NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0832

STATE OF LOUISIANA

VERSUS

RONALD ULFERS

Judgment Rendered: February 8, 2008

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 356669

The Honorable Peter J. Garcia, Judge Presiding

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Walter P. Reed
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State of Louisiana

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Counsel for Defendant/Appellant
Ronald P. Ulfers, Sr.

* * * * * * * *

BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.

GAIDRY, J.

Defendant, Ronald Ulfers, Sr., was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1. Defendant pled not guilty and was tried before a jury. A unanimous jury determined defendant was guilty as charged. The trial court sentenced defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

Defendant appeals, asserting the following assignments of error:

1. It was error to permit a lay witness to the autopsy, Detective Hall, to give his opinion that the contents of Debra Ulfers's stomach looked like "gumbo" you could "throw in a bowl and eat."

2. Because the fairness of Detective Hall's investigation of defendant was at issue, it was error for the court to prohibit the defense from questioning Detective Hall about his request, accepted by defendant, to take a polygraph exam.

3. The trial court's indiscriminate and limitless approval of hearsay statements by Debra Ulfers as proper state-of-mind evidence was error.

    a. Debra's pre-September 19 hearsay statements were not relevant to her decision to go home or not with defendant on September 20.

    b. Even if relevant, the pre-September 19 statements should have been excluded under La. Code Evid. art. 403.

    c. Because the veracity of Debra's statements was in issue, defendant was entitled to an admonition that the jury had the right to judge whether her hearsay statements accurately reflected her state of mind.

4. The trial court's refusal to give an instruction on the impeaching effect of a prior conviction of Debra Ulfers as a hearsay declarant was error.

5. The trial court should not have denied without a hearing the motion for new trial, which raised questions of the State's suppression of favorable evidence and presented newly discovered evidence.

FACTS

On September 21, 1996, at approximately 8:30 a.m., defendant returned to his home on Taulla Drive in Covington. Defendant had been at the Grand Casino in Gulfport since approximately 1:30 a.m. Defendant was unable to locate his wife, Debra, in the residence. Defendant noted that her vehicle was in the garage, and her purse and pager were on the kitchen table where he had last seen them before he left several hours earlier for the casino. Defendant made a couple of telephone calls to friends and family to determine his wife's whereabouts. When these calls revealed no information, he contacted the St. Tammany Parish Sheriff's Office to file a missing person's report.

Angela Hassert was a 911 operator and dispatcher for the St. Tammany Parish Sheriff's Office. According to Hassert, defendant called on the Sheriff's Office "4141" line, not the 911 line. Hassert stated that only calls received on the 911 line were recorded, and only law enforcement officers were aware of the "4141 line." Defendant contacted the Sheriff's Office between 8:30 and 9:00 a.m. Hassert recalled that defendant sounded "out of breath." Defendant explained to Hassert that he had just returned home from work and found a door open, the bed unused and his wife not home. Defendant told Hassert that his wife was supposed to be babysitting his grandchild, but was not there. He explained that he had phoned friends and a daughter-in-law, but could not locate his wife.[1]

Officer Mike Dupuis, of the St. Tammany Parish Sheriff's Office (STPSO), was dispatched to defendant's residence at 8:53 a.m. Dupuis

[1] On cross-examination, Hassert admitted that she wrote down her recollection of this call at Detective Hall's request. Hassert explained that she found the conversation "unusual" and had an independent recollection that defendant indicated his wife may have gone to the casino, and that his wife drank. Hassert acknowledged that she did not include those statements by defendant in her report.

arrived at the residence at 9:17 a.m. As Dupuis walked toward the residence, defendant met him at the front door and explained his wife was missing and he wanted to file a formal report. As defendant invited Dupuis into the kitchen, defendant commented that he was a retired New Orleans police officer.

Dupuis noted that as he began to solicit the preliminary information about the situation, defendant volunteered information establishing a timeline of his own whereabouts the previous evening. According to Dupuis, defendant explained that he and his wife had met for dinner and had eaten at Seafood World. After dinner, they got some fuel around 9:30 p.m. Defendant produced a receipt from the fuel purchase verifying the time this occurred. After purchasing the fuel, defendant claimed he and Debra met at Wal-Mart and purchased two gallons of milk, which defendant offered to show Dupuis. From Wal-Mart, they both arrived home in their separate vehicles around 10:30 p.m. Defendant stated that his wife went to bed and he decided to go to a casino, where he drank a Bloody Mary and three Diet Cokes.

Defendant told Dupuis that while he was driving home through Slidell, he called his wife, but because no one was home, left a message on their answering machine. Defendant played his message for Dupuis. When he arrived home, defendant found the bed was undisturbed from the previous night, certain lights and a television were on, and the rear door was unlocked. Defendant told Dupuis he believed foul play was involved because his wife always locked all the doors and never went anywhere without her purse and beeper, which were still in the kitchen.

In response to Dupuis's questions, defendant admitted that he and his wife were having marital problems and his wife was seeking counseling

from the YWCA Battered Women's Shelter. Defendant told Dupuis that he had abused his wife twice in the past and that she was having an affair with another man, but they had worked it out and it was behind them. Defendant also told Dupuis that he and his wife had a disagreement two nights earlier and she had not returned home, choosing instead to stay at a Motel 6 in Slidell. Defendant also advised Dupuis that his wife took medication for migraine headaches, and he assured Dupuis that his wife was not suicidal or mentally disabled.

After getting all the necessary information from defendant, Dupuis recommended they check outside because the property covered a large area. The backyard to the residence bordered on a canal. Between the backyard grass and the canal was a one-by-eight-foot bulkhead running almost the entire length of the property, and a boathouse attached to the upper deck of the residence. There was also a small cement porch connected to the residence. When they went outside, Dupuis checked the boat in the boathouse, and defendant walked directly toward the bulkhead that bordered the backyard and the canal.

Defendant was the first to spot Debra Ulfers's body floating in the canal just off the bulkhead. Defendant jumped into the water and began to move his wife's body parallel to the bulkhead. Dupuis also jumped into the water and assisted in removing the body of Debra Ulfers. According to Dupuis, the depth of the water in this area adjacent to the bulkhead was about shin deep and the bottom of the canal was very muddy.

As the two men were attempting to get Debra's body out of the canal, defendant appeared to be working against Dupuis, so Dupuis told him to go get a blanket from the house while he pulled Debra's body onto the bank. It was apparent to Dupuis that Debra was deceased and had already developed

rigor mortis. Dupuis radioed for further assistance and EMS. However, he noted at no time did defendant ever inquire about performing any resuscitation efforts on Debra.

According to Dupuis, Debra was wearing a blouse that was ripped across the back and had a button missing. Debra was also wearing slacks and socks, but no shoes. Debra's socks had no mud on them, despite the recovery of her body in shallow, muddy water. Dupuis was certain that Debra's blouse was not torn as a result of his efforts in removing her from the canal.

Burt Klein, a paramedic for Priority EMS in St. Tammany Parish, was called to the scene. Klein's evaluation revealed no signs of life and he obtained a do not resuscitate order after consulting over the phone with a doctor.

Joy Raborn, who was an investigator with the St. Tammany Parish Coroner's Office, arrived on the scene. Raborn clipped Debra's fingernails and bagged them, then turned them over to law enforcement. In her participation at the scene, Raborn noted that defendant's fingernails appeared very short, and very neat.

Detective David Hall of the STPSO was in charge of this investigation.[2] Upon his arrival at the scene, Detective Hall conferred with Dupuis and obtained some preliminary information. Detective Hall noted that defendant was wearing a long-sleeved pink shirt and black slacks. According to Detective Hall, defendant was "obviously upset," but "very capable" of holding a conversation. In his preliminary conversation with Detective Hall, defendant reiterated the timeline of the previous evening. Despite Detective Hall's failure to request such details, defendant provided

[2] At the time of trial, Detective Hall held the rank of Captain.

Detective Hall with the names and the physical descriptions of several blackjack dealers who served him at the casino. Defendant also told Detective Hall that he and his wife had eaten at Seafood World the previous evening and he had a seafood platter while his wife had two to three bowls of gumbo and dessert.

Detective Hall asked what he described as standard questions to defendant in order to establish what had occurred in Debra's final twenty-four hours. In answering these questions at the scene, defendant never disclosed that he and his wife had discussed divorce and separation of property the previous evening. Defendant explained their recent marital problems as being caused by his working too much, but that he had started to take more time off, which was having a positive impact on their marriage.

