowing the State to introduce evidence of the other two incidents to show motive and intent, the trial court applied a double standard in denying him "the opportunity to establish that his intent was to protect himself from a woman who was out of control."

At trial during the defendant's case-in-chief, the defendant testified on direct examination about an altercation he had with Mia on November 19, 2010. Regarding that incident, the defendant testified as follows:

> November 19th I was trying to go to work that day. That afternoon. She had already run her errands that day, but she demanded the truck. So I told her I wasn't going to give her the keys to the truck. She barricaded herself in the back seat of the truck, literally. She took the seat belts. She had the baby at the time. She took the seat belts and tied knots around the car seat. Took the other seat belt on the outboard side and tied knots around the door handle so I could not get in the back seat of the truck. And she sat there. And she said that she was going to call the police if I didn't get in the truck. Drive to work. And let her take the truck. So I documented this. She dialed 9-1-1 while sitting in the back of the truck. Screamed at the phone. And then looked me in the eye and said you better get in the truck now because they're coming. Then she immediately took her phone, flipped it over, took the battery out so they couldn't trace the call. And then continued to tell me the police were on the way. I needed to get in the truck.

As the defendant noted in his testimony, he documented this incident by videoing it on his cell phone. The video clip of the incident was put on a CD, and a copy of the CD was given to the prosecutor. Following the defendant's testimony about the incident, defense counsel sought to introduce the video clip into evidence. The prosecutor and defense counsel approached the bench and the following exchange took place:

> Mr. Hogue [defense counsel]: Your Honor, in the course of turning over discovery to each other, it was a -- he give me a disk of the pictures that I had for like CD [rom]. CDR and I gave him a picture of what discovery -- I gave him a copy of the discovery I had for him. Which was primarily pictures. And then one item on a disk was a video. Which he took referencing this incident he just testified to. I think the DA -- I will let the District Attorney speak for himself, but I didn't -- don't recall telling him there was a video on it. I think that was the point of contention. I was telling him a minute ago I turned

over what I had to him. And it's not my intent in any way to sandbag the District Attorney in any way. But there was a video on there. Bruce [prosecutor], in talking to the District Attorney, he said he was not aware of the video. And so that's the situation I think he is objecting to me intending to introduce it at this point.

Mr. Dearing [prosecutor]: Your Honor, the State, way back at the inception of this case, filed a Motion for Counter Discovery. And in addition to that, has on more than one occasion asked defense verbally for any defense discovery that the State would be entitled to. And it's my recollection that this past Friday, Mr. Hogue indicated to me that he had some pictures and that he was going to provide those to me on a disk. He did so. Only thing he ever mentioned were pictures. I put that disk in the computer. The only thing that came up were pictures. It wasn't until just moments before the defendant took the stand Mr. Hogue came over to me and asked if he could use the State's equipment to play a video. I said what video are you talking about? That's the first time he has ever mentioned a video before the trial commenced this morning. I even went on record and established that the only thing that defense had provided to me were pictures and defense agreed with that.[1]

The defendant is entitled to discover papers, documents, tangible objects, and other items that are within the possession of the State. See La. C.Cr.P. art. 718. Similarly, the State is entitled to copy, examine, reproduce, etc., anything that is in the possession, custody, or control of the defendant that the defendant intends to use in evidence at the trial. See La. C.Cr.P. art. 724. The rules of discovery are intended to eliminate unwarranted prejudice arising from surprise testimony. See State v. Harris, 00-3459, p. 8 (La. 2/26/02), 812 So. 2d 612, 617.

Our review of the CD sent by defense counsel to the prosecutor reveals twenty-one pictures of the defendant indicating injuries he purportedly sustained from Mia. After scrolling to the end of the pictures, the icon for a video clip can

[1] In this last sentence, the prosecutor states, "I even went on record and established that the only thing that defense had provided to me were pictures and defense agreed with that." It appears the prosecutor went on record regarding this issue following selection of the jury and prior to opening statements:

> The State would like to put on the record that it has filed a counter discovery request and defense has supplied some photographs that it may seek to use at trial. That is the only thing that the State has received from defense in response to its discovery request. I just want to put that on the record.

be seen. However, the video file cannot be opened with Windows Media Player (the default media player for Windows operating systems).[2] The video clip, as described by the defendant in his trial testimony, was captured by the defendant with his cell phone. Our review of the video clip reveals an argument between the defendant and Mia. Mia and her baby are in a truck, while the defendant is standing outside of the truck videoing her on his cell phone.

