NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 1807

STATE OF LOUISIANA

VERSUS

WILLIAM WAYNE LEE, JR.

Judgment Rendered: MAR 26 2008

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On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 370993

Honorable Peter J. Garcia, Presiding

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Hughes, J. concurs.

GUIDRY, J.

The defendant, William Lee, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He moved for a new trial and for a post-verdict judgment of acquittal, but the motions were denied. He was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating eight assignments of error. We affirm the conviction and sentence.

ASSIGNMENTS OF ERROR

1. The State failed to adduce constitutionally sufficient evidence to prove guilt beyond a reasonable doubt.

2. The trial court erred in allowing the State to introduce inadmissible evidence over defense objection.

3. The trial court erred in denying in part, the defendant's motion in limine to exclude La. C.E. art. 404(B) evidence.

4. The trial court erred in refusing to allow the defense to introduce certain photographs of the victim, and in doing so, deprived the defendant of his constitutional right to present a defense.

5. The trial court erred in allowing the State to impugn the integrity of the defense expert on an impermissible basis.

6. The trial court erred in allowing the State to introduce numerous highly prejudicial gruesome autopsy photographs.

7. The trial court erred in denying the defendant's motion to suppress and supplemental motion to suppress.

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

FACTS

On September 12, 2003, the victim, Audra Vanetta Bland, was involved in an extramarital relationship with the defendant. At approximately 9:00 p.m. on that date, the defendant claimed he first realized the victim was not merely sleeping off a hangover, but was not breathing, and screamed for help from his friends who were staying with him and the victim in his stepfather's home on North Lake Drive in Lewisburg. The friends, James Morse, Lea Castagna, and Joshua Grillot, testified the defendant's cry for help sounded genuine. The defendant also banged one of his fists on the floor while screaming and yelling. Castagna did not smell or taste alcohol while attempting mouth-to-mouth resuscitation of the naked victim. When emergency medical personnel arrived on the scene, the victim was unconscious and had no heart or motor activity. Her body was first examined at 10:53 p.m. Lividity was present, but was not fixed, indicating that she had been dead for six to twelve hours.

Although the defendant brought the victim to the North Lake Drive home at approximately daybreak on September 12, 2003, and spoke to his friends numerous times during the day, it was not until the 911 emergency call that he first claimed that the victim had fallen down drunk and bumped her head after he returned with her from a night of drinking in Mississippi.

St. Tammany Parish Sheriff's Office Sergeant Jerry L. Hall indicated that he had a casual conversation with the defendant after responding to the medical emergency call made from the North Lake Drive home. The defendant indicated that after he and the victim arrived at the house after drinking in Mississippi, the victim fell down while standing at the back of the car. The defendant stated, "I didn't know what happened. She might have passed out drunk[.] [M]aybe she hit her head[.] I don't know." He claimed he helped the unconscious victim into the house. He claimed he took the victim's clothes off and put her in the bed. He claimed the victim

woke up a few times during the day, but was incoherent. He claimed he tried to wake the victim up by giving her a bath at 12:30 p.m. He also claimed when he tried to wake the victim again at 3:00 p.m., he noticed she had vomited, so he cleaned her with towels. The defendant indicated the victim was his girlfriend or fiancée and he had given her a ring, but she had given the ring back recently.

On September 13, 2003, the defendant told Morse that while the drunk victim was attempting to get her overnight bag from his vehicle's trunk, she stumbled backwards, fell, and hit her head on the concrete. The defendant claimed the victim was knocked out by the fall and he tried to assist her when she regained consciousness. The defendant claimed he suggested that the victim go to a hospital, but the victim stated she would be all right and went upstairs with him.

According to Jenny Rebecca Warder, one of the victim's sisters, between August of 2003 and the time of her death, the victim indicated she was trying to end her relationship with the defendant. Following the victim's death, the defendant's mother returned certain personal items belonging to the victim to Warder, including a tiger-eye shirt.

Testing performed on the tiger-eye shirt revealed approximately sixteen bloodstains. Further testing on a stain located on the sleeve and a stain located on the front lower area of the shirt indicated the stains were human bloodstains. Additionally, testing of DNA in the stain on the stomach area of the shirt revealed DNA consistent with the DNA profile of the defendant, with 1 in 68 trillion odds of a donor other than the defendant. Testing of DNA in the stain on the sleeve of the shirt revealed DNA consistent with the DNA profile of the victim and the defendant, with 1 in 2.5 billion odds of the donors being the victim and someone other than the defendant. Testing of DNA on bloodstains on two towels from the bathroom adjoining the bedroom where the victim's body was recovered and a bloodstain from the bedroom revealed DNA consistent with the victim's DNA. Testing of DNA

under the victim's nails from her left hand revealed the victim's DNA. Testing of DNA under the victim's nails from her right hand revealed DNA from a male contributor.

T.B., the victim's daughter, was twelve years old at the time of trial. She indicated she saw the defendant strike the victim in the face with a hurricane flashlight during an argument on a prior occasion at the North Lake Drive home. After that incident, the victim and T.B. hid from the defendant under the stairs in the house and in their car. T.B. indicated her birthday was on September 9, and a party had been planned for her at the North Lake Drive home for September 12, 2003.

