NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2004-KA-1681**
VERSUS	*	**COURT OF APPEAL**
KEYNEL KNIGHT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 443-663, SECTION "J"
Honorable Darryl A. Derbigny, Judge
* * * * * *
Judge Roland L. Belsome
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Max N. Tobias Jr., Judge Roland L. Belsome)

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MARCH 23, 2005

AFFIRMED

STATEMENT OF CASE

On November 20, 2003 Keynel Knight (Knight) was indicted for the second degree murder of Charles Williams (Williams). At his arraignment on November 25 he pled not guilty. On May 8, 2004, at the conclusion of a multiple-day trial, a twelve-person jury found him guilty as charged. The court sentenced him on June 2, 2004 to life imprisonment without benefits of parole, probation, or suspension of sentence. On that same date the court denied a motion to reconsider sentence but granted a motion for appeal. The appellant's brief was filed with this court on October 25, 2004.

FACTS

At approximately 3:15 a.m. on September 19, 2003 police officers were called to investigate a murder at 4101 Cadillac Street, Apt. C. Once there, they found the body of twenty-three-year-old Williams. An autopsy revealed Williams was killed by a single gunshot wound to his head, which entered behind his left ear and exited the top of his head. Because of the amount of blood on the wound, the pathologist who performed the autopsy could not determine whether Williams' body had gunpowder markings.

Williams suffered extensive brain damage, and his body was drug free. The pathologist testified that because Williams' hands were not bagged when the body arrived at the morgue, no testing was done on them. In addition, the pathologist stated that he was not alerted to test to see if Williams had engaged in sexual activity prior to death. Williams' body was clothed only in socks and two shirts when it arrived at the morgue.

Det. Harold Wischan (Det. Wischan) conducted the investigation of Williams' murder. Det. Wischan stated that when he arrived at Williams' apartment the crime lab was already on the scene. He saw a bullet hole in the front door frame as he entered. He testified Williams was lying facedown on his bed, wearing only shirts and socks. He stated that on a dresser next to the bed he found an empty condom wrapper, a bottle of lubrication gel, and a jar of petroleum jelly. There was a shell casing on the pillow next to Williams' head, and a bullet was retrieved from the pillow. The bedroom window was open, and the screen was off the window. Det. Wischan further testified that Williams' vehicle was parked in a lot downstairs from the apartment with a shattered passenger side window. Officers also seized a shell casing from the ground next to the car. Inside the vehicle was a cell phone charger but no cell phone was found.

Det. Wischan claimed that by the time he arrived on the scene, the

eyewitness to the shooting, Chevez Ricard (Ricard), had been taken to the police station. Det. Wischan later interviewed and took statements from Ricard and Priest Cormier (Cormier), a friend of Williams. Ricard gave Det. Wischan Williams' cell phone number, and the records of calls made to and from the phone from midnight on September 18 to midnight on September 20 were obtained. The records revealed that a certain telephone number appeared on the phone log four or five times between 10:00 p.m. on September 18 and 2:00 a.m. on September 19. Based upon these calls, Det. Wischan obtained a photograph of the defendant, Knight, and showed the photograph to Cormier, who identified the photo. Det. Wischan then compiled a photographic lineup containing Knight's photo and showed the lineup to Ricard. Ricard immediately chose Knight's photo as that of the person he saw shoot Williams.

Det. Wischan obtained an arrest warrant for Knight, a search warrant for his residence at 233 Crozat Street, and a search warrant for Williams' vehicle. He testified that when he executed the warrant for the Crozat Street residence, Knight was not present, but various items including a single spent shell casing were seized from Knight's bedroom. The State produced a record of 911 calls made in connection with the murder. According to the calls, the suspect in the murder was wearing a red and yellow shirt. Det.

Wischan testified that Knight was arrested later that day (September 19), and at that time he was wearing a red shirt and black jeans.

