SUPREME COURT OF LOUISIANA

NO. 97-KA-0641

STATE OF LOUISIANA

V.

FREDRICK DOMNE GRADLEY

ON APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT,
FOR THE PARISH OF RAPIDES,
HONORABLE DONALD T. JOHNSON, JUDGE

MARCUS, Justice*

Fredrick Gradley was indicted for the first degree murder of Rita Rabalais in violation of La. R.S. 14:30. After trial by jury, defendant was found guilty as charged. 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. The trial judge sentenced defendant to death in accordance with the recommendation of the jury.

On appeal, defendant relies on twenty-six assignments of error for reversal of his conviction and sentence.[1]

FACTS

On the morning of October 24, 1994, Leta Juneau became concerned when her eighty-two year old sister-in-law, Rita Rabalais, did not attend 8:00 A.M. daily mass, as was her custom. Immediately after the service, Leta went to Rita's home to check on her. When she arrived, she found the door to Rita's home unlocked.

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* Johnson, J., not on panel. 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 They will be reviewed in an appendix which will not be published but will comprise part of the record in this case.

She entered the house and called to Rita, but neither Rita nor her pet dog responded. Various items were in disarray around the home and Leta became alarmed. She called her daughter, who shortly thereafter arrived with Leta's grandson, James Yarborough. James found Rita's pet poodle closed up in one of the home's bedrooms, cowering by the side of a bed. By that time, various other family members had arrived and gone through the house looking for Rita, to no avail. While searching about the house for his great-aunt, James noticed that a chest of drawers had been pulled from its usual spot against a wall and placed in front of the closet in Rita's bedroom. The police were called to investigate.

When the police arrived on the scene, James directed Officer James Bettevy to Rita's bedroom and pointed out the chest blocking the closet door. The officer moved the chest, opened the closet, and directed his flashlight inside. There Officer Bettevy and James Yarborough found the bludgeoned body of Rita Rabalais, covered with blood, in a slouched position on the floor of the closet.

The homicide division of the Alexandria police department soon arrived to collect evidence. Detectives J. D. Griffith and Ronald Beson took photographs, dusted for fingerprints, and recovered from the kitchen garbage can a knife, a knife sharpening rod, and a rubber glove bearing a latent palm print. They also found a bloody shoe print left on the floor of the home. The portion of the floor where the shoe print was found was removed by carpenters to be preserved as evidence. All of these items were introduced at trial.

An autopsy on the victim revealed that Rita had been repeatedly stabbed, slashed, and badly beaten. Her face and head bore evidence of multiple bruises and lacerations. There were four

groups of fatal wounds. Repeated blows to the head caused massive bleeding to the brain. In addition, there were three fatal stab wounds, one on each side of the neck which had severed the carotid arteries and one to the left side of Rita's body, which had penetrated six inches and pierced her heart and lung. The coroner, Brenda Rheams, also testified to evidence of blunt trauma about the upper body, apparently inflicted with fists and a blunt object, as well as defensive wounds to the victim's arms. She verified that the victim's stab wounds were consistent with wounds that could have been inflicted by the kitchen knife recovered by Officers Griffith and Beson at the scene. She also confirmed that the trauma to the victim's brain could have been caused by blows with the knife sharpening rod found by the officers.

In the course of their investigation, police canvassed the neighborhood for information. They spoke to Ricky Swafford, a fourteen year old boy living in the area. Ricky testified at trial that he had known Rita and that she appeared to him to be about ninety years old. A few days before the murder, he had heard defendant and several other young men planning to rob and kill Rita as they hung out in the front yard of Lonnie Smith's house. Smith was Rita's next door neighbor. He heard Gradley say that he believed the victim had money, jewelry, and a gun and that he wanted to go in "the old lady house and kill her" and see what he could find in the home. Ricky testified that he heard virtually the same comments made by defendant in another conversation the day before the murder. On the morning of the murder, he saw defendant in the neighborhood wearing a white T-shirt with red stains on it.

The police went to defendant's home and left a message asking that he call the detectives. He did so and reported voluntarily to the police station for questioning the next day,

December 9, 1994. After being advised of his rights, defendant gave a statement describing the murder of Rita Rabalais in graphic detail. He confessed that he had entered the victim's home with at least four other young men with the intention of robbing her. He had discussed the crime with one of the other perpetrators that morning, Cedric Howard, who had said, "come on, let's go kill this old woman and take her car." As he entered Rita's home behind the other attackers, they had already begun to beat her and she was calling out for help. She tried to run for the front door but she was caught by the hair and slammed to the floor where she was kicked, beaten, and hit in the head with a pipe. At some point Cedric Howard choked her with a wire. One of the perpetrators, Jerry Joseph, ran and got some knives out of the kitchen. Defendant admitted that he stabbed the elderly victim in the side and witnessed others in the group continue "cutting her all up." Then they pushed her into a closet and moved a dresser across the door. Defendant cleaned off the knife he had used and threw it and some hospital gloves worn during the murder into the kitchen garbage can. Then the attackers looked through the victim's "stuff" and her dresser, looking for the car keys. Defendant confirmed Ricky Swafford's testimony that he had seen him in the neighborhood that morning after the murder.

The state's expert forensic metallurgist, William Tobin, confirmed that the knife and knife sharpening rod found in the kitchen garbage can came from a knife block on the counter of the victim's kitchen. FBI special agent, Gary Kanaskie, testified that the bloody shoe print left at the scene of the crime was consistent with prints left by the Adidas sneakers seized from defendant pursuant to a warrant. Tim Trozzi, an FBI fingerprint expert, testified that the palm print found on the rubber glove retrieved

from the victim's kitchen garbage can matched defendant's palm print.

Police also secured the statement of Jerry Joseph, one of the men who participated in the crime. Joseph was allowed to plead guilty to manslaughter, which carries a maximum sentence of forty years in prison at hard labor, in exchange for his cooperation in giving evidence of the crime. This witness testified at trial that he had known defendant for about one week before the murder. One evening outside a local club, he heard defendant and others talk about robbing a lady who lived on Kelly Street. He heard defendant and Cedric Green planning the robbery; the plan was that if Rita recognized Cedric, who lived in the neighborhood, she would be murdered. On the morning of the murder, he met up with the group again and saw part of the group enter the rear of the victim's home after Cedric Howard had "messed with the back door" with a screwdriver. The rest of the group, including defendant, entered the front door. When Joseph went into the house, the victim was surrounded and was being beaten about the head with a pipe, kicked in the face, and punched. He saw defendant come into the room from another part of the house with the murder weapon, a kitchen knife. As one of the perpetrators held Rita up, he saw defendant's arm go up with knife in hand and then saw Rita fall. Jerry Joseph testified that money was taken from the house. He believed about $800.00 was taken and he personally got $100.00.

