SUPREME COURT OF LOUISIANA

NO. 96-KA-1609

STATE OF LOUISIANA

V.

MANUEL ORTIZ

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA,
HONORABLE ERNEST V. RICHARDS, IV, JUDGE

MARCUS, Justice*

Manuel Ortiz was indicted on two counts of first degree murder for the murders of Tracie Williams Ortiz and Cheryl Mallory, in violation of La. R.S. 14:30. After trial by jury, defendant was found guilty as charged on each count. A sentencing hearing was conducted before the same jury that determined the issue of guilt. The jury unanimously recommended that a sentence of death be imposed on defendant on each count. The trial judge sentenced defendant to death in accordance with the recommendation of the jury.

On appeal, defendant relies on thirty-one assignments of error for reversal of his convictions and sentences.[1]

FACTS

At about 7:00 P.M. on the evening of October 23, 1992, neighbors of Tracie Williams Ortiz, the wife of the defendant,

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* Calogero, C. J., not on panel, recused. Rule IV, Part 2, §3.

[1] The assignments of error not discussed in this opinion do not represent reversible error and are governed by clearly established principles of law. They will be reviewed in an appendix which will not be published but will comprise part of the record in this case.

found her severely injured and lying face down in an alley leading from her condominium at 901 Vouray Street in Kenner, Louisiana. Tracie, a black woman, had married the defendant in May of that same year. She told them that she had been stabbed and robbed and that her friend was inside the condominium. An emergency call was made to the police, but Tracie died before help arrived. When Jefferson Parish officers Christy Parker and Lynn Able got to the scene, they found Cheryl Mallory wounded inside. She had been shot twice and died at the scene after efforts to resuscitate her proved unsuccessful. The officers found no signs of forced entry and it did not appear to them that the residence had been ransacked. Family members testified at trial that nothing appeared to be missing from Tracie's home.

Shortly after the arrival of the police, the defendant's nephew arrived and spoke to the neighbors who had discovered the body outside. He told them that Tracie had called him that evening and asked whether his uncle, her husband, had given the key to the condominium to anyone because she thought certain items in the home had been disturbed. While they were talking, Tracie screamed and the phone went dead. He immediately drove to the scene but it was too late to render any assistance. He expressed concern that the police might think that his uncle was responsible and reported that his uncle was out of the country at the time.

The coroner, Dr. Susan Garcia, testified that Tracie died from a fatal stab wound to her left breast. She was also stabbed in the back and had defensive wounds on her arms and hands. Cheryl Mallory died from a gunshot wound to her left chest. She had a second gunshot wound to her abdomen, from which a medium caliber copper-jacketed Hydroshock bullet was removed. Another spent Hydroshock bullet also found on the second floor of the condominium. Both of these bullets bore markings indicating that they could

have been fired from a Glock nine millimeter pistol.[2] Neither the neighbors that found Tracie nor anyone else testified to having heard any gunshots or sounds of a struggle, possibly indicating that a silencer had been used on the gun that killed Cheryl Mallory.

The morning after the murders, Detective Bill Mouret and others conducted a "perimeter search" near the condominium. In the backyard of an adjoining condominium, police found a Glock nine millimeter magazine (fully loaded with Remington cartridges) and a brown gardening glove on an exposed shelf that held painting materials. A Clerke .22 caliber revolver, later determined to have been lent to Tracie by her brother-in-law, was found just under the porch of a shed in the adjoining yard. A fence separating this yard from the yard of the home directly behind the victim's was chipped, suggesting that someone might have climbed it in haste. In the next yard police found another brown gardening glove that appeared to match the first one found. From the path along which possible evidence of the crime was found, police eventually concluded that the murderer may have escaped through a vacant lot in the next block behind the victim's home. Eight days after the murder, on October 31, 1992, police conducted a thorough search of the vacant lot and discovered a Gerber Mark I tactical knife in a sheath. It appeared that identifying marks on the knife had been ground off near the hilt. DNA testing on minute traces of blood found on the knife indicated that it was the weapon used to murder Tracie. The gun used to murder Cheryl Mallory was never recovered.

Further investigation by the police revealed that Tracie, accompanied by the defendant, had purchased two Glock pistols in July, 1992. The Wal-Mart employee who approved the sale testified that Tracie was consulting with the defendant throughout the

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[2] Various other cartridges were also found at the scene. A .22 unspent cartridge was found under a second floor bed and 2 nine millimeter spent cartridges were found on the second floor, both of which also bore markings consistent with firing from a Glock pistol.

purchase. An employee from another Wal-Mart location testified that Ortiz had purchased a Glock nine millimeter pistol in May, 1992 and a Glock 40 caliber pistol on September 3, 1992.

While investigating additional gun transactions at a Chalmette sporting goods store, one of the employees, Vickie Billiot, volunteered that on October 17, 1992, just six days before the murders, she had shown a Gerber Mark I tactical knife to the defendant which he purchased along with a Baretta pistol. This was the same type of knife that had been found in the wooded lot near the murder scene. At trial, defense counsel attempted to prove that Ortiz had purchased a different type of Gerber knife and not the tactical model with serrated edges identified as one of the murder weapons. The testimony reflected that very few knives of this model are sold by the manufacturer to stores in this region and no sales in Louisiana were recorded at all in 1992. In fact, only 18 knives of this type were sold in the region that year, all shipped to Texas. However, an independent Gerber sales representative testified that he had sold two of the relatively rare knives in question to the Chalmette store out of his sample inventory. Ms. Billiot was steadfast in her testimony at trial that she definitely sold the Gerber Mark I tactical model with serrated edges to the defendant on October 17, 1992.

During the course of the investigation, agents from the FBI put the Kenner police in touch with Carlos Saavedra, who later proved to be the state's most important witness. Saavedra told the police during the investigation and testified at trial that he had known the defendant, Manuel Ortiz, in connection with some mechanic work Ortiz had done on one of his cars. They had also been involved in the joint purchase of a fax machine. Some time in 1992 before June, Ortiz had approached him to become involved in a scheme in which members of the Latin community would purchase vehicles for a small down-payment, insure them against theft, falsely report them as stolen, collect the insurance proceeds, and

resell the vehicles in Central America. Saavedra, a long-time informant for the government, actually accompanied Ortiz to look at an Isuzu that Saavedra was to purchase as part of the insurance fraud scheme. The vehicle purchase was not completed but Ortiz proposed that same afternoon that Saavedra take part in a larger scheme. Ortiz suggested that Saavedra murder someone that Ortiz had heavily insured in exchange for part of the life insurance proceeds that would be payable. Saavedra reported the suggested scheme to his contacts with the FBI in June, 1992.

Throughout July and August of 1992, Saavedra continued to report to the FBI on his conversations with Ortiz about the proposed deal. He played along with the scheme, tried to find out the identity of the proposed victim and attempted to bring in an undercover FBI agent. In the course of the negotiations, Ortiz told him that the proposed victim would be a black female, living in Kenner, who played tennis,[3] worked out and was athletic. He indicated that he would send Saavedra a packet of materials with a key to the victim's residence and information on the victim's activities. Ortiz asked that he determine when he would commit the murder and tell Ortiz in advance so he could arrange to be out of the country at the time. Ortiz told him that he would provide the murder weapon. At first Ortiz suggested a gun and silencer. Later he told Saavedra he wanted him to stab the victim and make it look like a sexual assault and robbery.

Throughout these discussions, Saavedra was reporting to FBI agents, who testified at trial substantiating Saavedra's story. The negotiations broke down by early September, 1992 because Ortiz did not want to bring in a third person from Texas as Saavedra was proposing (the undercover FBI agent), to help commit the murder. Ortiz told Saavedra that he might bring in a hit man from El Salvador known as "Hercules" to do the job.

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[3] Police found tennis gear on the ground floor of the condominium when they searched after the crime.

Thirteen days after the murders, Detective Mouret contacted Ortiz, who had left for El Salvador the day before the murders and was still there.[4] Ortiz asserted that he did not know what had happened to his wife, even though he admitted having spoken to the nephew who had been at the crime scene. When told that his wife was dead, he advised the detective that he would return to the United States in about ten days when he had completed his business in El Salvador. Ortiz was arrested in Miami when he reentered the country.

Shortly after Ortiz was arrested, police obtained a warrant to search his luggage and the home of his parents, which he had listed as his residence when arrested and where he received mail. In the garage, detectives found and seized a grinding wheel. The residue from the grinding machine was later identified by the state's forensic metallurgist as containing debris consistent with the 440C stainless steel used in the manufacture of Gerber Mark I tactical knives. The shape of the wheel was also consistent with its having been used to grind identifying marks off of the knife found in the wooded lot. In a locked tool box underneath the grinder, police found original insurance policies on the life of Tracie and "six torn pages" (some of which were written in Spanish) indicating that an Isuzu truck had been driven over the El Salvadoran border by Ortiz on June 17, 1992. Ortiz had participated in reporting the theft of the same Isuzu, owned by his wife, on July 6, 1992.[5] In defendant's luggage, police found an address book with the phone number of Carlos Saavedra, various insurance papers, and a document related to the importation of the Isuzu into

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[4] Ortiz originally had a reservation to leave for El Salvador on the morning of the murders. He went to the airport one day early, changed his reservation and left the day before the murders.

[5] State Exhibit No. 157 is a police report showing Manuel Ortiz as the person reporting the theft of a new 1992 Isuzu Rodeo with temporary plates. The report includes the VIN number of the vehicle. Three Glock nine millimeter handguns were reported as having been stolen in the vehicle, as well as five other guns.

El Salvador. Some of the mail recovered from his luggage was addressed to Ortiz shortly after the murders at addresses other than the Vouray condominium and was also being forwarded. Evidence was presented that about two weeks before the murders, he had rented another apartment in Jefferson Parish.

As part of the Isuzu theft report, defendant reported that at the time of the theft, the vehicle contained nine guns, including several Glock pistols. Through further investigation, an FBI agent working in El Salvador was able to identify the same Isuzu reported stolen as being in the possession of Jamie Sol, a business partner of the defendant's brother. Sol purportedly obtained the vehicle as part of a business deal.

At trial New York Life Insurance agent, Mario Ramirez, testified that on May 6, 1992, Ortiz insured his own life, listing as his beneficiary a woman he identified on the policy as his cousin, Marta Vasquez.[6] At the end of May, 1992, Ortiz increased his term life policy to $350,000 and also purchased life insurance for his new wife, Tracie, in the same amount. The values on the polices were increased and separate whole life policies were purchased over the next few months. By the time of her death, Tracie's life was insured for a total of $900,000 in the event of accidental death (including death by murder). Ortiz was designated as Tracie's sole primary beneficiary.

