**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0305

STATE OF LOUISIANA

VERSUS

AMY T. HEBERT

Judgment Rendered: February 11, 2011.

* * * * *

On Appeal from the
17th Judicial District Court,
in and for the Parish of Lafourche
State of Louisiana
District Court No. 448360

The Honorable Jerome J. Barbera, III, Judge Presiding

* * * * *

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* * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

**CARTER, C.J.**

The defendant, Amy T. Hebert, was charged by Lafourche Parish grand jury indictment with two counts of first degree murder, violations of La. Rev. Stat. Ann. § 14:30. The state gave notice of its intent to seek the death penalty. The defendant entered a plea of not guilty and not guilty by reason of insanity on both counts. A jury found the defendant guilty as charged. Defense motions for a new trial and for a post-verdict judgment of not guilty by reason of insanity were denied. During the penalty phase, the jury was unable to reach a unanimous verdict on either count. Thereafter, the defendant was sentenced on each count to life imprisonment without benefit of parole, probation, or suspension of sentence. The trial court expressly ordered that the sentences run consecutively, and the defendant was remanded to the custody of the Department of Corrections. The defendant appeals, designating six assignments of error:

1. The trial court erred in denying the motion for post-verdict judgment of not guilty by reason of insanity.

2. The trial court erred in denying the motion for new trial.

3. The evidence was insufficient to support the jury's verdicts.

4. The trial court erred in limiting the presentation of a defense by not allowing Dr. Spitz to testify as an expert in forensic pathology as to the defendant's state of mind, specifically her psychosis, as evidenced by his wound analysis and the extreme overkill evident in this case.

5. The trial court erred in failing to grant the defense's motion for change of venue.

6. The trial court imposed an excessive sentence by making the life sentences consecutive.

For the following reasons, we affirm the convictions and sentences.

## FACTS

The defendant and Chad Hebert were married on August 9, 1991. In 1994, they moved to 118 St. Anthony Street, Mathews, Louisiana, the scene of the offenses. The victim Camille Catherine Hebert (Camille) was born to the couple on June 4, 1998, and the victim Braxton John Hebert (Braxton) was born to the couple on May 12, 2000. In July of 2005, the couple separated, and in April of 2006, they divorced. The defense did not dispute that on August 20, 2007, the defendant stabbed both children to death at the family home.

Braxton suffered approximately 20-25 stab wounds to his chest and approximately 50-55 stab wounds to his back. The number of wounds could not be determined exactly due to the presence of perforating wounds, *i.e.*, wounds that went entirely through his body and exited on the other side. He also suffered five defensive wounds on his left arm and one or two defensive wounds on his right arm. Braxton bled to death.

Camille suffered approximately 30-35 stab wounds to her chest and approximately 30-35 stab wounds to her back. She also suffered perforating wounds. She had five defensive wounds on her left arm and nine defensive wounds on her right arm. She was stabbed in the scalp approximately 30 times. Camille also bled to death.

The children's paternal grandparents, R.J. "Buck" and Judy Hebert, lived across the street. On the day of the offenses, Buck became concerned for the welfare of the defendant and his grandchildren. He knocked on the defendant's front door, and when no one answered, he broke into the utility room of the home by climbing through a window. Buck saw blood

splattered on the floor of the kitchen/dining area. In the master bedroom, he saw a large quantity of blood and the defendant lying in bed with the children. Buck tried to exit the house to summon help, but the doors had been dead-bolted from the inside, and he could not find the keys.

Upon arrival, the police broke the kitchen door down and entered the house. When the police entered the master bedroom, the defendant lifted a large knife in her right hand and shouted, "Get the f--- out." The police used a Taser electroshock weapon to force the defendant to drop her knife so that they could attempt a rescue of the children. After removing the children from the bed, the police discovered multiple knives in the bed, as well as a dead dog. The police also discovered two notes at the residence. The first note states:

> Monday 8-20-07
>
> Chad,
>
> You wanted your own life. You got it. I'll be damned if you get the kids, too.
>
> Your ambition & greed for money won out over your love for your family.
>
> The hell you put us through & I do mean all of us because you don't know what the kids used to go through because of course you weren't here.
>
> This is no kind of life for them to live.
>
> I sure hope you two lying alduttering (sic) home wrecking whores can have more kids because you can't have these.
>
> Actually I hope you can't because then you'll only produce more lying homewrecking adultering (sic) whores like yourselves.
>
> Maybe you can buy some with all of your money you will make from this house & the life insurance benefits you'll get from the kids.