Defense counsel admitted during opening statements that Gradley had confessed to being at the scene of the crime and inflicting one of the victim's fatal wounds. However, counsel suggested that the stabbing was without specific intent and that it occurred as the victim tried to grab on to the defendant. The jury was asked to find the defendant guilty of second degree murder or

manslaughter rather than first degree murder.

PRETRIAL ISSUES

Assignment of Error No. 11

Defendant contends the trial judge erred in appointing two attorneys to represent him in this capital case who allegedly had not been certified in accordance with La. Sup. Ct. R. XXXI. Rule XXXI, which became effective July 1, 1994, sets forth Standards Related to the Effectiveness of Indigent Defense Counsel. At Section J(1)(a), the rule provides that in any capital case involving an indigent defendant, the court shall appoint no less than two attorneys who have been certified by the Louisiana Indigent Defender Board as qualified to serve in capital cases. Section J(1)(c) provides that if the court determines that a lawyer initially appointed is not currently certified, the court shall relieve the lawyer of the appointment and appoint the lawyer or lawyers recommended by the chief executive officer of the Louisiana Indigent Defender Board.

Defendant filed an application for a court appointed attorney on December 20, 1994. Ms. Katherine Geary was appointed to represent him and he was arraigned on February 17, 1995. By April, 1995, Mr. James Gravel had also been appointed to represent the defendant. In February 1996, Mr. Gravel passed away and Ralph Kennedy was appointed to take his place on the defense team.

Defendant has presented no evidence that his trial counsel, Ms. Geary and Mr. Kennedy, were not certified to serve in a capital case at the time of trial. However, even assuming that they were not certified, defendant's assignment of error lacks merit. Section R of Rule XXXI specifically provides that notwithstanding its provisions, failure to comply with the Rule shall not

be a ground for an attack on a conviction:

> The Rule shall not be construed to confer substantive or procedural rights in favor of any accused beyond those rights recognized or granted by the United States Constitution, the Louisiana Constitution, the laws of the state, and the jurisprudence of the courts.
>
> The system, programs, rules, procedures and standards included in, encompassed by, and resulting from this Rule shall not form a basis for a procedural or substantive attack in any case or proceeding pending or instituted in the Louisiana criminal justice system on or after the date this Rule is promulgated.

Accordingly, even assuming that trial counsel had not been certified at the time of trial, the failure of certification does not constitute a ground for reversal of defendant's conviction.[2]

This assignment of error has no merit.

Assignment of Error No. 15

Defendant contends the trial judge erred in denying his motion to suppress his confession. He argues that his recorded statement, in which he admitted stabbing the victim in the side, was not freely and voluntarily given because he was induced to make the statement by promises that he would only be charged with manslaughter.

At the hearing on defendant's motion to suppress, all three of the police officers present at the time the statement was given appeared. Det. Donald Weatherford testified that defendant had called him at 9:00 A.M. on the morning of December 9, 1994 to advise that he would be coming in to answer questions. Weatherford met him in the lobby of the station house at about 11:55 A.M. and walked with Gradley down the hall to the office he shared with Det.

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[2] The Uniform Capital Sentence Report filed in this case demonstrates that both of defendant's trial counsel had over 10 years experience.

Gary Billingsly. Dets. Billingsley and Darrell Jones were already in the office. Defendant concedes he was not under arrest at this time.

Once in the office, defendant was advised of his Miranda rights using an official "Advice of Rights Form" which was admitted into evidence at the hearing. As defendant was read his rights, Gradley initialed each of them on the form. Then defendant signed the "Waiver of Rights" section of the form, waiving his right to counsel, indicating a desire to make a statement, and affirming that no threats or promises had been made. Det. Weatherford testified that he told defendant they were investigating the murder of Rita Rabalais, that they wanted to ask him questions about the homicide, and that he would be charged with first degree murder. He denied that any threats, force, or coercion was used and clearly stated that no promises, inducements, or deals were offered to defendant in exchange for his statement. The three officers talked to defendant about the incident and proceeded to take a recorded statement at 12:25 P.M. The recorded statement was about nine minutes long. Det. Weatherford explained that the story defendant recounted involved at least four other people with similar names. The officers wanted to get the story and people involved clear before taking the formal recorded statement. Only about 30 minutes elapsed between defendant's arrival at the station and the commencement of the recorded statement. During that time, defendant was advised of his rights, completed the necessary paperwork, waived his Miranda rights, and informally told the officers what occurred in connection with the murder of Rita Rabalais. Det. Billingsly likewise testified that defendant's confession was free and voluntary. He was present throughout the advice and waiver of rights, initial questioning, and taking of the

recorded statement. No threats, force, coercion, promises, or inducements were made by anyone. Det. Darrell Jones testified that he had known defendant for about four years. It looked as if something was wrong and he recalled Gradley saying that he had some things to get off his chest that were bothering him. Det. Jones testified that he was present throughout the entire time Gradley was in the office and that no threats, force, coercion, promises, or inducements of any kind were given in exchange for defendant's statement.

Defendant testified at the hearing for the limited purpose of calling into question the free and voluntary nature of his statement. He claimed he had been promised he would be charged with manslaughter and would only get 20 years for the murder and that these promises were made before the recorded statement was taken and after Det. Jones had left the office.

The state recalled Det. Billingsly in rebuttal. He specifically denied that any of the officers had promised defendant any deal or that there had been any assurance or discussion of defendant's being charged with manslaughter if he cooperated with the police.

The trial judge heard the testimony of the three officers and defendant on the issue raised. He reviewed the Advice of Rights Form which defendant signed and which included a statement that no promises had been made to defendant. He also listened to the tape recorded statement made by defendant. At the end of the statement the following exchange took place:

> Q: Was there any force, threats, or promises been made to get you to give me this statement or was it of your own free will?
>
> A: On my own free will.
>
> Q: And it was done with your rights in mind, you still remember what your rights are?

A. Yes sir.

Based on all of the evidence, the trial judge denied defendant's motion to suppress his confession, noting that the testimony of the officers was straight forward and consistent. Defendant's testimony contradicted his own recorded statement and the statement in the Advice of Rights Form he had signed. He ruled:

> [t]he court resolves this credibility question in favor of the officers and finds that there is no merit to the motion to suppress and denies the motion.

It is well settled that before the state may introduce a confession into evidence, it must affirmatively show that the statement was free and voluntary and not the result of fear, duress, intimidation, menace, threats, inducements, or promises. La. R.S. 15:451; State v. Simmons, 443 So. 2d 512 (La. 1983). The state must specifically rebut a defendant's allegations of misconduct. State v. Vessell, 450 So. 2d 938 (La. 1984). However, where conflicting testimony is offered, credibility determinations lie within the sound discretion of the trial judge, and his ruling will not be disturbed unless clearly contrary to the evidence. Vessell, 450 So. 2d at 943.