Manuel Ortiz pleaded not guilty to the offenses charged. The prosecution presented various witnesses who testified to the facts set forth above. At the close of the guilt phase of the trial, the state asked the jury to find, based on the evidence presented, that Ortiz had orchestrated a murder-for-hire scheme in order to collect the insurance proceeds on Tracie's life. The state did not attempt to prove the identity of the person or

[6] At trial, Vasquez testified that she was not the cousin of Ortiz, but the mother of his illegitimate son born in El Salvador on Nov. 6, 1992, just two weeks after the murders. Ortiz was with her at the birth of the child.

persons who actually wielded the murder weapons or the amount of money or other things of value offered to the alleged assassin(s).[7] The state relied primarily on the evidence of Ortiz's purchase of the relatively rare knife used to stab Tracie, his participation in the purchase of unrecovered Glock pistols consistent with the type of weapon used to murder Mallory, his designation as sole primary beneficiary on the life insurance policies on Tracie's life (totalling $900,000), and the testimony of Carlos Saavedra that just a few months before the actual murders, Ortiz had proposed a murder-for-hire insurance scheme to him in which the description of the victim and the manner of commission of the crime bore striking similarities to the crime actually committed. The testimony of Saavedra was substantiated by the testimony of the FBI agents to whom he was reporting the proposed murder prior to its occurrence. Saavedra's testimony was also corroborated by evidence that Tracie's Isuzu, which had been reported stolen, was taken to El Salvador by Ortiz and ended up in the hands of a business partner of Ortiz' brother, consistent with the auto-theft insurance fraud scheme Ortiz had also proposed to Saavedra.

Defendant attacked the credibility of Carlos Saavedra, primarily by attempting to prove that he was engaged in the illegal sale of Florida lottery tickets. He also tried to establish that he did not buy the knife found in the vacant lot. Finally, he attempted to convince the jury that he had always been "insurance conscious." Defense counsel tried to suggest through another witness that Carlos Saavedra had committed the murders.[8] However, he never offered an explanation for why Saavedra would have

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[7] Twenty-three fingerprints were lifted at the crime scene. Twenty proved to be prints of either Tracie Williams Ortiz or Cheryl Mallory. The remaining three prints could not be identified. None were prints of the defendant.

[8] Defendant called as a witness Ena Rice. She testified that Carlos Saavedra told her that he had killed Cheryl Mallory and Ortiz had killed Tracie Williams. If taken as true, the statement implicates Saavedra but clearly does not exonerate Ortiz.

murdered Ortiz's wife or what he stood to gain by doing so, assuming Ortiz was not involved in a murder-for-hire plot with Saavedra.

TRIAL ISSUES

Assignment of Error No. 19

Defendant contends the trial judge abused his discretion by refusing a request to defer the defendant's opening statement until the close of the state's evidence. He argues that he was prejudiced by not having the opportunity to hear the state's evidence before opening, which resulted in defense counsel's exaggerating what he would be able to prove.

La. Code Crim. P. art. 765 provides in pertinent part:

> The normal order of trial shall be as follows:
> . . .
>
> (4) The opening statements of the state and of the defendant;
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> (5) The presentation of the evidence of the state, and of the defendant, and of the state in rebuttal. The court in its discretion may permit the introduction of additional evidence prior to argument; . . . .

The current version of the Louisiana Code of Criminal Procedure became effective in 1967. The official revision comments reflect that the format of La. Code Crim. P. art. 765 follows generally the format of the applicable provisions of Code Civ. P. art. 1632, except for the legislature's deletion of the portion of the civil procedure article that authorizes the court to vary the order of trial. While the trial judge may have inherent discretion in the management of the case before him to deviate from the normal order established by the legislature when sufficient justification is demonstrated, the legislature has indicated its intent to give less latitude for deviation in a criminal proceeding than in a civil trial. A defendant does not have a right to demand a deviation from the normal order of trial so that he can present his opening

statement at the close of the state's evidence.

In the instant case, the only reason given by the defendant at trial for requesting that his opening statement be delayed was his representation to the trial judge that his opening statement would reveal to the state the names of the witnesses he planned to call. However, the revelation of the identity of intended witnesses and defense strategy is a function of the content given to the opening statement by defense counsel rather than the timing of the statement. The same reason could be given for a request to deviate from the normal order of trial in every case.

In response to counsel's request, the trial judge cited La. Code Crim. P. art. 765 and indicated that he might deviate from the normal order if counsel could demonstrate "some circumstances that would justify it." Counsel was unable to articulate any further reason for a change in the normal order of trial.

On appeal, defendant argues that because he did not have the opportunity to hear the state's evidence before his opening statement, defense counsel made representations to the jury about what the defense would be able to prove that later proved incorrect. Our review of the record indicates that defense counsel did present evidence on most of the issues he discussed in the opening statement. However, even if defense counsel overstated his proof or speculated on what he would be able to establish on cross-examination of the state's witnesses, the consequences are not a product of the normal order of trial but are a product of the scope and content of the opening statement. Both the prosecution and the defense could doubtless fashion more accurate opening statements if they could prepare them with the benefit of a testimonial record. However, the order of trial has been established by the legislature with a view to giving the jurors a valuable preview of the case. Defense counsel can make good use of the opportunity to address the jury at the outset of trial without exaggerating his case or re-

vealing the details of the defense. The trial judge did not err in refusing counsel's request to defer his opening statement until after the presentation of the state's evidence.

Assignment of Error No. 19 is without merit.

Assignment of Error No. 23

Defendant contends the trial judge erred in not granting his motion for mistrial during the testimony of Carlos Saavedra. He argues that he was prejudiced by Saavedra's assertion that he had received a death threat "from jail."

La. Code Crim. P. art. 771 provides that a mistrial may be granted on motion of the defendant when a comment of a witness is of such a nature that it might create prejudice against the defendant, if an admonition to the jury is not sufficient to assure the defendant a fair trial. When the trial court is satisfied that an admonition to the jury is sufficient to protect the defendant, that is the preferred remedy. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion. State v. Narcisse, 426 So. 2d 118 (La. 1983), cert. denied, 464 U.S. 865 (1983).

In the instant case, the prosecutor asked Saavedra how many times he had moved since his involvement as a witness in the case. Defendant made no objection to that inquiry. The witness answered that he had moved four or five times. Then, without a further question being asked, the witness volunteered:

> And one time I was at a hotel, because they said that from jail they were going to send to kill me.

When the defendant objected to the unsolicited remark and moved for a mistrial, the trial judge responded by admonishing the jury as follows:

> Ladies and gentlemen of the jury, the remark made by the witness in response to the question, that someone from the jail had said they would kill him, is improper, and you should disregard that and not consider that as

> part of the evidence in this case.
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> Mr. Blanco [the interpreter], instruct Mr. Saavedra that he should not -- he should be directly responsive to the question; he should not volunteer information that's not required by the questions; and he should not tell us, generally speaking, he should not tell us what other people may have told him; other people that are not parties to this proceeding.

Defendant argues that the admonition was not sufficient to protect him against the prejudicial inference that defendant was going to "arrange" for Saavedra's death, a crime similar to that for which he was being tried. We note, however, that in his opening statement, defense counsel himself volunteered that Saavedra would testify that he had asked to be put in the FBI witness protection program, because "we're worried about Manuel Ortiz killing me." The non-responsive remark of Saavedra which formed the basis of the motion for mistrial was a less prejudicial version of testimony predicted by the defense in opening statement. The unsolicited comment of Saavedra did not refer directly to the defendant.

The trial judge admonished the jury that the remark was improper and instructed the witness not to volunteer information in the future. We cannot conclude that the unsolicited response was so prejudicial that the court's admonition was insufficient to insure the defendant a fair trial, especially when the defense itself had already put the issue before the jury in its opening statement in much more explicit terms. The trial judge did not abuse his discretion in denying defendant's motion for mistrial.

Assignment of Error No. 23 is without merit.

Assignment of Error No. 29

Defendant contends the trial judge erred in denying his motion for post verdict judgment of acquittal based on alleged insufficiency of the evidence.[9] He argues that the evidence did not

[9] Defendant filed a motion for post verdict judgment of acquittal pursuant to La. Code Crim. P. art. 821, properly raising the issue of the sufficiency of the evidence. It is clear that he is seeking review under the standards applicable to a motion

support a first degree murder conviction on either of the counts charged.

The constitutional standard for evaluating the sufficiency of the evidence is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find that the state proved all of the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 requires that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. State v. Porretto, 468 So. 2d 1142 (La. 1985).

The Louisiana Legislature has defined first degree murder as the killing of a human being under any one of several specific listed circumstances. Coupled with each of the listed circumstances is the additional requirement that the offender have specific intent. The circumstances recited in defendant's first degree murder indictment and as to which the judge charged the jury were as follows:[10]

> A. First degree murder is the killing of a human being:
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> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . aggravated burglary . . . ; . . . .

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for post verdict judgment of acquittal, notwithstanding inadvertent references to the trial judge's adverse ruling on a contemporaneously filed motion for new trial.

[10] Defendant did not object to the trial judge's charge to the jury and has not raised any assignments of error related to the jury charges. The jury returned a verdict of "guilty of first degree murder" on both counts of the indictment; it did not specify which of the specific circumstances listed in La. R.S. 14:30 it found applicable.

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered . . . anything of value for the killing.

(Emphasis added).

The verdict for the murder of Tracie Williams Ortiz

The first circumstance asserted by the state to support defendant's conviction of the first degree murder of Tracie Williams Ortiz was that Ortiz was a principal to a murder committed with specific intent to kill while the perpetrator was engaged in the course of an aggravated burglary. In order to support a conviction pursuant to La. R.S. 14:30(A)(1), the evidence had to show that the perpetrator committed a felony-murder with specific intent to kill and that Ortiz was a principal to that act. La. R.S. 14:24 provides:

> All 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. (Emphasis added).

Not all principals are automatically guilty of the same grade of the offense. We have held that in order to be a principal to first degree murder, an accused who did not physically commit the crime must be shown to have personally possessed the specific intent that the victim be killed. State v. West, 568 So. 2d 1019 (La. 1990); State v. Holmes, 388 So. 2d 722 (La. 1980).[11] In the

[11] Not all states require that a principal to a felony-murder share specific intent to kill the victim with the actual perpetrator. For a discussion of the varying state statutes, see Tison v. Arizona, 481 U.S. 137 (1987), wherein the United States Supreme Court found that a sentence of death for a principal who did not physically commit the offense does not violate the Eighth Amendment prohibition of cruel and unusual punishment where the defendant was a principal who had substantial participation in the felony-murder and where his mental state was one of reckless indifference to human life (a lesser standard than specific intent). The statute at issue in Tison, unlike the Louisiana first degree murder statute, did not require specific intent to kill a

instant case, the jury could reasonably have concluded based on the evidence that Ortiz shared with the assassin the specific intent to murder Tracie in accordance with the plan he had devised. The testimony of Carlos Saavedra demonstrated that Ortiz wanted Tracie dead in order to collect insurance proceeds approaching one million dollars. He concocted a plan whereby he would give a key to her home to a hit-man who would be paid a cut of the insurance money. He planned to provide the murder weapon and to be out of the country when the murder occurred. The crime occurred in substantial compliance with defendant's plan. Thus, there was sufficient evidence to support the specific intent component of the crime so that Ortiz could be found guilty as a principal to first degree murder if the crime was committed in the course of an aggravated burglary and he was a principal to the aggravated burglary.