The second note states:

> Monday 8-20-07
>
> Judy,
>
> You run from the very thing you support!

> Monica pairs up with a married man, becomes a kept woman & your response is maybe she is in love with him – so that makes it okay? How stupid! Your sons have affairs bring these whores home & you welcome them all in. I guess its okay for them to hurt the family as long as it is not you.
>
> Well when you started delivering my kids to that whore, Kimberly, that was the last straw!
>
> To all my friends thanks for all the help & support you tried to give me.
>
> I love you all,
>
> Sorry Daddy, Celeste & Renee I love you all too.

The defendant was taken to the emergency room for treatment of her injuries. The defendant's wrists were severed, exposing tendons; both of her lungs were collapsed from stab wounds to her chest; and she had stab wounds on her skull and neck and wounds to her eyelids.

## SUFFICIENCY OF THE EVIDENCE

The defendant combines her first three assignments of error for argument. She argues the evidence was insufficient to convict her because the preponderance of the evidence established she was insane at the time of the offenses. The defendant maintains she proved she was psychotic at the time of the offenses, and Doctors Salcedo and Seiden were unable to rebut her proof.

Insanity at the time of the offense requires a showing that because of mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question. *See* La. Rev. Stat. Ann. § 14:14. The law presumes a defendant is sane and responsible for her actions. La. Rev. Stat. Ann. § 15:432. The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence. La. Code Crim. Proc. Ann. art. 652. The State is not required to offer any proof of the defendant's sanity or to offer

evidence to rebut the defendant's evidence. *State v. Thames*, 95-2105 (La. App. 1 Cir. 9/27/96); 681 So. 2d 480, 486, *writ denied*, 96-2563 (La. 3/21/97); 691 So. 2d 80. Instead, the determination of whether the defendant's evidence successfully rebuts the presumption of sanity is made by the trier of fact viewing all of the evidence, including lay and expert testimony, the conduct of the defendant, and the defendant's actions in committing the particular crime. *Thames*, 681 So. 2d at 486. The issue of insanity is a factual question for the jury to decide. *Thames*, 681 So. 2d at 486. Lay testimony concerning a defendant's actions, both before and after the crime, may provide the jury with a rational basis for rejecting even a unanimous medical opinion that a defendant was legally insane at the time of the offense. *Thames*, 681 So. 2d at 486. Louisiana does not recognize the defense of diminished capacity. *State v. Pitre*, 04-0545 (La. App. 1 Cir. 12/17/04); 901 So. 2d 428, 444, *writ denied*, 05-0397 (La. 5/13/05); 902 So. 2d 1018. A mental disease or defect short of insanity cannot serve to negate an element of the crime. *Pitre*, 901 So. 2d at 444.

In reviewing a claim of insufficiency of the evidence in regard to a defense of insanity, we must apply the test set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979) to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant had not proven by a preponderance of the evidence that she was insane at the time of the offense. *Thames*, 681 So. 2d at 486.

Defense witness Dr. Alexandra Phillips testified as both a fact witness and as a court-accepted expert in psychiatry. Dr. Phillips was the attending physician for the acute psychiatric unit when the defendant was brought to the

hospital. She attempted to talk with the defendant on August 21, 2007, the day after the offense, but the defendant was unresponsive. Dr. Phillips again met with the defendant on August 23, 2007. The nurses were concerned because the defendant was not eating; the defendant told Dr. Phillips she was not eating because she was afraid of getting sick and vomiting. The defendant advised Dr. Phillips that she had heard the words of Satan for a long time and had pushed them away with the words of Christ and prayer. The defendant said she had not been planning on killing herself, but Satan took over, and she snapped. Dr. Phillips asked the defendant if she was hearing the voice of Satan at that moment, and the defendant stated Satan was in the room laughing at her. Dr. Phillips observed the defendant's eyes tracking the room. Dr. Phillips's attempts to redirect or calm the defendant were unsuccessful, and the defendant began to scream. Dr. Phillips concluded the defendant was completely psychotic and responding to internal stimuli so anti-psychotic medication was prescribed.

