NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 0538

STATE OF LOUISIANA

VERSUS

PATRICK WILSON

Judgment Rendered: November 9, 2011

* * * * * * *

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 12-09-0505

Honorable Anthony J. Marabella, Jr., Judge

* * * * * * *

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* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

JJP Pettigrew J. Concurs

WELCH, J.

The defendant, Patrick Wilson, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (count 1); and obstruction of justice, a violation of La. R.S. 14:130.1(A)(1) (count 2). The defendant pled not guilty to the charges and, following a jury trial, was found guilty as charged on both counts. The defendant filed a motion for post verdict judgment of acquittal and a motion for a new trial, which were denied. For the second degree murder conviction, the defendant was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. For the obstruction of justice conviction, the defendant was sentenced to ten years at hard labor. The sentences were ordered to run concurrently. The State subsequently filed a habitual offender bill of information, seeking to enhance the sentence for the obstruction of justice conviction. Following a hearing on the matter, the defendant was adjudicated a second-felony habitual offender. The trial court vacated the previously imposed ten-year sentence and resentenced the defendant to twenty years imprisonment at hard labor for the obstruction of justice conviction. The defendant now appeals, designating four assignments of error in his original brief and four assignments of error in his supplemental brief. We affirm the convictions, habitual offender adjudication, and sentences.

FACTS

On the evening of September 23, 2006, Evindra Simon and her friend, Abigail Moonkissoon, made plans to go out. At about 10:30 p.m., Evindra met Abigail at the Chase Suite Hotel in Baton Rouge. Abigail had arrived at the hotel earlier that night to meet up with her friends, Shane Castro and Gary Falcon, who had rented the hotel room for the night. From the hotel, Evindra, with her passenger Abigail, drove her Honda Accord to Triple A Bar and Grill. Shane and Gary rode in a separate vehicle and met them there. After spending some time at

Triple A Bar and Grill, the four walked to the Gold Club, where they stayed until closing time at 2:00 a.m. Evindra and Abigail then drove to the IHOP on College Drive, then to the one on Siegen Lane, but stayed at neither because they were too crowded. After this, they decided to go to the Belle of Baton Rouge Casino. Shane and Gary had gone to Walmart.

During the night, Evindra's boyfriend, the defendant, had made several Nextel calls (direct connect calls) to Evindra. Earlier, the defendant had told Evindra that he was spending the evening in New Orleans with friends. A little after 3:00 a.m. (September 24), Evindra and Abigail were parked in the casino parking lot. Shortly after 3:00 a.m., Evindra received a Nextel call from the defendant. Soon thereafter, the defendant drove into the casino parking lot and parked about twenty to thirty feet from Evindra's Accord. The defendant was alone in a white Jeep Liberty, which he had rented from Avis Car Rental earlier in the night. Evindra left her vehicle and got into the Jeep with the defendant. Abigail got out of the car, but after seeing Evindra get in the Jeep, got back in the car and called Shane and Gary to tell them not to come to the casino at that time so the defendant would not get the wrong idea.

While Abigail was in the car, she heard a gunshot from the Jeep. Abigail got out of the car. The defendant got out of the Jeep and screamed for Abigail to get into the Jeep because Evindra had been shot. When they got into the Jeep, the defendant told Abigail that Evindra tried to grab the gun and it went off. Abigail called 911 to get directions to a hospital while the defendant drove. When they arrived at Baton Rouge General Hospital, the defendant placed Evindra in a wheelchair outside. The defendant returned to the Jeep, left the hospital, and never returned.

Evindra had been shot in the head and died later that day from massive trauma to the brain caused by the gunshot wound. The bullet, likely a hollow-

point, fragmented when it hit Evindra's skull. A small fragment of the bullet entered Evindra's head, while another fragment of the bullet shattered the front passenger-side window of the Jeep. There was no exit wound in Evindra's head. The autopsy report indicated the bullet fragment entered the left side of Evindra's head, ten centimeters above the left ear. The defendant turned himself in to the authorities.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues the trial court erred in denying his motion for a continuance. Specifically, the defendant contends that he was denied his right to counsel of his choice when the trial court refused to grant a continuance on the first day of the trial.