In the instant case, defendant argues that the testimony of the officers at the motion to suppress and later at trial as to exactly what transpired between the time he appeared at the station and the time his recorded statement was taken 30 minutes later is inconsistent. Defendant suggests that because of these alleged inconsistencies, the officers' testimony should be disregarded and Gradley's accepted as true. He asserts that at trial, the officers made it seem as if defendant told his story right away and just repeated it on tape, while at the earlier motion to suppress, they testified that they had spoken to defendant to get the facts

straight before the recording.

After reviewing the record, we do not agree that the testimony of the officers, taken as a whole, is inconsistent. All three officers testified clearly that no promises whatsoever were made in exchange for defendant's statement. Det. Billingsly specifically refuted defendant's claim that he was promised a charge of manslaughter if he cooperated. In our view, the trial judge was well within the bounds of his discretion in denying defendant's motion to suppress and in permitting the introduction of defendant's confession at trial.

Assignment of Error No. 15 is without merit.

VOIR DIRE ISSUES

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

Defendant claims the trial judge improperly granted five of the state's challenges for cause made under Wainwright v. Witt, 469 U.S. 412 (1985). Defendant argues that the five prospective jurors were improperly excused and that there was no showing that the excluded jurors' attitudes about the death penalty would substantially impair their ability to follow the judge's instructions.

A prospective juror is properly excluded for cause because of his/her views of capital punishment when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412 (1985). La. Code Crim. P. art. 798(2)(b). A capital defendant's rights under the Sixth or Fourteenth amendments to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious

scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510 (1968). It is reversible error when such a prospective juror is excluded, even if the state could have used a peremptory challenge to strike the potential juror. Gray v. Mississippi, 481 U.S. 648 (1987). 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). Even where a prospective juror declares his ability to remain impartial, a challenge for cause will be upheld if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to the law may be reasonably implied. A trial judge has great discretion in determining whether sufficient cause has been shown to reject a prospective juror. Such determinations will not be disturbed unless a review of the voir dire as a whole indicates an abuse of discretion. State v. Tart, 93-0772 (La. 2/9/96), 672 So. 2d 116.

Our review of the record demonstrates that the trial judge did not abuse his discretion in granting the state's challenges for cause as to each of the prospective jurors in dispute. Prospective juror Rebecca Maricle testified that she would require the state to meet a higher burden of proof than "beyond a reasonable doubt." She acknowledged that she could vote for capital punishment in some circumstances but would require more proof than "beyond a reasonable doubt" in order to do so. Ms. Maricle stated that she would follow the instructions of the judge as to everything but the state's burden of proof. In response to questions by defense counsel, she replied:

> I just think that their evidence would have to be so strong that there would be, I mean, just-- he'd just have to have done it. That there would be no other ifs, ands and buts

about it.

While some of the defense questions were framed in terms of reasonable doubt, the witness never retreated from her position that more than proof "beyond a reasonable doubt" would be required by her in a capital case.

Prospective juror Tommy Lagrange similarly testified that because of the potential for imposition of the death penalty, he probably would hold the state to a higher burden of proof than "beyond a reasonable doubt." He also testified that he was leaning toward feeling that his conscience would impair him from ever considering the death penalty. While defense counsel was able to get a broad statement that he would follow the judge's instructions, the potential juror was never rehabilitated specifically with respect to his ability to impose the death penalty or the burden of proof he would require the state to bear.

Prospective juror Franklin Williams testified that the only way he could impose the death penalty was if the offense was personal or against a member of his immediate family. Otherwise, he did not believe he could do it. He also stated that in a first degree murder case he believed he would require more than proof "beyond a reasonable doubt." Mr. Williams indicated that he could only return a death penalty for a hideous crime like a "Charles Manson crime." In considering the challenge for cause, the trial judge commented that he did not believe the prospective juror's later answers indicated a change from his original attitude that he would hold the state to a higher burden of proof than that required by law.

Prospective jurors Michael Sawrie and Susie Washington both stated that their beliefs would prevent them from returning a death verdict. Sawrie indicated that even if he thought a person

deserved death, his Christian faith would prevent him from taking part in a decision that would end a human being's life. Washington testified that she did not know if she could impose the death penalty. On further questioning she indicated that it would bother her and that she could not vote for a death penalty under any set of circumstances. In response to questioning by defense counsel, both of these prospective jurors responded "yes" to a question of whether they could render a fair and impartial verdict in connection with the death penalty. However, they did not actually say they could impose the death penalty.

As to each of the prospective jurors referred to above, the trial judge granted the state's challenge for cause. Having read the entirety of the responses of the veniremen, we are unable to say that the trial judge abused his discretion in concluding that the views of these prospective jurors would substantially impair their abilities to follow the judge's instructions in a capital case. Tart, 672 So. 2d at 124.

These assignments of error are without merit.

TRIAL ERRORS

Assignment of Error No. 16

Defendant contends the trial judge improperly admitted victim-impact evidence during the guilt phase of the trial. He argues that permitting the testimony of family members, allowing the account by the victim's great-nephew of his discovery of the body, and the showing of a portion of a videotape depicting a family reunion was improper and prejudicial.

At the beginning of its case in chief, the state called various family members of the victim who had gone to her home to look for her on the morning of the murder. Leta Juneau was the

first to suspect that something was wrong when Rita did not appear at daily mass. She went to the house, entered the unlocked door, and found the home in disarray, supporting the state's contention that there had been a burglary and a robbery. This witness also testified to the age of the victim, one of the elements of the crime. The victim's sister, Lurline Mowad, testified that she came to the house and noticed the disarray. She likewise confirmed the victim's age and added that the victim had a car, the object of the robbery according to defendant's confession. Sharon Yarborough, the victim's niece, testified that when she arrived she saw things turned over in the den and furniture moved in the bedroom. She also described how Rita's pet poodle was found closed up in the front bedroom of the house and again confirmed the victim's age. Richard Juneau, a nephew, testified about the knife block his mother had given him when the family disposed of Rita's possessions after the murder. He explained that he had given it back to his mother so that she could transfer it to the police for testing.

The testimony of these witnesses was very brief, non-dramatic, and recounted facts about the crime scene and elements of the state's case. The testimony did not describe the character of the victim or the impact of the crime on the surviving family members. Thus, it is not correctly characterized as victim-impact evidence and was properly admitted at the guilt phase of the trial.[3]

The state also called James Yarborough, the victim's great-nephew, to testify as to his activities on the morning of

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[3] "Victim impact evidence" is a term of art used to describe evidence of the character of the victim and the effect of the victim's death on the victim's family. Such evidence is relevant and admissible at the penalty phase of a trial in order to permit the jury to meaningfully assess defendant's moral culpability and blameworthiness. State v. Bernard, 608 So. 2d 966 (La. 1992).