The court accepted defense witness Dr. Phillip Resnick as an expert in psychiatry. Dr. Resnick examined the defendant on August 6, 2008. The defendant told Dr. Resnick that in the summer of 2007 she was depressed, had lost weight, and did not have a good appetite. She was having trouble sleeping and lost interest in things. She felt fatigued and worthless. The defendant indicated she had trouble concentrating and remembering things and had thoughts of suicide.

Dr. Resnick defined "psychosis" as being out of touch with reality. In his opinion, on the day of the offenses, the defendant suffered an auditory hallucination. The defendant said she heard a forceful male voice telling her

that her ex-husband was going to take away her children, that she had to keep the family together, and that the family had to die to stay together. The defendant told Dr. Resnick that the voice instructed her to stab her children and to kill herself, and after she killed the victims, the voice dictated the notes she left at the scene. Dr. Resnick noted the defendant told Dr. Phillips that she heard Satan laughing at her. According to Dr. Resnick, the defendant was having auditory hallucinations when she heard the voice of Satan. Dr. Resnick maintained it was not surprising that the defendant's hallucination at the time of the offenses reflected her concerns that her children were getting close to her ex-husband's fiancée, that he was building a new house, and that she might lose custody of them. The defendant advised Dr. Resnick that when she stabbed Camille, Camille said, "Mommy, I love you. I don't want to die," and the defendant told her, "I love you, but I don't want daddy to take you away."

Dr. Resnick concluded that on the day of the offenses the defendant was suffering from major depression and killed her children because she was psychotic. In his opinion, with reasonable medical certainty, due to severe psychotic depression, distorted mind, delusions, and hallucinations, the defendant could not distinguish whether stabbing her children was right or wrong because she believed it was in their best interests. He conceded, however, that he had seen no evidence the defendant had been diagnosed as psychotic prior to the offenses, including when she saw a neurosurgeon and physical therapists in August 2007. He also conceded that Dr. Phillips's conclusion that the defendant was suffering from psychosis beginning long before Dr. Phillips saw her was unsupported by the evidence.

The defense also presented testimony at trial from Dr. Glenn Wolfner Ahava, who was accepted by the court as an expert in forensic psychology. He became involved in the case in January of 2008 and interviewed the defendant four times between March 28, 2008, and August 11, 2008. Dr. Ahava did not think the defendant was malingering. He diagnosed the defendant as suffering from major depressive disorder that was severe, recurrent, and with psychotic features. In his opinion, on the day of the offenses, it was more likely than not that the defendant could not distinguish right from wrong with respect to her criminal conduct. The defendant, a religious woman, had a delusional belief consistent with depression that God was speaking to her and commanding her. According to the defendant, on the day of the offenses, God spoke to her and told her "he" was going to take the children away, and she had to kill the children and herself to keep the family together so that they could go to heaven. The defendant advised Dr. Ahava that the voice told her to stab the victims in the head. The defendant told Dr. Ahava that as she stabbed the victims, she told them she loved them, but she could not let their father take them. The defendant explained that the voice told her to kill the family dog and, then, to make coffee to stay awake to write the notes. The defendant told Dr. Ahava she hesitated twice before stabbing the victims, but the voice told her to practice on a bed.

Dr. Ahava testified that the defendant, who was forty-one years old when he saw her, reported a history of mental health issues dating back to her early twenties. He conceded, however, there were no medical records to support her claim. The defendant told him she had heard voices prior to the date of the offenses; however, she had not made that claim to any of the other

doctors who had interviewed her. According to Dr. Ahava, the number of stab wounds inflicted on the victims indicated the defendant was obviously psychotic.

Dr. David Self testified as an expert in forensic psychiatry. Dr. Self interviewed the defendant on July 16, 2008, and August 14, 2008. He diagnosed her as suffering from major depression that was recurrent and severe with psychosis. He indicated with reasonable psychiatric certainty that due to mental disease the defendant was incapable of distinguishing the wrongfulness of her conduct in killing the victims. The defendant advised Dr. Self that she suffered from symptoms of major depression following the birth of Braxton, and her depression became much worse when her husband announced his intent to separate from her. Dr. Self testified that the likelihood of a person suffering from mental illness increased if other family members suffered from mental illness. The defendant's sister had a psychotic breakdown in her teens; the defendant's uncle had been diagnosed with schizophrenia; and the defendant's maternal grandfather had committed suicide. The defendant told Dr. Self that on the day of the offenses she heard a male voice taunting her, "He's going to take the children. He's going to take them." According to the defendant, the voice told her she had to keep the family together by killing the children and then herself, and to stab the brains of the children. Dr. Self, reflecting on the defendant's self-inflicted wounds, stated that only the most psychotic people attack their own eyes.