Stephanie Jenkins Moore was the defendant's fiancée for approximately one year beginning in the summer of 1998. She indicated the defendant was jealous and "pretty controlling," and had a temper "like a bomb ready to go off." She broke off her engagement with the defendant after he attacked her in her trailer. On February 27, 2000, Moore attended a Mardi Gras parade with the defendant in Mandeville. After the parade, she went home, but the defendant went to New Orleans. Early the next morning, the defendant returned to Moore's trailer. The defendant told Moore he had had "a lot of fun" with a blonde girl. Moore told the defendant to "get out," and kicked him on the leg. The defendant responded by ripping the bed clothes off of Moore, throwing her across the room, grabbing her by the hair above her ears, and pounding her head into the floor until he became tired. Moore believed the defendant tried to kill her during the incident.

Heidi Lee Ocmond was one of the victim's friends. Ocmond indicated she was present with the victim and T.B. in a hot tub at the North Lake Drive home when the defendant struck the victim in the head with a flashlight because she turned the music on after he had turned it off.

Ocmond was also present when the victim and the defendant argued at a daiquiri shop. The victim, the defendant, and Ocmond had been drinking, and the

victim asked the defendant why he had never worn some pants she had given him. The defendant left the daiquiri store and went to his car. Thereafter, the victim and the defendant shouted at each other and the defendant drove "crazy because he was arguing" while he drove back to the North Lake Drive home. At one point, the defendant stopped the car and told the victim to get out, but she refused.

After the victim, the defendant, and Ocmond arrived at the North Lake Drive home, the defendant asked the victim to put a choke collar around her neck, and she complied with the request. The defendant began asking the victim questions, and every time she did not give him the answer he wanted, he pulled the choke collar tighter. Thereafter, the victim and the defendant went into a bedroom. Ocmond heard "hustling and screaming" in the bedroom and heard the victim ask that Ocmond be allowed into the bedroom. The defendant instructed Ocmond to come into the bedroom and sit on the bed. He told Ocmond the victim was being punished, and if Ocmond got up she would "get worse than [the victim.]" The defendant pulled on the choke collar around the victim's neck, "trying to get an answer out of her," and the victim's face turned a palish blue, almost purple color. The defendant pushed the victim against a wall, and the victim struck her head on the wall and slid down the wall to the floor. She asked Ocmond for help. Ocmond indicated the victim and the defendant were not "playing" during the incident and, as a result of the incident, the victim had a cut on the back of her head. Ocmond conceded, however, that the victim and the defendant were both "into dominatrix."

Ocmond was also present on another occasion when the victim and the defendant argued at the victim's house. The victim and the defendant were both inebriated. During the argument, the defendant intentionally smashed a bottle of vodka with a magnum flashlight, scattering broken glass on the floor. The barefoot victim and the defendant then stepped in the glass.

According to Ocmond, between one month and one week before her death, the victim indicated the defendant wanted his ring back. Ocmond also indicated that the victim wanted the defendant to change himself and had told him if he did not change, she would leave him.

On September 11, 2003, the victim told Ocmond that the victim was going to go to a DWI class in Mississippi, and then to a casino with the defendant, but that would probably be the last time she "hung out" with the defendant. According to Ocmond, the victim was thinking about going back to her husband. The victim told Ocmond, "she was going to do it this time and that she wasn't going to stand for anything[.]" Ocmond told the victim, "if you do anything, go in public in a public place, and do not go somewhere with him alone." Ocmond agreed to babysit the victim's children while she was out. The victim was wearing a shirt with a tiger's face on it when she left with the defendant.

The victim was supposed to return home at 12:00 a.m., on September 12, 2003, but she telephoned Ocmond later that night and told Ocmond that she and the defendant were going to the North Lake Drive home and asked Ocmond to take T.B. and her friends to the house for T.B.'s birthday party the next day. Ocmond conceded that the victim was progressing to the point of becoming an alcoholic.

Petra Chapman was also one of the victim's friends. On September 11, 2003, at approximately 11:30 p.m., she joined the victim and the defendant at the Beau Rivage Casino in Biloxi, Mississippi. The victim and the defendant were kissing. The victim was wearing a shirt with a "cat eyes" design. She was also wearing a ring on the middle finger of her right hand. The victim told Chapman that the ring was a friendship ring from the defendant.

Chapman bought herself, the victim, and the defendant a round of vodka and orange juice. Subsequently, the defendant left to use the bathroom and someone asked the victim to dance. The victim danced a fast dance with the man. When the

victim returned to the table where she had been sitting with the defendant and Chapman, the defendant whispered something in her ears and then left the room. Chapman asked the victim what was going on, and the victim replied, "somebody's probably upset because I danced with somebody." The victim told Chapman that the defendant was jealous that the victim had danced with someone on the dance floor, but she did not mind if the defendant danced with someone else. Chapman testified, "I said those are the kind of people you read about in the newspaper, the front page of the newspaper. I told her to be careful."

