01/15/02 “See News Release 004 for any concurrences and/or dissents.”

# SUPREME COURT OF LOUISIANA

No. 00-KA-1529

STATE OF LOUISIANA

Versus

ROY BRIDGEWATER

ON APPEAL
FROM THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT,
FOR THE PARISH OF JEFFERSON,
HONORABLE KERNAN A. HAND, JUDGE

LOBRANO, Justice Pro Tempore*

A Jefferson Parish grand jury indicted defendant, Roy Bridgewater, for first degree murder in violation of La. R.S. 14:30.[1] After a trial by jury, defendant was found guilty as charged and sentenced to death based upon the jury’s finding of four aggravating circumstances. Asserting twenty-one assignments of error, defendant directly appeals his conviction and sentence. La. Const. Art. V, § 5(D). Finding merit to the argument that the evidence is insufficient to support a first degree murder conviction, we reverse defendant’s conviction and death sentence; however, we find the evidence sufficient to support a second degree murder

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*Retired Judge Robert L. Lobrano, assigned as Justice Pro Tempore, participating in the decision.

[1]Originally, the state indicted defendant and Lawrence Jacobs in a single indictment. The trial court granted defendant’s motion to sever. Jacobs was tried first. The jury convicted Jacobs and sentenced him to death. In State v. Jacobs, 99-1659 (La. 6/29/01), 789 So.2d 1280, we reversed Jacobs’ conviction and sentence due to voir dire error and remanded for a new trial. Our ruling in that case moots defendant’s argument regarding the trial court’s denial of his motion to admit Jacobs’ conviction and sentence at trial.

conviction and remand for resentencing pursuant to La. R.S. 14:30.1(B).

Factual and Procedural Background

On the morning of October 31, 1996, Marilyn Williams arrived at her son-in-law's residence in Marrero, Louisiana, as she regularly did each Thursday to clean the house. When she arrived, she found the garage door open and her son-in-law's maroon van missing. When she entered the house, she found signs of ransacking, including blinds pulled down in the den. When she entered the master bedroom, she found both her son-in-law, Nelson Beaugh (then forty-five years old), and his mother, Della Beaugh (then seventy years old), dead. Mr. Beaugh was lying on the bed; Ms. Beaugh was kneeling on the floor at her son's feet. Both victims had been shot in the head.[2] At 10:22 a.m., Ms. Williams called 911 to report this double homicide.

Earlier, at 9:20 a.m. that same morning, another 911 call was made from that same Marrero neighborhood. Only a block away and only an hour earlier, a neighbor, Brenda Menard, was approached by two young, African-American males claiming to be painting houses. After she chased the pair away, Ms. Menard spotted them walking in the direction of the Beaugh's residence. Because their story sounded suspicious and because their behavior was perceived as threatening, Ms. Menard called 911. Although the police promptly responded to her call and canvassed the neighborhood, they found no sign of the pair.

Suspecting the pair might be responsible for the double homicide, another neighbor (who was also a police officer) brought Ms. Menard to the crime scene shortly after the bodies were found. Based on Ms. Menard's detailed descriptions

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[2]Earlier that morning Ms. Beaugh had spoken on the phone with her daughter in Monroe. During that conversation, which lasted from 8:52 a.m. till 8:58 a.m., Ms. Beaugh expressed no signs of anything amiss. Also earlier that morning, Mr. Beaugh's wife left to work and his children to school.

of the pair,[3] a police sketch artist produced drawings of the then-unidentified suspects. These drawing were published and televised as wanted bulletins in connection with the double homicide.

Mr. Beaugh's cellular phone records reflected that his cell phone, which he kept in his van, was used at 11:31 a.m. that same day to call defendant's brother's girlfriend. Also, at 1:00 p.m that day, Mr. Beaugh's maroon van was found abandoned with the engine running in the Iberville Housing Development in New Orleans. Police lifted two fingerprints from the exterior front passenger door of the van that matched Lawrence Jacobs' right index finger. Police also found nearby the charred remains of Mr. Beaugh's briefcase, which had been set on fire. The initial report to the New Orleans Police Department officer was that two African-American males were observed running from the van.[4]

On Saturday night, November 2, 1996, defendant called 911 from a pay phone and turned himself in to the police. The reason defendant turned himself in

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[3]Ms. Menard described one suspect, later identified as defendant, as 19-21 years of age, 5'6" to 5'7", medium build, dark complexion, natural hair style, full on top with possible fade on the sides, wearing blue jeans and a black tee shirt with light brown emblem on upper left chest. This subject was the more talkative of the two. She described the other suspect, later identified as Lawrence Jacobs, as an African-American male, 19-21 years of age, possibly 6'1" to 6'2", thin build, light complexion, wearing baggy clothing, long sleeved tan, yellow and burgundy plaid shirt, cap (color unknown), prescription glasses with round wire frames.

[4]Defendant's hearsay objection to this statement was sustained, but his mistrial motion was denied. Defendant stresses that the trial court granted his pre-trial motion to exclude any reference to the hearsay statement regarding the two African-American males observed running from the van. Given defendant's admission that he and Jacobs abandoned the van in the Iberville Housing Development, even assuming this statement was hearsay, admitting it was harmless error, and the mistrial motion properly was denied. See also State v. Prudholm, 446 So.2d 729, 741 (La. 1984) (officer's remark allegedly casting the accused as an associate of criminals was not prejudicial and did not impact the fairness of trial).

was two-fold: first, he knew there were outstanding attachments on him; and, second, he knew about the wanted bulletins apparently implicating him in the double homicide. Defendant gave four separate statements to the police. The first was an exculpatory statement, which he gave at about 9:00 p.m that night, denying any involvement and any knowledge of the double homicide. Nonetheless, police detained him on the other attachments while they conducted an investigation. As part of that investigation, police presented Ms. Menard with a photograph line-up. After she positively identified defendant as one of the suspicious pair she spotted in the neighborhood, defendant was arrested for the double homicide.

The next day defendant gave three inculpatory statements.[5] In those statements, he made the following admissions: (i) that he and Jacobs were the suspicious pair Ms. Menard encountered on the morning of the double homicide; (ii) that Jacobs forced Mr. Beaugh into the residence at gun point; (iii) that he accompanied Jacobs into the Beaugh's residence; (iv) that they were both armed--Jacobs with a .38 revolver, defendant with a broken BB gun; (v) that his role was "the lookout," yet he admitted opening a drawer; (vi) that he was in the Beaugh's garage when he heard three shots fired and saw Jacobs come running out; (vii) that

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[5]Defendant argues that the trial court erred in denying his motion to suppress these three statements as fruits of an illegal detention. While defendant admittedly was not under arrest for the instant double homicide when he gave the initial exculpatory statement, he had voluntarily turned himself in on outstanding attachments. These outstanding attachments provided a valid basis for detaining defendant during the seventeen hour interval between his initial exculpatory statement and his subsequent inculpatory ones. See Arizona v. Evans, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). And, shortly after giving his initial statement, defendant was arrested for the instant double homicide; Ms. Menard's positive identification of him provided the probable cause for that arrest. The trial court thus did not err in admitting defendant's inculpatory statements. See State v. Yarbrough, 418 So.2d 503, 506 (La. 1982)(admissibility of a confession is a question for the trial court, and its conclusion on the credibility and weight of testimony will not be overturned on appeal unless not supported by the evidence).

they fled in Mr. Beaugh's van; (viii) that they abandoned the van in the Iberville Housing Development; and (ix) that some of the property (a Casio keyboard and Mr. Beaugh's watch) was located at his girlfriend's house. Based on the latter admission, police conducted a consent search of the girlfriend's house. Detective Dauth testified that the girlfriend's mother, Jeanette Grant, consented to the search and that they found the stolen property defendant described as well as some other property.[6]

On December 5, 1996, defendant and Jacobs, both African-Americans, were jointly indicted for the first degree murders of Nelson and Della Beaugh, both Caucasian-Americans. The trial court granted defendant's motion to sever.