While the video file may not have been playable on the prosecutor's computer, the CD containing the video clip was, nevertheless, given to the prosecutor. Thus, on the one hand, the prosecutor was arguably negligent in failing to view everything that was on the CD. On the other hand, as the discussion of counsel at the bench conference suggests, defense counsel represented to the State that he was providing a CD of only pictures to the State that he might seek to get into evidence at the trial. According to the trial prosecutor, the District Attorney had no knowledge of a video clip, and the prosecutor's first knowledge of the video clip was in the middle of the trial during the defendant's case-in-chief. Accordingly, it was arguably the defendant who failed to comply with the discovery rules and, as such, cannot now be heard to complain on appeal about the video not getting introduced into evidence. Louisiana Code of Criminal Procedure article 729.5 provides that if any party fails to comply with the discovery rules, the court may prohibit the party from introducing into evidence the subject matter that was not disclosed. However, resolution of this discovery issue is not required, because as the following discussion makes clear the video clip was irrelevant and hearsay and, therefore, properly ruled inadmissible at trial.

[2] The defendant's video clip file had a ".3gp" file extension, indicating it was a 3GP file, which is the new mobile phone video file format.

Following the prosecutor's explanation to the trial court that he had never seen the video in question, the trial court sustained the prosecutor's objection. Without explanation, the trial court stated, "I will not allow introduction of it." At the sentencing hearing, defense counsel informed the trial court he had filed a motion for a new trial on the grounds that the defendant's cell phone video clip should have been played at trial. The CD containing the video clip was submitted with the motion for a new trial. The trial court denied the motion, explaining, "I have already ruled on the admissibility of that, and that didn't have anything to do with this particular instance. It was another instance."

In questions of relevancy and admissibility, much discretion is vested in the trial court. Such rulings will not be disturbed on appeal in the absence of a showing of manifest abuse of discretion. State v. Duncan, 98-1730, p. 10 (La. App. 1st Cir. 6/25/99), 738 So. 2d 706, 712-13. We find no abuse by the trial court in ruling the video clip inadmissible at trial. The incident captured on video occurred November 19, 2010, about ten months *after* the instant offense (January 23, 2010) for which the defendant was convicted. The less-than-three-minute video clip capturing one of the many arguments between the defendant and Mia had no relevance to the instant offense, which occurred almost a year before, wherein the defendant strangled Mia into unconsciousness.

We also find that the video clip contains self-serving, exculpatory statements by the defendant, which are inadmissible hearsay.[3] During the video, while Mia is upset and casts accusations of abuse at the defendant, the defendant maintains he is blameless for Mia's behavior. Finally, the defendant walks away from Mia, looks into his cell phone camera, and states that this is what he goes through every time they get in a fight. Such statements were self-serving declarations and, therefore,

[3] We suggest, as well, that the entire video clip could be viewed as a self-serving exculpatory statement by the defendant.

did not constitute an admission against interest, which is an exception to the hearsay rule pursuant to La. C.E. art. 804(B)(3). See State v. Lanham, 31,791 (La. App. 2nd Cir. 3/31/99), 731 So. 2d 936, 939-41, writ denied, 99-1320 (La. 1/14/00), 753 So. 2d 207.

Finally, even had the trial court erred in excluding the video clip at trial, such exclusion would have constituted harmless error. Louisiana Code of Criminal Procedure article 921 states that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." 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).

In the instant matter, the defendant fairly accurately described in his trial testimony what was seen on the video taken of the incident. As such, the video was merely cumulative. On direct examination at trial, the defendant testified about six different occasions where he and Mia became involved in some type of physical altercation. In his description of each of these altercations, Mia was described as the aggressor or instigator, and the defendant described himself in a favorable light as someone only defending himself. The jury, therefore, heard the defendant's version of the instant offense, as well as five other altercations, and still elected to convict him. The medical and testimonial evidence at trial, notwithstanding a video clip that may have shown Mia angry on a separate occasion unrelated to the instant action, proved that the defendant strangled four-month-pregnant Mia until she lost consciousness and urinated on herself, which clearly established the defendant's guilt. As such, the guilty verdict rendered would surely have been unattributable to any extrinsic evidence that suggested Mia

was angry or "out of control" during an altercation with the defendant, and any error in excluding such evidence would have been harmless. See Sullivan, 508 U.S. at 279, 113 S. Ct. at 2081.

CONVICTION AND SENTENCE AFFIRMED.