Det. Wischan also testified that officers searched Williams' car and took various samples and a CD, but they did not find Williams' cell phone. He stated that no fingerprints found on items in the car matched Knight's prints, and the officers found no fingerprints on the window sill in Williams' bedroom. On cross-examination, Det. Wischan testified that Williams' cell phone log indicated that the last call received on that phone was at 11:58 p.m. on September 18, and that a series of calls were received between midnight and 2:00 a.m. on September 19, with more calls made at 3:16, 3:17, and 3:18 a.m. The police never recovered Williams' cell phone. Records from Williams' cell phone company showed that Williams received calls from 412-9241 at 10:20, 11:08, and 11:58 p.m. on September 18 and again at 12:24 and 1:46 a.m. on September 19. His phone called that number at 7:23 on the evening of September 19. The court took judicial notice that that number from the log was assigned to a telephone at 233 Crozat Street, the residence of Clarissa Knight.

Anna Duggar (Ms. Duggar), a criminalist for N.O.P.D., was qualified as an expert in the fields of latent print identification, serology, and hair and fiber analysis. She testified she processed Williams' 1999 black Pontiac

Grand Prix and seized a CD from the car, as well as trace evidence. She testified she collected trace samples from the front passenger seat and took a sample of the upholstery from that seat. Ms. Duggar recovered seventeen latent prints and found six latent prints on the CD. She compared red and black fibers taken from the passenger seat with fibers taken from the red shirt and black jeans Knight was wearing at his arrest. Her testimony was that the black fibers found on the passenger seat had the same microscopic characteristics as fibers taken from Knight's black jeans, and the red fibers found on the passenger seat had the same microscopic characteristics as fibers taken from Knight's red shirt. Ms. Duggar could not determine when the red and black fibers were deposited on the passenger seat, and she admitted that the fibers are quite common.

Off. Kenneth Leary (Off. Leary), qualified as an expert in firearms identification, testified that the bullet retrieved from the pillow on Williams' bed was consistent with 9 mm. ammunition. He testified that the shell found next to the pillow and the shell found next to Williams' vehicle were fired from the same gun. In addition, he testified that the spent shell seized from Knight's bedroom was also fired from the same gun.

Priest Cormier testified that he was Williams' best friend prior to Williams' death. Cormier admitted having a prior conviction for aggravated

battery in 1994. Cormier testified that he met with Williams at a restaurant at approximately 8:15 on the evening prior to the murder, and the two men made arrangements to meet later with some people from out of town to discuss a beauty pageant Williams and Cormier were planning. Cormier testified that Williams called him around 10:30 p.m. and asked for a ride to the meeting. Cormier stated that when he arrived at Williams' house, Williams' roommate, Ricard, asked for a ride to another location. Williams and Ricard went with Cormier. Cormier dropped Ricard off at the corner of Dumaine and N. Broad Streets. Cormier stated that on the way to the meeting, he picked up two other men who also were to attend.

It was Cormier's testimony that Williams received many calls on his cell phone during the course of the evening. After the men concluded their meeting at the Hyatt hotel, Cormier took the other two men home. As he was driving Williams home, Williams received yet another call. Cormier testified that Williams told the person to "be on the porch . . . I'm on my way." Cormier had seen Williams speaking to the same person in the Iberville Project two to three weeks prior to that night. Cormier described him as very short, weighing 130-140 pounds, sixteen to eighteen years old, with his hair in twists. Cormier dropped Williams off at his home at approximately 12:30 a.m. At that time, Williams had his cell phone in his

possession.

Cormier identified Knight as the man he and Williams met in the Iberville Project a few weeks prior to the murder. He stated that he did not know Knight's name and only saw him on that one occasion. He identified Knight's photograph and told the officers Knight was the man who Williams said was on the cell phone while they were driving home.