Throughout his case prior to trial, the defendant was represented by co-counsel, Martin Regan, Jr. and John McLindon. On the morning of May 10, 2010, the first day of the defendant's trial, the trial court informed McLindon that he had received a motion that same morning for a twenty-four hour continuance from Regan, the defendant's lead counsel. Regan explained in his motion that he was participating in another trial in New Orleans, and that, after two days of trial on May 5 and May 6, the trial had been continued to Monday, May 10, 2010. Regan anticipated his New Orleans trial would be concluded by early Monday afternoon. The trial court informed McLindon that Regan knew since Thursday (May 6) that his New Orleans trial was continued to this Monday (May 10); and on that Thursday, the trial court held a status conference, which included a lengthy discussion in chambers about wanting to get the defendant's trial underway, and that it would be available all day Friday in case something came up. However, the trial court "did not hear a word from anybody." McLindon informed the trial court that throughout the defendant's case, he had been "more or less" the investigations

lawyer, and that it was understood that Regan would "try the bulk of the case." Shortly thereafter, the following colloquy took place between the trial court and McLindon:

> **The Court:** -- The orderly process and the way we run things and -- and this isn't a blanket comment or -- or a comment that you hear people make very often, but Mr. Regan has chosen not to be here on a number of occasions. Had he been here every time and had he been here Thursday afternoon and said, Judge, look, I'm trying my darnedest to get everything ready, but I'm in the middle of a trial, we might have been able to make some adjustments.
>
> **Mr. McLindon:** Right.
>
> **The Court:** But, you know, he has shown no respect to this court. He doesn't show up half the time. He has required that you be here most of the time. On Thursday we tried to get some information from him. We tried to get some stipulations, but he wasn't here.
>
> **Mr. McLindon:** Well, Judge, I -- I don't know if that's a matter of disrespect to the court. That's --
>
> **The Court:** Well, I'm not --
>
> **Mr. McLindon:** I mean, that's part of me being local counsel.
>
> **The Court:** Let -- let me -- let me simply say this. Call it disrespect. Call it not. It's not handling your business. We were here to transact business --
>
> **Mr. McLindon:** Right.
>
> **The Court:** -- and you weren't given enough information to be able to transact that business and he wasn't here. And I don't know how they handle their business where he practices at, but that's not how we handle our business here, and so --
>
> **Mr. McLindon:** Yes, sir.
>
> **The Court:** -- I'm going to deny the continuance and we're going to get ready to pick a jury in just a few minutes.

The trial court then added:

> Well . . . I am thoroughly familiar with Mr. McLindon's work and I am not familiar with Mr. Regan's work. I know Mr. McLindon to be a very competent, well-prepared, hard-working lawyer; and, from what I've seen on the record of Mr. Regan, to me the two -- that Mr. Wilson is not in any way harmed or prejudiced by having Mr. McLindon sit next to him today as opposed to Mr. Regan. Now, I -- that isn't a comment on Mr. Regan's ability. I don't know. I'm sure

> he's a very good lawyer; but I know Mr. McLindon to be a very good lawyer, a very conscientious lawyer and one who is always prepared; and I'm sure he's prepared to go forward this morning.

After McLindon explained the trial court's ruling to the defendant, the defendant, personally addressing the trial court, stated that he paid Regan to be his head counsel and that McLindon was hired to assist Regan. In his brief, the defendant reiterates the trial court was made aware by the defendant that Regan was hired to be lead counsel and McLindon was only hired to assist Regan. Thus, according to the defendant, he was denied his constitutional right to counsel of his choice.