After the victim indicated she was hungry, Chapman and the victim made plans to meet at Avengers, a bar that served food. Chapman bought a round of vodka and orange juice at Avengers for herself, the victim, and the defendant, and then went home between 3:30 a.m. and 4:30 a.m. Chapman indicated that although the victim and the defendant were seated at a table with a pitcher of beer when she arrived, other people had been seated at the table. She indicated the victim did not have very much to drink during the night, and she was not concerned about the victim and the defendant driving home because "nobody was intoxicated." According to Chapman, the victim had no bruises on her forehead or arm and no scrapes or scratches on her neck or face when she left with the defendant.

Forensic Pathologist and St. Tammany Parish Chief Deputy Coroner Dr. Michael B. DeFatta performed an autopsy on the victim's body on September 15, 2003. He classified the victim's cause of death as blunt force head trauma and her manner of death as homicide. The victim suffered a fatal skull fracture and a large area of bleeding and bruising that resulted from an impact or several impacts to the left posterior of her head. She had a separate area of bruising, consistent with a blow, on her right temple. She also had bruising on her nose, bruising and swelling over her right eye, an abrasion or scratch mark on the inside of her right eye, an abrasion or scratch on her upper right lip, scratch marks on the right side of her neck, and

bruising on the middle of her forehead. Additionally, she had an "hours old" injury on the middle finger of her left hand consistent with a ring being torn from the finger.

According to Dr. DeFatta, the scratch marks on the victim's neck were also "hours old" and were most commonly seen when someone had a hand around their neck and was being choked or subdued to some degree. He felt that the scratch marks were most likely caused by fingernails. He did not feel that the injuries were the result of the efforts of the emergency medical technicians (EMTs) to revive the victim. Dr. DeFatta felt that the injuries to the victim's face were caused by a compression of some type, rather than a fall. He also did not feel that the injuries to the victim's mouth, lip, and nose were caused by an ambu bag[1] or oxygen mask. The bruising to the victim's forehead was also hours old.

Dr. DeFatta had worked on a number of cases in which people had sustained injury to the back of the head following a single fall, including cases where the person had been drinking or was under the influence of drugs. He indicated the skull fractures in those cases were much less severe than the skull fracture the victim suffered in the instant case. According to Dr. DeFatta, the victim's skull fracture was consistent with added force, i.e., "[a] push, a punch, someone on top of her that falls on top of her as she hits the ground."

Dr. DeFatta indicated that following an epidural hematoma, one of two things would occur. The initial impact could cause immediate loss of consciousness, followed by a lucid interval during which the injured person would regain consciousness until the enlarging and bleeding of their brain reached a critical point. Thereafter, the person would go into a coma and eventually die if untreated. Alternatively, the injured person would not lose consciousness following the initial

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[1] An ambu bag is a device used by EMTs to aerate or pump the lungs when intubating a person.

impact to their head, but would lose consciousness as the bleeding of their brain increased.

Toxicology testing of the victim's blood, vitreous fluid, and urine were negative for both alcohol and drugs. However, Dr. DeFatta conceded that, depending on how much time the victim survived following the initial impact to her head, alcohol in her system could have metabolized down to zero.

Dr. DeFatta examined the defendant on September 16, 2003. He found injuries consistent with the defendant having been in a struggle. The defendant had numerous scratches on his right wrist which were "days old." He had "days old" abrasions on his right elbow and his right forearm. He had "days old" small abrasions on the back of his neck. He had two scratch marks behind his right ear. He had small scratches on the left side of his face and on the left side of his nose. Further, the scratches on his ear, on his sideburns, and on his cheek were along the same line. Additionally, his right hand was visibly swollen.

Dr. DeFatta conceded that the scratches on the defendant's hands, elbow, neck, and face could have occurred before the victim's death. He conceded, to the best of his recollection, only the victim's DNA was found under her nails.[2] He added, however, that washing the victim's hands or giving her a bath could have washed away DNA evidence from under her nails.

The defendant did not testify, but the defense presented testimony from Georgia Bureau of Investigation Coastal Crime Laboratory Regional Medical Examiner Dr. Edmund Donoghue. Dr. Donoghue did not feel that the abrasions on the victim's lip, nose, cheek, neck, and face indicated that she had been smothered and choked. According to Dr. Donoghue, the injuries were most likely caused by the efforts to resuscitate the victim. He also opined that the victim's cause of death was

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[2] Testing of DNA under the victim's nails from her right hand revealed DNA from a male contributor.

an epidural hematoma due to a fracture of the left occipital bone of the skull due to a fall on the back of her head. Dr. Donoghue claimed it was impossible for a pathologist to tell from the injury to the victim's frontal lobes whether she had fallen accidentally or whether she had been pushed because the injuries would look exactly the same. Based on a review of records provided to him by the defense, Dr. Donoghue indicated it was "most likely" that after the victim fell, she was carried up to the third floor of the house in a small elevator, and thereafter, taken out of bed and bathed. He stated "that would present some opportunity to bump [the victim's] head if she were unconscious." Dr. Donoghue was confident that the victim died of a fall on the back of the head and not from blows during an altercation. He conceded he was being compensated by the defense at a rate of $450.00 per hour or a flat rate of $5,000.00 per day.