Ricard testified that he had been Williams' roommate for approximately nine months prior to the murder. On the evening before the shooting he asked Williams to drive him to "Kenneth's" house to get his hair twisted. Williams refused to do so, primarily because Williams planned to meet with a male nicknamed "Money." When Cormier arrived to take Williams to the meeting, Cormier agreed to drop Ricard off on the way. Ricard testified that after Cormier dropped him off, he walked a few blocks to Kenneth's house. When his hair was done, he called Williams to have Williams pick him up, but Williams did not answer his cell phone. A few of Kenneth's friends drove him home. Ricard testified that as they were driving home, they saw Williams' car. Ricard called Williams and asked him to take him the rest of the way home, but Williams refused, telling him that "the boy [was] in the car." Ricard testified that Williams also told him not to go home, but Ricard returned home nonetheless because he had to

study for a test the next day.

When Ricard arrived at home, Williams was not there. Ricard went into his bedroom, closed the door, and read until he fell asleep. Ricard awakened to the sound of the front door to the apartment opening and closing. He then heard Williams' bedroom door open and close. Soon thereafter, Williams entered his room and told him he needed some lubrication. He gave Williams a bottle of lotion, and when Williams left he told Ricard not to make any noise because "he" did not know Ricard was there. Ricard testified that soon thereafter Williams returned and asked for more lubrication because of the size of his companion. Ricard gave Williams a jar of petroleum jelly, and Williams offered to let Ricard watch him and the male have sex. Williams then left the room, leaving the doors to both bedrooms open.

Ricard stated that he eventually crawled into Williams' room to watch Williams and his guest. He testified that Williams and the male, whom he later identified as Knight, were on the bed engaged in foreplay, and then Williams rolled over onto his stomach, with Knight kneeling behind him. Ricard testified he saw Knight reach up toward Williams' shoulders, and believing Knight was going to grab hold of Williams' shoulders to brace himself to penetrate Williams, Ricard's gaze dropped down on their bodies

and away from Williams' shoulders. Ricard then heard a gunshot and saw a flash. He testified that when Knight pulled back from Williams, he had a gun in his hand.

Ricard fled the room as Knight pulled up his pants. He went into the living room and hid behind the television. He saw Knight come out of Williams' bedroom, wiping his gun on his shirt, and go into the bathroom. He heard a flush, and Knight emerged. Ricard heard Knight moving things around, and then Knight came into the living room and tried to leave through the front door. Knight could not exit, however, because the gate was locked. Knight closed the door and Ricard jumped out at him to try and wrestle the gun away from him. The gun fired while they were struggling, and a bullet hit the doorframe. Ricard testified the clip fell out of the gun, and he was able to get the gun away from Knight. Ricard yelled at Knight to leave, and Knight ordered him to give him the gun. Ricard refused to do so, and Knight picked up the clip, opened the door, threw the clip out through the locked gate, and closed the door. Ricard left the room to find keys to the gate, and when he returned Knight had armed himself with a knife. Knight put the knife down and went into Williams' room. Knight opened the window, knocked out the screen, and sat on the windowsill. Knight again demanded his gun, and Ricard threw it out of the window. Knight then

jumped out of the window. Ricard said he saw Knight pick up the gun and the clip. Fearing Knight would fire at him, Ricard jumped back and then heard a shot. He testified he looked back outside and saw Knight pulling his arm back out of the passenger window of Williams' car. Knight then ran from the scene.

Ricard testified he yelled to some people downstairs to call the police, and then he went into Williams' room to try to find Williams' cell phone. Instead he found the keys to the apartment on the table next to Williams' bed. He let himself out of the apartment and went downstairs. A neighbor had called the police, and Ricard got on the phone until officers arrived on the scene. Ricard said he went back inside the apartment with the officers, going to his room to dress while the officers went into Williams' bedroom. He then accompanied them to the police station where he gave a statement. In his first statement to the police he omitted the fact that he saw the shooting because he feared he would be blamed for it. He informed them of all the facts during his second statement six days later. Ricard testified that he identified Knight from a photographic lineup as the man who shot Williams. He stated that when the officers showed him the lineup they told him the perpetrator might or might not be in the lineup.

Ricard testified he gave the officers Williams' cell phone number. He

told the police that Knight might have taken the cell phone out of Williams' car. He denied that either he or Williams had a gun in the apartment. He testified he did not know what happened to the knife Knight had wielded at him.