Before going to trial, defendant went through a string of Jefferson Parish Indigent Defender Board ("IDB") attorneys. Initially, the IDB appointed Walter Amstutz as defendant's guilt-phase attorney and Linda Davis-Short as his penalty-phase attorney. In December 1997, Amstutz accepted a job with the Jefferson Parish District Attorney's office; as a result, his motion to withdraw as defendant's attorney was accepted.[7] To replace Amstutz, the IDB appointed Mark Armato. In

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[6]Defendant's hearsay objection to Dauth's testimony regarding the consent search of the Grant's residence was overruled. While defendant reurges that objection, we find it lacks merit. See State v. Calloway, 324 So.2d 801, 809 (La. 1976); State v. Monk, 315 So.2d 727, 740 (La. 1975)(as a general matter, the testimony of a police officer may encompass information provided by another individual without constituting hearsay if offered to explain the course of police investigation and the steps leading to the defendant's arrest). Even assuming the trial court erroneously admitted the testimony, the admission was harmless given defendant's admission directing police to the stolen property at that residence. See State v. Hearold, 603 So.2d 731, 739 (La. 1992).

[7]While defendant filed a motion to recuse the entire Jefferson Parish District Attorney's office based on Amstutz employment with that office, the trial court correctly denied that motion. We have consistently held that "[t]he mere fact that an assistant district attorney previously represented an accused does not ipso facto require disqualification of the District Attorney in the criminal proceeding." State v. Bell,

June 1998, Armato filed a Motion for a Sanity Commission alleging that defendant was not assisting in his defense. Citing a sanity commission hearing done about a year earlier in an unrelated armed robbery-aggravated burglary case in which defendant was represented by another attorney and found competent, the trial judge denied the motion.[8]

On June 15, 1998, defendant's first trial began; however, it ended in a mistrial on June 18, 1998, because Armato developed a conflict of interest.[9] In the summer of 1998, the IDB replaced Armato with Ken Dohre. While at his first appearance in the case Dohre indicated that he could not be ready for the tentatively selected October 26, 1998, trial date, the trial court denied the defense's request for a continuance.[10] On October 22, 1998, Dohre moved to withdraw based on

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346 So.2d 1090, 1100 (La. 1977). It follows then that defendant's reliance on the mere fact Amstutz previously represented him to require recusing the entire District Attorney's office is misplaced.

[8]The trial judge in this case was also the trial judge in that earlier, unrelated case. See State v. Bridgewater, 98-658 (La. App. 5th Cir. 12/16/98), 726 So.2d 987(affirming defendant's conviction of two counts of armed robbery and one count of aggravated burglary and sentence of thirty years at hard labor for each count, to run concurrently, and noting that trial judge specified the sentences for the armed robbery convictions were to be served without benefit of parole, probation, or suspension of sentence and that co-defendant, Jacobs, plead guilty to those unrelated charges).

[9]Armato had a conflict that arose out of his acquaintanceship with the victim's distant relative. Defendant complains that the transcript of that first trial is not part of the record. The record, however, contains all pre-trial motions Armato filed before he withdrew. Because the mistrial was declared after jury selection, but before trial commenced, a transcript of the voir dire is unnecessary for this appeal; a whole new jury was selected for the instant case.

[10]In response to defendant's complaint that the transcript from that hearing is not in the record, the state supplemented the record with a copy of that transcript. Defendant also complains that the trial court erred in refusing to continue this "tentative date," citing the three grounds he urged; to wit: (i) that date gave newly appointed defense counsel, Dohre, only three and a half months to prepare; (ii) penalty phase co-counsel, Ms. Short, voiced a pre-existing conflict (that date coincided with her pregnant daughter's due date); and (iii) that

"irreconcilable conflicts" with defendant regarding trial strategies. Following an ex parte, sealed hearing, the trial court denied the motion.

On October 26, 1998, defendant's second trial began. At the close of the state's case, the defense rested without putting on any evidence or witnesses. The trial judge personally questioned defendant regarding his desire to neither call any witnesses nor testify. That trial ended with a guilty verdict on October 30, 1998. On the two year anniversary of the crime, a penalty phase was conducted and concluded with the jury unanimously finding four aggravating circumstances and returning the sentence of death.[11] On March 1, 1999, the trial court formally sentenced defendant to death. This direct appeal followed.

As noted at the outset, we hold that the evidence in the record is insufficient to support defendant's first degree murder conviction and death sentence, and thus we vacate that conviction and sentence. However, we find the evidence in the record is sufficient to support a second degree murder conviction.[12] Our holding

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date coincided with the two-year anniversary of the crime. Granting or denying a motion for a continuance is a decision that rests within the sound discretion of the trial judge, and a reviewing court will not disturb such decision absent a clear abuse of discretion. La.C.Cr.P. Art. 712 (providing that "[a] motion for continuance, if timely filed, may be granted, in the discretion of the court, in any case if there is good ground therefore"); State v. Bourque, 622 So.2d 198 (La. 1993). Given Dohre was defendant's third IDB counsel, coupled with the fact the judge took several measures to avoid any reminders of the October 31st anniversary date in the courtroom (including making the clerk keep Halloween candy and decorations out of sight), we find no abuse of discretion.

[11]The four aggravating circumstances the jury found were: 1) that the offender was engaged in the perpetration or attempted perpetration of an aggravated burglary; 2) that the offender knowingly created a risk of death or great bodily harm to more than one person; 3) that the offense was committed in an especially heinous, atrocious or cruel manner; and 4) that one of the victims was sixty-five years of age or older. La.C.Cr.P. art. 905.4(A)(1),(4),(7),(10).

[12]We have reduced a first degree murder conviction to second degree murder without remanding for a new trial on at least three prior occasions. State v. Bright, 98-0398 (La. 4/11/00),

renders it unnecessary to address any of defendant's assignments of error relating to the penalty phase; consequently, we address in this opinion only his assignments of error relating to pretrial and trial phase issues which would, if meritorious, mandate we remand for a new trial. See State v. Hart, 96-0697 at p. 5 (La. 3/7/97), 691 So. 2d 651, 655 (citing State v. Bay, 529 So. 2d 845(La. 1988)).

**DISCUSSION**

Sufficiency of the Evidence

In reviewing the sufficiency of the evidence to support a conviction, we follow the due process standard of review enunciated in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under that standard, "the appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." State v. Captville, 448 So.2d 676, 678 (La. 1984). That standard "preserves the role of the jury as the factfinder in the case but it does not allow jurors 'to speculate if the evidence is such that reasonable jurors must have a reasonable doubt.'" State v. Pierre, 93-0893 at p. 5 (La. 2/3/94), 631 So. 2d 427, 429. The jury is not allowed to engage in speculation based merely upon "guilt by association." 93-0893 at pp. 5-6, 631 So. 2d at 429. In order for the trier of fact to convict and for the reviewing court to affirm a conviction, the totality of the evidence must exclude reasonable doubt.

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776 So. 2d 1134; State v. Hart, 96-0697 (La. 3/7/97), 691 So. 2d 651; State v. Bay, 529 So. 2d 845(La. 1988). As we noted in Bay, supra,"[w]hen the evidence does not support the conviction, the discharge of the defendant is neither necessary nor proper if the evidence supports a conviction for a lesser included offense. State v. Byrd, 385 So. 2d 248 (La. 1980)." 529 So. 2d at 846 n. 1.