La. R.S. 14:60 defines an aggravated burglary as the unauthorized entry of an inhabited dwelling with the intent to commit a felony therein if the offender is armed with a weapon upon entry, arms himself after entering, or commits a battery upon any person while inside or upon entering or leaving. To be guilty as a principal to a burglary, the offender does not have to personally enter the burgled building. State v. Kimble, 375 So. 2d 924 (La. 1979). And while possession of a dangerous weapon is an essential component of the commission of the aggravated burglary, a person may be a principal to the offense even though he did not personally have possession of the weapon used in the commission of the crime. See State v. Dominick, 354 So. 2d 1316 (La. 1978).

An essential element of the crime of aggravated burglary is "unauthorized entry." The only evidence offered suggested that defendant himself had lawful access to the premises. However, that did not prevent a finding by the jury that an unauthorized entry and aggravated burglary occurred under the particular facts and circumstances of this case. An "unauthorized entry" is an entry

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victim murdered in the course of a felony.

without consent, express or implied. State v. Dunn, 263 La. 58, 267 So. 2d 193 (1972). In the case of a private dwelling, a person must have the consent of an occupant or an occupant's agent to constitute a defense to "unauthorized entry." This consent must be given by a person with the authority and capacity to consent. State v. Lozier, 375 So. 2d 1333 (La. 1979). However, even if a person has lawful access to enter a premises himself, he is not empowered to grant lawful authority to another to enter for the purpose of committing a felony. In State v. Gendusa, 193 La. 59, 190 So. 332 (1939), cert. denied, 308 U.S. 511, we held that although a servant may have authority to enter a residence, where he conspires with another and allows entry so that his co-conspirator can commit a felony, both are guilty of burglary.

Of particular interest is the decision in Davis v. State of Mississippi, 611 So. 2d 906 (Miss. 1992). In that case, a husband charged as a principal to a burglary of his own home contested his conviction. He claimed that he had authorized his friend, Brown, to enter his home for the purpose of robbing and raping his wife. He argued that since there was no "unauthorized entry," there had been no burglary and, consequently, he could not be an accessory to that offense. The court soundly rejected such reasoning and explained:

> While Davis had the authority to consent to Brown's entry into the trailer for a lawful purpose, by no stretch of reasoning could he be considered as having a right to authorize Brown's entry to rob and rape Mrs. Davis.
>
> . . . .
>
> It would be monstrous to hold that Davis had any authority whatever to permit Brown to enter the trailer for the purpose of robbing and raping his wife, and having no such authority, his consent did not prevent Brown's entry from having been burglarious. 611 So. 2d at 912.

Since Davis aided and abetted Brown in the burglary, he was equally guilty as a principal to the burglary. Other courts considering the issue have also concluded that one party with lawful access to a premises cannot grant lawful authority to another

to enter to commit a felony against another occupant. Any purported permission given for such a purpose is without effect and does not prevent the entry from constituting a burglary.[12]

Just as in Davis, the person(s) who murdered Tracie cannot reasonably have believed that Ortiz had lawful authority to grant access to the premises for the purpose of murdering her. Accordingly, under the particular circumstances of this case, the jury could have found that the assassin did not have authority to enter the victim's residence.[13]

The final key element of the crime of burglary is that the accused must have had the intent to commit a felony at the moment of entry. State v. Lockhart, 438 So. 2d 1089 (La. 1983). The jury had sufficient evidence to warrant a conclusion that the murderer entered the residence with the intent to carry out the murder-for-hire plan hatched by Ortiz and that Ortiz aided and abetted him in doing so with the intent that Tracie be killed. The evidence suggested that Ortiz had given the assassin a key to the residence and provided information about the victim's activities. It was not necessary for the state to prove the identity of both principals in order to convict Ortiz of burglary; it was only necessary to prove that someone made an unauthorized entry with the requisite mental intent and that the accused was a person concerned in the commission of the crime. State v. Irwin, 535 So. 2d 365 (La.

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[12] See Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 508 U.S. 924; Damico v. State, 16 So. 2d 43 (Fla. 1943); K.P.M. v. State, 446 So. 2d 723 (Fla. App. 1984); People v. Harris, 338 N.E.2d 129 (Ill. App. 1975); People v. Castile, 339 N.E.2d 366 (Ill. App. 1975); Smith v. State, 477 N.E.2d 857 (Ind. 1985); State v. Upchurch, 421 S.E.2d 577 (N.C. 1992); State v. Tolley, 226 S.E.2d 672 (N.C. App. 1976), rev. denied, 229 S.E.2d 691.

[13] We note that it is the evil purpose of the party purporting to grant authority (Ortiz) that makes the grant invalid. This court has specifically rejected the argument that the concealed criminal intent of the party entering renders the entry unauthorized, in a case where the entry was otherwise authorized by a person with the capacity to consent and who did not authorize the entry for the purpose of facilitating the commission of a felony upon a co-occupant. State v. Dunn, 263 La. 58, 267 So. 2d 193 (1972).

1988).

Accordingly, the jury was entitled to return a verdict of first degree murder of Tracie Williams Ortiz pursuant to La. R.S. 14:30(A)(1). Defendant was a principal with specific intent to kill and aided, abetted and procured another to commit a murder in the course of an aggravated burglary.

The second circumstance asserted by the state as a basis for the first degree murder conviction is that the offender had a specific intent to kill or inflict great bodily harm upon more than one person. La. R.S. 14:30(A)(3). There is no question that the assassin had the requisite specific intent and did, in fact, cause the death of more than one person. Whether or not he expected to find Cheryl Mallory in the condominium when he entered, he formed the specific intent to kill her once her presence was known. Thus, the evidence clearly established that the assassin was guilty of first degree murder by virtue of having caused the deaths of more than one person.

A more difficult question is whether Ortiz, as a principal to the crime, had the requisite specific intent to kill more than one person. A principal to a crime must personally possess the requisite mental intent required for the commission of the offense. State v. West, 568 So. 2d 1019 (La. 1990). For purposes of the guilt phase of the trial, it was not sufficient for the jury to find that defendant merely created a risk of the death of more than one person. The statute required the jurors to find that defendant actively desired the result that followed from his actions.

The evidence supported the jury's conclusion that Ortiz procured someone to kill his wife, Tracie, in order to collect the proceeds of policies of insurance on her life. However, there was no evidence to suggest that Ortiz conceived of the death of Mallory as part of the insurance fraud scheme. Rather, the evidence suggested that Mallory was murdered simply because she happened to be at the condominium when the assassin appeared to kill Tracie. No

evidence was adduced to suggest that Ortiz contemplated Mallory's presence at the condominium, much less her murder. Based on the evidence in this record, the jury could not have concluded beyond a reasonable doubt that Ortiz actively desired the death of Cheryl Mallory. Thus, the jury could not reasonably have found that he was a principal to a murder committed with the intent to kill or seriously injure more than one person. A verdict of guilty pursuant to La. R.S. 14:30(A)(3) was not warranted.

Finally, the state asserted that the first degree murder conviction was justified pursuant to La. R.S. 14:30(A)(4) because the evidence showed that Ortiz had specific intent to kill Tracie and offered something of value to someone else to induce the commission of the murder. The evidence that Ortiz paid or offered to give something of value to the assassin who actually accomplished the murder was circumstantial. However, Saavedra testified that less than two months before the murders, defendant was negotiating with Saavedra for Tracie's murder in exchange for 1/3 of the life insurance proceeds. Ortiz only broke off negotiations with Saavedra because Saavedra represented that he could not do the job alone and wanted to involve another person unknown to Ortiz. There was no evidence that Ortiz ever abandoned his murder-for-hire scheme. The last understanding of Saavedra was that defendant was going to bring in an assassin with para-military experience from El Salvador, who was known as "Hercules," to do the job in place of Saavedra. The fact that Saavedra was reporting these details of the planned murder to FBI agents months before its occurrence, and the fact that they testified to their numerous meetings with Saavedra corroborated Saavedra's testimony of the murder-for-hire scheme.

The crime was eventually committed less that two months after the cessation of these negotiations in a manner strikingly similar to that planned with Saavedra. The evidence supported the conclusion that Ortiz had purchased the murder weapon (a relatively

rare knife) that killed Tracie just days before the murder. He also left the country right before the crime, just as he had told Saavedra he would. The jury was entitled to conclude that Ortiz arranged for someone to commit the crime. In our view, the circumstances were also sufficient to support the conclusion that he paid the assassin for the job. The only other hypothesis is that he found someone to commit the crime as a favor. In view of the prior negotiations with Saavedra, the jury could have excluded this hypothesis as unreasonable. A jury is entitled to accept the prosecution's hypothesis of guilt based on circumstantial evidence, when it is consistent overall with the evidence, and where the defendant's circumstantial theory of innocence is remote. State v. Graham, 422 So. 2d 123 (La. 1982).

Defendant primarily argues that the first degree murder verdict is insupportable because the state's case rested heavily on the testimony of Carlos Saavedra, which he claims was so inconsistent and unreliable that it cannot be considered constitutionally sufficient to support his conviction. We disagree. While Saavedra's testimony may have been inconsistent in some instances and while he may have been impeached regarding his sale of Florida lottery tickets, his story regarding his conversations with Ortiz was corroborated by the FBI agents who testified that he was working with them and reporting the details of the murder-for-hire insurance fraud scheme throughout the summer before the murders. The fact that the crime was committed in substantial conformity with the plan he reported to the FBI substantiated Saavedra's testimony. Accordingly, there was sufficient evidence to convict defendant with the first degree murder of Tracie Williams Ortiz pursuant to La. R.S. 14:30(A)(4).

The verdict for the murder of Cheryl Mallory

While we are satisfied that there was sufficient evidence to support a first degree murder conviction for the murder of

Tracie Williams Ortiz, we do not believe the same verdict was supported by the evidence as to the murder of Cheryl Mallory. We find no evidence in the record sufficient to support an inference that Ortiz ever offered anyone anything of value for Cheryl's murder. Thus, a first degree murder verdict was not warranted pursuant to La. R.S. 14:30(A)(4). Nor can we find defendant guilty of the first degree murder of Cheryl pursuant to La. R.S. 14:30(A)(3) by virtue of specifically intending the deaths of more than one person, for the same reasons articulated above regarding Tracie.

Finally, the evidence was not sufficient to support a finding that defendant was guilty as a principal to the first degree felony-murder of Cheryl pursuant to La. R.S. 14:30(A)(1). In certain cases, circumstantial evidence might justify a finding that the murder plan called for the elimination of persons other than the main target. However, the evidence of the plot to kill Tracie in this case did not extend to other victims. We can find no evidence to support a conclusion that defendant shared the specific intent to kill Cheryl that was doubtless formulated by the assassin after his entry into the condominium when he discovered Cheryl there with Tracie. The specific intent of the assassin to murder Cheryl cannot be automatically imputed to defendant. State v. Holmes, 388 So. 2d 722 (La. 1980). Therefore, defendant's first degree murder conviction and death sentence for the murder of Cheryl Mallory must be reversed.