In response to Detective Hall's questions, defendant indicated he was wearing the same clothing as he had worn the previous night when he and his wife went to Seafood World. As their preliminary conversation concluded, defendant commented to Detective Hall that he was aware he was the "prime suspect." Defendant acknowledged in his experience as a police officer the spouse was usually the first suspect.

While at the scene, law enforcement officers checked the property, including the bulkhead, decking over the boathouse, and porch for evidence that would explain how Debra wound up in the water. Nothing apparent was found.

Lieutenant Eugene Hirstius of the STPSO was in charge of processing the crime scene. According to Lieutenant Hirstius, the bulkhead was fifty-eight feet long and slightly higher than the grass yard. Debra Ulfers's body was recovered at approximately the midpoint of the bulkhead. The distance from the back slab of the porch to the bulkhead was forty-two feet. There

was only one area on the top of the bulkhead where algae could be observed, which was toward the opposite end of the boathouse near the end of the bulkhead and underneath a tree. Lieutenant Hirstius examined the areas of the bulkhead and boat slip and could find nothing floating in the water or anything protruding from the water that would explain how Debra entered the canal. Moreover, nowhere on the bulkhead did he observe any marks that could be explained as a strike or skid mark; however, on cross-examination, Lieutenant Hirstius admitted that many factors affect whether such marks are left when someone slips on a surface. Lieutenant Hirstius testified that because there was no mud on Debra's lower legs or feet, there was no indication that she dropped into the water then struggled to get out.

Defendant provided a series of statements to Detective Hall. When Detective Hall conducted the first interview of defendant, he received information that indicated defendant had abused Debra in the past and that within the past two days there had been another serious incident between defendant and Debra that caused her to leave the residence and stay in a hotel. In response to this information, Detective Hall interviewed defendant a second time.

In his second statement, defendant admitted that he grabbed Debra by the throat approximately four weeks earlier, after Debra had stayed out at a casino all night and defendant accused her of having an affair when she returned home. Defendant explained that after this altercation, Debra stayed in a hotel the next four nights until she agreed to return home.

Defendant explained that although his wife had returned to the residence, he still suspected her of having an affair and had discovered the name and telephone number of Mark DeGeorge on a piece of paper in his wife's pants pocket. Then on September 19, 1996, the Thursday night Debra

had gone out with her friend Lelah Edwards, defendant retrieved DeGeorge's telephone number from his wife's mobile phone. Defendant called Debra and told her he was going to call DeGeorge. According to defendant, his wife became upset and he suspected she tried calling DeGeorge herself before defendant could reach DeGeorge. Defendant told Detective Hall that he contacted DeGeorge and had a pleasant conversation. Defendant explained to DeGeorge that he and Debra were having marital problems and DeGeorge assured defendant that there had been no affair between him and Debra.

Defendant told Detective Hall that after he contacted Debra to tell her he had spoken with DeGeorge, Debra decided to stay in a hotel that night. Defendant explained that Debra assumed he was upset, but that he was not because DeGeorge had seemed sincere in denying that an affair had occurred. By the time they met for dinner the next evening, defendant claimed that DeGeorge was no longer an issue between them.

In another taped statement provided on October 1, 1996, defendant indicated that he suspected his wife's death was an accident, and commented about how once, one of his sons nearly fell off a railing into the canal.

During the early days of the investigation, Detective Hall obtained the surveillance photographs from the Shell station showing defendant and Debra at the cash register, following their dinner at Seafood World. In the photographs, Debra is wearing the same blouse she was found wearing when her body was discovered; however, defendant is pictured wearing a greenish-blue seashell-patterned short-sleeved shirt. This particular shirt was a different shirt than the long-sleeved pink shirt defendant was wearing when he entered the Grand Casino and when he returned to his home. Detective Hall later questioned defendant if he owned such a patterned shirt,

but defendant denied that he did. During a subsequent visit to defendant's residence, defendant opened his closet and directed the police officer's attention to similar shirts, and stated he did not own a shirt as they had described. Detective Hall would later obtain photographs of defendant wearing this exact shirt taken several months before Debra's death.

Dr. Fraser Mackenzie, who was accepted by the trial court as an expert in forensic pathology, performed the autopsy on Debra's body on September 23, 1996. According to Dr. Mackenzie, Debra's body evidenced numerous areas of superficial lacerations and abrasions, including: an abrasion of the left upper eyelid; an abrasion on the upper cheek adjacent to the eye; a mild abrasion of the soft tissue on the inferior septal cartilage; midline of the upper lip and inside of the lip a one-centimeter laceration; superficial abrasions on the right-lateral neck just below the ear; two roughly circular abrasions measuring one and one-half centimeters just above the right collarbone; a four-centimeter bruise just adjacent to the left-lateral breast; a two-centimeter abrasion on the medial aspect of dorsum on Debra's right wrist; a contusion on the thumb area of the right hand; a two-centimeter superficial laceration on the right mid-chest, a one-centimeter superficial laceration on the left-lateral lower back; and an abrasion on the medial right ankle. According to Dr. Mackenzie, all of these injuries were less than twenty-four hours old.

Dr. Mackenzie's examination of Debra's head revealed she had sustained a major hemorrhage over the vertex of her head measuring about six centimeters, three other smaller hemorrhage areas just above the crown of her head, and one area along the midline right at the top of her head. Dr. Mackenzie reported that these smaller areas of hemorrhage measured about three centimeters in diameter.

Dr. Mackenzie found that although Debra's head injuries were consistent with blunt force, he did not feel these injuries were significant enough to cause a loss of consciousness. Dr. Mackenzie testified that the observable injuries sustained by Debra could not be explained by a single fall. Moreover, Dr. Mackenzie stated on redirect examination that head injuries are unusual in drowning cases, and his opinion was that the different injuries to Debra's head were caused by three or four different events. Because Debra had water in her lungs, consistent with drowning, the cause of death was determined to be asphyxia by drowning. The drug screen revealed that there was no blood alcohol or drugs of abuse present. Dr. Mackenzie also noted there was no evidence Debra had been choked to death.

In examining Debra's stomach contents, Dr. Mackenzie was able to recognize rice, lettuce, tomatoes, bell peppers and onions. On cross-examination, Dr. Mackenzie testified that in his experience, someone who has consumed food within two hours of death usually has recognizable food within his or her stomach.

Dr. Mackenzie testified that drowning is a diagnosis of exclusion, that there are no identifying characteristics for drowning; so all other reasons for death need to be excluded. At the time of the autopsy, Dr. Mackenzie did not have information about any prescriptions Debra was taking. Dr. Mackenzie subsequently learned about her prescriptions and concluded the medication she had consumed did not cause or contribute to her death.

For a period of time, Debra's death was classified as "pending," then eventually the case was closed because Debra's death was found to be undetermined or unclassified; meaning all of the findings could not be explained with someone simply drowning.

Despite defendant's representations to Detective Hall that he and Debra were working through their marital difficulties, the investigation revealed that the Ulfers's marriage had been deteriorating since New Year's Eve 1995. Detective Hall also discovered that in the weeks preceding her death, Debra had taken steps to prepare to divorce defendant and may have even informed him of her wishes on the last night of her life, Friday September 20, 1996.

In the latter part of 1995, Debra learned that defendant was engaged in an extra-marital affair with one of his customers. On New Year's Eve 1995, Debra confronted defendant with the information she had about his affair and defendant physically attacked and choked her. It was at least a month or two later that Debra confided about this incident to Lelah Edwards, a close friend.

In mid-August 1996, Lelah Edwards and Debra spent a girls' weekend along the Mississippi Gulf Coast. Several days later, Debra returned to the area with her step-granddaughter, Angelle, who was the daughter of Ronald Ulfers, Jr. and his wife at that time, Angelique Lowery. During this visit, Debra met Mark DeGeorge and they exchanged personal information and planned to get together at some later point.

On Friday August 23, 1996, Debra traveled to Gulfport to meet with attorney Michael Bruffery regarding recovery of some prints from a frame shop. That evening, Debra told defendant she would be having dinner with a couple she met, but in reality, she spent the evening with DeGeorge. The following day, defendant telephoned Lelah Edwards around 5:00 a.m. to ask if she knew where Debra was, but Lelah did not know.