We do not agree. Despite the defendant's characterization as McLindon being hired as one only "to assist," McLindon undertook many of the pretrial responsibilities, such as filing motions and attending (and arguing at) hearings and conferences. Following the selection of the jury, McLindon and the defendant (in proper person) again moved for a continuance. Again denying the motion, the trial court stated in pertinent part:

> Mr. Wilson, let me say I understand your position and I understand your concerns. Let me say simply, every time you've been here and almost every hearing we've had, Mr. McLindon has been at your side. Mr. McLindon has been here at every hearing.
>
> . . . .
>
> . . . Mr. Regan has been here maybe once or twice throughout this entire two-year ordeal.
>
> . . . .
>
> . . . We had a lot of hearings. We had a lot of issues that have been decided here. You know, I was told he was going to be here this morning. He's not here. I got a call, said he'd be here in an hour. He's not here. I'm ready to go forward. I do -- I am -- I'm sympathetic to Mr. Wilson's concerns. We have -- we have a jury. That jury is sitting in there. They're ready to go. I'm going to proceed today.

Moreover, Regan tried most of the defendant's case. In his brief, the defendant points out that McLindon went on record at the motion for continuance

that Regan was to try the bulk of the case. Our review of the record indicates that Regan did, in fact, try the bulk of the case. McLindon covered jury selection, the opening statement, and the cross-examination of the first witness called at trial on May 11. Later in the day on May 11 through the end of the trial on May 14, Regan was present for the defense. Of the twelve witnesses called by the State during its case-in-chief, Regan cross-examined ten of them and lodged objections throughout the trial during the State's direct examination of these witnesses. Of the eight witnesses called during the defendant's case-in-chief, Regan conducted the direct examination of seven of those witnesses. Regan also made the closing argument. The defendant, thus, was clearly not denied his constitutional right to counsel of his choice.

The decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge and a reviewing court will not disturb such a determination absent a clear abuse of discretion. **State v. Strickland**, 94-0025 (La. 11/1/96), 683 So.2d 218, 229. See La. C.Cr.P. art. 712. Generally a conviction will not be reversed absent a showing of specific prejudice caused by the denial of a continuance. See **State v. Simpson**, 403 So.2d 1214, 1216 (La. 1981).

The defendant in this case had two experienced trial attorneys working on his behalf. When Regan could not be present during pretrial hearings and/or conferences, McLindon effectively and competently handled the defendant's case. When trial began, Regan tried almost the entirety of the defendant's case. As such, the defendant has made no showing of prejudice caused by the denial of his motion for continuance. See **State v. Jackson**, 2000-1014 (La. App. 5th Cir. 12/13/00), 778 So.2d 23, 30-31, writ denied, 2001-0162 (La. 11/21/01), 802 So.2d 629; see also **State v. Shannon**, 2010-580 (La. App. 5th Cir. 2/15/11), 61 So.3d 706, 712-16. Accordingly, the trial court did not abuse its discretion in denying the motion

for continuance.

This assignment of error is without merit.

ASSIGNMENTS OF ERROR NUMBERS TWO AND THREE

In his second and third assignments of error, the defendant argues, respectively, that the evidence was insufficient to support the second degree murder conviction, and that the trial court erred in denying the motion for post verdict judgment of acquittal. Specifically, the defendant contends that the State did not prove beyond a reasonable doubt that he had the specific intent to kill Evindra since the shooting was accidental. The defendant does not contest the obstruction of justice conviction.

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 La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** 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 factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. See La. R.S. 14:30.1(A)(1). Specific intent is that 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 (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 defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1st Cir. 1986).

There is no dispute that Evindra suffered a fatal gunshot wound to her head at point-blank range while she was sitting in the Jeep alone with the defendant. The theory of the defense was that, while the defendant was holding the gun, Evindra tried to grab the gun and it accidentally discharged. While Evindra was the registered owner of the gun that killed her, a .40 Glock 23 semiautomatic, the State and defense counsel stipulated at the beginning of trial, prior to opening statements, that the gun was in the Jeep Liberty and was not transferred by Evindra into the Jeep from the Honda Accord. Also, at trial Abigail testified she remembered Evindra telling her that she bought a gun for the defendant. At a motions hearing prior to trial, the State and defense counsel also stipulated that the Glock 23 that killed Evindra was owned by Evindra and was given to Detective Ross Williams, with the Baton Rouge Police Department, on May 31, 2007, by Regan, counsel for the defendant. Thus, it would be more than eight months after Evindra was shot that the gun that killed her came into the possession of the authorities.