Under State v. Byrd, 385 So. 2d 248 (La. 1980) and La. Code Crim. P. art. 821, the discharge of the defendant is neither necessary nor proper when the evidence supports a conviction on a lesser and included offense which was a legislatively authorized responsive verdict. La. R.S. 14:30.1 in pertinent part defines second degree murder as the killing of a human being when the offender is engaged in the perpetration of an aggravated burglary, even though there was no specific intent to kill. As noted hereinabove, there was sufficient evidence to conclude that defendant was

a principal to the commission of an aggravated burglary, during which a second murder occurred, although he had no specific intent that Mallory be killed. Furthermore, second degree murder is a legislatively provided responsive verdict to first degree murder. La. Code Crim. P. art. 814. Thus, it is not necessary to remand this case for a new trial in order to convict defendant of the second degree murder of Cheryl Mallory.

Accordingly, we modify the jury verdict and render a judgment of conviction of second degree murder for the murder of Cheryl Mallory. We remand the matter to the trial court for sentencing on the modified judgement of conviction. La. Code Crim. P. art. 821.

SENTENCE REVIEW

Article I, section 20 of the Louisiana Constitution prohibits cruel, excessive, or unusual punishment. La. Code Crim. P. art. 905.9 provides that this court shall review every sentence of death to determine if it is excessive. The criteria for review are established in La. Sup. Ct. R. 28, § 1, which provides:

> Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(a) PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTORS

There is no evidence that passion, prejudice or any other arbitrary factors influenced the jury in its recommendation of the death sentence for the murder of Tracie Williams Ortiz.

Defendant's contentions regarding the conduct of the prosecutor during closing argument to the jury and the effectiveness of defense counsel during the penalty phase of the trial have been considered by us and found to be either without merit or better suited to post-conviction review.

(b) STATUTORY AGGRAVATING CIRCUMSTANCES

The jury in its verdict found the following aggravating circumstances:

> (a) The offender was engaged in (as a principal) the perpetration of an aggravated burglary. (La. Code Crim. P. art. 905.4 A(1));
>
> (b) The offender knowingly created a risk of death or great bodily harm to more than one person. (La. Code Crim. P. art. 905.4 A(4));
>
> (c) The offender offered something of value for the commission of the offense. (La. code Crim. P. art. 905.4 A(5));
>
> (d) The offense was committed in an especially heinous, atrocious or cruel manner. (La. Code Crim. P. art. 905 A(7)).

As we explained hereinabove, the jury was justified in finding the aggravated circumstance set forth in La. Code Crim. P. art. 905.4 A(5). The evidence admitted, albeit circumstantial, was sufficient to support the jury's conclusion that the defendant offered something of value for the killing of his wife.

We need not address the other aggravating circumstances found by the jury because the failure of one aggravating circumstance does not invalidate others, properly found, unless introduction of evidence in support of the invalid circumstance interjects an arbitrary factor into the proceedings.[14] State v. Martin, 93-0258 (La. 10/17/94); 645 So. 2d 190, cert. denied, 515 U.S. 1105 (1995). Evidence that defendant was a principal to a murder committed in the course of an aggravated burglary was offered to prove one of the circumstances supporting his first degree murder convic-

[14] We do not by our treatment of only one aggravating circumstance imply that one or more of the other aggravating circumstances found by the jury were invalid.

tion. Evidence of the manner of Tracie's death and the potential risk of harm to more than one person was part of the facts surrounding the murder. It is clear that the admission of this evidence did not interject an arbitrary factor into the proceedings.

(C) PROPORTIONALITY TO THE PENALTY IMPOSED IN SIMILAR CASES

Federal constitutional law does not require a proportionality review. Pulley v. Harris, 465 U.S. 37 (1984). Nonetheless, La. Sup. Ct. R. 28, § 4(b) provides that the district attorney shall file with this court a list of each first degree murder case tried after January 1, 1976 in the district in which sentence was imposed. The state's list reveals that fifty-seven first degree murder cases were tried in the Twenty-Fourth Judicial District Court for the Parish of Jefferson since January 1, 1976. Our research reveals that jurors in the Twenty-Fourth Judicial District have recommended the death penalty in thirteen cases since January 1, 1976.

Only one murder-for-hire case has been prosecuted by the district attorney in Jefferson Parish as a first degree murder case. In that case, State v. Parks, 422 So. 2d 1164 (La. 1982), the defendant wife conceived a plan to split life insurance proceeds on the life of her husband with her lover, who actually accomplished the murder according to their joint plan. The jury convicted the wife of second degree murder. Given the scarcity of comparable cases in Jefferson Parish, it is appropriate to look beyond the judicial district in which sentence was imposed and conduct the proportionality review on a state-wide basis. State v. Davis, 92-1623 (La. 5/23/94); 637 So. 2d 1012, cert. denied, 513 U.S. 975.

Throughout the state since 1976, there have been relatively few murder-for-hire convictions in comparison to other first degree murder convictions. In most cases arising under La. R.S.

14:30 (A)(4), a life sentence has been recommended.[15] However in State v. Smith, 600 So. 2d 1319 (La. 1992), a death sentence was imposed on the party who procured the services of another to construct an explosive device and affix it to the victim's car.[16] And we recently affirmed the conviction and death sentence of a defendant hired to kill the wife of another man. State v. Lavalais, 95-0320 (La. 11/25/96); 685 So. 2d 1048.

Although we recognize that the death penalty has been infrequently applied in cases involving murder-for-hire, this fact alone in not dispositive on the issue of proportionality. As we noted in Lavalais, we would forever preclude the possibility of imposing a death sentence in a murder-for-hire case if we held, based on the small sampling of cases available, that the imposition of a death penalty is disproportional simply because other juries recommended life in the preceding cases. It is also noteworthy that this case involved multiple murders. Louisiana juries have frequently recommended the death penalty in such cases. We do not find that defendant's death sentence is disproportionate.

The Uniform Capital Sentence Report and the Capital Investigation Report indicate that defendant is a white male born October 13, 1957 in El Salvador. He was 35 years old at the time of the offense. In 1979, defendant married a native El Salvadoran, Ana Eraheta. Before divorcing in 1991, they had one son who is now 15 years old. Defendant also has a son born out of wedlock a few weeks after the murders to Marta A. Vaquez. Defendant, who is not

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[15] See State v. Jones, 607 So. 2d 826 (La. 1993); State v. Velez, 588 So. 2d 116 (La. App. 3rd Cir. 1991), writ denied, 592 So. 2d 408 (La. 1992), cert. denied sub nom., Quintero-Cruz v. Louisiana, 505 U.S. 1220; State v. Fleming, 574 So. 2d 486 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 1313 (La. 1992); State v. Seward, 509 So. 2d 413 (La. 1987); State v. Woodcock, No. 275-167 "I", as reported in State v. Koll, 463 So. 2d 774 (La. App. 4th Cir. 1985), writ denied, 467 So. 2d 1131 (La. 1985); State v. Ester, 458 So. 2d 1357 (La. App. 2d Cir. 1984), writ denied, 464 So. 2d 313 (La. 1985); State v. Johnson, 438 So. 2d 1091 (La. 1983); State v. Whitt, 404 So. 2d 254 (La. 1981); State v. Sylvester, 388 So. 2d 1155 (La. 1980).

[16] The conviction was reversed by this court on other grounds. On retrial, the defendant was acquitted.

a United States citizen, emigrated to this country in 1980 and worked as a mechanic until 1988. Defendant married the victim, Tracie Ortiz, in May, 1992. The defendant had no criminal history.

After having considered the above factors, we are unable to say that the sentence of death in the instant case is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Hence, based on the above criteria, we do not consider that defendant's sentence of death for the murder of Tracie Williams Ortiz was cruel, excessive, or unusual punishment.

DECREE

For the reasons assigned, defendant's conviction and death sentence for the murder of Tracie Williams Ortiz are affirmed for all purposes except that this judgment shall not serve as a condition precedent to execution as provided by La. R.S. 15:567 until (a) defendant fails to petition the United States Supreme Court timely for certiorari; (b) that court denies his petition for certiorari; (c) having filed for and been denied certiorari, defendant fails to petition the United States Supreme Court timely, under their prevailing rules, for applying for rehearing of denial of certiorari; or (d) that court denies his application for rehearing.

Defendant's conviction of first degree murder and his death sentence for the murder of Cheryl Mallory is set aside. The jury's verdict of first degree murder is hereby modified and a judgment of conviction of second degree murder is rendered. We remand the case to the trial court for sentencing on the modified judgment. La. Code Crim. P. art. 821.

Note to Publishing Companies: This appendix is not designated for publication in any print or electronic format.

APPENDIX - 96-KA-1609

PRETRIAL ISSUES

Assignments of Error Nos. 1 and 2

Defendant contends the trial judge erred in failing to conduct a hearing on defendant's motion to suppress an identification made by Debra Kospelich. He also contends that the trial judge erred in failing to suppress an identification by Vickie

Billiot. He argues that the identification procedures were improper and tainted later identifications by the witnesses.[1]

On October 25, 1992, police interviewed a Wal-Mart assistant store manager, Debra Kospelich, who participated in the sale of two Glock nine millimeter pistols to Tracie Williams in July, 1992. Police showed Kospelich a single photograph of the defendant; she identified him as the man with Tracie when she purchased the pistols.

On Nov. 5, 1992, police interviewed employees of Chalmette Jewelry Store about defendant's purchase of guns at that store. Employee Vickie Billiot recognized the paperwork on a gun sale that occurred on October 17, 1992. She volunteered that she had shown the same customer a Gerber Mark I tactical knife as part of the transaction. She described the customer as a Hispanic male in his 30's. Billiot was then shown a single photograph of the defendant; she identified defendant as the customer to whom she had shown the tactical knife. On March 1, 1993, as part of a follow up investigation, Billiot again identified defendant as the customer in question when shown a photographic array of six pictures.[2]

The state advised the court that it would not rely on the out-of-court single photograph identifications of the defendant at trial. Thus, the trial court correctly held that there was no reason to suppress the single photograph identifications. However, defendant further argued that the initial out-of-court identifications impermissibly tainted later identifications, a matter on which he was entitled to a hearing.

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[1] The state contends that neither of these photographic identifications constituted an "identification procedure." The identifications in question were not identifications of the defendant as the perpetrator of a crime. Both witnesses merely identified the defendant as having been present at a retail store prior to the commission of any crime and in connection with noncriminal activity. However, for purposes of this opinion we will assume that an "identification" made under these circumstances is subject to the same rules that apply to procedures employed for identification of a perpetrator.