When Debra arrived home on Saturday August 24, 1996, defendant accused her of cheating and physically attacked Debra. According to Lelah

Edwards, Debra would later describe how defendant choked her with both hands, and picked her up by her throat as her feet dangled above the floor until she believed she would pass out. Following this altercation, Debra left their residence and stayed at a hotel for approximately four days. While staying at the hotel, Debra contacted Bruffery to seek advice on what to do. Debra informed Bruffery of the choking incident of New Year's Eve 1995. Bruffery testified that Debra told him she could no longer stay with defendant because the violence was escalating and increasing in frequency.

Debra returned to the marital home when defendant began staying at an apartment adjacent to his business. On August 30, 1996, Debra contacted Ray Davis, who worked for Dean Witter (investments and financial services). The Ulfers maintained several accounts with Dean Witter that were managed by Davis. Davis testified that he kept notes of all conversations with clients. His notes regarding this conversation reflected that Debra informed him that she and defendant were separated and might be divorcing, and described the physical abuse defendant had inflicted on her. Debra inquired about their finances and how she could withdraw some of the money from their accounts. Davis informed her that she could withdraw all the cash and a bearer bond, which would mature in October, and that would amount to roughly half of the total value of the Ulfers's accounts.

In the meantime, defendant was hospitalized because of a cardiac episode. Following his release from the hospital, defendant went back to living in the residence with Debra. However, Detective Hall's investigation would reveal that on September 4, 1996, Debra completed a change of address form with the United States Postal Service, changing her address to a post office box number.

On September 10, 1996, Debra contacted Sharon Gellepis, a realtor and friend. Gellepis testified that Debra described the physical abuse that had occurred and asked for her advice about seeking a divorce. According to Gellepis, Debra had decided to seek a divorce and indicated she was trying to get a job. Gellepis testified that Debra told her she feared defendant was going to kill her. Gellepis advised Debra to speak to an attorney and determine what their financial holdings were.

On September 11, 1996, Debra opened a safety deposit box at Parish National Bank in Mandeville in her maiden name in order to secure some of her valuables. Kathy Rushing, the bank representative who dealt with Debra, testified that Debra appeared nervous, upset and scared. Debra stated to Rushing that she was going to see an attorney in order to file for divorce. Rushing testified that Debra described how she lived in fear of defendant's physical abuse.

Debra also went to the YWCA Battered Women's Shelter in Slidell on September 11, 1996. Debra began to fill out the intake paperwork, but because the counselor was called away on an emergency, she decided to return the following day. On September 12, 1996, Debra returned to the YWCA and met with Melody Long, who worked as a counselor. Long was accepted by the trial court as an expert in domestic violence.

According to Long, Debra's demeanor had changed drastically since the previous day. Debra described the physical abuse defendant had inflicted upon her. Long testified that Debra appeared terrified that defendant was going to kill her. Long described to Debra the spectrum of violence in domestic abuse situations, which begins with emotional abuse, then proceeds to control issues, such as checking on and following the other person, then physical assaults such as slapping, hitting, then to choking.

According to Long, choking is the last stage before the use of weapons or threatening the use of weapons, with the final stage being death by murder or suicide. Based on Debra's representations during this counseling session, Long was convinced Debra was leaving defendant and would not put herself in a situation where she was alone with him.

Later that evening on Thursday, September 12, 1996, Debra and Lelah Edwards met for dinner. Debra and Lelah had a standing Thursday night get-together, but they had not done so since defendant's cardiac issue. According to Lelah, defendant paged Debra every twenty minutes throughout the evening asking her to return home.

A couple of days later, on September 14, 1996, Debra contacted Perry and Cynthia Theriot, who were old friends. Perry was an attorney, who had previously worked as a prosecutor. Perry answered the phone and noticed that Debra sounded agitated and that her voice was uncharacteristically hoarse and raspy. Perry testified that Debra told him of the physical abuse; that she believed defendant would kill her; and asked what she should do. Perry responded that she should leave. Perry's wife, Cynthia, then spoke with Debra and she also advised Debra to get out of the house. According to Cynthia, Debra stated that she had made up her mind to seek a divorce and that she had contacted an attorney and was moving forward. According to Cynthia, their phone conversation was abruptly cut short when Debra heard defendant approaching and hung up the phone.

On September 16, 1996, Debra contacted Ray Davis again. According to Davis, Debra was concerned that defendant would liquidate their accounts before she could withdraw her half of the proceeds. Davis testified that Debra told him she had decided to tell defendant she wanted a divorce, but feared his reaction.

On Thursday September 19, 1996, Debra met Lelah Edwards in the afternoon and they ran errands together. Debra and Lelah had planned to have dinner then shop and see a movie. As they arrived at the mall, defendant paged Debra, and Debra returned his call. According to Lelah, Debra grew very upset during her conversation with defendant. Lelah testified that Debra told her defendant had found DeGeorge's phone number and admitted to Lelah that she had spent an evening with DeGeorge unbeknownst to defendant.

Lelah left Debra in the parking lot as Debra attempted to call DeGeorge at his home in Kentucky. Phone records introduced into evidence reflect a series of phone calls between the phone numbers of DeGeorge, Debra's cell phone and the Ulfers's home phone. Debra feared that defendant had become angry and Lelah advised her not to return home.

Lelah drove Debra to her home to pick up a shirt to sleep in, and then Debra went to a hotel. Debra later spoke with Lelah and described how she had closed the curtains of the hotel room, turned off all the lights and television in order to make the room appear unoccupied.

On Friday September 20, 1996, Debra contacted Nancy Durant, an attorney specializing in family law. Bruffery had referred Debra to Durant. Debra asked to see Durant as soon as possible. Durant scheduled an appointment for Debra on Monday September 23, 1996. Durant testified that it was her practice to request her divorce clients to videotape or photograph property so that the community could be inventoried.[3]

Later that day, Debra returned to the YWCA and had another counseling session with Long. Long testified that Debra initially cried, but

[3] Detective Hall testified that an eight-millimeter videotape was recovered from Debra's locker at World Gym. The videotape contained footage of the interior of the Ulfers's residence with Debra's narration describing the contents.

as they spoke, she became more upbeat and described how she was making plans for her future. Debra told Long that she was reading a book written by Myra Kirsham, entitled, *Too Good to Leave, Too Bad to Stay*.

Debra also described the incident the previous evening wherein defendant found a cell phone bill reflecting her calls to DeGeorge. Debra told Long that defendant had become crazy and violent, and because she was terrified, she spent the night in a hotel. According to Long, Debra stated that she planned to meet with defendant later that day and tell him she was leaving. Long testified she warned Debra that the situation was lethal and advised her not to meet him alone.[4] Debra assured Long that she planned to meet defendant in a public place, a restaurant. After speaking with Debra, Long felt that Debra was not going home with defendant.

At approximately 7:00 p.m. on Friday September 20, 1996, Lelah Edwards spoke with Debra on the phone. Debra told Lelah that she had been in Wal-Mart buying toiletries and had gone to the Battered Women's Shelter. Debra told Lelah that she needed to retrieve some clothing from home. Lelah warned Debra not to do that, but Debra assured Lelah that she would only go inside and pack a bag if defendant was not there.

Debra also contacted Angelique Lowery in order to tell her that she would not be able to baby-sit Angelle. According to Angelique, Debra told her she was afraid to go home because defendant had discovered her relationship with DeGeorge. According to Angelique, Debra stated that she was going to meet defendant to talk to him about a divorce. Debra assured Angelique that she would meet defendant in public and was not going home that evening. Angelique testified that Debra explained her fear of defendant

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[4] Long testified the most dangerous time in an abusive relationship is the time after one partner tells the other that he or she is leaving. According to Long, this is when the highest incident of lethality occurs.

by describing how she had seen "something" in defendant's eyes the last time she saw him that she had never seen before, which made her fear for her life.

Because the autopsy by Dr. Mackenzie was inconclusive whether Debra's death was a homicide, the investigation was left open for several years. In 1999, representatives of the St. Tammany Parish Sheriff's Office contacted Dr. Michael Graham, a pathologist, to review their file. Based on this contact, officials with the STPSO urged the coroner's office to reclassify Debra's death as a homicide. The coroner's office declined. A few years later, following the election of a new coroner, personnel changes were made in the office, including the retention of Dr. Michael DeFatta.

Dr. Michael DeFatta was accepted by the trial court as an expert in forensic pathology. Dr. DeFatta began working as Chief Deputy Coroner and Chief Pathologist for the St. Tammany Parish Coroner's Office in January, 2001. Approximately three months after he started, he was asked to review the records involving Debra's death. Based on the materials presented by the sheriff's office and the coroner's case file, Dr. DeFatta chose to obtain Debra's medical and pharmacy records.