The State presented testimony at trial from Dr. Rafael Salcedo, a court accepted expert in clinical and forensic psychology. He interviewed the defendant on April 28, 2008. In Dr. Salcedo's opinion and within a reasonable

degree of psychological certainty, at the time of the offenses, although the defendant was suffering from a psychotic disorder (major depression), the disorder did not rise to the level that it impaired her ability to distinguish right from wrong. Stated differently, the defendant was capable of distinguishing right from wrong when she murdered her children.

Dr. Salcedo delineated numerous sources of stress in the defendant's life from 2006 until the date of the offenses. The defendant's husband, Chad, had moved out and ultimately divorced her. The defendant did not want the divorce. The defendant was a single mom, and Braxton suffered from Asperger's disorder, a mild form of autism. The defendant was very angry with her ex-husband and that anger intensified when she learned that he was involved with Kimberly. Moreover, the children were excited that Chad and Kimberly were building a house. Camille was becoming attached to Kimberly; the defendant had seen Camille at a ball game holding hands with, or sitting next to, Kimberly. Camille was excited about being a flower girl at Chad and Kimberly's wedding. The defendant also was upset by Chad's mother, Judy, encouraging a relationship between Braxton, Camille, and Kimberly.

Dr. Salcedo testified that psychosis builds up over time. A delusion that lasts four hours—beginning suddenly without any evidence of delusional thinking and ending after being shocked by a Taser—would be very unusual. Dr. Salcedo pointed out that the defendant first claimed she was acting at the direction of God and later at the direction of Satan. Moreover, the defendant's note to Chad did not appear to be written by someone who was psychotic. Dr. Salcedo explained:

> It is logical. The content is consistent with the circumstances that were found to be in evidence later on. It shows no evidence of loosening of associations. See, one of the things that I didn't mention is that psychosis is not just hallucinations and so called delusions. Usually, a psychotic individual also displays disorganized thinking, loosening of associations, you know, they go off on tangents. You ask them one question, they come back with something else. You know, it incorporates what we call cognitive distortions, cognitive disorders. That's a very well-written, well-organized, thought-out letter.

Dr. Salcedo stated the defendant's statement in the note, "You wanted your own life. You got it. I'll be damned if you get the kids, too," presented a plausible motive for the behavior she manifested. When the defendant wrote, "I sure hope you two lying alduttering (sic) home wrecking whores can have more kids because you can't have these," she was telling Chad that she was getting ready to kill, or had already killed, the children, and he was not going to have them. Dr. Salcedo also remarked the note showed no evidence of delusional ideation; specifically, the note did not refer to heaven or being together.

Dr. Salcedo also discussed the defendant's note to her ex-mother-in-law, Judy. The defendant's statement, "Well when you started delivering my kids to that whore, Kimberly, that was the last straw!" was consistent with Judy supporting Kimberly developing a close relationship with Camille and Braxton. The defendant had a huge amount of anger at her mother-in-law and had not let Camille and Braxton visit Judy's house, which was across the street from her own house, since June of 2007. Dr. Salcedo concluded his analysis of the notes by stating:

> Well, what you have here is something that I've never had in the numerous not guilty by reason of insanity cases that I've been involved with and, that is, you have an authored description written by the defendant of her mental state at the time.

> Sometimes you have observers. Sometimes you have a video camera. Sometimes you have witnesses. But rarely are you able to get inside the mind of the defendant in such close proximity to the time of the commission of the alleged offense. It's almost like having a videotape of her thought processes at the time. That's what's remarkable about this case.
>
> And I would add that there's no mention of psychosis or delusions or, you know, nothing psychotic in the notes themselves, as opposed to what she self-reported.

Dr. Salcedo indicated in a retribution killing of children, also known as a spousal revenge killing of children, the woman who kills her children loves them but that love is overridden by her hatred for her spouse. It is typical in such a killing to leave behind a note to inflict cruelty on the other spouse.