[2] Defendant does not attack the composition or procedures used with respect to the photographic array.

Single photograph identifications are generally viewed with suspicion. Simmons v. United States, 390 U.S. 377 (1968). However, even where a suggestive pre-trial identification has occurred, an in-court identification may be permissible if there does not exist a "very substantial likelihood of irreparable misidentification." Manson v. Brathwaite, 432 U.S. 98 (1977). Factors considered in determining whether a substantial likelihood of misidentification has been created are: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of his prior description of the criminal; 4) the level of certainty demonstrated at the confrontation; and 5) the time between the crime and the confrontation. A defendant attempting to suppress an identification bears the burden of proving the suggestiveness of the identification and the likelihood that the initial identification procedure has or will result in a misidentification. State v. Chaney, 423 So. 2d 1092 (La. 1982).

In the instant case, both witnesses had ample opportunity to observe the defendant in a non-traumatic, relaxed, well lighted setting. Ms. Kospelich testified at trial that she particularly remembered the gun transaction because in her many years of work at Wal-Mart, she had never before sold two guns at one time. She noticed that Tracie appeared nervous and went over to the defendant to consult with him about the purchase during the transaction. The circumstances of the sale were unusual enough that she interpreted a kick under the counter from another clerk as an indication that he, too, found the transaction peculiar.

Inasmuch as the witness had ample opportunity to view the defendant at the store, paid attention to him, and was certain of her identification at trial, we do not believe that the single photograph identification during the state's initial investigation of the crime created a substantial likelihood of later misidentification by Ms. Kospelich. Thus, the trial judge's failure to conduct

a hearing on the matter did not result in reversible error.

Ms. Billiot testified that she definitely remembered the defendant and a young boy that accompanied him into the Chalmette store. She observed the defendant as he waited for assistance because all of the sales clerks were busy. For that reason she left her normal secretarial post to assist him. She had to dismantle a display case in order to get out the tactical knife he wanted to examine; it was an item rarely sold in the store. Just as in the case of Ms. Kospelich, this witness had ample opportunity to view the defendant, paid attention to him, and was certain in her later identifications.[3] Considering the totality of the circumstances, there was not a substantial likelihood of irreparable misidentification that tainted either her in-court identification or her March, 1992 photo array identification. The trial judge did not err in denying defendant's motion to suppress Ms. Billiot's identifications.

Assignments of Error Nos. 1 and 2 are without merit.

Assignments of Error Nos. 3, 6, 7, 8, 9 and 10

Defendant contends that the trial judge erred in failing to suppress evidence seized pursuant to a search warrant of a residence located at 6694 Bellaire Drive in New Orleans, the home of defendant's parents. Defendant argues that probable cause did not exist for the issuance of the warrant, that intentional misrepresentations were made to the issuing magistrate and that he was improperly limited in his prosecution of the motion to suppress.

Probable cause for the issuance of a search warrant ex-

[3] In addition to the photographic identification of the defendant, State Exhibit 119 bears what appears to be the signature of Manuel Ortiz on the Firearms Transaction Record filed in connection with the purchase of Baretta handgun, Serial No. 01567N, on Oct. 17, 1992. State Exhibit 118 is a receipt filled out at the Chalmette store showing a sale to Manuel Ortiz of the same handgun, identified by serial number, and a Gerber knife, both on October 17, 1992. Thus, there is documentary evidence in the record to back up the identification of Ms. Billiot and her testimony that defendant was in the store on that date purchasing a Gerber knife.

ists when it is established to the satisfaction of the issuing magistrate that facts and circumstances within the affiant's knowledge are sufficient to support a reasonable belief that an offense has been committed and that evidence of the crime may be found at the place to be searched. State v. Lingle, 436 So. 2d 456 (La. 1983). The disputed search warrant was sworn out by Detective Bill Mouret. The affiant detailed at length in the warrant application the discovery of the murder victims, the lack of evidence of forced entry at the crime scene, and the discovery of large life insurance policies recently taken out on the life of Tracie Ortiz, with defendant designated as the beneficiary. The application recited that defendant had listed the Bellaire address as his residence when he flew into Miami on Nov. 21, 1992. In addition, the application described a meeting between the Kenner police and confidential informant, Carlos Saavedra, during which Saavedra disclosed that in the months before the murder, defendant had offered him part of the insurance proceeds on Tracie's life if he would kill her. There is no question that the issuing magistrate had probable cause to issue the search warrant in question based on the application submitted to him.

However, even where an application on its face supports issuance, a warrant will be invalidated and the evidence seized pursuant thereto will be suppressed if a trial judge finds that the warrant was obtained through a fraud on the issuing magistrate accomplished by the affiant's deliberate and intentional misrepresentations. State v. Williams, 448 So. 2d 659 (La. 1984); State v. Ogden, 391 So. 2d 434 (La. 1980). The burden of proof is on the defendant to show that the application contained intentional misrepresentations. State v. Wollfarth, 376 So. 2d 107 (La. 1979). Whether or not the defendant has met that burden is a determination that rests within the discretion of the trier of fact. State v. Klar, 400 So. 2d 610 (La. 1981).

After reviewing the record, we do not find any convincing

evidence that the affiant made intentional and deliberate misrepresentations to the magistrate. While there may have been some discrepancies between the affidavit and later testimony at trial, the determination of the trial judge that no deliberate misrepresentations were made was within his sound discretion and his credibility determinations were not manifestly erroneous. State v. Klar, 400 So. 2d at 613. Moreover, even after disregarding the matters as to which there may have been inaccuracies, the affidavit still supported probable cause for the search.

Neither do we find any abuse of discretion in the rulings of the trial judge before or during the hearing on the motion to suppress. The trial judge did not abuse his discretion in requiring defendant to amend his motion to suppress to state supporting facts as required in La. Code Crim. P. art. 703(E)(1). Nor did he err in limiting the areas of cross-examination of the confidential informant whose information was included in the application for a warrant. The trial judge correctly ruled that any examination of the informant would be limited to determining whether he had in fact reported to the Kenner police the matters contained in the affidavit. The credibility of the affiant was at issue at this stage of the proceedings, not the credibility of the confidential informant. State v. Babbitt, 363 So. 2d 690 (La. 1978). We similarly find no abuse of discretion in the limitation of cross-examination of Officer Gallagher since the questions either dealt with issues not raised in the motion to suppress or irrelevant to a determination of the credibility of the affiant.

Finally, we find no error in the judge's refusal to order Detective Mouret to refresh his recollection of addresses given for the defendant by the informant by reference to a non-discoverable recorded statement of the informant. The detective actually answered the question in later testimony. Thus defendant can have suffered no prejudice from the witness's failure to refresh his recollection by use of the statement. In sum, our review of the

record satisfies us that the trial judge did not infringe on the defendant's right to properly explore the sufficiency of the probable cause asserted to support the warrant or the good faith of the affiant.

These Assignments of Error are without merit.

Assignments of Error Nos. 4 & 11

Defendant contends that the trial judge's use of his contempt powers during pre-trial proceedings resulted in denial of his right to counsel. Specifically, he contends that the trial judge erred in holding open for too long a state motion to hold defense counsel in contempt. He also argues that a later contempt order interfered with his right to counsel.

During a pre-trial motion, the state moved to have defense counsel held in contempt of court for failing to provide certain discovery to the state. The judge took the motion under advisement. Two days later, the pending motion was discussed during another pre-trial hearing. Defense counsel did not press for an immediate disposition of the motion. Seven days later, the trial judge granted the state's motion for a continuance on the contempt hearing. Defendant complained about the delay but did not move to have the matter scheduled for hearing until October 4, 1993. The judge agreed to hear the matter in November, 1993 but the state withdrew its motion for contempt on Nov. 11, 1993.

Defendant has made no showing that the pendency of the motion prejudiced him. Counsel continued to vigorously pursue pre-trial motions and trial preparation while the motion was pending. We will not reverse a conviction or sentence because of pre-trial conduct which does not affect the substantial rights of the accused.

Defendant also contends that the trial judge erred when it found defense counsel in direct contempt of court on March 8, 1994, as a consequence of remarks made by counsel about why the

trial judge had granted the state's request for a continuance of a hearing. He argues that the ruling deprived him of effective assistance of counsel.

Pursuant to defense counsel's application for supervisory writs, the court of appeal promptly set aside the contempt order and vacated any remaining unserved sentence.[4] It does not appear that defense counsel was incarcerated for any appreciable length of time. Moreover, there is no showing that this brief episode was prejudicial to the defendant. Defendant hired another attorney to represent him during pre-trial proceedings on April 6, 1994 and was represented by two attorneys until his original counsel withdrew from the case on May 23, 1994. There is no evidence in the record that the trial judge's ruling, however incorrect, adversely affected defendant's right to counsel.

Assignments of Error Nos. 4 and 11 are without merit.

Assignment of Error No. 5

Defendant contends the trial judge should have granted his motion to recuse the district attorney's office from prosecution of the case. He argues that the assistant district attorney assigned to the case had developed a personal bias in the case.

At the time defendant made his motion to recuse, he did not cite personal interest or bias as the grounds for recusal. Nor did he cite any other ground for recusal recognized in La. Code Crim. P. art. 680. Pursuant to La. Code Crim. P. art. 841 and our holding in State v. Taylor, 93-2201 (La. 2/28/96); 669 So. 2d 364, cert. denied, 117 S.Ct. 162. we do not review assigned errors unless the trial court was contemporaneously made aware of the objection and the grounds therefor. See also State v. Arvie, 505 So. 2d 44 (La. 1987).

Moreover, it is clear that there was no evidence to sup-

[4] State v. Regan, 94-172 (La. App. 5th Cir. 3/18/94); cert. denied., 94-0609 (La. 3/25/94); 635 So. 2d 242.

port the charge that the district attorney's office was so infected with personal interest and bias that recusal was warranted. The trial judge did not err in denying the motion.

Assignment of Error No. 5 is without merit.

Assignment of Error No. 12

Defendant contends the trial judge erred in requiring him to designate one of his two attorneys as lead counsel in the case. He argues that this ruling adversely affected his relationship with counsel and infringed on his right to counsel.

While there is no procedural rule requiring the designation of lead counsel in a criminal proceeding, the trial judge has inherent powers to impose such reasonable requirements as will facilitate the administration of justice and the management of the court's docket. The record reflects that the trial judge required a designation because the two defense attorneys were in different offices and the court desired that there be a designated official contact for purposes of communicating court business. The judge assured defendant that both defense attorneys could actively participate in the defense.

Pursuant to the judge's order, defendant designated one of his two attorneys as "contact counsel." Eleven days later the other attorney withdrew from the case, for reasons not shown in the record. No showing has been made that the requirement for designation of lead counsel in any way prejudiced the defense. Defendant continued to be vigorously represented during the pre-trial and trial of the case.

Assignment of Error No. 12 is without merit.