Based on all the information he reviewed, Dr. DeFatta concluded that because Debra's stomach contents revealed identifiable food items, these items had to have been consumed within two hours or less of her death. Dr. DeFatta used the textbook, Medical Legal Investigation of Death (3d. edition 1993), authored by Werner Spitz. Because of his opinion that Debra died within two hours of consuming her last meal at Seafood World, which would have been no later than 9:15 p.m., and defendant claimed to have left her at their residence between midnight and 12:30 a.m., this placed defendant at the house during the time of Debra's death.

Dr. DeFatta also testified based on his review of the autopsy records that because all of Debra's injuries were of the same age or character, and the fact Debra was found in the water, he was of the opinion that these injuries were sustained during an altercation. Dr. DeFatta testified that Debra's injuries were not consistent with a single fall because her head would have had to strike the ground four to five different times.

Dr. DeFatta stressed that the injuries to Debra's lip and the area underneath her nose were not the result of a punch, because a punch would have caused the lip to swell. Dr. DeFatta stated that the injury to the inside of Debra's lip indicated this area was injured from a compression, such as someone placing their hand over Debra's mouth. In support of this, Dr. DeFatta also emphasized that Debra had a crescent-shaped tear inside her lip consistent with her front incisor. Dr. DeFatta also pointed to the small abrasion or scratch mark below Debra's right ear. In his opinion, such injuries are typically seen during choking or when someone has been subdued around the mouth or neck, such as "sleeper" holds sometimes performed by law enforcement. According to Dr. DeFatta, these types of marks are actually caused by the fingernail marks of the victims themselves in an attempt to remove their attacker's hands.

Dr. DeFatta testified that the injury to Debra's ankle on the inside of her leg was not consistent with an injury sustained during a fall, but more likely the result of being grabbed around the ankle during a struggle. Likewise, the injury to Debra's right wrist was also consistent with a struggle and the bright red coloration indicated it had probably occurred moments before her death. Further, Dr. DeFatta indicated that if Debra's death had been caused by a fall, it would be likely that she would have

sustained some type of cervical injury; however, her autopsy revealed no such injuries.

In direct contradiction of the defense theory that Debra had accidentally fallen into the canal, Dr. DeFatta addressed the issue of Verapamil found in her stomach. Verapamil is a drug prescribed for high blood pressure or angina, but it can also be used in the prevention of migraines. There is no dispute that Debra suffered from migraines. Dr. DeFatta obtained Debra's medical records and learned that a few months before her death, she had been prescribed Verapamil for the prevention of migraines, not for any cardiac or blood pressure issues. Moreover, Dr. DeFatta testified that Verapamil does not affect the rate of gastric emptying.

According to Dr. DeFatta, Debra had taken anywhere from one to two tablets of Verapamil shortly before her death. In his opinion, this would be consistent with the therapeutic use of that drug. Dr. DeFatta acknowledged that there were reports of dizziness or loss of orientation associated with the ingestion of Verapamil, but that those results were brought about by ingesting ten to twenty tablets as opposed to the small amount found in Debra's stomach.

Dr. DeFatta also addressed the Duradrin in Debra's stomach. Dr. DeFatta described Duradrin as a combination of three drugs used in relieving headaches, typically migraines. According to Dr. DeFatta, it was unforeseeable that this drug could have contributed to Debra's death.

In Dr. DeFatta's opinion, Debra was either incapacitated at the time or forcibly held under the water, which would have caused her death by asphyxiation. In his review of the medical records and autopsy report, Dr. DeFatta could find no reason for Debra's death from a natural disease, pharmacology or toxicology standpoint. In other words, there was no

medical condition or effect from ingestion of any drug that would explain Debra's presence in the canal. Dr. DeFatta concluded that Debra had been incapacitated by someone or forcibly submerged under the water.

The State also called Gina Pineda, who was employed by ReliaGene Technologies, a private DNA laboratory in New Orleans. Pineda was accepted by the trial court as an expert in the forensic analysis of DNA. Pineda testified that in September 1997, ReliaGene first tested fingernail scrapings and clippings taken from Debra's body.

The technology used in this initial DNA testing was only capable of testing for the presence of three STR markers and six or seven other DNA markers called PMDQ.[5] Despite such technological limitations, ReliaGene was able to detect the presence of a foreign profile from the evidence taken from Debra's right hand.

Between 1997 and 2002, technological advances were made in what type of markers could be identified through DNA testing. Using this technology, the items were retested; however, there was no way to identify any male DNA from the samples submitted.

In May 2006, the samples were again retested by ReliaGene. By this time, technology was available to test for a total of 17 alpha DNA markers and the presence of a Y-chromosome. Based on this testing, ReliaGene issued a report indicating that the foreign profile from Debra's fingernails had eleven identifiable markers. This profile was compared to defendant's DNA sample and ReliaGene concluded that defendant and his paternal relatives could not be excluded as the donors of the foreign profile underneath Debra's fingernails.

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[5] Pineda explained that present technology allows testing for thirteen to fifteen different STR markers.

Pineda testified it was not likely that the DNA recovered from Debra's fingernails would be considered contact DNA because her body had been submerged in water for approximately ten hours, which would wash away any contact DNA. In Pineda's opinion, the foreign DNA recovered was deposited there during a struggle or other forcible contact where Debra scratched the donor.

Defendant presented testimony from John Constantino, Jr. Constantino was a close friend and employee of defendant's son, Ronald Ulfers, Jr. ("Ronnie, Jr."). Constantino described an incident about a month before Debra's death where Debra arrived at the store with Ronnie, Jr.'s daughter Angelle and was babbling and disoriented. According to Constantino, Debra became dizzy while in the store and nearly fell. Debra told Constantino that things did not make sense to her. Shortly thereafter, Ronnie, Jr. arrived and took both Debra and his daughter home. On cross-examination, Constantino admitted that he never brought this episode to the investigator's attention in the months following Debra's death.

Ronnie, Jr. testified on his father's behalf. At the time of Debra's death, Ronnie, Jr. and the defendant were estranged because the defendant had opened a competing business near Ronnie, Jr.'s pool business in Mandeville. According to Ronnie, Jr., Debra was always trying to get the two of them to reconcile. Ronnie, Jr. denied that the defendant ever bragged about choking Debra and denied ever seeing defendant abuse Debra in any way.

According to Ronnie, Jr., in late August 1996, Debra contacted him and told him that defendant had tried to choke her. He claimed that he was upset by this and wanted to confront defendant about it, but Debra refused to

let him. According to Ronnie, Jr., Debra later told him she was going to the YWCA Battered Women's Shelter. When he expressed concern for her safety, Debra assured him that she was just "getting her ducks in a row" in the event she and his father divorced.

Ronnie, Jr. also testified consistently with Constantino's testimony regarding the incident a few weeks prior to Debra's death wherein she arrived, disoriented, at his Mandeville store with his daughter. Ronnie, Jr. further testified of an episode two to three months prior to Debra's death wherein he arrived at his father's residence with his daughter and Debra was standing in the kitchen not acknowledging anyone. According to Ronnie, Jr., Debra's condition greatly upset his daughter, and he called his younger brother, Danny, to take care of Debra so he could leave with his daughter. However, Ronnie, Jr. also admitted that he never relayed any of these episodes to the investigating officers, despite not knowing how Debra could have died.

Danny Ulfers, defendant's youngest son, also testified on his father's behalf. At the time of Debra's death, Danny was twenty-three years old. According to Danny, he never thought Debra was afraid of his father in any way. Danny testified that he knew about the two choking incidents, but denied that defendant ever bragged about them. Danny further testified that there was never an occasion on which he intervened to keep defendant from abusing Debra, nor did he ever see defendant strike Debra.

Danny testified that several weeks before Debra died, she removed all the guns from the house to keep defendant from hurting himself. Danny also testified consistent with Ronnie, Jr.'s testimony about the incident two to three months prior to Debra's death where he was called home to help Debra because she did not recognize anyone and was just sitting there with a blank

stare. According to Danny, he helped Debra to her bedroom and then called defendant. After defendant arrived home, he went into the bedroom where Debra was and a short time later, Debra came out and said something about taking a nap. According to Danny, Debra had no recollection of acting strangely. On cross-examination, Danny admitted he never told the police about this episode.

Danny testified that he remembered the defendant leaving on Friday September 20, 1996 to meet Debra at Seafood World and that defendant was wearing a blue and green seashell-patterned shirt. Following Debra's death, Danny claimed that he had washed this shirt several times because he did all the laundry in the house.