Under Jackson, all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. See State v. Jacobs, 504 So.2d 817, 820 (La. 1987). When circumstantial evidence forms the basis of the conviction, the totality of such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. However, "[h]ypotheses of innocence are merely methods for the trier of fact to determine the existence of a reasonable doubt arising from the evidence or lack of evidence." State v. Shapiro, 431 So. 2d 372, 389 (La. 1982)(on reh'g)(Lemmon, J., concurring). This circumstantial evidence rule is not a separate test from the Jackson standard; rather, La. R.S. 15:438 merely "provides an evidentiary guideline for the jury when considering circumstantial evidence and facilitates appellate review of whether a rational juror could have found defendant guilty beyond a reasonable doubt." State v. Wright, 445 So. 2d 1198, 1201 (La. 1984). "Although the circumstantial evidence rule may not establish a stricter standard of review than the more general reasonable juror's reasonable doubt formula, it emphasizes the need for careful observance of the usual standard, and provides a helpful methodology for its implementation in cases which hinge on the evaluation of circumstantial evidence." State v. Chism, 436 So. 2d 464, 470 (La. 1983).

Applying the above guidelines to this case in which the state's proof hinged almost entirely on circumstantial evidence and viewing the evidence in light most favorable to the state, we find merit to defendant's contention that the state failed to exclude a reasonable hypothesis of innocence; namely, that Jacobs was the sole shooter and that defendant was merely present, neither advancing nor assisting Jacobs in shooting the victims. Advocating this reasonable hypothesis, defendant concedes that he entered the Beaugh residence with specific intent to commit

aggravated burglary, but contends that he did not have specific intent to kill and, in fact, did not kill anyone.

At trial, the state advanced two possible scenarios for finding defendant guilty of first degree murder: (1) defendant and Jacobs both were shooters; or (2) Jacobs was the sole shooter, and defendant was a principal. Under the first scenario, the state was required to identify defendant as a shooter.[13] Yet, as defendant stresses, the state's opening statement at trial was that we "may never know who fired these shots."

Due to the lack of any eyewitnesses coupled with the equivocal physical evidence, suggesting only a possibility of multiple shooters,[14] the state apparently realized that any attempt to identify the actual shooter would result in a "finger pointing" game between defendant and Jacobs. The state's case thus focused on the second scenario--that even if defendant was not the shooter, he acted in concert

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[13]More precisely, the state was required to prove: (1) that defendant had the specific intent to kill or to inflict great bodily harm and was engaged in the perpetration or attempted perpetration of an aggravated burglary or armed robbery or both, La. R.S. 14:30(A)(1); (2) that defendant had the specific intent to kill or to inflict great bodily harm upon more than one person, La. R.S. 14:30(A)(3); or (3) that defendant had the specific intent to kill or to inflict great bodily harm upon a victim who was sixty-five years of age or older, La. R.S. 14:30(A)(5).

[14]At oral argument before this court the state's attorney suggested that the evidence against defendant was "not the best." The evidence the state relies upon is the possibility noted by the ballistics expert that while all three bullets were .38-caliber class, the bullets could have come from two different guns. The state also relies on the possibility raised by the autopsy that the angles from which the shots were fired implicates two different gunmen. The state also cites defendant's admission to being one of the two people present on the scene, and that there were two people dead. As a fall-back position, the state argues that if the evidence is insufficient to establish specific intent to kill, then, by definition, defendant admitted to second degree murder.

with Jacobs, and thus is guilty as a principal under La. R.S. 14:24.[15] To prevail on its principal theory, the state had the burden of proving beyond a reasonable doubt that defendant harbored specific intent to kill the victims, not merely that defendant knew of Jacobs' intent to do so. The shooter's specific intent cannot be transferred to the principal; "[a]n individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state." State v. Pierre, 93-0893 at p. 4 (La. 2/3/94), 631 So.2d 427, 428; State v. Holmes, 388 So.2d 722, 726-27 (La. 1980)(reasoning that "[p]roof of one person's intent is not proof of another's" and thus that to find non-shooter liable state was require to establish "the circumstances indicated that [non-shooter] also actively desired the death of or great bodily harm to the victim").

In support of its principal theory, the state relies upon our recent holding in State v. Anthony, 98-0406 at p. 14 (La. 4/11/00), 776 So.2d 376, 386, cert. denied, 531 U.S. 934, 121 S.Ct. 320, 148 L.Ed. 2d 258 (2000), for the proposition that the state is not required to prove defendant actually pulled the trigger. In Anthony, supra, however, the evidence reflected the defendant's "participation was major;" the defendant "had, minimally, a neutral element of reckless indifference;" the defendant "intended from the outset to kill these victims;" and the defendant was armed. Id. The same cannot be said of the evidence in this case.

The circumstantial evidence the state relied on in this case to establish defendant's liability as a principal was as follows: (1) that defendant was in the Beaugh's neighborhood on the morning of the double homicide (as established by

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[15]La. R.S. 14:24 provides that "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

his own admission and by Ms. Menard's identification); (2) that defendant entered the Beaugh's residence and was armed, albeit with a broken BB gun (as established again by his own admissions); and (3) that defendant failed to prevent (or, as the state argues, attempt to prevent) Jacobs from committing the double homicide. Citing La. R.S. 14:10(1)'s reference to specific intent in terms of an offender's "failure to act," the state argues that the latter apparent failure to act sufficed to establish defendant's specific intent. We disagree.

As a general rule, "liability [as a principal] will not flow merely from a failure to intervene;" however, "silence in the face of a friend's crime will sometimes suffice when the immediate proximity of the bystander is such that he could be expected to voice some opposition or surprise if he were not a party to the crime." 2 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law § 6.7(a)(1986)(Emphasis supplied). Defendant's statement that he was in the Beaugh's garage when the fatal shots were fired places him outside the "immediate proximity" of the double homicide and inside the general rule precluding a finding of liability as a principal based solely on a passive failure to intervene in a friend's criminal acts.

Our finding that the evidence is insufficient to establish defendant's liability as a principal is buttressed by the state's failure to present any evidence establishing defendant's specific intent to kill. No one testified that defendant had anything more than a broken BB gun; indeed, as noted, it was defendant who conceded that much. Ms. Menard, the neighbor, observed no weapons on either of the suspicious pair. This lack of evidence that defendant even was armed with a functional weapon reduces the state's circumstantial case to a request that the jury engage in speculation based merely upon "guilt by association." Pierre, 93-0893 at

p. 6, 631 So. 2d at 429.

Accordingly, we reject the state's contention that the jury reasonably could have found defendant liable as a principal based merely on his failure to prevent Jacobs from committing the double homicide. We hold that the state failed to exclude a reasonable hypothesis of innocence--that defendant was merely present--and, for that reason, we reverse defendant's conviction of first degree murder and death sentence. However, as we noted earlier in this opinion,[16] we find that the evidence in the record is sufficient to support a conviction for second degree murder under La. R.S. 14:30.1(A)(2)(a), which defines that crime as the killing of a human being "[w]hen the offender is engaged in the perpetration or attempted perpetration of" certain enumerated felonies, including armed robbery and aggravated burglary, "even though [the offender] has no intent to kill or to inflict great bodily harm." As the state contends, defendant does not dispute that the elements of this lesser included offense were established; defendant concedes that he entered the Beaugh's residence with the specific intent to commit an aggravated burglary. Given that concession, we find the evidence, filtered through the Jackson v. Virginia sufficiency standard, supports a conviction for second degree murder, an authorized responsive verdict to the charge of first degree murder. La. C. Cr. P. art. 814(A)(1). Accordingly, since (as discussed below) we find no meritorious assignments of error and no prejudicial or erroneous ruling, we modify the judgment of guilty of first degree murder, render a judgment of guilty of second degree murder, and remand the case to the district court for sentencing on the modified judgment as set forth in La. R.S. 14:30.1(B).