Assignment of Error No. 13

Defendant contends that even if the warrant to search the Bellaire residence was proper, the police should not have seized "six torn pages" found in the home which were not described in the

warrant. He also contends in this assignment that recordation of a telephone conversation between himself and Detective Mouret violated his privacy rights. He argues that the trial court should have granted his motion to suppress this evidence.

The application contained a list of evidence to be seized which read in pertinent part:

> [A]ny and all insurance policies, binders, applications or contracts listing the insured as Tracie J. Williams, Tracie J. Ortiz, Manuel A. Ortiz and Manuel A. Ortiz Navarro . . . papers or informational brochures and pamphlets on obtaining visas or actual visas to visit the United Sates . . . any and all airbills, receipts, envelopes or packages mailed with Federal Express addressed to or from Manuel A. Ortiz . . . any and all marriage licenses in the name of Manuel A. Ortiz Navarro . . . .

A peace officer in the course of executing a search warrant may seize things that may constitute evidence tending to prove the commission of a crime, whether or not described in the warrant. La. Code Crim. P. art. 165; Coolidge v. New Hampshire, 403 U.S. 443 (1971); State v. Feeback, 414 So. 2d 1229 (La. 1982). The state admitted at the motion to suppress that the disputed "six torn pages" dealt with ownership of an Isuzu truck and its exportation over the Texas border; they were not specifically listed in the warrant. However, in the instant case, the officers were lawfully searching, pursuant to a warrant, for tools that may have been used to remove the identification numbers from the knife believed to be the murder weapon. They were empowered to force open a tool box where such tools might have been kept. When the tool box was opened, they came upon papers including the life insurance policies specifically mentioned in the warrant. They were entitled to examine other papers also found in the toolbox to determine if they also fell within the scope of the warrant.

At the hearing on the motion to suppress the evidence, the officer who seized the papers testified that he believed at the time that the documents concerning the Isuzu vehicle could have

been related to the murder because one of the victims was shot with a 9 millimeter pistol and several such pistols had been reported stolen along with the Isuzu before the murders. In addition, in view of Saavedra's reports of a scheme to take vehicles over the border for sale in Central America, the officers were fully justified in seizing the "six torn pages" as potential evidence of another offense. The trial judge was correct in refusing to suppress the seized evidence.

Defendant also argues that the trial judge erred in not suppressing a taped telephone conversation between himself and Det. Mouret. He claims that it was an invasion of his privacy to tape the conversation without his consent and without advising him of his Miranda rights. It is well settled that the secret recordation of a conversation by a peace officer acting under color of law without the consent of the party recorded is permissible. La. R.S. 15:1303(C)(3). Furthermore, such a secret recordation by one participant in the conversation does not violate the privacy interests of the other participant. United States v. Santillo, 507 F.2d 629 (3rd Cir. 1975), cert. denied, 421 U.S. 968 (1975); State v. Reeves, 427 So. 2d 403 (La. 1982). The officer was under no duty to advise the defendant of Miranda rights since he was not in custody or otherwise detained at the time of the conversation. Miranda v. Arizona, 384 U.S 436 (1966); State v. Hennigan, 404 So. 2d 222 (La. 1981).

Assignment of Error No. 13 is without merit.

Assignment of Error No. 14

Defendant contends the trial judge erred in allowing the state to present evidence of defendant's involvement in an auto-theft insurance fraud scheme. He argues that the state's Prieur notice was untimely and that the evidence constituted inadmissible

evidence of other crimes and should have been suppressed.[5]

The state has an obligation to give reasonable particularized notice of its intent to use other crimes evidence. State v. Prieur, 277 So. 2d 126 (La. 1973). In this case, the state gave its notice on the morning of the first day of trial. Such notice was unquestionably late. However, defendant has made no showing that he was prejudiced by the late notice. He was well aware that state witness Saavedra would testify that defendant attempted to enlist him in an auto-theft fraud scheme and he was aware of documentary evidence suggesting that defendant had participated in taking his wife's Isuzu, which was later reported stolen, over the Texas border to El Salvador. Moreover, the trial judge offered to continue the trial if defense counsel needed more time to prepare a defense to the Prieur issues and counsel declined. Accordingly, we will not reverse defendant's conviction because of the untimeliness of the notice. State v. Sanders, 93-0001 (La. 11/30/94); 648 So. 2d 1272.

Defendant also argues that the "other crimes" evidence was not admissible pursuant to La. Code Evid. art. 404(B) or any other evidence rule. The general rule is that evidence of other crimes is not admissible due to the substantial risk of grave prejudice to the accused. Evidence that a person has a "bad character" or has committed offenses in the past is not allowed for the purpose of showing that the defendant acted in conformity with his "bad character" in committing the crime with which he is charged. State v. Prieur, 277 So. 2d 126 (La. 1977). However, La. Code Evid. art. 404(B) creates two exceptions to the general rule. It allows the admission of such evidence when it is relevant to show "motive, opportunity, intent, preparation, plan, knowledge, identi-

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[5] Defendant applied to the court of appeal for supervisory writs on this issue, which were denied. We also denied defendant's application. State v. Ortiz, 94-KK-2368 (La. 9/19/94). Our denial of supervisory review does not bar our consideration of this issue on appeal from a final judgement. State v. Fontenot, 550 So. 2d 179 (La. 1989).

ty, absence of mistake or accident." It also allows admissibility where the evidence of other crimes, wrongs, or acts relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding. In both cases, the probative value of the evidence must also outweigh its prejudicial effect. State v. Jackson, 93-0424 (La. 10/18/93); 625 So. 2d 146.

The state argued that the evidence of the auto-theft scheme was covered by both exceptions. Specifically, it claimed that the insurance fraud elements of both the auto-theft and murder-for-hire schemes were sufficiently similar to fall within the exception as showing knowledge and intent. The trial judge agreed. The trial judge may well have been correct in ruling that the insurance fraud aspects of the two crimes made the auto-theft scheme admissible. In order to admit the evidence under this exception, the state attempted to prove by clear and convincing evidence that an "other crime" had been committed by the defendant.[6] Accordingly, the state was entitled to show that the vehicle had actually made its way into El Salvador in completion of the scheme.

However, even if the evidence was inadmissible under La. Code Evid. art. 404(B), we believe that it was properly admitted because of its independent relevance in the case. State witness Saavedra told the FBI that Ortiz first approached him with the idea of involving him in an auto-theft insurance fraud scheme. They travelled together to an auto dealership, but Saavedra was unable to consummate a purchase in furtherance of that scheme. When the plan fell through, Ortiz proposed the murder-for-hire insurance fraud scheme on the same day and right after the first deal failed. The state was entitled to introduce the totality of the defendant's conversations with Saavedra as part of the essential background of their relationship.

Moreover, defendant made every effort to impeach Saavedra

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[6] Defendant does not argue that the state failed to prove the crime by clear and convincing evidence.

during cross-examination and with independent extrinsic evidence. The state was entitled to counter the impeachment efforts by attempting to corroborate Saavedra's testimony. Documents showing that the defendant had transported the same Isuzu that belonged to his wife to El Salvador shortly before it was reported stolen and testimony by the FBI agent that he located the same vehicle in El Salvador after the murders tended to prove that Saavedra's report of defendant's involvement in the auto-theft ring was credible, thereby tending to diminish the effect of the attempted impeachment. Thus, the evidence in dispute was independently relevant to show the background of the relationship and to corroborate Saavedra.

Finally, the state introduced evidence that the Isuzu was reported stolen along with several nine millimeter pistols. One of the victims was killed with a nine millimeter pistol. The theft of the Isuzu could well have been part of the overall murder plan by distancing Ortiz from the murder weapon, thereby making the theft of the vehicle an integral part of the commission of the crime.

In State v. Constantine, 364 So. 2d 1011 (La. 1978), we held that evidence that is logically relevant to issues before the jury should not be excluded merely because it also tends to show that the accused has committed another offense. Moreover, even if the trial court erred in admitting the evidence, our review of the entire record convinces us that the error was harmless and that defendant's conviction was not attributable to the admission of the disputed evidence. State v. Johnson, 94-1379 (La. 11/27/95); 664 So. 2d 94.

Assignment of Error No. 14 is without merit.

VOIR DIRE ISSUES

Assignment of Error No. 16

Defendant contends the trial judge erred in denying his challenge for cause of potential venireman, Constantino Bendick.

Defendant claims that Bendick was biased in favor of the death penalty and since he exhausted his peremptory challenges, the trial judge's action resulted in reversible error.

When a juror's view on capital punishment would substantially impair the performance of his duties as a juror in accordance with the court's instructions and his oath, a capital defendant must be allowed to challenge that juror for cause. Wainwright v. Witt, 469 U.S. 412 (1985). Where a defendant has been improperly denied a challenge for cause and exhausts his peremptory challenges, the denial constitutes reversible error. State v. Cross, 93-1189 (La. 6/30/95); 658 So. 2d 683; State v. Maxie, 93-2158 (La. 4/10/95); 653 So. 2d 526. However, a trial judge's determinations about a venireman's fitness for service are owed great deference where they are "fairly supported by the record." Witt, 469 U.S. at 424; State v. Lindsey, 543 So. 2d 886 (La. 1989), cert. denied, 494 U.S. 1074 (1990). Even when a venireman's initial responses suggest unfitness for service, if subsequent questioning and instruction demonstrate the venireman's willingness and ability to decide the case impartially and according to the law and evidence, the trial judge does not abuse his discretion in denying the challenge for cause. State v. Cross, 93-1189 (La. 6/30/95); 658 So. 2d 683.

In response to defense questioning, the potential venireman explained that his family was from the Middle East and that "an eye for an eye" was a tenet of his Arab orthodox religion. He indicated that he believed in the death penalty and that if someone intentionally killed another, he would deserve the death penalty. However, he also noted that he had been in the United States since 1958 and that the law in this country is different from the customs of the Middle East. He understood that the defendant would have to be proven guilty before he could be sentenced to death. Repeatedly he indicated that he would be guided by the evidence and by his fellow jurors. He denied that he would be governed by the dictates

of religion. He said that he could listen to evidence of mitigating circumstances and would consider both life imprisonment and death as alternative possible sentences. Having reviewed the entirety of the voir dire examination, we are satisfied that the responses of the venireman reflected an awareness that in this country the death penalty is not necessarily the penalty to be imposed once a guilty verdict is returned.

Finally, we note that an obvious language barrier existed which made the venireman's answers more difficult to evaluate. In this circumstance, the deference always given to the trial judge's evaluation of fitness to serve as a juror is particularly appropriate. In view of the totality of the venireman's testimony, we do not believe the trial judge erred in denying defendant's challenge for cause of this prospective juror.

Assignment of Error No. 16 is without merit.

Assignment of Error. No. 17

Defendant contends the trial judge erred in failing to sequester potential jurors. Specifically, he suggests that the trial judge should have sworn and sequestered potential jurors before they were accepted on all issues and he asserts that the judge told one potential juror that she could read the newspaper.