Testimony at trial established that Evindra and her young daughter lived with Evindra's mother. Evindra's mother and sister testified that a couple of weeks before Evindra was killed, she had a black eye. Evindra's mother testified that while her daughter and the defendant dated, she observed similar marks on

Evindra four or five other times. She told Evindra she needed to leave the defendant or call the police. Evindra's sister testified that when she was talking to Evindra on the phone about her black eye, the defendant yelled and told Evindra to "hang up the f---ing phone."

The night Evindra was killed, she thought the defendant was going out in New Orleans with some friends. However, that night the defendant met Cocoa Collins, who lived in Biloxi, Mississippi, at a hotel in New Orleans. Afterward, they had dinner and drinks. Cocoa testified at trial that she had a relationship with the defendant in 2006. Later that evening, the defendant told Cocoa that he had to leave to take care of some business and that he would be back.

Cell phone records of the defendant and cell phone tower records indicated the defendant called Evindra from New Orleans at 12:54 a.m., 12:55 a.m., and 1:00 a.m. Thereafter, according to the phone and tower records, the defendant was moving through the Gonzales area and into Baton Rouge. His calls were made near the Gold Club and Siegen Lane. It would seem the defendant began following Evindra at some point when he got into Baton Rouge. When Abigail and the defendant were looking for a hospital while Abigail was on the phone with a 911 operator, the defendant can be heard saying, "Abigail, I asked about them white boys y'all were with." Abigail responded, "That's Shane."

When the defendant arrived at the casino parking lot that Evindra and Abigail were in, it appeared from the casino surveillance video, which was introduced into evidence and played for the jury, that he drove around for a few minutes before parking. Within a very short time of Evindra's getting into the Jeep, she was shot in the left side of her head, the side facing the defendant as she sat in the passenger seat. Dr. Edgar Cooper, pathologist and the East Baton Rouge Parish Coroner, testified at trial that it was a contact or "very near" contact wound; that is, the barrel of the gun was in direct contact with or within a couple of

millimeters of Evindra's head when fired. Dr. Cooper also indicated that the manner of death was classified as a homicide. Further, contrary to assertions made by the defense, the Glock handgun is not an unsafe weapon. Although there is no standard safety on Glocks, which prevents the trigger from being pulled, the Glock has several built-in safety features. Jeff Goudeau, an expert in firearms examination with the Louisiana State Police Crime Lab, testified at trial that Glocks have two internal and one external safety feature, namely a firing pin, drop, and trigger safety. In other words, a Glock pistol can only be fired when the finger is on the trigger and the trigger is pulled. Also, the "trigger pull" for Glocks is about 5.5 pounds of pressure, which is not uncommon.

After the defendant brought Evindra up to the hospital entrance, he left. Lieutenant Dennis Moran, with the Baton Rouge Police Department, testified at trial that he was working detail at Baton Rouge General when Evindra was brought in. According to Lieutenant Moran, the defendant told him that he was going to park the Jeep, but left and never came back. He called dispatch to have a BOLO put out on the Jeep. After leaving the hospital, the defendant called Cocoa. Cocoa testified at trial that the defendant told her that it was an accident, and that she needed to get her things and leave the hotel room. The defendant called Cocoa again later and told her that if she saw "it on the news, it wasn't" him. Cocoa left the hotel room and went back to Mississippi. The defendant's cell phone and tower records indicated the defendant then drove east through Hammond, Madisonville, Pearl River, and finally to Biloxi. Later, the defendant returned to Baton Rouge and took the gun, the spent shell, and Evindra's phone and purse from the Jeep, then abandoned the vehicle about four or five blocks from Baton Rouge General. The defendant was arrested shortly thereafter, but did not turn over the gun until several months later.