Dr. LeRoy Riddick, who was accepted by the trial court as an expert in forensic pathology, testified on behalf of defendant. Dr. Riddick reviewed various photographs from the autopsy, the autopsy reports, and the police reports. Based on the material he reviewed, Dr. Riddick concluded that he would not have classified Debra's death as a homicide. In Dr. Riddick's opinion, he would have found the cause of death to be undetermined.

According to Dr. Riddick, the large, bruised area on the back of Debra's head could have been caused by a fall, which may have rendered her dazed or confused. Dr. Riddick explained that if Debra were dazed, she might have hit her head several more times as she attempted to recover from this fall. Dr. Riddick further explained that because it was unknown what was under the water where Debra was found, an undiscovered object could not be eliminated as a source of the injuries to her head.

According to Dr. Riddick, the three areas of arachnoid bleeding seen in the autopsy photographs were probably caused by the autopsy itself, when

the scalp was pulled away. Dr. Riddick testified that there was an absence of bruising in Debra's neck area; however, he could not eliminate the possibility that Debra was incapacitated from being placed in a "carotid sleeper hold" as used by law enforcement officers.

Dr. Riddick testified that it is certainly possible for a person to drown in two or three feet of water, particularly if that person is disoriented or dazed. Under such circumstances, that person would die while thrashing around in a panic. According to Dr. Riddick, the 200-300 milliliters of cloudy liquid recovered from Debra's stomach, was likely water from the canal ingested as she gasped for breath.

Finally, Dr. Riddick testified that the use of stomach contents to estimate the time of death is strongly discouraged by the College of American Pathology. Dr. Riddick testified he was unaware of any studies that supported the Werner Spitz textbook statement that readily identifiable food contents are indicative of that food being ingested within two hours of death. According to Dr. Riddick, the presence of the food in Debra's stomach leads to the conclusion that it may have been there three to four hours prior to her death.

Defendant did not testify at trial.

OPINION TESTIMONY BY LAY WITNESS

In his first assignment of error, defendant argues the trial court erred in allowing Detective Hall to give his opinion that the contents of Debra Ulfers's stomach looked like "gumbo" you could "throw in a bowl and eat."

The defense was based on a timeline whereby defendant claimed he and his wife left the restaurant around 9:15 p.m. and proceeded to a Shell station and then Wal-Mart, before they returned to their residence. Before stopping at Wal-Mart, Debra dropped defendant off at Atlas Tires to pick up

his vehicle. Defendant claimed to have left their residence for the casino sometime between midnight and 12:30 a.m. The investigation revealed that it took approximately one hour to drive from the Ulfers's residence to the Grand Casino. However, the only times that could be definitively corroborated by the police were the purchase of fuel at a Shell station with a receipt reflecting 9:32 p.m., and defendant's entry into the Grand Casino at 1:29 a.m. Thus, the time of Debra Ulfers's death is of obvious importance regarding whether it occurred before or after defendant left for the casino.[6]

Detective Hall was present for the autopsy of Debra Ulfers. According to Detective Hall, after Debra's stomach was opened, he asked the pathologist if he could observe the stomach contents. Detective Hall testified that the removed portions of the contents of the stomach appeared to be gumbo, including pieces of tomato, onion, bell pepper, and rice. Shortly thereafter, the prosecutor questioned Detective Hall if these contents had been in another setting, would they have been recognizable. Detective Hall replied that they would be, and that he commented to Dr. Mackenzie that "you could take the contents, throw them in a bowl and eat them. I don't think anybody would have known it had been digested." Defense counsel objected.

In overruling defense counsel's objection, the trial court ruled that it would allow Detective Hall to relay what he observed but not to give his opinion relative to that. The trial court further denied defense counsel's request to strike Detective Hall's comment.

Louisiana Code of Evidence article 701 permits non-expert testimony in the form of opinions or inferences that are rationally based on the

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[6] In brief, defendant contends that "[a]ccording to the restaurant bill, the Ulfers left at 9:15 PM." However, we note that there was no receipt with a time on it indicating precisely when the Ulfers left the restaurant.

perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. The general rule is that a lay witness is permitted to draw reasonable inferences from his or her personal observations. If the testimony constitutes a natural inference from what was observed, there exists no prohibition against it as the opinion of a non-expert as long as the lay witness states the observed facts as well. A reviewing court must ask two pertinent questions to determine whether the trial court properly allowed lay opinion testimony: (1) was the testimony speculative opinion evidence or simply a recitation of or inferences from fact based upon the witness's observations; and (2) if erroneously admitted, was the testimony so prejudicial to the defense as to constitute reversible error. *State v. LeBlanc*, 2005-0885, pp. 7-8 (La. App. 1st Cir. 2/10/06), 928 So.2d 599, 602-03.

If the reviewing court determines that lay opinion testimony was improperly admitted, it must then proceed to the next question: whether that testimony was so prejudicial to the defense as to constitute reversible error. Erroneous admission of evidence requires reversal only where there is a reasonable possibility that the evidence might have contributed to the verdict. Stated somewhat differently, the inquiry is whether the reviewing court may conclude that the error was harmless beyond a reasonable doubt, whether the guilty verdict actually rendered was unattributable to the error. *State v. LeBlanc*, 2005-0885 at p. 8, 928 So.2d at 603.

Prior to the autopsy of Debra Ulfers's body, defendant had informed Detective Hall that he and his wife had eaten dinner at Seafood World. Defendant told Detective Hall that Debra had eaten two or three bowls of gumbo and dessert. Clearly, Detective Hall's statement that Debra's stomach contents resembled undigested gumbo was a reasonable inference

based on his personal observations. Detective's Hall's description of Debra's Ulfers's stomach contents is an obvious opinion based on his perception of what he was observing during the autopsy and upon first consideration does not appear to have been improperly admitted. In other words, for a non-medical witness to describe the stomach contents of a deceased person as resembling gumbo seems to be an acceptable lay opinion. Accordingly, our impression is that the trial court properly admitted this testimony from Detective Hall.

However, because Debra Ulfers's last reported meal was, in fact, gumbo, and the time of her death was the major issue of this case, with both sides presenting expert testimony regarding whether a time of death could be determined based on the state of Debra Ulfers's stomach contents, out of an abundance of caution we examine whether this testimony was so prejudicial to the defense as to constitute reversible error.

The jury also heard that Dr. Mackenzie noted readily identifiable food in Debra's stomach at the autopsy. Dr. Mackenzie's autopsy protocol also described that there were three to four partially digested rice grains and greenish-brown mucoid fluid present in Debra's duodenum, and more greenish-brown mucoid fluid present in the small intestine. The jury also heard Dr. Mackenzie's testimony that in his experience, someone who has eaten within two hours of death, depending on the type of food consumed, will usually have recognizable food in his or her stomach.

The jury heard testimony from all three pathologists about the concept of gastric emptying, the different rates of gastric emptying, and how the use of stomach contents was not a generally-accepted method in establishing a time of death. According to Dr. DeFatta, gastric emptying occurs once food is ingested into the stomach, whereupon certain enzymes are then secreted

into the stomach to break down the food in order to pass it into the small intestine. As the food is broken down, it is projected into the duodenum at a rate of a few ccs per minute. Dr. DeFatta explained that hard or fatty solid food would have a slower gastric emptying rate than lighter liquid food. Dr. DeFatta opined that based on all the concepts of the presence of food and the identifiability of food in the stomach, because there were only three or four grains of rice in the duodenum, he estimated Debra's last meal was within two hours of her death, probably closer to one hour. On redirect, Dr. DeFatta emphasized that based on the autopsy protocol, he concluded that the food in Debra's stomach had not even started emptying except for the few grains of rice. Thus, if Debra consumed her last meal no later than 9:15 p.m., based on her gastric contents, she was dead by 11:15 p.m. at the latest. In reaching his conclusion, Dr. DeFatta relied on the autopsy protocol completed by Dr. Mackenzie and additional information gathered regarding prescriptions Debra was taking near the time of her death.

Dr. LeRoy Riddick, accepted by the trial court as an expert in forensic pathology, testified on behalf of defendant. According to Dr. Riddick, the use of stomach contents to establish the time of death is "frowned upon" by forensic pathologists. Moreover, Dr. Riddick could find no studies to support the statement in the Spitz textbook that readily-identifiable stomach contents were usually ingested within two hours of death. Dr. Riddick opined that the food in Debra's stomach could have been there for three or four hours.