October 24, 1994. He described going through the victim's house looking for her. When the police arrived, he pointed out a chest of drawers pulled across the front of his great-aunt's closet blocking entry into the closet. He recounted how the officer moved the chest, opened the door, and directed his flashlight inside the closet. He then testified:

> I didn't really see a person. It was like a figure of a person. I saw white and red. And it would appear like someone slouching over. And I just blacked out.

In our view, the factual testimony offered by James Yarborough describing the initial investigation of the crime and the discovery of the victim's body was clearly admissible. His testimony was not given in the context of describing the impact on him of the victim's death and is not properly characterized as victim-impact evidence.

Defendant also complains about the trial judge's decision to allow the state to play a portion of a videotaped family reunion. The state claimed that it was entitled to use the videotape as proof of the victim's age, notwithstanding defendant's offer to stipulate to her age, since defendant was charged with first degree murder by virtue of having committed the murder of a person over the age of sixty-five. However, the state had already presented testimony of several family members as to the victim's age and was prepared to introduce the testimony of the secretary of the church where the victim was baptized establishing that the victim was 82 years old at the time of her death. In view of the other evidence of age available and defendant's willingness to stipulate to the victim's age, the portion of the tape showing the victim stating her own age might be considered to be cumulative. Nevertheless, a review of the record demonstrates that only a very brief portion of the tape was shown. The jury saw the victim

stating her age and the tape continued playing just long enough for James Yarborough to leave the witness stand and identify his great-aunt on the film. At that point, the film was stopped pursuant to defense counsel's objection. After discussion of the objection, the state made no further attempt to show other segments of the videotape. We are satisfied that even if admission of the brief portion of the videotape was cumulative, there was clearly no prejudice to defendant.

These assignments of error are without merit.

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:
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> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
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> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
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> (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 Rita Rabalais.

(b) STATUTORY AGGRAVATING CIRCUMSTANCES

The jury in its verdict found the following aggravating circumstances:

> The offender was engaged in the perpetration of an aggravated burglary and armed robbery. La. Code Crim. P. art. 905.4 A(1);
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> The offense was committed in an especially heinous, atrocious or cruel manner. La. Code Crim. P. art. 905.4 A(7).

The jury found the state had proven that both an armed robbery and an aggravated burglary had occurred. Defendant admitted in his confession that he entered the home of the victim with the intent to rob her and armed himself with a dangerous weapon after entry. He further admitted that the group searched the house for valuables after killing the elderly victim. Ricky Swafford testified that he had heard defendant say he wanted to kill the old lady and go in her house where he expected to find money, jewelry, and a gun. Jerry Joseph, one of the perpetrators, testified that money was taken from the home. He explained that the first wave of attackers entered the rear of the house after Cedric Howard had "messed with" the back door with a screwdriver. The victim's relatives testified that the rear door was unlocked when they arrived at the scene. Accordingly, the evidence amply supported a finding that the murder took place while defendant was engaged in the perpetration of an armed robbery and aggravated burglary. Thus the jury was clearly justified in finding the aggravating circumstance set forth in La. Code Crim. P. art. 905.4 A(1).

Since we find that one aggravating circumstance was clearly supported by the evidence, we need not address whether the jury erred in finding that the murder was committed in an especially heinous manner. 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.[4] State v. Martin, 93-0285 (La. 10/17/94), 645 So. 2d 190. Since evidence of the manner of Rita Rabalais' death was part of the essential facts surrounding the murder, the admission of this evidence clearly 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 six first degree murder cases were tried to a jury in the Ninth Judicial District Court for the Parish of Rapides since January 1, 1976. The jurors of the Ninth Judicial District recommended the death penalty in five of the six cases.[5]

Four of the murder cases in which capital verdicts were

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[4] We do not by our treatment of only one aggravating circumstance imply that the other aggravating circumstance found by the jury was invalid.

[5] State v. Felde, 422 So. 2d 370 (La. 1982) (Defendant found guilty of killing a policeman.); State v. Moore, 432 So. 2d 209 (La. 1983) (Defendant found guilty of killing a store clerk in the course of an armed robbery.); State v. Comeaux, 514 So. 2d 84 (La. 1987) (Defendant found guilty of burglary and the beating death of two elderly victims in connection with their rape. The conviction was reversed; defendant was retried and again sentenced to death. The case is now on appeal to this court.); State v. Eaton, 524 So. 2d 1194 (La. 1988) (Eighteen year old defendant who was mildly retarded with an I.Q of 71, but who knew right from wrong, found guilty of murder of minister in the course of robbery and aggravated rape.); State v. Roy, 95 KA 0638 (Defendant found guilty of brutal double homicide after he broke into a home.)

returned involved brutal murders committed in the course of aggravated burglaries and/or armed robberies. One of the cases involved a defendant who was eighteen years old at the time of the murder and who was mildly retarded. State v. Eaton, 524 So. 2d 1194 (La. 1988). While those cases are not identical to this one, they share sufficient similarities to demonstrate that defendant's sentence of death in this case was not disproportionate.

The Uniform Capital Sentence Report and the Capital Investigation Report indicate that defendant is a black male who was eighteen years old at the time of the murder. He was living with his mother and half brother at the time and was enrolled in a local high school where he was placed in classes for learning disabled students.

Defendant had an extensive juvenile record going back to the age of twelve. One of his juvenile convictions involved the armed robbery of an elderly stroke victim living in defendant's neighborhood, during which defendant threatened the victim with a butcher knife taken from the victim's kitchen. He also had simple burglary convictions as a juvenile and as an adult.

Three psychologists testified about defendant's mental status. One opined that defendant was mildly mentally retarded with an IQ in the mid-sixties range. However, this psychologist testified that the portion of the test measuring "social comprehension" demonstrated a score considerably above the other areas. This portion of the test measured abilities such as the ability to understand laws and regulations. Two others psychologists testified that defendant's IQ scores were in the borderline to low average range of 75 to 80. All of the psychologists testified that defendant was capable of distinguishing right from wrong and making decisions based on those distinctions. Police officers that had

dealt with defendant testified that he had never appeared to be mentally retarded in their dealings with him.

After having considered the above factors, we are unable to say that the sentence of death imposed 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 defendant's sentence of death for the murder of Rita Rabalis was cruel, excessive, or unusual punishment.

DECREE

For the reasons assigned, defendant's conviction and death sentence for the murder of Rita Rabalais 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.

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

APPENDIX - 97-KA-0641

PRETRIAL ISSUES

Assignment of Error No. 5

Defendant contends the trial judge erred in denying his motion to quash the first degree murder indictment on the ground that La. R.S. 14:30(5) is unconstitutional.[6] The statute provides in pertinent part:

> A. First degree murder is the killing of a human being:
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> . . . .
>
> (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty-five years of age or older.