SUFFICIENCY OF THE EVIDENCE

In assignments of error numbers 1 and 8, the defendant argues the State failed to bear its burden of proving beyond a reasonable doubt that the death of the victim was a homicide, and not an accidental death as contended by the defense and borne out by the lay and expert testimony. The standard of review for 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 conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," in order to convict, every reasonable hypothesis of innocence is excluded. State v. Wright, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. Wright, 98-0601 at p. 3, 730 So.2d at 487.

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. La. R.S. 14:30.1(A)(1).

Specific criminal intent is that "state of mind which 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). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. State v. Henderson, 99-1945, p. 3 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

In State v. Mitchell, 99-3342 (La. 10/17/00), 772 So.2d 78, the Louisiana Supreme Court set forth the following precepts for appellate review of circumstantial evidence in connection with review of the sufficiency of the evidence:

> On appeal, the reviewing court 'does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events.' Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt.

> The jury is the ultimate factfinder of 'whether a defendant proved his condition and whether the state negated that defense.' The reviewing court 'must not impinge on the jury's factfinding prerogative in a criminal case except to the extent necessary to guarantee constitutional due process.'

Mitchell, 99-3342 at p. 7, 772 So.2d at 83. (Citations omitted).

Further, the Mitchell Court cautioned:

> "The actual trier of fact's *rational* credibility calls, evidence weighing, and inference drawing are preserved ... by the admonition that the sufficiency inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." The reviewing court is not called upon to determine whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Rather, the court must assure that the jurors did not speculate where the evidence is such that reasonable jurors must have a reasonable doubt. The reviewing court cannot substitute its idea of what the verdict should be for that of the jury. Finally, the "appellate court is constitutionally precluded from acting as a 'thirteenth juror' in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact."

Mitchell, 99-3342 at p. 8, 772 So.2d at 83. (Citations omitted).

After a thorough review of the record, we are convinced the evidence presented in this case, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and the defendant's identity as the perpetrator of that offense against the victim. The verdict rendered against the defendant indicates the jury accepted the testimony of the State's witnesses and rejected the testimony of the defense witnesses. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. State v. Johnson, 99-0385, p. 9 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 00-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. State v. Glynn, 94-0332, p. 32 (La. App. 1st Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. Further, in

reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See State v. Ordodi, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. Additionally, the jury rejected the defense theory that the victim's death was the result of an accidental fall. 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. See State v. Moten, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case.

These assignments of error are without merit.

INADMISSIBLE EVIDENCE

In assignment of error number 2, the defendant complains the State: presented hearsay testimony from Warder that the victim intended to end her relationship with the defendant; presented hearsay testimony from Ocmond that the victim stated that September 11, 2003 was probably going to be the last time she "hung out" with the defendant; presented hearsay testimony from Chapman that the defendant was jealous after the victim danced with someone else; presented lay opinion testimony from Ocmond that she told the victim to break up with the defendant in a public place; and presented lay opinion testimony from Chapman that she told the victim to be careful and that the defendant was the kind of person who ends up on the front page of the newspaper.

Over defense objection and relying on La. C.E. art. 803(3), the trial court allowed the challenged testimony from Warder and Ocmond concerning the victim's intent to end her relationship with the defendant. Louisiana Code of Evidence article 803(3), in pertinent part, provides:

> The following are not excluded by the hearsay rule, even though the

declarant is available as a witness:

. . .

> **(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. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.

The defendant argues reliance on Article 803(3) was error under Garza v. Delta Tau Delta Fraternity National, 05-1508, 05-1527 (La. 7/10/06), 948 So.2d 84, and the probative value of the hearsay evidence that the victim intended to end her relationship with the defendant was outweighed by its prejudicial effect under State v. Weedon, 342 So.2d 642 (La. 1977). Garza involved a wrongful death tort action following the death by suicide of Courtney Garza. Garza, 05-1508 at p. 2, 948 So.2d at 87. The court in Garza addressed the issue of the admissibility of a suicide note wherein the victim stated she was raped in the bedroom of Paul Upshaw after she had been drinking. Garza, 05-1508 at pp. 3-4, 948 So.2d at 87-88. In regard to admissibility of the suicide note under Article 803(3), the court found the suicide note "might be admissible" to prove Garza's state of mind, for example, depressed or despondent or suicidal, at the time of the statement and to prove her future action of taking her own life, but it was not admissible to prove the actions of Upshaw, other fraternity members, the fraternity itself, and/or SLU. Garza, 05-1508 at pp. 21-22, 948 So.2d at 98.

In Weedon, the defendant was convicted of manslaughter after the body of his wife, with two shots to her head, was found in the trunk of a vehicle at the Weedon home. Weedon, 342 So.2d at 643-44. After finding reversible error on the basis of an unconstitutionally obtained admission, the court in Weedon addressed the admissibility of the victim's declaration to a friend on the day before

the victim's death that the next day, after the defendant left on a trip, the victim intended to secretly leave the defendant. Weedon, 342 So.2d at 645-47. The court in Weedon held that the victim's uncommunicated intention to leave the defendant on the morning of her death did not permit an inference of any reaction by the defendant to the undisclosed intention, and thus, the prejudicial effect of the hearsay far outweighed its probative value. Weedon, 342 So.2d at 647.