The evidence presented through the testimony of the three pathologists established a time frame as long as four hours between the time of Debra's last meal and her death. However, assuming the accuracy of the time of her last meal was 9:15 p.m. and that defendant departed from their

residence as late at 12:30 p.m., it still provides a basis for the jury to have concluded defendant was at home at the time of Debra's death, independent of any opinion regarding Debra's stomach contents by Detective Hall. Under these circumstances, we do not find that Detective Hall's testimony, even if erroneously admitted, was so prejudicial as to constitute reversible error.

In the present case, defendant's conviction is based solely on circumstantial evidence. Clearly, the unanimous guilty verdict in this case indicates that the jury accepted the State's contention that defendant murdered Debra, and rejected the defense theory that Debra died as a result of an accident.

The evidence supporting the guilty verdict included that there were two previous incidents where defendant had choked Debra. Multiple witnesses testified regarding Debra's growing fear of defendant due to his propensity for violence. In the weeks preceding her death, Debra had begun making preparations to divorce defendant; she had inquired about withdrawing her share of their joint Dean Witter account, she had opened a safety deposit box to store her valuables, she had videotaped the contents of their home, she had prepared a resumé to use while she sought employment, she had completed a change of address with the Postal Service, and she had indicated to multiple witnesses her intent to tell defendant she wanted a divorce.

The State also established through the expert testimony of Melody Long that in a situation where there is escalating domestic violence, the most lethal situation is when one partner tells the other partner they are leaving the relationship. According to Long's testimony, she made Debra aware of this danger, which is why Debra assured her she would meet with defendant

in a public place on Friday September 20, 1996, in order to discuss her desire for a divorce.

The State established Debra met defendant at Seafood World. Although the State could not verify precisely when the Ulfers left Seafood World, the Ulfers were photographed at a Shell station at 9:32 p.m. In this photograph, defendant was wearing a blue-green print shirt that contradicts his statements to the police wherein he claimed to have been wearing a long-sleeved pink shirt all evening.[7] Despite police requests, the blue-green print shirt was never turned over to them by defendant. Although defendant claimed that after leaving the Shell station, he accompanied his wife to Wal-Mart, where they purchased two gallons of milk, the State was never able to verify this purchase from the Wal-Mart records. Thus, the jury clearly had a reasonable basis to conclude Debra arrived at their residence earlier than defendant told the police.

Further, Debra's body was found in the canal by defendant the following morning. Defendant had been home less than one half hour before he contacted the police to file a missing-person report.

When her body was found in the canal, Debra's clothing was torn and she had bruising indicative of being in a struggle. Specifically, Dr. DeFatta opined that the external injuries were indicative of Debra being grabbed from the back, with a hand over her mouth and perhaps being incapacitated by a "carotid sleeper-hold" used by law enforcement officers. Defendant is a former police officer. In addition, testing performed on the scrapings from Debra's fingernails indicated the presence of a DNA profile of defendant and his paternal relatives. The type of DNA recovered from these scrapings

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[7] "Lying" has been recognized as indicative of an awareness of wrongdoing. See *State v. Alpaugh*, 568 So.2d 1379, 1384 (La. App. 1st Cir. 1990), writ denied, 572 So.2d 65 (La. 1991).

was consistent with the State's theory that it was deposited during a struggle when Debra scratched her attacker.

Moreover, Debra's stomach contents revealed identifiable food items, which according to the testimony of expert pathologist Dr. DeFatta, indicated Debra had consumed this food no more than two hours prior to her death. Using the timeline supplied by defendant to the law enforcement officers the day Debra was discovered in the canal, this placed defendant at the residence at the time of Debra's death; i.e., Debra and defendant left Seafood World at approximately 9:15 p.m., and defendant left her at the residence between midnight and 12:30 a.m.

Finally, although Debra died as a result of drowning, the State established she had previously been qualified as a SCUBA diver. Deputy Dupuis, who assisted in removing Debra's body from the canal, testified that the water was no more than shin deep and that the bottom was very muddy. However, Debra's feet and legs were not covered with mud that would have indicated she struggled in the canal. At the time of her death, Debra was not wearing any of her usual jewelry, which was later located inside the residence.

Clearly, the jury rejected defendant's theory that Debra's death was an accident. No witness affiliated with the State testified regarding any dizzy spells or episodes of disorientation suffered by Debra. Moreover, the witnesses who provided such testimony admitted they failed to inform law enforcement investigators of these events. Finally, the medicine detected in Debra's stomach was shown to be used in the prevention of migraines and the amount detected (one to two pills) was not associated with producing dizziness.

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 which raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). We find no error in the admission of Detective Hall's testimony, and in evaluating the evidence in the light most favorable to the prosecution, we find that even if the trial court had erred in admitting Detective Hall's testimony regarding the appearance of Debra Ulfers's stomach contents, such error was not attributable to the verdict.

This assignment of error is without merit.

POLYGRAPH EXAMINATION

In his second assignment of error, defendant argues that it was error for the trial court to prohibit the defense from questioning Detective Hall about his request, accepted by defendant, to take a polygraph exam. Defendant asserts that Detective Hall concluded that defendant was responsible for his wife's death, and failed to fairly conduct and present the results of his investigation. In support of this contention, defendant argues that he should have been allowed to question Detective Hall about his acceptance of his offer to take a polygraph exam.

In a preliminary motion, defendant sought a ruling from the court to be allowed to cross-examine Detective Hall about a reference in one of the recorded interviews with defendant wherein Detective Hall acknowledges that defendant had offered to take a lie detector test and asked defendant if that offer still stood, to which defendant replied that it did. Defendant argued that such a reference to defendant's willingness to take a polygraph exam would not be offered to show his innocence, and further, that Detective

Hall's failure to follow through on such an offer unfairly narrowed the focus of his investigation.

The Louisiana Supreme Court has long adhered to the view that lie detector or polygraph test results are inadmissible for any purpose at the trial of guilt or innocence in criminal cases. Consistent with this view, the court has made it clear that the rule excluding polygraph evidence also operates to prevent any reference during trial to the fact that a witness has taken a polygraph examination with respect to the subject matter of his testimony. Such evidence is prohibited because it invites a probable inference by the jury that the witness passed the polygraph examination and therefore is testifying truthfully. Moreover, the supreme court has held that polygraph information and test results are inadmissible either as substantive evidence or as relating to the credibility of a party or witness. *State v. Legrand*, 2002-1462, pp. 10-11 (La. 12/3/03), 864 So.2d 89, 98, cert. denied, 544 U.S. 947, 125 S.Ct. 1692, 161 L.Ed.2d 523 (2005).[8]

Defendant acknowledges the jurisprudence on this topic, but argues that such jurisprudence does not address the present issue, which is whether the decision of a detective not to give a polygraph to a willing suspect can be introduced as evidence of the biased state of mind *of the detective.* Defendant asserts that Detective Hall's decision not to administer a polygraph examination to defendant implied that he did not want to risk a favorable result to defendant.

Defendant's argument precisely reflects the danger in admitting evidence of polygraph examinations. As stated in *State v. Catanese*, 368 So.2d 975, 981 (La. 1979), the principal reasons for excluding such test

[8] See the factually distinguishable case of *State v. Blank*, 04-0204 (La. 4/11/07), 955 So.2d 90, cert. denied, _ U.S. _, 128 S.Ct. 494, _ L.Ed.2d_ (2007), wherein the supreme court discussed the provisions of La. R.S. 15:450 as a possible grounds for the admission of evidence of a polygraph examination that may be part of a confession.

results are: (1) the propensity of triers of fact to give conclusive weight to the polygraph expert's opinion; (2) the lack of a regulatory program for maintaining an adequate level of examiners' ability, experience, education, integrity and availability; and (3) the need for procedural rules and safeguards governing the introduction of polygraph evidence.

In the present case, for the jury to receive evidence of defendant's willingness to submit to polygraph examination would certainly imply that defendant would have earned a favorable result, thereby bringing the dangers enumerated in *Catanese* squarely into consideration. While we agree that defendant's offer to submit to a polygraph examination is not exactly the same as introducing the results of a polygraph examination, the danger that the jury would place conclusive weight on a test, that in this case, **was never taken**, is too great to allow such consideration.