Defendant argues that the statute violates federal and state constitutional protections against discrimination based on age and against arbitrary and capricious punishment.[7]

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[6] Because the jury returned a general verdict finding defendant guilty of first degree murder without specifying either or both of the grounds relied upon by the state at the guilt phase of trial, we review defendant's assertion that La. R.S. 14:30(A)(5) is unconstitutional. Stromberg v. California, 283 U.S. 359 (1931). Cf. Griffin v. United States, 502 U.S. 46 (1991).

[7] Defendant raised this argument in applications for supervisory relief when the trial judge denied his motion to quash. Both the court of appeal and this court denied defendant's writ applications. State v. Gradley, 96-2061 (La. 8/9/96), 678 So. 2d 22; State v. Gradley, 96-1104 (La. App. 3rd Cir. 8/6/96).

La. Const. art. I, § 3 provides that "[n]o law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . age." In Manuel v. State, 95-2189 (La. 7/2/96), 677 So. 2d 116, we held that statutes classifying persons based on age are unconstitutional unless the classification "substantially furthers an appropriate state purpose."

The legislature has recognized that the very young and those over the age of sixty-five are more vulnerable and less able to defend themselves than members of other age groups. It has enacted a variety of laws differentiating crimes based on the ages of the victims. See, e.g., La. R.S. 14:42, 14:43.1, 14:43.3 and 14:43.4.

The legislature has also attempted to enhance the punishment of violent crimes committed against persons over the age of sixty-five. La. R.S. 14:50 was enacted in 1977 to add a minimum of five additional years to the sentence of those convicted of certain crimes committed against the elderly. In State v. Goode, 380 So. 2d 1361 (La. 1980), we acknowledged that the legislative motive in determining that persons over sixty-five are particularly vulnerable to crimes against the person is commendable. We specifically held that the fact that the enhancement of penalty dictated by the statute was triggered by the age of the victim did not render the statute unconstitutional. We struck down the statute as unconstitutional in Goode only because of its failure to state a maximum sentence that could be imposed. The legislature's concern over crimes committed on senior citizens is further demonstrated in La. R.S. 15:1232A, which provides in part:

> [t]he state should seek to expand efforts to reduce crime against this growing and uniquely vulnerable segment of its population.

Furthermore we note that other jurisdictions facing the

claim that classification of crimes based on the age of the victim violates the equal protection clause of the constitution have rejected the argument.[8] We similarly hold that the legislature may define crimes differently depending on the age of the victim where, as here, it has a legitimate governmental interest in safeguarding the welfare of those more needful of protection.

Defendant also asserts that the statute is constitutionally infirm because it permits the arbitrary and capricious imposition of the death penalty and that it constitutes excessive punishment in this case. Defendant complains that the statute does not require the state to show that defendant knew or should have known that the defendant was over age sixty-five. We note at the outset that defendant does not actually claim that he thought the victim was under the age of sixty-five. In his recorded confession, he referred to the victim as the "old woman." Moreover, the jury would have clearly been justified, based on the evidence admitted at trial, in concluding that defendant knew or should have known that this eighty-two year old victim was over the age of sixty-five. In any event, we do not believe that the absence of a statutory requisite that defendant knew or should have known the victim's age is fatal to the statute.

Defendant also contends that the death penalty constitutes cruel, unusual, excessive, and arbitrary punishment because it does not provide a deterrent and that life imprisonment is therefore the only appropriate punishment. It has been clearly

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[8] See Jones v. Oklahoma, 542 P.2d 1316 (Okl. Crim. App. 1975) (holding the classification of murder as a capital offense based on age of the victim is a rational and legitimate exercise of the state's police power); see also People v. Jordan, 430 N.E.2d 389 (Ill. App. 1981) and Carter v. State, 647 P.2d 374 (Nev. 1982) (holding that a state legislature may properly classify a battery on a person over sixty-five as a crime of a higher degree).

established that the imposition of the death penalty does not constitute cruel, unusual, or excessive punishment so long as it is not arbitrarily and capriciously imposed. The legislature has narrowed the field of crimes for which the death penalty is an available punishment by designating those offenses for which the death penalty can be imposed. We consider that the legislature has acted appropriately in classifying certain murders as first degree murders based on the tender or advanced ages of the victims of those crimes.

This assignment of error is without merit.

Assignments of Error Nos. 12 and 13

Defendant contends the trial judge abused his discretion in not granting motions for continuance filed by defendant on July 30, 1996 and on the morning of trial, August 12, 1996.

We have consistently held that the decision of whether to grant a motion for a continuance rests with the sound discretion of the trial judge, whose determination will not be disturbed absent a clear abuse of discretion. La. Code Crim. P. art. 712; State v. Bourque, 622 So. 2d 198 (La. 1993), rev'd on other grounds, State v. Comeaux, 93-2729 (La. 7/1/97), 699 So. 2d 16. In support of the motion for continuance heard on July 29, 1996, defense counsel stated that neither they nor their experts were prepared to go to trial. Specifically, defense counsel represented that their experts had been unable to obtain all of the necessary records on defendant. In response to the motion, the trial judge offered to issue immediate orders requiring production of the records sought so that defense experts could be adequately prepared. The record reflects that this remedy was acceptable to the defense. Defense experts at the penalty phase of the trial testified at length and

did not indicate that their expert opinions had been compromised by lack of time to prepare or by lack of documents.

While defendant argues on appeal that the judge should have granted a continuance on July 29, 1996 because defense counsel indicated in motion papers that neither had previously tried a capital case, that was not urged as a ground for the continuance. Nor did counsel suggest any other reason at the hearing for being unprepared to proceed. There is no showing that additional time or preparation by defense counsel would have had an effect on the strategy adopted at trial or upon the eventual verdicts at either phase of the trial. The trial judge did not err in denying this motion for continuance.

Defense counsel again moved for a continuance on the morning of trial. The only ground for the continuance urged at this time was the possible inability of defense expert, Dr. Ronald Pryer, to testify at trial due to a medical emergency. The trial judge refused the continuance, advising counsel that he would make sure the expert's testimony was available even if it meant taking the testimony in a hospital. In fact, the expert was available at trial and testified at length for defendant during the penalty phrase of the trial. The trial judge did not err in refusing this request for a continuance.

These assignments of error lack merit.

Assignments of Error Nos. 14 and 18

Defendant contends the combination of the judge's refusal to release his sealed juvenile record until the last working day before trial and his allowing the state to amend its notice of other crimes evidence to include offenses revealed in the juvenile record without granting his motion for continuance on the first day

of trial resulted in a denial of his constitutional rights to effective assistance of counsel and a fair trial.