**PRETRIAL ISSUES**

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[16]See footnote twelve.

Competency Issues

Defendant argues that the trial court erred by simultaneously finding him incompetent to represent himself, yet competent to stand trial. This issue includes three sub-issues: (i) defendant's competence to stand trial, (ii) defendant's right to represent himself, and (iii) defendant's strategic conflict with appointed counsel. We address each of these separately.

(i) defendant's competence to stand trial

La.C.Cr.P. art. 641 provides that "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." The two-fold test of capacity to stand trial is whether the defendant: (1) understands the consequences of the proceedings, and (2) has the ability to assist in his defense by consultation with counsel. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); State v. Bennett, 345 So.2d 1129, 1138 (La. 1977). While a court may receive the aid of expert medical testimony on the issue of competency to proceed, the ultimate decision of capacity rests with the trial court.[17]

Simply because a defendant's capacity to proceed is called into question by formal motion does not mandate a mental examination be ordered and a sanity commission be appointed. La.C.Cr.P. arts. 643, 644; State v. Goins, 568 So.2d 231, 234 (La. App. 3d Cir.1990), writ denied, 573 So.2d 1117, 1118 (La. 1991). Appointing a sanity commission is neither a perfunctory matter nor a ministerial duty of the trial court; it is not guaranteed to every accused in every case. State v.

[17]La.C.Cr.P. arts. 647, 648; State v. Rogers, 419 So.2d 840, 843 (La. 1982).

Lott, 574 So.2d 417, 424 (La. App. 2d Cir.), writ denied, 580 So.2d 666 (La. 1991). Given the presumption of sanity, before the court is required to appoint a sanity commission, the defendant must establish by a preponderance of the evidence that reasonable grounds exist to doubt his mental capacity to proceed. State v. Bickham, 404 So.2d 929, 934 (La. 1981); Goins, supra. A reviewing court owes the trial court's determination on these matters great weight, and the trial court's ruling will not be disturbed on appeal absent a clear abuse of discretion. Bickham, supra.[18]

In this case, two different defense attorneys (Dohre and Armato) in five separate motions moved to have the trial court appoint a sanity commission. While both defense attorneys expressed concerns about defendant's competency, both attorneys' main concern was that they could not communicate with defendant because he was "uncooperative, violent, and irrational" and that defendant disagreed with their trial strategies. In denying these multiple motions, the trial judge relied upon two factors: (1) that defendant was found competent about a year earlier, albeit in a different, unrelated case in which he was represented by different counsel; and (2) that in his (the trial judge's) prior interactions with defendant, he personally observed that defendant exhibited a good understanding of his current

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[18]State v. Perry, 502 So.2d 543, 549 (La. 1986), cert. denied, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987); State v. Machon, 410 So.2d 1065, 1067 (La. 1982); State v. Morris, 340 So.2d 195, 203 (La. 1976); State v. Franks, 391 So.2d 1133, 1135 (La. 1980), cert. denied, 450 U.S. 983, 101 S.Ct. 1520, 67 L.Ed. 2d 818 (1981)("Neither the testimony of his mother nor that of Dr. Ellington created a reasonable ground to doubt defendant's mental capacity to proceed."); State v. Hicks, 286 So.2d 331, 333 (La. 1973) (When defense counsel presented no evidence on the motion for appointment of a sanity commission, and the psychiatrist asked by the court to examine the defendant reported that the defendant appeared to have the capacity to proceed, "[t]he only logical conclusion that can be drawn from this record is that the defense has failed to convince the court that there was a reasonable ground to doubt the defendant's mental capacity to proceed.")

circumstances and a good handle on legal concepts. Illustrative, in response to the trial judge's questions during a pre-trial hearing on his request to represent himself, defendant explained the charges against him and articulated a relatively complex definition of the legal term principal. Indeed, the prosecutor repeatedly emphasized that defendant gave a better definition of principal than some attorneys.

Citing State v. Synder, 98-1078 (La. 4/14/99), 750 So.2d 832, defendant argues that the trial judge abused his discretion in refusing to appoint a sanity commission. Snyder is easily distinguishable. There, we stated that "when such claims [like difficulty communicating with the defendant], combined with objective medical evidence, raised a sufficient doubt as to defendant's competence, we must question whether defendant received a fair trial in this regard." Snyder, 98-1078 at p. 23, 750 So.2d at 850 (emphasis supplied). Unlike in Synder, defendant offered no medical evidence suggesting he was incompetent.[19]

We do not find that the trial judge abused his great discretion in declining to appoint a sanity commission under the circumstances of this case. Even assuming there was no prior evaluation in an earlier, unrelated case finding defendant competent to proceed, the trial judge was entitled to base his ultimate decision on

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[19]Although appellate counsel relies heavily on Dr. Colon's psychiatric evaluations done in preparation for the defendant's penalty phase to suggest incompetence, Dr. Colon's report was reviewed by the trial court in denying defendant's motions, and the trial court found it unpersuasive. While defendant complains that this report is not in the record, at the pre-trial hearing at which Dr. Colon's report was addressed, defense attorneys argued that if the court admitted this report and turned it over to the state, they would seek writs challenging the ruling. It follows then that due to the defense's own actions this report was never entered into evidence--sealed or otherwise.

Defendant also complains that a bench conference held during a hearing on his motion to appoint a sanity commission was not in the record. Given the lengthy subsequent bench conferences that were recorded regarding defendant's repeated motions to appoint a sanity commission, this omission is clearly not material.

his extensive prior dealings with defendant. Although two defense counsel voiced concern over defendant's behavior, those objections, standing alone, do not persuade us that the trial judge should have appointed a sanity commision.

In sum, given the presumption of sanity and given the trial judge's numerous chances to observe defendant personally, we conclude that defendant failed to demonstrate the trial judge abused his discretion in denying the numerous motions for the appointment of a sanity commission.

(ii) defendant's right to represent himself

As noted, defendant contends that it was inherently inconsistent for the trial judge to simultaneously find him competent to stand trial, yet incompetent to represent himself. While competency to stand trial is equivalent to competency to represent oneself, the Court in Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), cautioned:

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. In this sense there is a "heightened"standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence.

509 U.S. at 401. Explaining the latter statement, the Court noted that "competence to waive" counsel has been used as a "shorthand for the 'intelligent and competent waiver' requirement." Id. More recently, in Martinez v. Court of Appeal of California, 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), which held there is no right to self-representation on appeal, the Court commented:

> [T]he right to self-representation is not absolute. The defendant must "'voluntarily and intelligently'" elect to conduct his own defense, and most courts require him to do so in a timely manner. . . . A trial judge may also terminate self-representation or appoint "standby counsel"--even over the defendant's objection--if necessary. . . . Additionally,

> the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal "chores" for the defendant that counsel would normally carry out. Even at the trial level, therefore, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.

528 U.S. at 162 (internal citations omitted).

An accused has the right to chose between the right to counsel and the right to self-representation. State v. Strain, 585 So. 2d 540, 542 (La. 1991). An accused, however, will be held to have forfeited the right to self-representation if he vacillates between self-representation and representation by counsel. United States v. Bennett, 539 F.2d 45, 51 (10th Cir. 1976); United States v. Frazier-El, 204 F.3d 553 (4th Cir.), cert. denied, 531 U.S. 994, 121 S.Ct. 487, 148 L.Ed. 2d 459 (2000). In light of the fundamental significance attached to the right to counsel, the jurisprudence has engrafted a requirement that the assertion of the right to self-representation must be clear and unequivocal. See 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 11.3(a)(2nd ed.1999)(noting courts should "'indulge in every reasonable presumption against waiver'"); Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); State v. Hegwood, 345 So.2d 1179, 1181-82 (La. 1977). Requests which vacillate between self-representation and representation by counsel are equivocable. Bennett, supra.