Clearly, evidence of a defendant's refusal to submit to a polygraph examination would be unfairly prejudicial because of the implication that a defendant failed it. Likewise, we cannot allow a defendant to benefit from an unfair conclusion reached by a jury that would result by evidence that defendant **would have passed** such an examination despite the fact it was never administered. The trial court did not err in denying defendant the opportunity to cross-examine Detective Hall on defendant's willingness to take a polygraph examination.[9]

This assignment of error is without merit.

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[9] We note that defendant's assignment of error is phrased to indicate Detective Hall requested defendant submit to a polygraph examination; however, in arguing the motion before the trial court, defense counsel indicated that defendant had offered to take the polygraph exam. This distinction, although subtle, further erodes defendant's contention that the investigation was not conducted in a fair manner.

STATEMENTS OF DEBRA ULFERS

In his third assignment of error, defendant contends the trial court erred in admitting hearsay statements of Debra Ulfers. Defendant argues that the trial court improperly admitted statements made by Debra Ulfers from January 1, 1996, through the date of her death, September 21, 1996. Defendant argues that the focus of this assignment of error revolves around the testimony from multiple State's witnesses as to what Debra specifically said about being choked by defendant on two prior occasions, December 31, 1995 and August 24, 1996.

Defendant acknowledges that proof of the two previous choking incidents is admissible under La. Code Evid. art. 404(B); however, defendant contends that the multiple versions offered through the State's witnesses were not relevant. In the alternative, defendant argues that even if these statements were relevant, their probative value was substantially outweighed by considerations enumerated in La. Code. Evid. art. 403. Finally, defendant contends that because the veracity of Debra's statements as true state-of-mind evidence was in issue, the trial court should have given an admonition advising the jury that it had the right to judge whether Debra's statements accurately reflected her state of mind.

Relevancy

In his first argument under this assignment of error, defendant contends that any statement made by Debra prior to September 19 would not be relevant to her decision of whether to accompany defendant back to the marital home on September 20. Defendant argues that the overriding question for the jury was whether Debra would voluntarily accompany defendant to their home after they ate dinner together on Friday, September 20.

Defendant argues that prior to September 19, Debra was living with defendant, and any concerns from the August 24 choking incident had been alleviated because of her return to the residence. Defendant concedes that Debra's state of mind changed on September 19, after she learned that defendant had spoken with Mark DeGeorge and she spent the night at a hotel. Defendant contends that any change in Debra's state of mind on September 19 was not the result of what she said to various people before that date.

As the prosecutor argued to the trial court, in order to have the jury distinguish between the two scenarios of Debra's death, i.e., accident or murder, the jury would have to understand the decline that took place in the Ulfers's marriage from New Year's 1995 to September 20, 1996. In order to show that decline, Debra's state of mind could be reflected in statements made to various witnesses. The trial court agreed with the prosecutor and allowed Debra's statements made from New Years 1995 until the time of her death into evidence under La. Code Evid. art. 803(3).

Louisiana Code of Evidence article 803 provides, in pertinent part, that the following is not excluded from evidence by the hearsay rule:

> **(3) Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), offered to prove the declarant's then existing condition or his future action.

Evidence to prove the declarant's state of mind can be used to prove the declarant's subsequent conduct. La. Code Evid. art. 803(3). The length of time between the making of the statement and the conduct in question does not determine the admissibility, but rather goes to the weight of the

evidence. *State v. Lee*, 559 So.2d 1310, 1319 (La. 1990), cert. denied, 499 U.S. 954, 111 S.Ct. 1431, 113 L.Ed.2d 482 (1991).

A state of mind declaration is relevant if it has a tendency to make the existence of any consequential fact more or less probative than it would otherwise be without the evidence. La. Code Evid. Art. 401. Nevertheless, relevant declarations may be legally inadmissible if their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misapplication by the jury. La. Code Evid. Art. 403; *State v. Brown*, 562 So.2d 868, 878 (La. 1990).

Extrajudicial statements of a declarant's subjective fear or revulsion have considerable probative value in circumstantially explaining the declarant's subsequent conduct. Even when the declarant's state of mind is not the ultimate proposition to be proven, the declaration may be used as circumstantial evidence of declarant's behavior by providing an intermediate basis for further inferences about declarant's conduct. Where extrajudicial declarations are offered to show the declarant's state of mind or intent to undertake a course of action, when the communication indicates the act is dependent upon an event or upon acts of another the contingency operates only to reduce the probative force (weight) of the evidence, not its admissibility. The declarations are non-hearsay if offered only to circumstantially prove decedent's state of mind prior to the homicide. *State v. Brown*, 562 So.2d 878-79 (and authority cited therein.)

Defendant's argument presumes that the issue presented to the jury was as he frames it, i.e., whether Debra voluntarily accompanied defendant to their home following their dinner at Seafood World. However, the issue that makes Debra's statements during this time frame relevant, is how her feelings about remaining in her marriage deteriorated with the two choking

incidents, such that she began to fear for her life and took steps in preparation for divorcing defendant.

Under these circumstances, we find Debra's statements to be relevant.

Article 403 Considerations

In his second argument under this assignment of error, defendant argues that even if relevant, the pre-September 19 statements should have been excluded under La. Code Evid. art. 403. Defendant argues that some of the State's witnesses provided more graphic descriptions of the two choking incidents. Specifically, there was testimony by the State's witnesses that defendant lifted Debra off the ground during one instance; bragged about choking Debra to his sons; and one of defendant's sons had to intervene as defendant choked her. Defendant argues that these details would mislead the jury into believing these accounts of the choking incidents were an accurate depiction of what occurred and unfairly prejudiced defendant.

As previously discussed, Debra's statements were admissible to show her state of mind and prove that she was preparing to divorce defendant. It has been previously held that in homicide cases, evidence of the victim's fear may be limited to situations where the defendant has made the criminal character of the death an issue by raising defenses of self-defense, suicide, or accident. When such is the case, a decedent's declaration of fear becomes relevant to circumstantially rebut the defense's theory. *State v. Brown*, 562 So.2d at 879.

By raising the defense of accident, Debra Ulfers's state of mind became an indirect, but material fact at issue. The State presented multiple witnesses who testified regarding defendant's escalating pattern of violence towards Debra; defendant's discovery of Debra's relationship with DeGeorge; and Debra's growing fear of defendant and what steps she was

taking to divorce defendant, including communicating to defendant her desire for a divorce on the very night she died. In contrast to this portrayal, defendant asserted that Debra willingly accompanied him back to the marital home, where he stayed for a short time, then left to go gambling at a casino.

According to the defense theory presented at trial, Debra's death was accidental, caused by perhaps some physiological or medically-induced state. These two contrasting theories clearly placed Debra Ulfers's state of mind at issue. Thus, Debra Ulfers's statements at issue became probative as direct evidence of her future relationship with defendant, and circumstantial evidence that she would not voluntarily be alone in a non-public place with defendant. In other words, it directly supported the State's theory that Debra did not accompany defendant back to the marital home, but returned alone, only to be surprised by his unexpected presence.

The relevancy and probative value of Debra's statements at issue, when used to show she had no intention of being alone with defendant in a non-public location, far outweighed the danger of the jury misusing the evidence. The trial court correctly ruled these statements admissible.

Furthermore, we note that defendant was able to present testimony from both of defendant's sons denying that defendant bragged about choking Debra or that they had to intervene in any physical confrontation involving defendant and Debra. Moreover, defendant was also allowed to elicit testimony from Ronnie, Jr. that Debra had told him she was "getting her ducks in a row" in the event of a divorce by documenting herself at the YWCA Battered Women's Shelter, a clear implication that Debra's state of mind may not have been as fearful as purported by the State's witnesses. There was no danger of confusion of the issues or unfair prejudice considering that defendant was allowed to present evidence disputing the

veracity of Debra's accounts of the two choking incidents. Accordingly, we cannot say these statements should have been excluded under La. Code Evid. art. 403.

Admonition

In his final argument under this assignment of error, defendant contends that because the veracity of Debra's statements as true state-of-mind evidence was at issue, the trial court should have issued an admonition that the jury had the right to judge whether her hearsay statements accurately reflected her state of mind.

In the present case, the trial court provided the following limiting instruction to the jury during testimony that was identified as reflective of Debra's state of mind:

> You will hear or have heard evidence regarding the decedent's state of mind. You are to consider the declaration as evidence only of decedent's state of mind, or as circumstantial proof of her subsequent conduct, rather than for the truthfulness of the assertion. This evidence of state of mind of the decedent is not admissible to show the future actions of the defendant.