In this case, the defendant did not testify. The jury was presented with the

theory by the defense that the shooting was accidental and the theory by the State that the shooting was intentional. In finding the defendant guilty of second degree murder, it is clear the jury rejected the claim of accidental shooting, and concluded that the defense version of the events preceding the fatal shooting was a fabrication designed to deflect blame from the defendant. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

The jury heard all of the testimony and viewed all of the evidence presented to it at trial and found the defendant guilty. 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 factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

Based on the physical evidence and the testimony of several witnesses, a rational trier of fact could have reasonably concluded that the defendant was possessive and followed Evindra around in Baton Rouge when she went out with

Abigail. The defendant became jealous when he saw her with two other men; and shortly after she got in the Jeep, the defendant placed the Glock 23 that he had in his possession to Evindra's head and fired once; and that nothing in the foregoing facts suggested that the shooting was accidental. Deliberately pointing and firing a deadly weapon at close range indicates specific intent to kill or inflict great bodily harm. See **State v. Robinson**, 2002-1869 (La. 4/14/04), 874 So.2d 66, 74, cert. denied, 543 U.S. 1023, 125 S.Ct. 658, 160 L.Ed.2d 499 (2004); **State v. Ducre**, 596 So.2d 1372, 1382 (La. App. 1st Cir.), writ denied, 600 So.2d 637 (La. 1992). As such, the hypothesis of an accidental shooting by the defense falls.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant intentionally shot and killed his victim and, therefore, was guilty of second degree murder. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 422 (per curiam).

Having determined there was sufficient evidence to affirm the verdict of the jury, we find no error in the trial court's denial of the defendant's motion for post verdict judgment of acquittal. Accordingly, these assignments of error are without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In his fourth assignment of error, the defendant argues he was convicted of second degree murder by a ten to two non-unanimous verdict in violation of the United States and Louisiana Constitutions. Specifically, the defendant contends that La. C.Cr.P. art. 782(A) violates the Sixth Amendment right to a jury trial since it must be considered in light of the Fourteenth Amendment right to due process of law.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor. See La. R.S. 14:30.1(B). Louisiana Constitution article I, § 17(A) and La. C.Cr.Pr. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. 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. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164.

The defendant suggests that **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), which emphasize the necessity of a unanimous verdict, "implicitly overrule the prior anomalous holding in **Apodaca**, and must be taken account of by this Court." This argument has been repeatedly rejected by this court. See **State v. Smith**, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 15-16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352; **State v. Caples**, 2005-2517 (La. App. 1st Cir. 6/9/06), 938 So.2d 147, 156-57, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684. Moreover, our supreme court has affirmed the constitutionality of Article 782. In **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738, 743, the court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, or Fourteenth Amendments.

Accordingly, this assignment of error is without merit.

SUPPLEMENTAL ASSIGNMENT OF ERROR NUMBER FIVE[1]

In his supplemental fifth assignment of error, the defendant argues he was denied due process and a fair trial. Specifically, the defendant contends he was denied the right to confront a fact witness, namely the pathologist who performed the autopsy on Evindra Simon.

Dr. Cooper testified that Dr. Gilbert Corrigan had performed the autopsy on Evindra, but he had retired and no longer lived in Louisiana. Dr. Cooper stated that he was asked to, and did in fact, review the autopsy protocol, photographs, and the toxicology report. Dr. Cooper explained that the manner of death was classified as a homicide. When asked if the shooting was an accident, Dr. Cooper responded, "No." Shortly thereafter, the following colloquy then took place:

> **Mr. Regan** [defense counsel]: Ob -- Objection. Unless he's qualified this man and -- he's interviewed -- you know, there's got to be more than a basis at this point than he read somebody's autopsy to draw [a] conclusion regarding this.
>
> **The Court:** What is your objection?
>
> **Mr. Regan:** If this -- excuse me. Objection, no foundation, as he's interviewed the witnesses and things of this sort.
>
> . . . .
>
> [The parties approached the bench out of the hearing of the jury.]
>
> **[Mr.] Regan**: Objection, no foundation. For this man to say, it's not -- he's got to lay a foundation he's interviewed the witnesses, he's -- he's studied, this, that and the other and that's how he came to his conclusion that it was not an accident.
>
> **The Court:** I'm going to sustain the objection. I don't believe that this doctor has any -- I don't believe that he can testify whether this is an accident or a homicide or anything other than that. He can testify what's on his report and -- and -- and maybe that it's some protocol for doing that and -- but -- but I'm not going to allow him to speculate as to why this is an accident or why it's not an accident or it's a homicide or it's not.
>
> **Mr. Derbes** [prosecutor]: Wouldn't that go both ways, Judge?