Dr. Salcedo testified that people who are depressed often commit suicide. A suicidal mother may be very concerned about what will happen to her children after the parent kills herself and, therefore, may decide to kill the children too. Given the defendant's religious belief that heaven was a better place—which he noted was not a delusion but, rather, a belief shared by many people from her church—and her anger toward Chad, she decided to kill her children and herself.

In Dr. Salcedo's opinion, Dr. Phillips did not have enough information to render an accurate diagnosis. Dr. Phillips's final diagnosis of the defendant was "psychosis NOS," which means "not otherwise specified," or the diagnosis does not fit in any category of psychosis. Dr. Salcedo opined that Dr. Phillips did not have any background information on the defendant and assumed the defendant was crazy because she talked about Satan and God and seemed to be hyper-religious.

State witness Dr. George Seiden was accepted by the court as an expert in general and forensic psychiatry. He interviewed the defendant on March

24, 2009. Dr. Seiden stated that, although the defendant was suffering from a depressive episode, on the day of the offenses, she was capable of distinguishing right from wrong in connection with the killings of the victims.

Dr. Seiden found no evidence in the defendant's medical records that she had exhibited any psychotic features prior to the day of the offenses. He pointed out that on August 16, 2007, on a "Functional Health Intake Summary" for a physical therapist, the defendant indicated she could fully concentrate.

The defendant told Dr. Seiden that a voice had commanded her to kill her children. She also told him she attempted to stab one of the children, left, and then came back. The defendant explained she hesitated because she "could not hurt her babies." According to Dr. Seiden, the defendant's statement indicated she knew she was going to hurt her children.

Dr. Seiden found nothing in the defendant's note to Chad that indicated she was in a psychotic state when it was written. He found no evidence of the psychotic disorganization of thought that is seen in a true psychosis. To the contrary, Dr. Seiden felt the note indicated the defendant was not psychotic at the time it was written. The defendant's statement in her note, "Sorry Daddy, Celeste & Renee I love you all too," was significant in that it was a statement acknowledging she had done something wrong. Dr. Seiden defined a delusion as a fixed false belief that cannot be changed with any amount of information and that is not consistent with the culture. Herein, there was no delusion but, rather, the defendant's fear of losing her children either through formal legal means or through the loss of their love.

In thirty years of practice, Dr. Seiden had never seen or read about a psychotic disorder that began and ended suddenly. Psychoses gradually develop and gradually ebb. Dr. Seiden concluded that Dr. Phillips was mistaken in her diagnosis of the defendant on August 23, 2007, because Dr. Phillips did not view the defendant's claim of Satan being in the room and laughing at her within the context of the defendant's religious beliefs—that Satan is a real and tangible entity.

After a thorough review of the record, we are convinced any rational trier of fact could have found the defendant failed to rebut her presumed sanity at the time of the offenses. The verdicts returned in this case indicate the jury credited the testimony of the witnesses presented by the State and rejected the testimony of the witnesses presented by the defense. As the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. *State v. Johnson*, 99-0385 (La. App. 1 Cir. 11/5/99); 745 So. 2d 217, 223, *writ denied*, 00-0829 (La. 11/13/00); 774 So. 2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. *State v. Glynn*, 94-0332 (La. App. 1 Cir. 4/7/95); 653 So. 2d 1288, 1310, *writ denied*, 95-1153 (La. 10/6/95); 661 So. 2d 464. Further, in reviewing the evidence, the jury's determination was not irrational under the facts and circumstances presented. *See State v. Ordodi*, 06-0207 (La. 11/29/06); 946 So. 2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to,

and rationally rejected by, the jury. *State v. Calloway*, 07-2306 (La. 1/21/09); 1 So. 3d 417, 418 (*per curiam*).

These assignments of error are without merit.

**RIGHT TO PRESENT A DEFENSE**

Defense witness Dr. Daniel Spitz was accepted by the court as an expert in forensic, anatomic, and clinical pathology. In assignment of error number 4, the defendant argues the trial court violated her right to present a defense by refusing to allow Dr. Spitz to render an opinion on the defendant's state of mind at the time of the offenses based on analysis of the victims' wounds.

The Louisiana Code of Evidence provides for the admission of opinion testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. La. Code Evid. Ann. art. 702.