In contrast to the challenged evidence in Garza, in the instant case, testimony concerning the victim's intent to end her relationship with the defendant concerned her then existing state of mind and was offered to prove her then existing mental or emotional condition or future action. Further, in contrast to the situation in Weedon, this case did not involve a victim's secret or undisclosed intent to leave the defendant, offered to prove the defendant's future actions. See State v. Adams, 04-0482, p. 10 n.1 (La. App. 1st Cir. 10/29/04), 897 So.2d 629, 634 n.1, writ denied, 05-0497 (La. 1/9/06), 918 So.2d 1029; see also State v. Brown, 562 So.2d 868, 879-80 (La. 1990) ("declarations of revulsion ('I don't like defendant.' or 'I'm not interested in having a casual affair with anyone.') may circumstantially evince declarant's expected reaction to defendant or show the probable nature of their future conduct, without necessarily averting to defendant's aggressive or culpable acts. ... The risk of unfair prejudice to defendant by confusing the jury with inflammatory or dispositive allegations, therefore, decreases. Consequently, in homicide cases, extrajudicial declarations of revulsion have been found relevant, admissible evidence as immediately antecedent circumstances explanatory of the killing and tending to connect the accused with it.") (Citations omitted). Accordingly, the trial court properly overruled the defense objection to the testimony.[3]

[3] We also note that the testimony from Warder and Ocmond concerned the victim's intent to end her relationship with the defendant, expressed within days and a day, respectively, of her death, and thus, was highly probative of her state of mind at the time of her death.

The defendant failed to object to Ocmond's testimony that she told the victim to be in a public place when she ended her relationship with the defendant as improper lay opinion. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. La. C.Cr. P. art. 841; La. C.E. art. 103(A)(1).

In regard to Chapman's testimony that jealous people were the kind of people "you read about" on "the front page of the newspaper," the defense objected to the testimony as improper lay opinion testimony under La. C.E. art. 701, arguing the opinion was not rationally based on Chapman's perception and was not helpful to a clear understanding of her testimony. The trial court found that Chapman's statement was a reference to behavior in general. The State argued that Chapman was available to be cross-examined on the reasonableness of her opinion and on the basis for that opinion. The court ruled the testimony admissible, and the defense objected to the court's ruling.

The defense also objected to Chapman's testimony as prohibited character evidence. The trial court, however, found that Chapman was not saying that the defendant was a jealous person, and rejected the argument. The defense objected to the court's ruling.

Additionally, over defense objection, the trial court found Chapman's testimony that the victim stated, "somebody's probably upset because I danced with somebody" was admissible under La. C.E. art. 803(1), to-wit:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Louisiana Code of Evidence article 701 permits non-expert testimony in the form of opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. State v. LeBlanc, 05-0885, pp. 6-7 (La. App. 1st Cir. 2/10/06), 928 So.2d 599, 602-03.

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, no prohibition against it as the opinion of a non-expert exists 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. LeBlanc, 05-0885 at pp. 7-8, 928 So.2d at 603.

Chapman's testimony that jealous people were the kind of people "you read about" on "the front page of the newspaper," was improper lay opinion. The testimony was not a natural inference from the facts she observed. Chapman stated that after the victim danced with a "tall, Italian-looking guy," she observed the defendant whisper something in the victim's ear, the victim looked down, and the defendant left the room. Based on what Chapman observed, any opinion as to jealous people being the kind that you read about on the front page of the newspaper was purely speculative opinion evidence. Accordingly, the trial court abused its discretion in finding that Chapman's testimony was not prohibited character evidence under La. C.E. art. 404(A).

Further, Article 803(1) contains an immediacy requirement which permits only the passage of time needed for translating observation into speech. Buckbee v.

United Gas Pipe Line Company, Inc., 561 So.2d 76, 84 (La. 1990). The victim's statement to Chapman that "somebody's probably upset because I danced with somebody[]" was a response to a question by Chapman, and thus, the immediacy requirement was not satisfied.

However, to the extent that Chapman's testimony concerning jealous people and her testimony concerning the victim's statement was objectionable, the guilty verdict actually rendered was unattributable to the error, and thus, the error was harmless beyond a reasonable doubt. See La. C.Cr. P. art. 921; State v. Casey, 99-0023, p. 13 (La. 1/26/00), 775 So.2d 1022, 1033, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000). At most, the challenged testimony implied that the defendant was *momentarily* jealous after the victim danced with another man. Chapman went on to testify that following the dancing incident, the defendant continued to eat, drink, and socialize with both Chapman and the victim for hours. Far more damaging evidence concerning the defendant's explosive temper was presented through the testimony of Moore at trial. Further, Dr. DeFatta's testimony indicated that the victim's skull fracture was consistent with added force, rather than an accidental fall, as claimed by the defendant.

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In assignment of error number 3, the defendant argues the trial court's ruling allowing unfairly prejudicial other crimes evidence was erroneous and resulted in reversible error.