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[1] In his supplemental brief, the defendant notes that for his first four supplemental assignments of error, he adopts the four assignments of error previously addressed in this opinion.

. . . .

The Court: I'm not sure what you mean. Does it go both ways, what does that mean?

Mr. Derbes: I'm sorry, Judge. On cross-examination is he going to do the same --

The Reporter: I'm sorry?

Mr. Regan: Well, I'm -- I'm -- wait. Excuse me. He's not qualified to give an opinion at this point. I may want to show why he's not qualified to do that at this point.

The Court: I don't think it's appropriate to ask this doctor whether or not it's an accident or whether it's a homicide or not because that's a jury question.

In his supplemental brief, the defendant contends that, under **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Dr. Cooper should not have been permitted to testify because he was not the party who performed the autopsy. According to the defendant, the autopsy report was testimonial and, as such, he should have been allowed to confront the witness who prepared the autopsy report, Dr. Corrigan.

We note initially that the trial court sustained the objection regarding whether the shooting was a homicide or an accident. Also, the autopsy report, which Dr. Cooper had reviewed to testify, indicated that the manner of death was homicide. More importantly, however, defense counsel did not make a **Crawford** or a confrontation objection. His objection only addressed the State's failure to lay a proper foundation as to Dr. Cooper's ability, as an expert, to discuss whether the shooting was an accident.

Our law requires that a defendant make a contemporaneous objection and state the reason therefor to allow the trial judge the opportunity to rule on it and prevent or cure error. La. C.Cr.P. art. 841(A). See La. C.E. art. 103(A)(1). A new basis for an objection cannot be raised for the first time on appeal. **State v. Herrod**, 412 So.2d 564, 566 (La. 1982). Accordingly, the issue of the Sixth

Amendment right to confrontation has not been properly preserved for appellate review. See **State v. Dilosa**, 2001-0024 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 671, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

This supplemental assignment of error is without merit.

SUPPLEMENTAL ASSIGNMENT OF ERROR NUMBER SIX

In his supplemental sixth assignment of error, the defendant argues he was denied his right to due process. Specifically, the defendant contends the trial court erred in allowing the prosecution to introduce highly prejudicial and speculative other crimes evidence.

The trial court ruled in a pretrial **Prieur**[2] hearing that the State could introduce other crimes evidence on cross-examination regarding an incident where the defendant battered Evindra's face. Thereafter, based on a motion by the State, the trial court ruled that the other crimes evidence could be used during the State's case-in-chief. The defendant took writs to this court and the Louisiana Supreme Court. Both writs were denied. See **State v. Wilson**, 2007-1759 (La. App. 1st Cir. 11/28/07) (unpublished); **State v. Wilson**, 2008-0012 (La. 2/22/08), 976 So.2d 1288.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. **State v. Lockett**, 99-0917 (La. App. 1st Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So.2d 115.

Louisiana Code of Evidence article 404(B)(1) provides:

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2 **State v. Prieur**, 277 So.2d 126 (La. 1973).

> Except as provided in Article 412, evidence 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. La. C.E. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence that is not relevant is not admissible. La. C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403. A trial judge's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of discretion. **State v. Freeman**, 2007-0470 (La. App. 1st Cir. 9/14/07), 970 So.2d 621, 625, writ denied, 2007-2129 (La. 3/14/08), 977 So.2d 930.

In his supplemental brief, the defendant contends that evidence of other bad acts was introduced at several points throughout the State's case-in-chief. The defendant maintains that the State called two witnesses, Gail Simon and Stacie Cox, "for the sole purpose of introducing those other bad acts in order to muddy up [the defendant] before the jury." The defendant cites no page references from the record to either Gail's or Stacie's testimony in support of his position. The argument on a specification or assignment of error in a brief shall include a suitable reference by volume and page to the place in the record that contains the basis for the alleged error. The court may disregard the argument on that error in

the event suitable reference to the record is not made. Uniform Rules - Courts of Appeal, Rule 2-12.4.