Dr. Spitz testified that he had reviewed the autopsy reports, a sheriff's office report, photographs of the autopsies and the crime scene, medical records, and reports of other doctors. During Dr. Spitz's testimony, the State approached the bench and advised the court that in one of his reports, Dr. Spitz had written, "The nature of this homicidal violence towards both children together with the presence of extreme overkill is most indicative of an assailant who is suffering from severe psychiatric illness such as an acute psychosis." The State objected to Dr. Spitz testifying about the defendant's mental state because he had not been qualified as an expert in any area involving mental health, and no evidence had been presented that he had ever treated anyone

with a psychiatric condition or ever rendered a diagnosis in the field of mental health. The defense responded that Dr. Spitz had provided similar testimony in the past and one need not be a psychiatrist to testify about the defendant's mental state.

The court explained it was usual for a pathologist to testify about the wounds to a victim, the type of weapon used, the angle of entry of the weapon, the force used, and the violent nature of the act based on the wounds, but diagnosis of the mental state of the person inflicting the wounds was "a far stretch." The court ruled testimony from Dr. Spitz relating wound analysis to the state of mind of the defendant or to a medical diagnosis, such as acute psychosis of the defendant, was outside of his expertise. The defense objected to the court's ruling and supplemented the record with testimony from Dr. Spitz. *See* La. Code Evid. Ann. art. 103.

Outside the presence of the jury, Dr. Spitz indicated he had examined the wounds to both victims in accordance with the procedures and methodologies from his training as a forensic pathologist. The defense then asked Dr. Spitz if the wound pattern was consistent with the defendant suffering from severe psychiatric illness, such as acute psychosis. Dr. Spitz replied:

> It would be. The extreme overkill is the wound pattern that's being analyzed. And if you—in certain cases, when the wound pattern is so unusual, it can be used as an indicator for the state of mind of the assailant.
>
> And in this case the extreme overkill, the excessive wounding of both child victims, as well as the family dog, was indicative of an individual who was suffering a severe psychiatric illness. In other words, this was well outside the typical—what is typically expected with the overwhelming majority of homicides. And when you have homicides that involve young children where the mother is the believed assailant and you have extreme

> overkill, you're really down to a very limited number of situations that can account for it as far as the state of mind of the assailant.
>
> And I'm not here to analyze the assailant in terms of a psychiatric approach. This is the—this is a wound analysis to help identify what might be going on with the assailant. As far as the wounds go, there is [sic] a limited number of possibilities.

In response to questioning by the defense, Dr. Spitz answered affirmatively when asked if he had "done this on prior occasions," and if this would fall within the realm of wound analysis and is part of the field of forensic pathology.

When again in the presence of the jury, Dr. Spitz testified that the photographs of the victims and the family dog showed a similar wounding pattern: "extensive injury, extreme overkill, unnecessary wounding in order to cause death, a very extreme nature of the injuries." The defense then asked Dr. Spitz to define "overkill" as it was used in his profession. Dr. Spitz replied, "Overkill is something that I see fairly infrequently. In fact, it's infrequent to say the least. And what it is is extreme wounding, wounding that is far beyond what is necessary to result in somebody's death, wounding that is so extreme that it raises a variety of questions."

We conclude the trial court did not abuse its discretion in excluding the supplemental testimony of Dr. Spitz. The defendant's mental condition at the time of the offenses was outside of the scope of Dr. Spitz's expertise. Further, although neither the State nor the defense referenced *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), under that decision, trial courts must exercise a gatekeeping function to ensure that any and all scientific

testimony or evidence admitted is not only relevant but also reliable.[1] The defense failed to establish the reliability of its theory that wound analysis can be used to determine whether an assailant was suffering from psychosis. Moreover, the defense presented its theory that the defendant was suffering from psychosis at the time of the offenses through numerous other experts at trial.

This assignment of error is without merit.

## CHANGE OF VENUE

In assignment of error number 5, the defendant argues the trial court erred in denying the motion for change of venue because a jury composed of fair and impartial jurors could not be secured in Lafourche Parish. She relies on the testimony of Elliot Stonecipher, an expert in public research, and claims nearly all of the prospective jurors had heard of the case from the media and/or talked about it with family and friends.