Defendant contends that the trial court erred in not providing the following instruction:

> Of course, it is solely your decision, as finders of fact, to decide what her state of mind was, and whether her statements accurately reflected her real state of mind.

Defendant argues that this proposed instruction did not violate the tenets of La. Code Crim. P. art. 807 because it did not require qualification, limitation, or explanation, and was correct and pertinent to the issues in the case.

Defendant's argument lacks merit. A court is not required to give a special charge if the substance of the instruction has already been provided in a general charge. La. Code Crim. P. art. 807; *State v. Howard*, 98-0064,

p. 19 (La. 4/23/99), 751 So.2d 783, 805-06, cert. denied, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999).

In addition to the previously mentioned state-of-mind charge repeatedly given throughout the trial, the trial court also instructed the jury during the general charges that, "you alone determine the weight and credibility of the evidence." The trial court further instructed the jury, "You have the right to accept hearsay evidence as true or reject it as false as you are impressed with the veracity or lack of veracity of the source of the hearsay statement."

Accordingly, we find the jury was accurately instructed on the applicable law and the trial court's denial of defendant's special instruction was not error.

This assignment of error is without merit.

REFUSAL OF INSTRUCTION

In his fourth assignment of error, defendant argues the trial court erred by refusing to instruct the jury on the impeaching effect of a prior conviction of a hearsay declarant.

Defendant points to the testimony of State's witness, Perry Theriot, who testified under cross-examination that he believed Debra to be "as honest as the day is long." Defense counsel then confronted Perry Theriot with a certified copy of Debra's 1975 felony conviction wherein she pled guilty to stealing $2,000.00 from a Wilson's store. The prosecutor then offered a stipulation that Debra had a prior conviction in 1975 when she was twenty-one years old, and she received a first-offender pardon.

Before closing argument, defendant offered to add the following to the court's proposed instruction of credibility based on prior convictions: [10]

> This rule applies equally to your judgment on the credibility of any person as to who's [sic] out-of-court or hearsay statement you have heard [or hearsay statement I have ruled admissible.]

Louisiana Code of Evidence art. 806 provides:

> **Attacking and supporting credibility of declarant.**
> When a hearsay statement, or a statement defined in Article 801(D)(2)(c) or (D)(3), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, offered to attack the declarant's credibility, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as a witness identified with an adverse party.

Defendant contends that the State's stipulation regarding Debra's prior conviction served to dismiss the prior conviction "as a blip on an exemplary life: it occurred when she was a kid and she got pardoned for it." Defendant argues the jury should have been specifically instructed on how to apply the conviction to Debra's credibility.

We disagree. As previously discussed, a court is not required to give a special charge if the substance of the instruction has already been provided in a general charge. La. Code Crim. P. art. 807; *State v. Howard*, 98-0064 at p. 19, 751 So.2d at 805-06. We find the trial court's instructions to the jury regarding credibility of witnesses to be wholly correct and accurate. Moreover, we note that defendant was free to attack Debra's credibility by

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[10] The trial court instructed the jury as follows:

> The testimony of a witness may be discredited by showing that the witness previously was convicted of a crime. The conviction does not necessarily mean that the witness is failing to tell the truth. It is a circumstance you may consider along with all the other evidence in deciding whether you believe any or all of his or her testimony.

the admission of such evidence and argue this prior conviction affected her credibility during closing arguments.

This assignment of error is without merit.

DENIAL OF MOTION FOR NEW TRIAL

In this assignment of error, defendant argues the trial court erred in denying his motion for new trial without a hearing. Defendant contends his motion for new trial raised questions of the State's suppression of favorable evidence and presented newly-discovered evidence.

On November 29, 2006, defendant filed a motion for new trial. Defendant's motion alleged that prior to trial,[11] he could not locate Mark DeGeorge, but that on November 5, 2006, the defense investigator was able to find him and obtain a signed statement from DeGeorge.[12] Defendant claims that DeGeorge's testimony would be new and material evidence that was not discoverable before or during the trial, and if the evidence had been introduced at trial, it would have changed the jury's verdict of guilty.

DeGeorge's handwritten statement indicated that he became friends with Debra in 1996, and that she told him she was in the process of obtaining a divorce from defendant. DeGeorge's statement described how a few days prior to Debra's death, he received a phone call from defendant. During this conversation, defendant asked DeGeorge whether he was engaged in an affair with Debra, which DeGeorge denied. According to DeGeorge's statement, defendant's tone was "matter of fact" and defendant did not seem angry or enraged.

DeGeorge's statement further indicated that a few minutes after his conversation ended with defendant, he received a phone call from Debra, who "didn't seem to know" that defendant had called him or was going to

[11] Defendant's trial took place between September 14-24, 2006.
[12] The statement is not notarized and is signed by DeGeorge and the defense investigator.

call. DeGeorge's statement further indicated that he had the impression from these conversations that things were going to work out between Debra and defendant.

Finally, DeGeorge's statement indicated that several days before defendant's trial, the prosecutor contacted him inquiring about these last conversations he had with Debra and defendant, and that he told the prosecutor the same things he previously stated. DeGeorge's statement also states that the prosecutor told him that he believed defendant had murdered his first wife.

After reviewing defendant's motion for new trial, which was submitted without a hearing or argument, the trial court denied the motion on the basis that defendant's claim that he was unable to counter the State's contention that defendant was angry over Debra's relationship with DeGeorge failed to change the fact that the jury rejected the defense's theory that Debra's death was accidental. The trial court further indicated that defendant's "so-called newly discovered evidence" was not convincing in light of the other evidence that was presented to the jury.

Defendant's motion for new trial was based on La. Code Crim. P. art. 851(3)(4) and (5). Initially, we note that La. Code Crim. P. art. 851(3) provides that a new trial shall be granted whenever:

> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

In order to obtain a new trial based on newly-discovered evidence, the defendant has the burden of showing: (1) the new evidence was discovered after trial; (2) the failure to discover the evidence at the time of trial was not caused by a lack of diligence; (3) the evidence is material to the issues at

trial; and (4) the evidence is of such a nature that it probably would have produced a different verdict. *State v. Johnson*, 98-1407, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 800, 807, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439.

In the present case, defendant makes no showing that he subpoenaed DeGeorge or made any effort to procure DeGeorge's testimony at trial. Clearly, by defense counsel's own admission, the prosecutor was able to speak with DeGeorge prior to trial, but there is no evidence the defense requested such contact information from the prosecutor. Based on the conclusory statements supporting this argument, we cannot say defendant satisfied his burden of proving that through proper diligence he could not have discovered the whereabouts of DeGeorge prior to trial.

Moreover, newly-discovered evidence affecting only a witness's credibility ordinarily will not support a motion for new trial because new evidence that is merely cumulative or impeaching is not an adequate basis for a new trial. *State v. Johnson*, 98-1407 at p. 13, 734 So.2d at 808.

Based on the argument and written statement of DeGeorge attached to defendant's motion for new trial, we do not find this evidence is of such a nature that it would have produced an acquittal in the event of a retrial. DeGeorge's written statement merely corroborated defendant's second taped statement to Detective Hall wherein defendant denied being angry or enraged about the relationship between Debra and DeGeorge.

Defendant's motion for new trial also cited La. Code Crim. P. art. 851(4), which provides a new trial shall be granted whenever:

> (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment.

In support of this basis for obtaining a new trial, defendant argues the "circumstances of DeGeorge's avoidance of the defense investigators while cooperating with prosecutors" and whether the State obstructed justice or concealed favorable evidence.

We note defendant makes no factual allegations supporting such accusations against the State. Moreover, at no time after submitting his motion for new trial did the defendant articulate to the trial court such reason in support of the motion for new trial. Further, DeGeorge's written statement makes no allegation that he was told to avoid the defense investigators. On the showing made, we do not find merit in this portion of defendant's assignment of error.

Next, defendant argues that a new trial should be granted because the ends of justice would be served under La. Code Crim. P. art. 851(5). In any event, La. Code Crim. P. art. 851(5) allows the trial court to grant a new trial if "the ends of justice would be served ... although the defendant may not be entitled to a new trial as a matter of strict legal right." Therefore, even assuming, arguendo, that the grounds now raised on appeal were included under "the ends of justice" portion of the motion for new trial, the grant or denial of a new trial based on Article 851(5) is not subject to appellate review. *State v. Walder*, 504 So.2d 991, 994 (La. App. 1st Cir.), writ denied, 506 So.2d 1223 (La. 1987).

DECREE

The defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.