Prior to trial, the State filed notice of its intent to use evidence of other crimes as described in previously filed discovery. The notice specifically set forth: that Ocmond had indicated to the police that approximately two months earlier, she had seen the defendant push the victim down on a hot tub, causing her to strike her head, and then strike the victim with a heavy flashlight; that Ocmond had indicated

to the police that in another argument, the defendant had struck the victim, knocked her to the floor, and had held the victim by the hair and struck her head on a marble column; that T.B. had indicated to the police that she had seen the defendant strike the victim and then hit her with a flashlight in the hot tub; that T.B. had indicated to the police that she had seen the defendant strike the victim while she was handcuffed to a bed at his own home; and that the defendant's engagement to Stephanie Jenkins Moore ended on February 27, 2000, when, after an all-night trip to the French Quarter, the defendant came home, snapped for no apparent reason, yanked Moore out of bed, grabbed her by her hair, and repeatedly slammed her head onto the trailer floor.

Following a hearing on a defense motion in limine to exclude evidence of the defendant's assault on Moore, the trial court held evidence of the assault on Moore, evidence of the defendant's striking the victim with a flashlight in the hot tub, and evidence of the defendant breaking a bottle of vodka at the victim's house would be admissible at trial. During the testimony of Ocmond at trial, the defense objected to hearsay, but otherwise had no objection to Ocmond's testimony. The defense made no objections during the testimony of T.B.

It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. La. C.E. art. 404(B)(1). Evidence of other crimes, wrongs or acts committed by the defendant is generally inadmissible because of the substantial risk of grave prejudice to the defendant. However, the State may introduce evidence of other crimes, wrongs or acts if it establishes an independent and relevant reason such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. La. C.E. art. 404(B)(1). Upon request by the accused, the State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. Even when the other

crimes evidence is offered for a purpose allowed under Article 404(B)(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. The State also bears the burden of proving that the defendant committed the other crimes, wrongs or acts. State v. Rose, 06-0402, p. 12 (La. 2/22/07), 949 So.2d 1236, 1243.

Although a defendant's prior bad acts may be relevant and otherwise admissible under La. C.E. art. 404(B)(1), the court must still balance the probative value of the evidence against its prejudicial effects before the evidence can be admitted. La. C.E. art. 403. Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. State v. Germain, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. Germain, 433 So. 2d at 118; see also Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."); Rose, 06-0402 at p. 13, 949 So.2d at 1243-44.

Initially, we note, the only "other crimes evidence" objected to by the defendant was Moore's testimony concerning the defendant's attack. Accordingly, we address whether or not the admission of that evidence violated Article 404(B)(1). See La. C.Cr. P. art. 841; La. C.E. art. 103(A)(1).

The State's notice of intent to use evidence of other crimes set forth that the evidence at issue was admissible because the defendant's acts of domestic violence against the victim and other women from previous relationships was relevant to his motive in the instant case, his intent to kill or create great bodily harm, and to negate the defense that the victim's death was an accident.

In the instant case, the State's case was dependent on circumstantial evidence and the defense at trial was that the injury to the back of the victim's head was the result of an accidental fall, rather than a homicide. Thus, evidence tending to prove the absence of accident was extremely probative and tended to corroborate the other evidence introduced at trial. The testimony of Moore indicated that the defendant reacted to little or no provocation from a woman he was romantically involved with by repeatedly bashing the back of her head onto the floor. The defendant was romantically involved with the victim; she may have provoked him by ending her relationship with him; and she died as a result of blunt force head trauma. The prejudicial effect of the other crimes evidence did not rise to the level of undue or unfair prejudice when balanced against its probative value.

This assignment of error is without merit.

RIGHT TO PRESENT A DEFENSE

In assignment of error number 4, the defendant argues the trial court prejudiced the defendant's right to present a defense and committed reversible error by refusing to allow the introduction into evidence of photographs which would have explained the lifestyle engaged in by the victim and the defendant.

Formal rules of evidence must yield to a defendant's constitutional right to confront and cross-examine witnesses and to present a defense. See U.S. Const. amend. VI; La. Const. art. I, §16; Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); State v. Van Winkle, 94-0947 (La. 6/30/95), 658 So.2d 198; State v. Gremillion, 542 So.2d 1074 (La. 1989).

At trial, the defense moved that it be permitted to ask Chapman if she recognized the person depicted in six photographs as the victim, and if so, that the photographs be introduced into evidence. The defense argued the photographs were relevant to whether or not the victim and the defendant engaged in sexually

oriented game playing involving dominatrix and bondage concepts and were also relevant because Ocmond had testified that, at times, it was difficult for her to determine whether the victim and the defendant were playing or being serious during their sex games.

The trial court permitted the defense to introduce the first photograph, depicting the victim wearing a choke collar and a negligee, into evidence, but excluded the remaining five photographs, depicting the victim wearing only a bra, garter belt, stockings and boots.[4] The court ruled Proffers #1 - #5 were too suggestive or inflammatory, were prejudicial, were character evidence to paint the victim in a particular light, were not probative as argued by the defense, and were not relevant. The court also ruled that the prejudicial effect of the photographs outweighed their probative value, if any. The defense objected to the court's ruling.