Whether the defendant has knowingly, intelligently, and unequivocably asserted the right to self-representation must be determined based on the facts and circumstances of each case. See State v. Strain, 585 So.2d 540, 542 (La. 1991)(citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

Turning to the instant case, we find no merit in defendant's procedural contention that the trial court applied the wrong standard by focusing on his lack of

legal experience and no merit in his substantive contention that his request to represent himself was unequivocable.

Procedurally, the trial judge's reasoning, taken as a whole, evidences that he applied the correct legal standard; specifically he stated:

> Well, it's obvious to me that to waive counsel is not in Mr. Bridgewater's best interest. He would not know what he was doing in the conducting of a trial. He has very little legal experience, if any, and I don't believe that the choice would be — he would make would be a knowing, intelligent choice being made with his eyes open. So I'm going to deny him his right to or deny the right, his motion to represent himself. (Emphasis supplied).

We are satisfied that the trial judge properly focused on defendant's lack of a "knowing, intelligent choice" as his basis for denying the motion. See Frazier-El, supra (rejecting similar argument that district court legally erred in focusing on defendant's competence to represent himself).

Substantively, defendant's request to represent himself was not an unequivocal one; rather, it was an obfuscated request to substitute appointed counsel because of his disagreement with current counsel's choice of trial strategy. Addressing a similar request, the federal court in Frazier-El, supra, reasoned:

> A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel. The circumstances surrounding Frazier-El's purported waiver of his right to counsel and the assertion of his right to proceed without counsel in this case suggest more a manipulation of the system than an unequivocal desire to invoke his right of self-representation. Taking the record as a whole, we are satisfied that the district court was justified, when confronted with Frazier-El's vacillation between his request for substitute counsel and his request for self-representation, in insisting that Frazier-El proceed with appointed counsel.

204 F.3d at 560 (internal citations omitted).

Although the defendant argues that this Court's decision in State v. Santos, 99-1897 (La. 9/15/00), 770 So.2d 319, is controlling, that case is easily

distinguishable. In Santos, supra, the defendant made an unequivocal request to discharge his court-appointed counsel and to represent himself, explaining that he feared "'the Indigent Defender Board is working with the police of St. Bernard Parish to keep me here.'" 99-1897 at p. 3, 770 So.2d at 321. Unlike the defendant in Santos who was convinced that no public defender could serve his interests, in this case defendant specifically stated that it was current counsel with whom he was dissatisfied. Two other factors we relied upon in Santos were that the defendant (i) unequivocally asserted his right to represent himself, and (ii) made that request "under circumstances which precluded a finding that he was simply engaged in dilatory tactics." 99-1897 at p. 4, 770 So.2d at 322. Neither factor is present here.

First, defendant's request was not clear and unequivocal; rather, defendant's request was, like in Frazier-El, supra, "a manipulative effort to present particular arguments" and vacillated between self-representation and representation by counsel. Second, given that defendant raised similar arguments before (a point discussed below) and that he sought a continuance on the eve of trial, this clearly could be characterized as a "dilatory tactic."

(iii) defendant's strategic conflict with appointed counsel.

Defendant claims that the trial court erred in denying his attorney's motion to withdraw four days before trial "based on irreconcilable conflicts between [himself] and Mr. Bridgewater." At a pre-trial, ex parte, sealed hearing, defense counsel clarified that the conflict arose out of defendant's wish to present a defense of total innocence and counsel's recommendation that defendant admit to second degree murder and argue that the requisite specific intent needed to prove first degree murder was lacking.

As a general proposition, a criminal defendant has the right to counsel of his

choice. State v. Leggett, 363 So.2d 434, 436 (La. 1978); State v. Mackie, 352 So.2d 1297, 1300 (La. 1977); State v. Anthony, 347 So.2d 483, 487 (La. 1977). This right, however, is the flip-side of the right to self-representation. Like self-representation, this right cannot be manipulated to obstruct orderly court procedure or to interfere with the fair administration of justice.[20] "Defendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings." State v. Seiss, 428 So.2d 444, 447 (La. 1983). Absent a justifiable basis, "[t]here is no constitutional right to make a new choice of counsel on the very date the trial is to begin, with the attendant necessity of a continuance and its disrupting implications." State v. Leggett, 363 So.2d at 436. A trial court's ruling on this issue will not be disturbed in the absence of a clear showing of abuse of discretion. State v. Cousin, 307 So.2d 326, 328 (La. 1975).

In the instant case, defendant voiced the same strategic conflict with prior counsel, Armato, as he had with his trial counsel, Dohre. Given that this was (as the state suggests) becoming a "pattern," that defendant had already gone through two other attorneys, and that this capital murder trial was scheduled to begin in just four days, we cannot say that the trial court abused its discretion by denying defense counsel's motion to withdraw.

*Batson* challenges

Defendant claims that the state systematically excluded African-Americans from the jury by striking the only two African-Americans qualified for the petit jury, resulting in defendant, an African-American, being tried by a jury of all Caucasian-

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[20] State v. Seiss, 428 So.2d 444, 447 (La. 1983); State v. Johnson, 389 So.2d 1302, 1304 (La. 1980), State v. Jones, 376 So.2d 125, 129 (La. 1979); State v. Lee, 364 So.2d 1024, 1028 (La. 1978).

Americans.[21]

In its simplest statement, the Batson analysis is as follows:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834, 839 (1995). While the state counters that defendant failed to even satisfy step one, the state's voluntary articulation of race-neutral explanations (step two) mooted the issue of whether defendant satisfied the prima facie case requirement (step one). State v. Green, 94-0887 at p. 25 (La. 5/22/95), 655 So. 2d 272, 288. This case thus involves only step three--whether defendant proved purposeful discrimination. In finding defendant failed to do so, the trial court did not err.

The state's reasons for challenging both African-American jurors, Ms. Campbell and Ms. Black, were race-neutral. The record reveals that the prosecutor, in response to the defense's Batson challenge, voluntarily articulated the following reasons for striking these two prospective jurors:

> [Ms. Black was] the lady who indicated that she had some acquaintance with the defendant's father, stopped and spoke with him as she left court the other day. Had a smiling, very friendly conversation with him. It was apparent she knew him in some capacity. She indicated she knew him from working downtown years ago.
>
> As to Ms. Campbell, the reason we cut her, contrary to Mr. Dohre's opinion that she is a good State juror, she's indicated she's a security

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[21]Defendant's real objection appears to be the composition of the entire venire, as evidenced by defense counsel's statement that "Judge, that this is the second of the only two [African-Americans] in the 28 people who have been called up here today and we're definitely lodging an objection." Defendant's failure to challenge the venire timely resulted in a waiver of such challenge.

> officer. The State has a habit of never keeping anybody in law enforcement or in any type of security. . . .
>
> Also, we believe that with a brother that was dead, that could cut both ways. I don't know that that's necessarily favorable to the State if, in fact, the person who murdered her brother was not sentenced to death, she might feel that no one deserves to be. And we had some concerns about that, felt like it could go both ways, so for those two reasons, we cut Ms. Campbell.

Defendant countered that there were two other prospective Caucasian-American jurors who had people murdered in their family, but whom the state accepted. Defendant's counter argument is without merit, factually and legally. Factually, neither of those other jurors remained on the jury; the state could have used their backstrikes on them had the defense not excused them. Legally, this court rejected a similar argument in State v. Taylor, 99-1311 at p. 5 (La. 1/17/01), 781 So. 2d 1205, 1212, stating that "although the voir dire responses of [the striken] prospective juror Porter are not markedly different from other venire-persons who actually sat on the jury, the defendant fails to show that the trial court erred when it accepted the state's race-neutral explanation for the strike." Id. The trial court thus correctly concluded that defendant failed to prove purposeful discrimination.