Each person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. La. Const. Ann. art. I, § 16. Concurrent with that right, the law provides for a change of venue when a defendant establishes she will be unable to obtain an impartial jury or a fair trial at the place of original venue. *State v. Lee*, 05-2098 (La. 1/16/08); 976 So. 2d 109, 132, *cert. denied*,

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[1] The gatekeeping duty imposed upon trial courts in *Daubert* with regard to scientific testimony applies to all expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999).

___ U.S. ___ (2008). Louisiana Code of Criminal Procedure Annotated article 622 provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

In unusual circumstances, prejudice against the defendant may be presumed. *See State v. David*, 425 So. 2d 1241, 1246 (La. 1983) ("[U]nfairness of a constitutional magnitude will be presumed in the presence of a trial atmosphere which is utterly corrupted by press coverage or which is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of the mob."). Otherwise, the defendant bears the burden of showing actual prejudice. *Lee*, 976 So. 2d at 132.

A defendant must prove more than mere general public knowledge or familiarity with the facts of the case to have her trial moved to another parish. *Lee*, 976 So. 2d at 133. A defendant is not entitled to a jury entirely ignorant of her case and cannot prevail on a motion for change of venue merely by showing a general level of public awareness about the crime. *Lee*, 976 So. 2d at 133. However, courts must differentiate largely factual publicity from that which is invidious or inflammatory because they present real differences in the potential for prejudice. *Lee*, 976 So. 2d at 133.

Whether a defendant has made the requisite showing of actual prejudice is a question addressed to the trial court's sound discretion, which will not be

disturbed on appeal absent an affirmative showing of error and abuse. *Lee*, 976 So. 2d at 133. Several factors are pertinent in determining whether prejudice exists rendering a change in venue necessary, including: (1) the nature of pretrial publicity and the degree to which it has circulated in the community; (2) the connection of government officials with the release of the publicity; (3) the length of time between the dissemination of the publicity and the trial; (4) the severity and notoriety of the offense; (5) the area from which the jury is to be drawn; (6) other events occurring in the community that either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. *Lee*, 976 So. 2d at 133.

Prior to trial, the defense moved for a change of venue, arguing the publicity this matter had received, the age of the two victims, their manner of death, and their relationship to the defendant, all supported an immediate change of venue. In the alternative, if the trial court should defer disposition of the motion until jury selection, the defense moved for individual, sequestered *voir dire*.

Defense expert Stonecipher testified at the hearing on the motion for change of venue. Stonecipher offered scientific evidence regarding prejudice in the minds of prospective jurors in the case. According to the United States census, as of 2006, the population of Lafourche Parish was 93,554, and as of July 15, 2008, voter registration was 56,233. In May of 2008, Stonecipher conducted a telephone poll of 406 Lafourche Parish registered voters concerning prejudice against the defendant in the public mind. Stonecipher claimed a 400-person sample yields data that is accurate within five percent,

plus or minus, at the 95 percent confidence level. According to Stonecipher, 86 percent of the survey respondents knew of the case with no mention of names. Stonecipher indicated 25 percent of the survey respondents who had heard of the case were able to name the defendant. According to Stonecipher, 3 percent of respondents who had heard of the case felt strongly the defendant was innocent; 4 percent of respondents who had heard of the case leaned toward believing the defendant was innocent; 12 percent of respondents who had heard of the case leaned toward believing the defendant was guilty; and 46 percent of respondents who had heard of the case felt strongly the defendant was guilty.

Additionally, Stonecipher stated 31 percent of survey respondents who believed the defendant was guilty, or leaned toward believing the defendant was guilty, believed that if convicted she should be given the death penalty. Stonecipher concluded, "there is unquestionably a high degree of prejudice existing in the public mind of Lafourche Parish," and it would be impossible for the defendant to receive a trial by fair and impartial jurors in Lafourche Parish. On cross-examination, Stonecipher stated that approximately two-thirds (66 percent) of the population of the State of Louisiana believe in the death penalty.

The trial court denied the motion to change venue and in reasons explained:

> The evidence of the publicity and the results of the poll, while it shows knowledge on the part of many, and a predisposition to vote guilty and impose the death penalty on the part of a significant number interviewed, does not satisfy the defendant's burden, that this community is so prejudiced, collectively, against her, that a jury cannot be selected from its citizens to afford her a fair and impartial trial.