The failure to include specific page references, notwithstanding, we note that there were no objections raised by the defense during the State's direct examination of Gail. During the State's direct examination of Stacie, defense counsel objected several times. The objections were all based on hearsay, not bad acts or bad character. A new basis for an objection cannot be raised for the first time on appeal. **Herrod**, 412 So.2d at 566.

The defendant further contends the State "overstepped bounds" when it questioned Cocoa. On direct examination, the State asked, "Now, in your relationship with Mr. Wilson, he had a controlling kind of personality?" Cocoa responded, "Yes, sometimes." Defense counsel objected. The trial court sustained the objection. The prosecutor argued that "being controlling is not a crime." The trial court stated, "It's an act and it's not coming in." The defendant did not ask for an admonishment or mistrial. When the trial court sustains an objection and defense counsel fails to request an admonition or a mistrial, the defendant cannot later raise the issue on appeal. See La. C.Cr.P. arts. 771 & 775; **State v. Baylis**, 388 So.2d 713, 720-21 (La. 1980); see also **State v. Legendre**, 2005-1469 (La. App. 4th Cir. 9/27/06), 942 So.2d 45, 49 n.1; **State v. Akins**, 96-414 (La. App. 3rd Cir. 12/11/96), 687 So.2d 489, 499.

The defendant reproduces in his supplemental brief the rest of Cocoa's testimony during direct examination, wherein she stated that the defendant had a darker side and that he was "an eye for eye and a tooth for a tooth kind of guy." However, defense counsel did not lodge any objections during this part of Cocoa's testimony. The basis or ground for the objection must be sufficiently brought to the attention of the trial court to allow it the opportunity to make the proper ruling and prevent or cure any error. A defendant is limited on appeal to the grounds for

the objection that were articulated at trial. **State v. Young**, 99-1264 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005. See La. C.E. art. 103(A)(1); La. C.Cr.P. art. 841(A). The defendant failed to object to the aforementioned testimony and, as such, has waived his right to raise the issue on appeal.

Finally, the defendant contends that the State took the opportunity to again bring up the defendant's character during the testimony of April Arnone, a witness for the defense. The defendant specifically refers to the State's cross-examination of April, wherein April was asked if she had seen the black eye the defendant gave to Evindra. The defendant indicates in his supplemental brief that this exchange ended as follows:

> Mr. Knight [prosecutor]: And you didn't see the injury he gave her then?
>
> Mr. Regan: Excuse me.
>
> Arnone: No.
>
> Mr[.] Regan: I'm going to object.

However, Regan actually withdrew his objection. The entirety of what Regan stated is as follows: "I -- I'm going to object. She said she didn't see them when they started dating. There's no objection to did she ever see an injury; but, you know, she doesn't know the answer to -- I withdraw the objection, please. Go ahead." The transcript reveals no objection to allegedly improper questioning by the State. Accordingly, this issue has not been preserved for appellate review. See La. C.E. art. 103(A)(1); La. C.Cr.P. art. 841(A); **Young**, 764 So.2d at 1005.

This supplemental assignment of error is without merit.

SUPPLEMENTAL ASSIGNMENT OF ERROR NUMBER SEVEN

In his supplemental seventh assignment of error, the defendant argues his sentence is excessive. Specifically, the defendant contends his sentence is disproportionate based on the facts alleged and the crime charged.

A thorough review of the record indicates that the defendant did not make a written or oral motion to reconsider his life sentence. Under La. C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. See **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam); see also **State v. LeBouef**, 97-0902 (La. App. 1st Cir. 2/20/98), 708 So.2d 808, 808-09, writ denied, 98-0767 (La. 7/2/98), 724 So.2d 206.

This supplemental assignment of error is without merit.

SUPPLEMENTAL ASSIGNMENT OF ERROR NUMBER EIGHT

In his supplemental eighth assignment of error, the defendant asks this court to examine the entire record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether such a request is made by a defendant. Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONCLUSION

For the foregoing reasons, the defendant's convictions, habitual offender adjudication, and sentences are affirmed.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.