## TRIAL PHASE ISSUES

We have grouped defendant's remaining assignments of error pertaining to the trial proceeding into three broad categories: (i) mistrial motions, (ii) incomplete record, and (iii) prosecutorial misconduct. We address each of these categories.

(i) Mistrial Motions

Defendant argues that the trial court erroneously denied several motions for mistrial lodged during the trial. Keeping in mind the general principles that mistrial is a drastic remedy warranted only when substantial prejudice implicates the

fairness of trial and that the trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial,[22] we address each of these motions defendant reurges.

*(a) Prejudicial Publicity*

La.C.Cr.P. art. 775 requires a mistrial when "prejudicial conduct in or outside the courtroom makes it impossible for the defendant to receive a fair trial." (Emphasis supplied). Prejudicial conduct may include pretrial or midtrial publicity about the case. State v. Russell, 416 So.2d 1283, 1290 (La.), cert. denied, 459 U.S. 974, 103 S.Ct. 309, 74 L.Ed.2d 288 (1982). A mistrial "is not warranted absent a determination that the jurors were actually exposed to the publicity in question and were so impressed by it as to be incapable of rendering a fair and impartial verdict." Russell, 416 So.2d at 1290.[23]

In this case, the prejudicial conduct defendant relies upon is an article that appeared in the Times-Picayune on the second day of jury selection. The article reported that defendant and Jacobs both admitted they were at the crime scene, but each one accused the other of being the shooter. Defendant contends that this

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[22]State v. Sanders, 93-0001 at pp. 20-21 (La. 11/30/94), 648 So.2d 1272, 1288-89; State v. Wingo, 457 So.2d 1159, 1166 (La. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2049, 85 L.Ed.2d 322 (1985); State v. Harper, 430 So.2d 627, 635-636 (La. 1983); State v. Tribbet, 415 So.2d 182, 186 (La. 1982); State v. Smith, 430 So.2d 31, 44 (La. 1983).

[23]See also Sanders, 93-0001 at p. 20, 648 So.2d at 1288 ("As to the five ultimately selected to sit on the petit jury, the individual questioning by the trial judge supports the conclusion that although the jurors had suffered exposure to the publicity, none were so impressed by it as to be incapable of rendering a fair and impartial verdict"); State v. Young, 569 So.2d 570 (La. App. 1st Cir. 1990), writ denied, 575 So.2d 386 (La. 1991); State v. Hunter, 551 So.2d 1381, 1385 (La. App. 3rd Cir. 1989); see also Marshall v. United States, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959) ("The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. . . . Generalizations beyond that statement are not profitable, because each case must turn on its special facts.")

article resulted in prejudicial publicity; more precisely, he contends that it "tainted the entire jury panel and appropriate measures were not taken to ensure that prospective jurors, particularly those qualified the previous day" were not tainted by this prejudicial publicity. Contrary to defendant's contention, we find the measures taken by the trial court were sufficient to ensure the publicity did not taint the jury.[24]

*(b) Defendant's outburst*

Defense counsel moved for a mistrial immediately after an outburst by defendant that occurred at the end of the state's closing arguments. Particularly, the outburst occurred as the prosecutor, Ms. Morgan, completed her rebuttal closing argument, and the following exchange took place:

> DEFENDANT: Before you sit down, Ms. Morgan - I want to say — (Attorneys urge the defendant to keep quiet.)
>
> COURT: Let's remove the jury from the court.
>
> JURY EXITS COURTROOM
>
> (While the jury is exiting the courtroom, the defendant starts to speak again).
>
> DEFENDANT: I still want to say --
> (Attorneys and deputies tell the defendant to keep quiet.)
>
> DEFENDANT: -- that Jacobs was convicted of this crime. If I'm the killer, why was he convicted of this damn crime already, Ms. Morgan? That's what I want to know.
>
> THE DEPUTIES RESTRAIN THE DEFENDANT FROM SAYING ANYTHING FURTHER AND REMOVE HIM FROM THE COURTROOM.

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[24]In denying the mistrial motion, the trial judge agreed to question each of the jurors about their exposure to the article and to repeat his prior instruction to the panel that they are not to read the newspaper. Moreover, both jurors who admitted they read the article were excused and two other jurors who indicated they were exposed to prior articles or publicity were excused. And, as the state stresses, none of the jurors who actually decided the case were exposed to the article.

In denying defendant's mistrial motion, the trial judge admonished defendant that if he was unable to keep quiet, the court would have him gagged; admonished Ms. Morgan regarding her comments that apparently provoked this outburst; and admonished the jury, instructing them that: "it's been a long and stressful day and I need to instruct you to disregard Mr. Bridgewater's comments."

Defendant argues that the prosecutor's improper closing argument provoked his outburst and the ensuing prejudice and that the trial judge's admonishment was insufficient to cure the error. The state counters that defendant's outburst was a deliberate and calculated move from which he should get no benefit. We agree. As former Justice Tate aptly stated in State v. Wiggins, 337 So.2d 1172, 1173 (La.1976), "[a] defendant cannot complain that prejudicial conduct requires a mistrial, when the alleged prejudice was created by his own obstructive conduct met by a reasoned and ordered reaction by the trial court in the interest of maintaining orderly procedure in the courtroom." Id.**;** State v. Shank, 448 So.2d 654, 658 (La. 1984)( "defendant is [not] entitled to a new trial because his first was tainted with prejudice caused by his own conduct.").[25]

*(c) Improper indirect references to defendant's failure to testify*

La.C.Cr.P. art. 770(3) provides that the trial court "shall" declare a mistrial when the prosecutor "refers directly or indirectly" to "[t]he failure of the defendant

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[25]The federal jurisprudence is in accord. Indeed, almost one hundred years ago, the Court in Falk v. United States, 15 App.D.C. 446 (1899), held that to afford a defendant relief based on his own misconduct would be to give him a tool by which he can effectively prevent forever a final determination of his guilt. "To allow the disruptive activities of a defendant like respondent to prevent his trial is to allow him to profit from his own wrong. The Constitution would protect none of us if it prevented the courts from acting to preserve the very process that the Constitution prescribes." Illinois v. Allen, 397 U.S. 337, 350, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)(Brennen, J., concurring).

to testify in his own defense." (Emphasis supplied). When the challenged reference is indirect, the court must inquire into the remark's "intended effect on the jury" so as to distinguish between impermissible indirect reference to the defendant's failure to testify and permissible general statements that the prosecution's case was unrebutted. State v. Johnson, 541 So.2d 818, 822 (La. 1989). "In cases where the prosecutor simply emphasized that the state's evidence was unrebutted, and there were witnesses other than the defendant who could have testified on behalf of the defense but did not do so, the prosecutor's argument does not constitute an indirect reference to the defendant's failure to take the stand." Id. at 822-23; State v. Smith, 433 So.2d 688, 694-95 (La. 1983) (prosecutor's comments allegedly directed to defendant's failure to testify actually related to lack of evidence).

In this case, the prosecutor's reference to defendant's quiet demeanor did not refer to his failure to testify; instead, these references were intended to rebut defendant's claim that his co-defendant-Jacobs, and only his co-defendant, had the necessary specific intent to kill. Accordingly, the comment was within the bounds of proper closing argument and did not warrant a mistrial. Likewise, despite appellate counsel's creative attempt to frame the prosecutor's closing arguments about defendant's lack of remorse as an indirect reference to defendant's failure to testify, at most, the comments regarding defendant's lack of remorse reflect impermissible closing argument. Regardless, defense counsel's failure to object waived this issue on appeal. La.C.Cr.P. art. 841.