Proffers #1 - #5 were properly excluded. The probative value, if any, of the photographs was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, and waste of time. See La. C.E. art. 403. The photographs proved only that the victim had worn a bra, garter belt, stockings and boots. The fact that the victim and the defendant engaged in sexual game playing was irrelevant to the issue in the case, i.e., the cause of the victim's blunt force head trauma. The State's theory was that the blunt force head trauma resulted from the intentional actions of the defendant. The defense theory was that the blunt force head trauma resulted from an accidental fall. Neither side argued that the blunt force head trauma resulted from sexual game playing. Exclusion of the photographs did not prevent the defendant from presenting his defense.

This assignment of error is without merit.

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[4] Proffer #1 also depicted the victim touching her genitals.

IMPROPER CROSS-EXAMINATION

In assignment of error number 5, the defendant argues the trial court erred in permitting the State to cross-examine Dr. Donoghue on his failure to prepare a written report because he was not required to prepare a written report.

During cross-examination of Dr. Donoghue, the defense objected to questioning by the State concerning the fact that Dr. Donoghue had not prepared a written report, arguing that it was misleading to suggest that the absence of a report somehow denigrated his opinion. The State argued the fact that Dr. Donoghue had not prepared a written report went to the weight and sufficiency of his testimony versus another expert who had put his opinion in writing and subjected it to review. The trial court ruled that the decision of whether or not to have a report generated was a strategic decision and a proper basis for cross-examination. The defense objected to the ruling of the court. Thereafter, in response to cross-examination, Dr. Donoghue reluctantly conceded that if he had put his opinion on paper, he would have been committed to that opinion.

The trial court did not abuse its discretion in allowing the challenged line of questioning. The questioning was posed to attack the credibility of the expert witness. See Denton v. Vidrine, 06-0141, 06-0142, p. 17 (La. App. 1st Cir. 12/28/06), 951 So.2d 274, 288, writ denied, 07-0172 (La. 5/18/07), 957 So.2d 152.

This assignment of error is without merit.

GRUESOME AUTOPSY PHOTOGRAPHS

In assignment of error number 6, the defendant argues the numerous gruesome autopsy photographs had no real evidentiary value and should have been excluded as unfairly prejudicial.

Photographs which illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted, are generally admissible, provided their probative value outweighs any prejudicial effect. The trial

court's admission of allegedly gruesome photographs will be overturned on appeal only if the prejudicial effect of the photographs clearly outweighs their probative value. No error will be found unless the photographic evidence is so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence. State v. Brunet, 95-0340, p. 3 (La. App. 1st Cir. 4/30/96), 674 So.2d 344, 346, writ denied, 96-1406 (La. 11/1/96), 681 So.2d 1258.

Prior to the testimony of Dr. DeFatta, the defense moved for exclusion of all autopsy photographs, arguing that the injuries could be explained by a qualified forensic pathologist and the probative value of the photographs was outweighed by their prejudicial effect. The State indicated the victim's injuries were subject to two different determinations, and it understood that the defense expert would argue, based on the autopsy photographs, that the victim's injuries were accidental in direct contravention of the testimony of the State's expert. The State indicated it had already removed photographs depicting injuries below the victim's neck or which involved dissection. Additionally, the State indicated Dr. DeFatta had marked the photographs which he considered "absolutely critical." The trial court ruled the marked photographs would be admissible with the exception of photographs which the court considered repetitive, and the defense objected to the court's ruling. Thereafter, the defense specifically objected to five other autopsy photographs, and the State withdrew two of those photographs. The court ruled the three other photographs would be admissible, and the defense objected to the court's ruling.

There was no error in the admission of the challenged photographs. The prejudicial effect of the photographs did not clearly outweigh their very high probative value. They depicted the nature, location, and severity of the victim's injuries and were highly probative of the cause of her blunt force head trauma and other injuries. The photographic evidence was not so gruesome as to overwhelm the

jurors' reason and lead them to convict the defendant without sufficient other evidence.

This assignment of error is without merit.

MOTIONS TO SUPPRESS

In assignment of error number 7, the defendant argues the trial court's ruling denying his motions to suppress was erroneous and should be reversed because the initial search of the North Lake Drive home was conducted without a warrant or an exception to the warrant requirement and warrants for the subsequent searches for physical evidence were supported by affidavits that were defective because they relied on information from the first search or because they failed to establish probable cause.

The Fourth Amendment to the United States Constitution and article I, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the State to affirmatively show it was justified under one of the narrow exceptions to the rule requiring a search warrant. La. C.Cr. P. art. 703(D). A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the district court had the opportunity to observe the witnesses and weigh the credibility of their testimony. A search conducted pursuant to consent is an exception to the requirements of both a warrant and probable cause. State v. Young, 06-0234, pp. 5-6 (La. App. 1st Cir. 9/15/06), 943 So.2d 1118, 1122, writ denied, 06-2488 (La. 5/4/07), 956 So.2d 606.

A search warrant may issue only upon probable cause established to the satisfaction of a judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant. La. Const. Art. I, § 5; La. C.Cr.