The defendant requested supervisory relief from this court. *State v. Hebert*, 09-0039 (La. App. 1 Cir. 2/13/09) (unpublished). We denied the writ application, finding no abuse of the trial court's discretion in the application of the pertinent factors used to determine whether actual prejudice existed, and noting under the jurisprudence, a decision on a motion for change of venue could best be determined immediately before the trial date. We further stated, if during the completion of *voir dire*, the trial court found a fair and impartial jury could not be obtained because of prejudice, it could reconsider its ruling.

Jury selection began on April 16, 2009. The prospective jurors were divided into four groups, which were further divided into panels. Prospective jurors were questioned individually on three separate issues: sequestration, pre-trial publicity, and the death penalty. Many jurors expressed familiarity with the case from media reports. Others indicated having heard the case discussed amongst friends, family, or co-workers. Most recollections were of a mother who had killed her children and then tried to kill herself.

A thorough review of the record fails to reveal error or abuse of discretion in the denial of the motion to change venue. The defendant failed to establish actual prejudice by her trial being held in Lafourche Parish. At most, she established a general level of public awareness about the offenses. The television news stories, newspaper articles, and transcribed radio stories offered in support of the motion for change of venue spanned the period from August 20, 2007, through July 19, 2008. The presentation of evidence at trial began on May 4, 2009. Most of the media coverage was factual in nature, and no attempt was made to demonize the defendant. Many of the stories portrayed her in a positive manner, referring to the defendant as a good person

and loving mother who was law abiding and active in her church. None of the media coverage referenced the notes the defendant left at the scene or her claim that Satan had spoken to her during the offenses. The local sheriff was referenced in some of the media reports, but the Lafourche Parish District Attorney's Office issued an official statement that it would not make any public statements regarding the case as long as it was pending.

Although the offenses were severe and notorious, the defense did not dispute the defendant had killed the victims. Thus, prior knowledge by prospective jurors of the fact that the defendant had killed the victims was much less significant than in a case where identity was at issue. *See State v. Lee*, 559 So. 2d 1310, 1313 (La. 1990), *cert. denied*, 499 U.S. 954 (1991) (no abuse of discretion in denying motion for change of venue where only penalty phase at issue, and thus, prior knowledge of basic facts "not nearly as significant as it might be").

We find no abuse of discretion in the trial court's denial of the defendant's motion for change of venue. This assignment of error is without merit.

## EXCESSIVE SENTENCES

In assignment of error number 6, the defendant argues the imposition of consecutive, rather than concurrent, life sentences was excessive. It is within sentencing court's discretion to order that sentences run consecutively, rather than concurrently. *State v. Berry*, 95 1610 (La. App. 1 Cir. 11/8/96); 684 So. 2d 439, 460, *writ denied*, 97-0278 (La. 10/10/97); 703 So. 2d 603. Prior to imposing sentences, the trial court heard argument from counsel regarding whether consecutive or concurrent life sentences were appropriate

in this particular case. The trial court provided ample justification for its express imposition of consecutive sentences.[2] The trial court properly reasoned that the two convictions involved two distinct and separate acts. The court stated that it had considered both La. Code Crim. Proc. Ann. arts. 883 and 894.1 and listed particular factors to be considered: the victims, their perpetrator, and any past history of violence. The trial court described the present crimes as particularly vicious and heinous. The trial court concluded that imposition of anything other than concurrent sentences would deprecate the seriousness of the offenses.

While we acknowledge the defendant's status as a first felony offender, the reasons given by the trial court support the imposition of consecutive sentences. The defendant brutally killed her two helpless, young children; she is the worst kind of offender. Consecutive sentences are not necessarily excessive, and in this instance, the record amply supports the trial court's decision. *See State v. Palmer*, 97-0174 (La. App. 1 Cir. 12/29/97); 706 So. 2d 156, 160. The trial court did not abuse its discretion in ordering that the sentences be served consecutively.

**CONVICTIONS AND SENTENCES AFFIRMED.**

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[2] The trial court expressly directed that the two first degree murder convictions were to run consecutively; thus, those sentences are outside the scope of La. Code Crim. Proc. Ann. art. 883, which provides the rule of construction when a court does not expressly direct whether sentences are to be served concurrently or consecutively. *See State v. Palmer*, 97-0174 (La. App. 1 Cir. 12/29/97); 706 So. 2d 156, 160.