The trial judge, with the concurrence of the state and defense, conducted voir dire of prospective jurors in two phases. First, voir dire was conducted to qualify the veniremen on the issue of the death penalty. Then the judge conducted voir dire of the jurors on other issues. The judge and all counsel agreed that upon the qualification of prospective jurors on all issues, counsel would be allowed to "back strike," i.e., to move to strike jurors they had not previously moved to strike.

The judge did not swear potential jurors between the two phases. No jurors were sworn until the full voir dire and back striking procedure had been completed. At that point the jurors

were sworn and sequestered. The trial judge did initially sequester the first few jurors accepted in the initial phase of voir dire on the death qualification issue only. However, when he realized how long the entire procedure would take for both phases as well as back striking, he allowed them to go home.

La. Code Crim. P. art. 791 provides that in capital cases, jurors must be sequestered after they are sworn, unless the state and defendant both move to waive sequestration. La. Code Crim. P. art. 788(a) provides for the immediate swearing of jurors accepted by the state and defendant. The article does not contemplate the two-phase, back-striking procedure used in this case with the concurrence of defense counsel. Rather, it contemplates a procedure whereby the state and defendant accept the jurors on all issues in a one-phase procedure, after which the jurors are to be sworn and sequestered. Since under the procedure utilized, the state and defendant did not accept the jurors until the completion of both phases of voir dire and after an opportunity for back striking, the delay in swearing and sequestering the potential jurors did not violate the rules set forth in Code Crim. P. arts. 788 and 791. Moreover, even if the procedure used by the judge was arguably improper, defendant impliedly waived any right to an earlier sequestration of the jurors by acquiescing in the procedure. See State v. Taylor, 93-2201 (La. 2/28/96); 669 So. 2d 364, cert. denied, 117 S. Ct. 162; State v. Craighead, 114 La. 84, 38 So. 28 (1905).

Nor do we find merit in defendant's contention that the trial judge advised one of the unsequestered witnesses that she could read the paper. To the contrary, the trial judge admonished the unsequestered jurors that they should not read the newspapers or discuss the case with anyone. Taken in context, the judge's indication to prospective juror Ford that she could "get a paper" was not a reference to a newspaper but an agreement that she should get a written note from the clerk's office to her employer explain-

ing that she was still a prospective juror and would have to remain at court until the completion of voir dire or her dismissal.

Assignment of Error No. 17 is without merit.

Assignment of Error No. 18

Defendant contends that the last panel of prospective jurors should have been dismissed due to prejudicial remarks made by prospective juror Herman Nolan during voir dire.

While the trial judge was questioning potential jurors regarding their knowledge of the case, venireman Nolan interrupted to ask what they were doing there if the defendant killed someone? When the trial judge answered that such had not yet been determined, Nolan remarked: "Well, the way I feel, he's dead in my book." Defendant did not move for a mistrial or request an admonition to the panel.

We have held that failure to request a mistrial or admonition constitutes a waiver of any error that might otherwise have been claimed pursuant to La. Code Crim. P. arts. 771 and 775. Moreover, we note that the trial court did admonish the potential jurors to disregard Nolan's remarks. He also questioned the panel as to whether the statements made by Nolan influenced them and whether any of them shared a belief that just because someone is charged, he should get a penalty. The record does not reflect, and defendant does not represent, that any of the prospective jurors indicated that they were influenced in any way by hearing the remarks made by Nolan. Defendant had ample opportunity to follow up on the court's questions to document any prejudice by virtue of Nolan's comments. None was shown. The trial judge did not abuse his discretion in denying the defense motion to dismiss the entire panel.

Assignment of Error No. 18 is without merit.

Assignments of Error Nos. 20 and 21

Defendant contends the trial judge erred in failing to give the defendant a copy of the entire "chain of custody" document referred to by the state's forensic serologist during the state's direct examination. Defendant argues that he was prejudiced in his cross-examination of the witness by not having the document.

The trial judge ruled during pre-trial motions that the state had no obligation to provide the "chain of custody" to the defendant. When the witness used the document to refresh her recollection at trial, the judge ordered the state to excise from the "chain of custody" any portions of the document the witness actually referred to during her direct examination by the state and to give them to the defendant. This order was in keeping with La. Code Evid. art. 612(C). Thus, defendant had before him those portions of the document actually referred to by the witness for use during cross-examination.

Defendant's attempt to get other portions of the document appears to have been an effort to circumvent the judge's earlier ruling that the state was not required to surrender the document as part of discovery. Other portions of the document not used on direct would not have been material to cross-examination on the testimony given to that point but only on other possible areas not covered on direct and as to which the document had not used to refresh the witness's recollection. Moreover, we note that the witness was able to recall, without the aid of the document, the receipt and discharge of items of evidence with which her office was connected. Her testimony from the requested document about the activities of other departments would have been inadmissible hearsay. The thrust of cross-examination was intended to suggest that the murder knife or the blood sample taken from it may have become contaminated with the victim's blood at the laboratory. However, the serologist insisted that the testing was carefully done and no

contamination occurred.[7] We are not persuaded that defendant suffered any prejudice from the court's ruling that he was not entitled to the entire document for use during cross-examination.

Defendant likewise argues that the trial judge should have ordered the state to provide the document to the witness so that she could refresh her recollection as to matters that might have been disclosed therein. The state is under no obligation to provide a witness with undiscoverable documents so that the witness can refresh recollection to answer the defendant's questions. Were that the case, any failure of recollection of a witness of matters disclosed in an otherwise nondiscoverable document would require the production of the document to the defense.

Assignments of Error Nos. 20 and 21 lack merit.

Assignment of Error No. 22

Defendant contends the trial judge erred when he allowed two FBI agents to testify from as yet unadmitted and unauthenticated foreign documents. He contends that he was prejudiced by the use of information from the documents which contained inadmissible hearsay.

La. Code Evid. art. 901 provides that the requirement for identification or authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Authenticity can be established by the distinctive characteristics of the document, circumstantial evidence, or testimony of a witness with knowledge. The official comments to the article make it clear that the initial determination of whether there is sufficient evidence of authenticity for admissibility is made by the trial judge. The factfinder ultimately determines

[7] State Exhibit 82 is the report of the serologist, K. Gerdes. In that report, it is indicated that she received the bloody clothes and other samples recovered at the crime scene on October 28, 1992 from K. Gonsoulin. The knife and knife sheath were received for testing on Nov. 6, 1992. Thus the knife could not have become contaminated by being packaged with other bloody evidence from the scene before reaching the lab.

whether the evidence is genuine. See Cross v. Cutter Biological, Div. of Miles Inc., 94-1477 (La. App. 4th Cir. 5/29/96); 676 So. 2d 131, writ denied, 96-2220 (La. 1/10/97); 685 So. 2d 142.

In the instant case, Agent Berlingeri read a VIN number off of one of the documents. He did not identify the document at that time and the state indicated that it would lay a predicate and introduce the document later in its case. Inasmuch as the document was not tendered for admission into evidence at that time, it was not necessary that it be authenticated at this stage of the trial. Moreover, we do not believe that any prejudice was suffered by the defendant from the reading of the VIN number off of the document. There was no dispute as to the accuracy of the VIN number of the Isuzu owned by Tracie that had earlier been reported stolen. Later, in rebuttal to cross-examination by the defense as to whether the agent could prove who imported or registered the car in El Salvador, the agent identified one of the disputed documents as a customs document and read the dates from the document. Again the document was not admitted and the state represented that it would be admitted into evidence later.

While it may have been preferable to have the documents admitted prior to their use, we find no prejudice to the defendant's case. The agent personally located the vehicle in question in El Salvador in November, 1992 and viewed and recorded its VIN number. The same VIN number appeared on the police report on the theft of the Isuzu, which report was taken from Manuel Ortiz. Thus, there was independent evidence that Tracie's vehicle reached El Salvador. This witness did not use the disputed documents to offer testimony that defendant was the party who actually brought the vehicle into the country.

Agent Roviaro later identified a document dated June 18, 1992 as a customs document indicating that a fee had been paid to drive the Isuzu into El Salvador and that the vehicle was shown as owned by Ortiz. The agent identified another document as a customs

form dated June 17, 1992 showing that defendant had driven the Isuzu vehicle registered in Louisiana into El Salvador. Again, the trial judge allowed the identification of the documents as part of a predicate for their later admission.

The documents were subsequently admitted in connection with the testimony of Det. Mouret, as documents seized during the search of the residence of defendant's parents. Defendant did not ask for a limiting instruction to the jury regarding the purpose for which the documents could be used. The jury had direct access to the documents containing the same information testified to by the agents.

Defendant argues that the documents should not have been admitted because they were not properly authenticated. In the instant case, the agents could speak Spanish and could describe the documents as papers issued by the El Salvadoran customs department. The documents had been found in a locked tool box belonging to defendant under circumstances that made it doubtful that they were forged or fraudulent. Defendant argues that the documents had to be authenticated in accordance with La. Code Evid art. 902(3). That article, however, sets forth the requirements for accepting a document as authentic in the absence of any extrinsic testimony and circumstances tending to establish authenticity. In our view, the trial judge did not abuse his discretion in determining that there was sufficient evidence of authenticity to allow the ultimate question to go to the jury.

Defendant next argues that even if the documents met the authenticity test, they contained inadmissible hearsay. The documents did contain information the state wished the jurors to accept as true. To that extent, the content of the documents was hearsay. Nevertheless, La. Code Evid. art. 103 provides that error cannot be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected. In the context of all of the evidence offered throughout the trial, we cannot conclude

that testimony of the agents from the documents was sufficiently prejudicial to warrant reversal of the defendant's conviction. There was other evidence in the record that Tracie's "stolen" Isuzu ended up in El Salvador.

Assignment of Error No. 22 is without merit.

Assignment of Error No. 24

Defendant contends that the trial judge improperly limited his cross examination of state witness Carlos Saavedra, impinging on his constitutional rights to cross-examine and confront his accuser, by refusing to make available the entire transcript of a statement made by the witness to the police. Defendant argues that since the judge gave him part of the document, he was entitled to all of it.

Prior to cross-examination of Saavedra, the judge reviewed the statement in question in camera at the request of the defendant. Pursuant to La. Code Crim. P. art. 723, the defendant is not entitled to discover a statement taken by the police unless the statement was given by the defendant. Only if the statement contains information which the state is under a duty to disclose under Brady v. Maryland, 373 U.S. 83 (1963) is the defendant entitled to any portion of the statement of a witness.

In the instant case, the trial judge reviewed the statement and determined that the state had already produced all discovery required under Brady. Thus the defendant had no further rights to the statement. Defendant's right to effective cross-examination was not improperly impinged by the judge's refusal to hand over nondiscoverable material.

Assignment of Error No. 24 is without merit.

Assignment of Error No. 25

Defendant contends the trial judge erred in giving a limiting instruction to the jurors during the defendant's direct exam-

ination of a witness. Defendant argues that the judge's instruction amounted to an improper comment on the evidence.