*(d) Improper other crimes evidence*

La.C.Cr.P. art. 770(2) mandates a mistrial "when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official,

during the trial or in argument, refers directly or indirectly to . . . [a]nother crime committed or alleged to have been committed by the defendant as to which evidence is not admissible." Unsolicited and unresponsive testimony, however, is not chargeable against the state to provide a ground for mandatory reversal of a conviction.[26]

Defendant contends that impermissible other crimes evidence was improperly admitted when the state played a portion of the tape recording of Ms. Menard's 911 call; specifically, defendant objects to her remark that "two [unidentified] blacks had committed some robberies in the area." Defendant stresses that the state agreed to excise this information from the tape before playing it in front of the jury. This unsolicited remark inadvertently left in the 911 tape is not a grounds for a mandatory mistrial under La. C.Cr.P. art. 770(2); rather, this oblique and ambiguous reference falls under La.C.Cr.P. art. 771, which provides for a discretionary mistrial when a witness' prejudicial remarks render it impossible for the defendant to obtain a fair trial. State v. Smith, 418 So.2d 515, 522 (La. 1982); State v. Prudholm, 446 So.2d 729, 741 (La. 1984). Such is not the case here. Ms. Menard's remark did not refer to any specific crime committed by defendant; she merely referenced her personal knowledge of recent robberies committed in her neighborhood by two unidentified African-American males.

*(e) Improper reference to co-defendant's statement*

Defendant cites the testimony of the lead investigator, Detective Maggie

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[26]State v. Jack, 554 So.2d 1292, 1295-96 (La. App. 1st Cir. 1989), writ denied, 560 So.2d 20 (La. 1990); Cf. State v. Watson, 449 So.2d 1321, 1328 (La. 1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed. 2d 952 (1985)(police officer's unsolicited remark is not the comment of a "court official" under La.C.Cr.P. art. 770); State v. Holmes, 94-0907 (La. App. 5th Cir. 3/15/95), 653 So.2d 642 (police detective's testimony that photograph of defendant used in photographic lineup was "booking" photograph did not entitle defendant to mistrial).

Snow, regarding co-defendant-Jacobs' statement to police as a basis for a mistrial. Particularly, defendant quotes the following exchange:

> STATE: During your investigation, were you ever able to formulate who the shooter was?
>
> WITNESS: No, I was not. Neither one during any time of the investigation admitted to being the trigger man.

Defense counsel objected to this exchange and moved for a mistrial, arguing that the prosecutor was "comment[ing improperly] about what the other guy didn't say" and that "[t]he jury shouldn't be told that the other guy didn't make a statement saying that he was the shooter." Defendant adds that the prosecutor's extensive voir dire on the "buddy system" of committing crimes made this exchange particularly prejudicial.

Even assuming this reference to Jacobs' statement was inadmissible hearsay, the jurors knew that defendant and Jacobs were being separately tried for this double homicide. Furthermore, the "finger pointing" substance of Jacobs' statement was not the crux of the state's case; rather, as discussed earlier, the state's case centered on the assumption that Jacobs was the shooter, and defendant was a principal. Admitting this statement was thus, at best, harmless error. See State v. Willie, 559 So. 2d 1321, 1332 (La. 1990)(admitting hearsay evidence which is merely corroborative and cumulative of other properly introduced evidence is harmless).[27]

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[27]Defendant also claims that the prosecutor argued facts not in evidence by improperly referring to the co-defendant-Jacobs' statement, citing the following remark: "[t]here are four people who know who pulled the trigger in that room. Two of them are dead. The other two - well, you know the other two, you know what he says. You know from Lieutenant Snow that nobody ever admitted to shooting anybody." This portion of the state's argument accurately reflects the testimony of Lieutenant Snow, quoted above, that neither co-defendant admitted to being the shooter. The prosecutor's argument summarizing Ms. Snow's

(ii) incomplete record

La. Const. Art. I, § 19 guarantees an accused the right to an appeal based on a complete record. Although this Court has found reversible error when material portions of the trial record were unavailable or incomplete, we have declined to reverse an accused's conviction based on "[a] slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal." State v. Ford, 338 So.2d 107, 110 (La. 1976); see also State v. Parker, 361 So.2d 226, 227 (La. 1978). Moreover, a defendant is not entitled to relief based on an incomplete record absent a showing of prejudice resulting from the missing portions of the transcripts. State v. Castleberry, 98-1338 at p. 29 (La. 4/13/99), 758 So.2d 749, 773, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999) (holding no reversible error given defendant failed to show prejudice resulting from bench conferences not being transcribed).

Defendant contends that the record is incomplete in that it lacks, among other things, the following: (a) the bench conference on jury charges, (b) the jury's note, and (c) the discussions regarding books and movies for the jury.[28]

*(a) the bench conference on jury charges*

Defendant argues that the lack of a transcript of the critical bench conference on jury charges precluded his appellate counsel from determining whether his trial counsel lodged any objections to the court's instructions. Given that none of defendant's claims regarding jury instructions had any merits,[29] the omitted portion

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testimony was proper.

[28]The alleged record omissions discussed elsewhere in this opinion are not repeated here.

[29]See footnote thirty-three addressing defendant's argument regarding the "acquit first" instruction. As to defendant's other two arguments regarding jury instructions, those pertained to the instruction on "principals" and the judge's failure to

of the record was not material.

*(b) the jury's note*

Defendant argues that the trial court erred when it answered a jury question outside his presence. This issue arose after the jury returned its guilt verdict. At that point, defense counsel informed the trial judge that, according to defendant's family, the jury had asked a question or wanted an instruction during deliberations. Without responding, the court polled the jury and then stated: "[t]his is the note that the jury knocked and said that can we have a copy of the judge's instructions to the jury and I instructed the bailiff to tell them no, they couldn't have anything written in the jury room." Objecting, defense counsel argued that the fact the jury requested written instructions could be construed to mean they needed some instruction. Defendant thus contends that the trial judge's failure to bring the jury back into the courtroom constituted reversible error under La.C.Cr.P. art. 808.[30]

The better practice would have been to bring the jury back and to instruct them that no written materials are allowed in the jury room. However, since the jury did not ask to be re-instructed, we do not find the trial judge's actions were erroneous.

While the actual note is not in the record, its contents are clear from the record. Reading the note aloud, the trial judge stated on the record that "[i]t's

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instruct on the elements of aggravated burglary (an underlying felony). Defendant's arguments regarding those two instructions were rendered moot by our reversal of defendant's first degree murder conviction. Regardless, defense counsel did not object properly to the jury instructions and therefore did not preserve the issue for appellate review.

[30]La. C.Cr.P. art. 808 provides that "[i]f the jury . . . after having retired to deliberate . . . desires further charges, the officer in charge shall bring the jury into the courtroom, and the court shall in the presence of the defendant, his counsel, and the district attorney, further charge the jury."

pretty straight forward; [the note asks] 'Can we have a copy of the judge's instructions to the jury?'" This omission is thus immaterial.

*(c) The books and movies for the jury*

The absence from the transcript of the discussions regarding which books and movies would be allowed for the sequestered jury clearly constitutes an "inconsequential omission" to the proper determination of defendant's appeal. Ford, 338 So.2d at 110.

(iii) Prosecutorial Misconduct

La.C.Cr.P. art. 774 provides that the scope of argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact which each side may draw, and to the law applicable to the case; argument shall not appeal to prejudice. Nonetheless, this court will not reverse a conviction if not "thoroughly convinced" that the improper closing argument influenced the jury and contributed to the verdict.[31] Even when the prosecutor's statements and actions are excessive and improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have seen the evidence and heard the arguments. State v. Kyles, 513 So. 2d 265, 276 (La. 1987).