P. art. 162. Probable cause exists when the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that the evidence or contraband may be found at the place to be searched. The facts establishing probable cause for a search warrant must be contained within the four corners of the affidavit. La. C.Cr. P. art. 162. The judicial officer must be supplied with enough information to support an independent judgment that probable cause exists for the issuance of a warrant. State v. Fugler, 97-1936, p. 24 (La. App. 1st Cir. 9/25/98), 721 So.2d 1, 19, rehearing granted and amended in part on other grounds, 97-1936 (La. App. 1st Cir. 5/14/99), 737 So.2d 894, writ denied, 99-1686 (La. 11/19/99), 749 So.2d 668.

An affidavit supporting a search warrant is presumed to be valid. When a defendant proves that an affidavit contains false statements, it should be determined whether the misrepresentations are intentional or unintentional. Defendant must prove by a preponderance of the evidence that the affidavit contains intentional misrepresentations. Fugler, 97-1936 at p. 24, 721 So.2d at 19.

Affidavits, by their nature, are brief, and some factual details must be omitted. Unless the omission is willful and calculated to conceal information that would indicate that there is not probable cause, or would indicate that the source of other factual information in the affidavit is tainted, the omission will not change an otherwise good warrant into a bad one. In matters relating to the possibility that a warrant contains intentional misrepresentations, the question of the credibility of the witnesses is within the sound discretion of the trier of fact. Such factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence. The harsh result of quashing a search warrant, when the affidavit supports a finding of probable cause, should obtain only when the trial

judge expressly finds an intentional misrepresentation to the issuing magistrate. Fugler, 97-1936 at pp. 24-25, 721 So.2d at 19.

Prior to trial, the defense moved to suppress evidence found pursuant to warrants pertaining to: the search of the defendant's own residence, the search of his vehicle, the search of the North Lake Drive home, a sex crime kit and photographs of the defendant; x-rays of the defendant; and a search of two cellular telephones. The defendant argued the affidavits submitted in support of the warrants were "conclusory and bare-bones" and failed to supply sufficient information to justify findings of probable cause. In a supplemental motion to suppress evidence, the defendant argued Sergeant Hall and St. Tammany Parish Sheriff's Office Deputy Dawn Lenel had conducted illegal, unconstitutional, warrantless searches and seizures at the North Lake Drive home.

Following a hearing, the trial court denied the motions to suppress for detailed written reasons. In regard to the supplemental motion to suppress, the court found the defendant consented to the search of the North Lake Drive home both expressly and through his actions. The court noted: the defendant initiated the 911 call alerting the police that there was an emergency at the house; the defendant indicated to Sergeant Hall where the victim was found and told him to go ahead when he asked if he could look around; when asked on cross-examination whether he wanted to help Sergeant Hall, the defendant responded, "Yeah. I mean, I didn't want to hinder him[;]" at the time Sergeant Hall first went to the North Lake Drive home, the investigation was a generalized investigation to ascertain a then unknown cause of death; it was only after further investigation and the coroner's report, that it was determined that a crime had been committed; the defendant, an occupant of the premises, called the police and acted in a manner which demonstrated a diminished expectation of privacy in the premises, significantly

indicating his expectation of privacy was yielding to determining the cause of death of his girlfriend.

In regard to the original motion to suppress, the court found, given the totality of the circumstances, including the facts recited in the affidavits and the reasonable inferences drawn by the issuing magistrate in issuing the warrants, the affidavits were not merely conclusory and bare bones, but a showing was made that there was a fair probability that evidence pertaining to the victim's death would be found at the North Lake Drive home, the defendant's residence, in the car used by the victim and the defendant prior to the incident in question, in the defendant's cell phone records and voice mail, from an examination of physical injuries to the defendant's person, and in a sex crime kit of the defendant. The court noted the affidavits represented that the defendant, "a male companion" of the victim, "reportedly found [the victim] deceased in bed"; the defendant was with the victim after she had reportedly fallen down that morning on the driveway of the North Lake Drive home; and the victim's cause of death was blunt force trauma to her head.

The court also found that there had been inadvertent material omissions from the affidavits, and thus, it was permissible to look beyond the affidavits to support or destroy the probable cause finding. See State v. Morris, 444 So.2d 1200, 1202 (La. 1984). Referencing the investigative case report prepared by Sergeant Hall, the court further noted: the coroner determined that the cause of death was homicide by blunt force head trauma, with injuries to the victim's head, face and neck consistent with a physical altercation and inconsistent with injuries that would be sustained in a single fall;[5] the defendant had previously struck the victim with a flashlight, handcuffed her to a bed for long periods of time, knocked her to the

[5] The affidavit in support of the warrant to search the victim's and the defendant's cellular telephones set forth that the victim's death had been "ruled as a homicide."

floor, held her by her hair and struck her head on a marble column; and it was observed that the defendant's right hand was swollen.[6]

There was no abuse of discretion in denying the motions to suppress. The reasons set forth by the trial court are supported by the record and the law.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

[6] This fact was included in the affidavit in support of the warrant to have the defendant's hands and arms x-rayed.