The record reflects that the trial judge denied the state's motion to release defendant's juvenile records, ruling that the records would be kept under seal until the penalty phase of the trial. Defendant had objected to the release of the juvenile records to the state. Nevertheless, the state clearly gave written notice in September 1995 that it intended to use defendant's juvenile record against him and gave notice again at the hearing held in January 1996 that it intended to introduce defendant's juvenile records at the penalty phase. It was made clear at the hearing that the state wanted the records so that it could give defendant particularized notice of the juvenile adjudications reflected in the sealed proceedings and that it would seek to introduce any adjudications revealed in the sealed record at the penalty phase. The trial judge indicated that the juvenile adjudications would be relevant at the penalty phase in the event the jury found defendant guilty and that he would view the records and set up a procedure for a determination of what would be released at a later date. Defendant made no efforts to obtain his own juvenile records pursuant to the procedures outlined in La. Ch. Code art. 412.

In response to a renewed state request, the judge permitted both the prosecution and the defense to review the juvenile records on the last working day before the commencement of the guilt phase of the trial. That same day, the state amended its previously filed notice of other crimes evidence to specify thirteen delinquency adjudications reflected in the juvenile records. No objection was made to the amended notice when filed.

On the first day of trial, defense counsel renewed an

earlier request for a continuance asserting that counsel was not ready for trial. However, the record reflects that the ground for the renewed motion had nothing whatever to do with defendant's juvenile records or the amended other crimes notice filed by the state. (Defendant moved for continuance based on the possible inability of Dr. Pryer to testify, the subject of assignment of error no. 13, dealt with hereinabove.) No mention was made at the hearing on the renewed motion for continuance that defendant was surprised by the content of the juvenile records or would be unable to prepare to meet the state's other crimes evidence.

Defendant raises for the first time on appeal the argument that the continuance should have been granted because the defense did not have timely notice of the other crimes evidence in the juvenile record. We do not review assigned errors unless the trial judge was contemporaneously made aware of the objection and the ground therefor. La. Code Crim. P. art. 841; State v. Taylor, 93-2201 (La. 2/28/96), 669 So. 2d 364; State v. Arvie, 505 So. 2d 44 (La. 1987). Moreover, despite the claims of defense counsel to the contrary, it appears that the defense had ample notice of the state's intent to use other crimes evidence from his juvenile record. Defendant makes no showing that additional time would have altered the presentation of the defense case or strategy.

These assignments of error are without merit.

VOIR DIRE ISSUES

Assignments of Error Nos. 1-4

Defendant contends the trial judge erred in denying his motion to quash the general venire. He argues that the court's procedure for choosing a jury from a venire composed of only those who responded to a regular mail notice to appear for jury duty and

the court's procedure for excluding potential veniremen deprived defendant of a jury selected from a fair cross section of his community in violation of his state and federal constitutional rights.

La. Code Crim. P. arts. 404.1, 416.1 and 417 clearly contemplate that potential petit jurors may be summoned to appear for jury duty by use of regular mail. Thus, there is no merit to defendant's suggestion that potential jurors were improperly summoned to appear. While defendant insists that the trial judge should have compelled the attendance of all those called to serve, no provision of the Code mandates a court to pursue potential jurors where it is otherwise satisfied that a pool of jurors has appeared from which a jury can be selected constituting a fair cross section of the community. The trial judge commented in ruling on the motion to quash that he believed the jury pool represented a cross section of the community from which a fair and impartial jury with necessary alternates could be chosen. Defendant attacks the court's procedures on a theoretical basis, but makes no showing that the jury selected failed to represent a fair cross section of the community.

Defendant also suggests that the result of the court's procedure was to constitute a "volunteer venire," composed only of citizens who wanted to serve on a jury. However, the record does not substantiate defendant's speculation about the motives of the prospective jurors who appeared for service. A review of the voir dire reflects that many prospective jurors unsuccessfully tried to persuade the trial judge to excuse them from service due to a variety of medical complaints, work, or family inconveniences.[9]

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[9] The record reflects that at least 250 persons were notified to appear for jury duty in this case. The trial judge noted that at least 150 additional jurors would be available from those

Defendant further complains of the manner of granting excuses from service to prospective jurors. La. Code Crim. P. art. 403 provides that exemptions from jury service may be granted pursuant to rules promulgated by the Louisiana Supreme Court. This court has provided that the district court is empowered to excuse from jury duty qualified persons where service would result in undue hardship or extreme inconvenience. La. Sup. Ct. R. XXVI. The record reflects that those jurors who were excused by the trial judge's clerk were excused pursuant to a policy of excusing elderly citizens claiming an exemption and those claiming medical exemptions based on written verification by a physician. In any case where a claim to be excused was questionable, the matter was referred to the trial judge who made the final decision. Defendant does not point to any grant of an excuse from service as having been improper. There is no indication that any jurors potentially qualified for permissive exemptions were automatically excluded from the venire, as was the case in State v. Procell, 332 So. 2d 814 (La. 1976).

La. Code Crim. P. art. 419 provides:

> A. A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race.
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> . . . .

Defendant bears the burden of proving that fraud or irreparable injury was caused by the jury selection process. State

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jurors called to appear for another division of the court, all of whom were members of the same general venire. 102 persons responded to the regular mail notice for this case. Approximately 40 had already been excused based on claimed excuses for age or medical reasons substantiated by a physician. The court's procedures complied with the statutory requirements provided in La. Code Crim. P. arts. 408, 416, and 417.

v. Bourque, 622 So. 2d 198 (La. 1993), rev'd on other grounds, State v. Comeaux, 93-2729 (La. 7/1/97), 699 So. 2d 16. In this case defendant makes no showing that fraud was practiced in constituting the general or petit venires or that any prospective jurors were systematically excluded on the basis of race or any other factor.[10] There is no evidence that the trial judge failed to comply with the statutory procedures for the venire's selection. Nor is there evidence of any great wrong committed that worked irreparable injury to the defendant. The mere absenteeism of prospective jurors or the fact that a large number have been excused from service is not a basis to quash a venire. State v. Smith, 430 So. 2d 31 (La. 1983). The trial judge did not err in denying defendant's motion to quash the venire.

Assignments of Error Nos. 1 through 4 are without merit.

TRIAL ISSUES

Assignment of Error No. 17

Defendant contends the trial judge erred in permitting the state to introduce excessive and redundant victim-impact evidence at the penalty phase of the proceeding.

A review of the record demonstrates that the state called only three family members of the victim to testify during the penalty phase of the trial. The state gave notice of the victim-impact witnesses it intended to call on October 3, 1995, as well as a description of the expected nature of their testimony. The testimony of all three witnesses was brief (a total of 59 lines in the trial record) and not overly dramatic. Defendant appears to have abandoned this assignment of error on appeal to this court,

[10] We note that three members of the jury, including the foreperson, were African Americans.

inasmuch as no briefing has been directed to the victim impact evidence admitted during the penalty phase of the trial. In any event, we find no error in the introduction of the testimony adduced by the state.