During defendant's earlier cross-examination of Carlos Saavedra, Saavedra denied that he had ever been called "Hercules" or that he had been addressed as "Hercules" at the Seafarer's Union Hall. As part of its case in chief, defendant called to the stand its private investigator to testify that he was present at the Union Hall when someone called out the name "Hercules" and Carlos responded by turning around. The trial judge initially refused to allow the testimony at all, ruling that it was inadmissible hearsay. The court of appeal granted a supervisory writ directing the court to allow the evidence because neither the calling out of the name nor the physical response was properly classified as hearsay.

When the witness retook the stand after the supervisory ruling, the state asked the court for a cautionary instruction that the calling out of the name did not prove the truth of the name. The court gave the following instruction:

> All right, ladies and gentlemen, I'm going to overrule the objection of the state and allow the witness to testify only for the purpose of impeaching, <u>if he can</u>, any testimony that may have been given by Carlos Saavedra, not for the truth of what may have happened at the Seaman's Hall. (Emphasis suggested by defendant).

La. Code Crim. P. art. 772 precludes the judge from commenting on the evidence in the presence of the jury. Improper comments which are shown to have influenced a jury and contributed to the verdict can constitute reversible error. <u>State v. Gallow</u>, 338 So. 2d 920 (La. 1976). In our view, however, the judge's instruction and use of the phrase "if he can" did not constitute a comment on the evidence. Rather, the instruction reflected the reasoning of the court of appeal in granting the supervisory application. Had the trial judge not included a caveat, the jury might have interpreted the admonition as indicating that the testimony did necessarily impeach Saavedra, a matter hotly contested. There was tes-

timony that others may have turned in the direction of the person who called out as well, implying that the physical response of Saavedra could have been to the loudness of the call, the unusual name or some factor other than name recognition. The determination of whether or not impeachment had occurred was within the province of the jury.

Moreover, we note that at the time of the objection, defense counsel did not object to the substance of the admonition but only to its timing in the middle of his witness's testimony. Given that we do not believe the trial judge was incorrect in deeming the instruction appropriate, we cannot conclude that it was an abuse of discretion to give the instruction contemporaneous with the testimony to which it applied.

Assignment of Error No. 25 is without merit.

Assignment of Error No. 26

Defendant contends the trial judge erred in denying his multiple requests for a mistrial during the state's closing rebuttal argument. Defendant argues that the prosecutor commented on evidence not in the record and injected his personal opinion into the argument.

We agree that the prosecutor's remarks were in some cases inappropriate and flirted with reversible error. La. Code Crim. P. art. 774 provides that the prosecutor's argument should not appeal to prejudice and should be confined to the evidence admitted, lack of evidence, conclusions of fact that can be drawn from the evidence, and the applicable law. However, the evidence commented upon by the prosecutor that was arguably not in the record was not at the heart of the prosecution's case and did not affect any of the material aspects of its proof. Moreover, while the prosecutor should not have made personal attacks on defense counsel or witnesses in the case and while is was inappropriate to suggest that defendant blocked the introduction of certain evidence, we are un-

able to conclude that the prosecutor's argument influenced the jury and contributed to the verdict.

Before this court will reverse a conviction or sentence on the ground of improper closing argument, it must be thoroughly convinced that the remarks influenced the jury and contributed to the verdict. State v. Taylor, 93-2201 (La. 2/28/96); 669 So. 2d 364, cert. denied, 117 S.Ct. 162. After carefully reviewing the closing argument as a whole, we do not believe the remarks contributed to the verdict.

Assignment of Error No. 26 is without merit.

Assignments of Error Nos. 15 & 27

Defendant contends that his trial counsel rendered ineffective assistance during both the guilt and penalty phases of the trial. He argues that during the guilt phase his attorney should have accepted the trial judge's offer of a continuance when the state gave untimely Prieur notice of intent to introduce evidence of defendant's involvement in an auto-theft insurance fraud scheme. He also complains that during the penalty phase, counsel did not present a vigorous case of mitigating circumstances.

We have held that a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief, so that a full evidentiary hearing can be held if appropriate. State v. Burkhalter, 428 So. 2d 449 (La. 1983); State v. Seiss, 428 So. 2d 444 (La. 1983). However, where the record contains evidence sufficient to decide an issue raised on appeal by assignment of error, we will treat the issue in the interest of judicial economy. State v. Ratcliff, 416 So. 2d 528 (La. 1982). Such is the case with respect to the assignment regarding the guilt phase of the trial.

A conviction will be reversed due to ineffective assistance of counsel only if the defendant establishes that: (1) counsel's performance fell below an objective standard of reason-

ableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and unjust. Trial counsel's refusal of the judge's offer of a continuance in the guilt phase of trial was a deliberate choice. The record reflects that he already knew the details of the insurance scam and already had all or substantially all of the documents the state intended to use regarding the auto-theft, insurance fraud scheme. Counsel obviously felt that he was prepared to go to trial, regardless of the late Prieur notice. This court does not second-guess strategic and tactical choices made by trial counsel. State v. Myles, 389 So. 2d 12 (La. 1979). Moreover, there has been no showing that the failure to accept a continuance rendered the defendant's trial unfair or the verdict suspect. We reject defendant's claim of ineffective assistance of counsel during the guilt phase of the trial based on defense counsel's failure to accept the trial judge's offer of a continuance.

A defendant is entitled to effective assistance of counsel during the penalty phase of the trial as well as during the guilt phase. State v. Fuller, 454 So. 2d 119 (La. 1984). During the penalty phase, defense counsel waived his right to make an opening statement. Defendant took the stand and maintained his innocence. He also testified to his lack of a prior criminal record. Defense counsel made a closing statement which appealed to any residual doubt the jurors may have had regarding guilt. He argued primarily that Ortiz should not be given the death penalty because later discovered evidence might bear out his protestations of innocence.

Defendant complains that his counsel did not prepare adequately for the penalty phase of the trial as shown by his failure to introduce other evidence of mitigating circumstances and his failure to make an opening statement. We are unable to determine on the record before us whether the conduct complained of was a

product of trial strategy and/or the unavailability of such evidence. On appeal, defendant does not indicate what witnesses could have been called on his behalf or what their testimony in mitigation might have been. In our view, defendant's claim of ineffective assistance of counsel during the penalty phase of trial is more properly raised in an application for post-conviction relief. State v. Burkhalter, 428 So. 2d 449 (La. 1983).

Assignments of Error Nos. 15 and 27 are without merit.

Assignment of Error No. 28

Defendant contends that the jury erred in finding statutorily sufficient aggravating circumstances to impose the death penalty and that the death penalty is disproportionate. The substance of this assignment is dealt with in the Capital Sentence Review contained in the main body of this opinion.

Assignment of Error No. 28 is without merit.

Assignments of Error Nos. 30 & 31

Defendant contends the trial judge should have granted his motion for new trial in which he asserted Brady violations and misconduct on the part of the district attorney.[8] Defendant argues that he should have been given additional documents connected to the insurance claim on the Isuzu and FBI reports on an alleged confession of the crime by Carlos Saavedra. He also asserts that the conduct of the district attorney in advising state witnesses not to bring their reports with them to trial rendered his cross-examination of witnesses ineffective.

All exculpatory evidence related to this offense should have been timely given to the defendant, whether it was directly

[8] After the record was lodged in this court, defendant filed two pleadings in proper person, seemingly raising Brady issues and claims of newly discovered evidence. On the showing made, we decline to review these matters which are not part of the record before us. Defendant may raise these issues in an application for post-conviction relief.

exculpatory or constituted impeachment evidence. United States v. Bagley, 473 U.S. 667 (1985). The state apparently received documents from Allstate Insurance Company purporting to bear the signature of Tracie Williams regarding the reported theft of the Isuzu. The district attorney admitted that he did not review the documents for Brady information but sent them to another division of the office for possible use in another case. Defendant claims that he did not have the documents in question and, if he could have verified Tracie's signature, would have used them to show that Tracie made the claim, not the defendant. This supposedly would have countered the state's position that Ortiz had committed an auto-theft insurance fraud.

The state has an ongoing duty to look for Brady material and to disclose it. The state cannot avoid that duty by segregating documents in different crime files. However, the defendant had access to insurance documents during trial. It is unclear which of the insurance documents the defendant lacked. Defense counsel testified and admitted that he had done discovery on Allstate. He had to have looked for a cancelled check and claims forms in the course of his investigation. Moreover, he knew from pre-trial motion practice that a draft for the insurance proceeds had been issued to Tracie and endorsed with the purported signatures of both Tracie and the defendant. It appears that defendant had access to some insurance documents bearing Tracie's name. State Exhibit 201 is a Fire and Casualty Theft Claim Report that purports to bear the signature of Tracie. Moreover, the jury heard evidence that Tracie filed a theft report and that it was her vehicle. In that event, any payment would obviously have been issued to her.

Defendant has yet to submit the documents at issue to a handwriting analyst to prove that Tracie did indeed endorse the check and fill out the forms. But regardless of the results of such an analysis, we believe that the availability of that evidence at trial would not have affected the jury verdict. The jury al-

ready had before it other evidence to the same effect. Direct evidence that Tracie signed forms and received the insurance proceeds would not have been exculpatory for Ortiz. She could have made the claim and collected the proceeds without knowing that her husband had arranged for the theft and resale of the vehicle in El Salvador. Alternatively, the jury might have concluded that she was also a party to the theft and fraud scheme.

We will not overturn a conviction on the basis of a claim that the state suppressed exculpatory material unless the defendant demonstrates a reasonable probability that the result of the proceeding would have been different had the disputed evidence been disclosed to the defense; a reasonable probability is one sufficient to undermine confidence in the outcome. State v. Marshall, 94-0461 (La. 9/5/95); 660 So. 2d 819. Based on the evidence already introduced at trial and available to the defendant, there is no reasonable probability that the disclosure to the defense of the documents in question would have resulted in a different outcome.

Nor do we believe that disclosure of further evidence of the alleged confession of Saavedra would have changed the verdict. The state provided defendant with the name of the person who allegedly heard the confession and the name of the FBI agent who initially received the information. Defendant complains that he did not get a FBI written report. The state denied having a FBI report that contained any Brady information. The defendant could have subpoenaed the FBI agent and the person who heard the confession. He apparently did not do so because the party denied hearing such a confession when interviewed by defense counsel during trial preparation. We find no reasonable probability that a written FBI report, even assuming the state was in possession of one, would have affected the outcome of the case.

Finally, defendant complains about the fact that the district attorney instructed witnesses not to bring reports to court with them. The state is not required to make available to the defendant

reports of nonparty witnesses, other than the initial police report, unless and to the extent that they contain Brady information or the report is used by the witness during testimony. The state is not guilty of misconduct in advising witnesses not to create a situation that may lead to the state having to disgorge otherwise nondiscoverable information.

Assignments of Error Nos. 30 and 31 are without merit.