In the instant case, defendant argues that the prosecutor's closing arguments violated La.C.Cr.P. art. 774 in five respects.

First, defendant argues that the prosecutor's disparaging remarks about

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[31]See State v. Martin, 93-0285 at p. 18 (La. 10/17/94), 645 So.2d 190, 200, cert. denied, 515 U.S. 1105, 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995); State v. Kyles, 513 So.2d 265, 275 (La. 1987); State v. Jarman, 445 So.2d 1184, 1188 (La. 1984); State v. Knighton, 436 So. 2d 1141, 1152 (La. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); State v. Dupre, 408 So.2d 1229, 1234 (La. 1982).

defense counsel during voir dire and closing argument were improper.[32] While prosecutors should refrain from personal attacks on defense strategy and counsel, a comment that suggests the state carried its burden despite defense attempts to show otherwise, even if improper, is not reversible error. See State v. Brumfield, 96-2667 at p. 4 (La. 10/20/98), 737 So.2d 660, cert. denied, 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999); State v. Lucky, 96-1687 at p. 22 (La. 4/13/99), 755 So.2d 845, 858, cert. denied, 529 U.S. 1023, 120 S.Ct. 1429, 146 L.Ed.2d 319 (2000).

Second, defendant complains that the prosecutor characterized him as a "cold-blooded killer" and an "animal." The state clarified that the latter characterization was a comparison of defendant to "an animal looking for prey," and further replied that these were accurate characterizations. We have held that

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[32]Specifically, defendant complains of the following remarks during voir dire:

> "You could have a doubt, and remember, there will always be that voice that's telling you to look for doubt, telling you to say, there's got to be doubt here, then our client is not guilty."
>
> "And remember all the time the defense's job is going to be to get you to look for doubt and they're going to throw some stuff up there, I'm sure, and you have to sort it out."

Defendant further complains of the following remarks during closing argument:

> "To think that intelligent jurors like you are going to have to listen to somebody make excuses and have somebody argue to you about excuses as to what criminal intent is; you're smart enough to look at the facts, you're smart enough to say that, Yeah, okay, I'm going to listen to what you got to say but the facts are the facts."
>
> "Well, he hires himself a good lawyer and he gets a lawyer that's going to be able to take that intent thing and kind of twist it around and hope that he can play the odds--. . . he knows that the odds aren't good that all 12 of you are going to buy this nonsense that he had no intent to kill anybody."

characterizing a defendant as an animal, while ill-considered, is not reversible error. State v. Gray, 351 So.2d 448, 460 (La. 1977).

Third, defendant contends that the prosecutor misstated the law by telling jurors that they had to acquit of first degree murder before they could consider the responsive verdicts. Misstatements of law by the district attorney during argument do not give rise to reversible error when the trial court properly instructs the jury at the close of the case. State v. Cavazos, 610 So.2d 127, 128-29 (La. 1992); State v. Brogdon, 457 So.2d 616, 630 (La. 1984). Assuming this statement was an incorrect characterization of the applicable law,[33] any prejudice was cured by the trial judge's jury charges, which included proper instructions regarding the responsive verdicts to first degree murder.

Fourth, defendant contends that the prosecutor improperly appealed to prejudice by playing the tape recording of Ms. William's 911 call for a third time and by displaying gruesome photographs of the victims. Given that both the 911 tape and the photographs were properly admitted at trial,[34] the prosecutor's

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[33]As noted, defendant argues that the trial court erroneously gave an "acquit first" instruction; more specifically, defendant urges us to reconsider our holding in State v. Sanders, 93-0001 (La. 11/30/94), 648 So.2d 1272, cert. denied,517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996), approving this "step down" instruction. In Sanders, supra, this court unanimously rejected the attack on the "step down" instruction, which requires jurors to acquit the defendant of first degree murder before they consider any of the responsive verdicts. We concluded that the charge does not create a reasonable likelihood that jurors will apply it in an unconstitutional manner by considering responsive verdicts otherwise supported by the evidence at trial withdrawn from their consideration. We decline defendant's invitation to revisit this issue.

[34]Defendant challenges the repeated playing of the recording of Ms. William's 911 call, especially during argument, and characterizes this as "victim impact evidence" being improperly introduced during the guilt phase. We find no merit to this argument. Defendant also challenges the admissibility of the gruesome photographs and argues that the trial court committed reversible error by allowing the state to introduce these

displaying the pictures and playing the tape were within the scope of proper argument as defined by La. C.Cr.P. art. 774.

Finally, defendant contends that the cumulative effect of the allegedly improper statements by the prosecutor during closing argument warrants relief. In support of this contention, defendant cites the fact that following his outburst the trial judge admonished the prosecutor as demonstrating the "pervasiveness of the misconduct and the cumulative effect of the improper arguments." Defendant's reliance on that admonishment is misplaced; the trial judge was attempting to bring order to the courtroom and was not specifically admonishing the prosecutor for improper argument. Nor do we find any merit to defendant's contention that the cumulative effect of the prosecutor's improper arguments was prejudicial. See State v. Scales, 93-2003 at p. 13 (La. 5/22/95); 655 So.2d 1326, 1335, cert. denied,

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autopsy photographs, especially those showing a metal rod inserted into the victims' bullet wounds. Defendant contends that the prejudicial effect of these photographs outweighed their probative value under La.C.E. arts. 401, 403.

Photographic evidence will be admitted unless it is so gruesome that it overwhelms jurors' reason and leads them to convict without sufficient other evidence; the state is entitled to the moral force of its evidence, and post-mortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, as well as location and placement of wounds and to provide positive identification of the victim. State v. Koon, 96-1208 at p. 34 (La. 5/20/97), 704 So.2d 756, 776, cert. denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997); State v. Maxie, 93-2158 at p. 11 (La. 4/10/95), 653 So.2d 526, 532, fn. 8 (citing State v. Martin, 93-0285 at p. 14 (La. 10/17/94), 645 So.2d 190, 198; State v. Watson, 449 So.2d 1321, 1326 (La. 1984); State v. Kirkpatrick, 443 So.2d 546, 554-55 (La. 1983)); State v. Perry, 502 So.2d 543, 558-59 (La. 1986), cert. denied, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987)). In this case, the photographs at issue were introduced during the state's redirect questioning of its forensic pathologist, Dr. Susan Garcia, who performed the autopsies. The photographs corroborated Dr. Garcia's testimony regarding the trajectory of the bullets that killed the victims. Contrary to defendant's contention, the probative value of these photographs was not outweighed by their prejudicial effect.

516 U.S. 1050, 116 S.Ct. 716, 133 L.Ed.2d 670 (1996)(rejecting similar argument). The prosecutorial misconduct defendant cites, even if outside the proper scope of closing argument, does not require relief, singularly or collectively.[35]

Decree

For the reasons assigned, we set aside defendant's first degree murder conviction and death sentence. We hereby modify the jury's verdict of guilty of first degree murder and render a judgment of guilty of second degree murder. La. C.Cr.P. art. 821(E). We remand the case to the district court for sentencing of defendant on the modified judgment to serve life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence as provided for in La. R.S. 14:30.1(B).

[35]Nor does defendant's cumulative error argument pertaining to all of his pre-trial and guilt phase assigned errors have any merit. See Mullen v. Blackburn, 808 F.2d 1143, 1147 (5th Cir. 1987) (court rejects cumulative error claim and finds that "twenty times zero equals zero"). As noted earlier, we pretermit addressing the penalty phase assigned errors given our reversal of defendant's first degree murder conviction and death sentence.