Assignment of Error No. 17 has no merit.

Assignments of Error Nos. 19, 20 and 21

Defendant contends he was prejudiced by the introduction into evidence of certain documents from his juvenile records and by the testimony of Jack Wilson at the penalty phase of the trial. Defendant first claims that the presentation to the jury of State Exhibits 62 and 63 was prejudicial and misleading. He argues that the documents suggested two separate juvenile adjudications when there had actually only been one adjudication and one probation revocation for the same underlying offense.

The state admitted at the penalty phase of the trial Exhibits 62, 63, 64 and 65 dealing with three separate charges. Exhibit 64 dealt with criminal proceeding no. 235,674, in which defendant was charged with unauthorized use of a movable having a value in excess of $1000.00 (a felony) on August 26, 1993. Defendant was represented by counsel and entered a guilty plea to the offense. Exhibit 65 dealt with criminal proceeding no. 238,012, in which defendant was charged with three counts of simple burglary on July 22, 1994. Defendant was represented by counsel and entered a guilty plea to this offense as well.[11]

Exhibit 63, dated September 11, 1991, dealt with juvenile proceeding no. 11,505, in which defendant had been charged with an aggravated burglary and a separate simple burglary, both committed

[11] During motion practice, defense counsel indicated that he did not object to the state's introduction of these records. Trial record, Vol. 9, p. 1875.

in 1991. Defendant appeared in court on September 11, 1991 in proceeding no. 11,505 with his mother and admitted the charges after being advised of and waiving his right to counsel. The court adjudicated defendant a delinquent only as to the simple burglary charge and he was committed to the Department of Safety and Corrections for two years, but sentence was suspended and he was placed on supervised probation. Exhibit 62 dealt with further action in proceeding no. 11,505 revoking defendant's probation in that matter on October 16, 1991. Defendant also complains that the charge in proceeding no. 11,505 recited two separate crimes, but defendant was only adjudicated for one of them.

Each of the state's exhibits (nos. 62, 63, 64 and 65) consisted of multiple pages from the proceedings. When the state introduced these documents into evidence, it asked for a stipulation from defense counsel that the person involved was the same person as defendant. In its request, the state mistakenly characterized the documents introduced as Exhibits 62 and 63 as delinquency adjudications. However, the error in characterization was brief and made only in the context of requesting a stipulation. The jurors did not yet have the documents in hand. These documents were admitted by the court along with a curriculum vitae of the state expert psychologist. They were given to the jury for examination with no further comment by counsel. If the jurors examined the documents submitted for their review, it would have been apparent from the dates, the sentences imposed, and the crimes charged, that defendant was adjudicated or convicted of only three separate charges.

Based on the exhibits themselves and the context in which the prosecutor's description of the documents was made, we are satisfied that any technical error made in the description or

admission of these state exhibits was harmless. Moreover, the jurors were well aware of defendant's extensive criminal record from testimony of defendant's own witnesses.[12] Defendant was not prejudiced by the manner of introduction of state Exhibits 62 and 63.

Defendant also argues that the trial judge improperly admitted evidence of uncounselled juvenile adjudications. Although the state gave notice of intent to introduce numerous juvenile adjudications at the penalty phase of trial, the state did not do so. It introduced documentary evidence of only one crime for which defendant was adjudicated a delinquent, the simple burglary charged in proceeding no. 11,505. The record suggests that defendant admitted the offense in the presence of his mother, Gail Gradley. He was one of several juveniles who were advised of and waived their rights to counsel at the time. Defendant appears to argue that this adjudication was unconstitutionally obtained in violation of his right to counsel and that records of same should not have been admitted.

First, there is no showing that defendant's waiver of counsel was invalid. Furthermore, pursuant to our holding in State v. Jackson, 608 So. 2d 949 (La. 1992), juvenile adjudications are admissible at trial under the same rules as adult criminal convictions. Adult convictions are admissible at the penalty phase as long as they are for crimes classified as felonies. That being the case, even assuming that the adjudication was without counsel, that did not prevent its introduction at the penalty phase of the trial. In State v. Mattheson, 407 So. 2d 1150 (La. 1982), we held that prior convictions are relevant and admissible at the penalty

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[12] See discussion of defendant's criminal record in our treatment of Assignment of Error No. 22.

phase of a trial without the state's being required to show that defendant had counsel. In so holding, we did not insinuate, as this defendant suggests, that a different result would have been obtained had defendant affirmatively proved that he had been uncounselled. In State v. Jordan, 440 So. 2d 716 (La. 1983), we affirmed our holding in Mattheson that an uncounselled conviction may be introduced as relevant evidence of a defendant's character at the sentencing phase of the trial, even if a defendant was not properly Boykanized and entered an uncounselled guilty plea. Accordingly, there is no merit to the argument that defendant's juvenile adjudication in proceeding no. 11,505 (for simple burglary--a felony) should not have been admitted.

Defendant also complains of the introduction at the penalty phase of live testimony of Jack Wilson, who described how defendant broke into his home on June 26, 1992, threatened him with a kitchen knife, and robbed him. In motion practice, defendant argued that the state could not introduce documentary evidence of this juvenile adjudication because it was uncounselled.[13] Perhaps in an abundance of caution, and because no guardian or counsel was present at the adjudication in this matter, the state opted to follow the more stringent rules for introduction of unadjudicated juvenile conduct specified in State v. Jackson, 608 So. 2d 949 (La. 1992). Rather than introduce documentary evidence of the adjudication, the state introduced independent evidence of the crime. The

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[13] Juvenile records demonstrated that the adjudication for this offense was based on a confession not made in the presence of an attorney or guardian. Although a waiver of counsel witnessed by defendant's mother was signed on June 26, 1992, the confession was not made until ten days later. No new waiver contemporaneous with the confession appeared in the record. The trial judge ruled that the state could use documentary evidence of this adjudication, regardless of any constitutional infirmities regarding counsel, based on State v. Jordan, 440 So. 2d 716 (La. 1983).

testimony of the victim, which was competent evidence of the incident, established by clear and convincing evidence that an aggravated burglary and armed robbery had been committed by defendant, both of which are crimes involving violence against the person of the victim and are listed in Ch. Code art. 305. Moreover, the statute of limitations had not run on these crimes. La. Code Crim. P. art. 572 (2). Thus even if the offense committed against Jack Wilson had not been adjudicated and was treated as an unadjudicated juvenile offense, the state's evidence was properly admitted. The state gave adequate notice that it would adduce evidence of this particular crime. It had no obligation to specify how it would prove the offense.

These assignments of error are without merit.

Assignment of Error No. 22

Defendant claims he was prejudiced by testimony during the state's rebuttal in the penalty phase of the trial concerning the reason defendant left high school. He contends that the state elicited improper rebuttal evidence that constituted evidence of an unadjudicated crime without giving notice of its intent to use such evidence.

Defendant introduced into evidence as a mitigating circumstance testimony that he was a slow learner and that he fit or nearly fit the statistical description for mild mental retarda-tion. Defendant's mental status was his primary evidence of mitigation and was highly contested by the state. Defense experts testified concerning their review of school records, which revealed that defendant had not progressed beyond the early grades in acquiring basic skills.

The state called the principal of the high school

defendant had attended, Ron Aiken, as a rebuttal witness. Aiken testified that defendant had been placed in classes for the learning disabled but had never been placed in classes for the mentally retarded. In response to a question by the state as to whether the witness knew why defendant had left school, Aiken responded that Gradley had been expelled in connection with an attack on a fellow student.

Arguably, the witness's response to the state's question may not have fallen into the category of proper rebuttal evidence since it did not directly address the issue of defendant's mental capacity. On the other hand, testimony that defendant was a slow learner and that he had not completed high school may have left the jury with the incorrect impression that defendant had dropped out of school because he was not academically able to handle the work.

There is no question that defense counsel knew of the incident, which was described in defendant's school records obtained by the defense pursuant to defense discovery efforts and transmitted to the defense experts. The state found out about the records of the expulsion incident on the day before cross-examination of one of the defense experts during the penalty phase of the trial when a return was made on a subpoena duces tecum issued by the state. The defense expert had testified based on the school records. Contrary to the instructions of the trial judge, the defense had not produced to the state the page of the school records discussing the expulsion incident. Under the circumstances, defendant is unable to make a showing of surprise or that lack of notice in any way affected the defense strategy. The state's failure to give notice of this incident earlier in the proceedings did not prejudice defendant.

Moreover, even assuming that the testimony about his

expulsion from high school was an improper reference to an unadjudicated act of defendant, the jurors were well aware from the testimony of defendant's own witnesses that he had an extensive criminal record. Defendant elicited testimony from a staff worker at Delhi House to the effect that defendant was on probation in 1992. Defendant's expert clinical psychologist, Ronald Pryer, testified that he examined defendant in November 1991 at the request of his probation officer. Defense expert sociologist Craig Forsyth, testified that defendant had been incarcerated as a juvenile at Delhi House and LTI. As an adult the expert indicated that defendant had three burglaries and a car theft. In fact, this defense expert testified that it would be fair to call defendant a career criminal.

In addition, the state properly admitted evidence at the penalty phase of the trial of two adult convictions and a juvenile delinquency adjudication. It also presented the live testimony of Jack Wilson, an elderly stroke victim who was burglarized, robbed at knifepoint, and tied up by defendant. In view of the otherwise lengthy criminal record of defendant and the live testimony of Jack Wilson, we are satisfied that admission of this evidence of a high school incident was harmless and the capital sentence was not attributable to the testimony of the high school principal. Sullivan v. Louisiana, 508 U.S. 275 (1993); State v. Sanders, 93-0001 (La. 11/30/94), 648 So. 2d 1272.

This assignment of error lacks merit.

Assignments of Error Nos. 23, 24 and 25

Defendant contends the trial judge erred in not sufficiently instructing the jury to differentiate between the acts of defendant at the scene of the murder and the acts of others when

the jury considered whether defendant should receive the death penalty because of the aggravating circumstance that the murder was committed in an especially heinous manner.

The evidence at trial demonstrated that defendant was present while at least four other young men beat, kicked, punched, slashed, and strangled the eighty-two year old female victim who offered little resistance and posed no threat of physical retaliation. Defendant admitted that he inflicted one of the victim's fatal wounds, sinking a kitchen knife six inches into her side and piercing her heart and lung. The jury, based on the evidence, could have concluded that defendant was a willing participant in the group and that the crime was particularly cruel and heinous. While the evidence showed that defendant did not inflict all of the victim's wounds, the jury may well have considered participation in a group attack on a defenseless victim atrocious conduct justifying the death penalty. The trial judge had no duty to instruct the jury that the acts of the other participants lessened defendant's culpability. The general charge adequately advised the jurors that defendant was being tried and sentenced for his own acts. Moreover, defendant presented to the jurors for their viewing five other young men also charged with the first degree murder of Rita Rabalais as well as Jerry Joseph, who had pleaded guilty and testified in the guilt phase of the trial. Thus, the jurors were clearly mindful that perpetrators other than this defendant had participated in the crime.

However, even if the charge to the jury had not properly directed evaluation of defendant's personal responsibility for the alleged heinous nature of the crime, there was ample evidence to support the jury's finding that defendant committed murder in the course of an aggravated burglary and armed robbery, another of the

aggravating circumstances applicable in this case and as to which the jury was properly charged. Thus no claimed inadequacy of the instructions to the jury regarding the aggravating circumstances relied upon by the state justifies a reversal of defendant's conviction.

Nor do we find that the jury improperly considered the fact that the victim was over sixty-five as one of the aggravating circumstances justifying the death penalty. La. Code Crim. P. art. 905 was not amended to add age as an aggravating circumstance until after the trial in this matter. The state did not assert age as one if the aggravating circumstances and the jury was not charged with age as an aggravating circumstance.

Assignments of Error Nos. 23, 24 and 25 are without merit.

Assignment of Error No. 26

Defendant contends the record of the trial proceedings is so incomplete that he is unable to obtain meaningful appellate review. He points to instances during the charge conferences for the guilt and penalty phases of trial where the comments of counsel and the judge are occasionally recorded as "unintelligible." However, counsel does not point to any of the charges given at either phase of trial as having been infirm, other than as discussed in assignments of error nos. 23, 24, and 25 treated hereinabove. In fact trial counsel noted that changes the judge made in the proposed charges after the guilt phase charge conference were satisfactory. No further objections to the charges were made.

Plaintiff also points to deficiencies in the transcripts of two bench conferences. However, there is no suggestion, much

less any showing, that any objections of the defense to the conduct of the trial were lost by the deficiencies in recording these conferences. Nor does defendant suggest any other unrecorded conduct that prejudiced his right to a fair and impartial trial at either the guilt or penalty phases of the proceedings. Unlike the record deficiencies which defeated meaningful review in State v. Ford, 338 So. 2d 107 (La. 1976) and State v. Thetford, 445 So. 2d 128 (La. App. 3rd Cir. 1984), the transcript in this case does not delete the testimony of witnesses, voir dire examination, or opening statements. Accordingly we conclude that defendant's right to appellate review has not been affected in any way by deficiencies in the trial record.

Assignment of Error No. 26 is without merit.