The defense recalled Det. Wischan, who testified that the coroner's office workers bagged Williams' hands at the scene of the murder. He testified he did not know if the coroner's office routinely checked the hands of gunshot victims for gunpowder residue. He also testified that he did not know to look for the knife at the scene because by the time he arrived Ricard had already gone to the police station.

ASSIGNMENT OF ERROR 1

In the appellant's first assignment of error, he contends that the trial court erred by admitting hearsay evidence, which served to identify him as the killer. He argues that the prejudicial effect of this evidence outweighed its probative value, and thus his conviction must be reversed.

The hearsay testimony to which the appellant refers concerned Williams' identification to Cormier of the person who called Williams on his cell phone while Cormier and Williams were driving back to Williams' apartment just prior to the murder. Cormier testified that he heard Williams tell that person he was on his way to meet him and for the person to wait for

him on a porch. According to Cormier's testimony, Williams then told him that the person on the phone was a male with whom he had seen Williams speaking in the Iberville Project two to three weeks prior to the murder. Cormier testified he did not know the male's name at that time, but he described him and later identified him as the appellant.

Clearly, Cormier's testimony as to what Williams told him about the identity of the person on the phone and his testimony as to what Williams told that person while talking on the phone was hearsay. In State v. Plaisance, 2000-1858, p. 23 (La. App. 4 Cir. 3/6/02), 811 So. 2d 1172, 1190, this court defined hearsay:

> Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. C.E. art. 801(C); *State v. Castleberry*, 98-1388 (La. 4/13/99), 758 So.2d 749, 765. Hearsay is not admissible except as otherwise provided by the Code of Evidence or other legislation. La. C.E. art. 802; *State v. Richardson*, 97-1995 (La. App. 4 Cir. 3/3/99), 729 So.2d 114, 121.

This court further discussed the standard for determining whether the admission of hearsay testimony constituted reversible or harmless error:

> Although it was error to admit this testimony, such error warrants reversal only if it affected the substantial rights of the accused. La. C.Cr.P. art. 921. To determine whether an error is harmless, the proper analysis is "not whether, in a trial that occurred without the error, a guilty

> verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *State v. Snyder*, 98-1078 (La. 4/14/99), 750 So.2d 832, 845 (*quoting Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (La. 1993)). The reviewing court must be able to conclude that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967); *State v. Hearold*, *supra*. Plaisance, at 24, 811 So. 2d at 1190-1191.

Here, the testimony at issue concerned what Cormier heard Williams say to the person on the phone and Williams' identification of that person to Cormier. The testimony was offered to prove the truth of the matter asserted, that the person on the phone, whom Williams was planning to meet shortly, was the appellant. Thus, it was hearsay testimony and thus inadmissible unless it was an exception to the hearsay prohibition.

Prior to trial, the State filed a motion in limine to have the testimony admitted. The State acknowledged that this testimony was hearsay, but it contended the testimony was nevertheless admissible as "a statement of explanation or [sic] an event made while [the victim] was perceiving such event, or immediately thereafter," tracking the language of La. C.E. art. 803 (1). At the start of trial, the State reiterated this argument. The court granted the motion over the defense objection.

The appellant now appears to concede that this testimony was an

exception to the hearsay prohibition, although his argument is geared more toward the exception set forth in La. C.E. art. 803(3):

> (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or his future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.

Appellant nonetheless argues that this evidence should not have been admitted because its probative value is greatly outweighed by its prejudicial effect. See La. C.E. art. 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."

It is not clear, however, that this evidence constituted an exception to the hearsay rule. In essence, the State succeeded in admitting evidence of what Cormier was told by Williams regarding whom he was speaking with on the phone. In State v. Veals, 576 So. 2d 566 (La. App. 4 Cir. 1991), this court reversed the defendant's conviction based upon the admission of very similar hearsay testimony. Veals involved a murder at a house, and a

witness had spoken to the victim on the phone just prior to the murder. The defense moved to keep the witness from testifying that the victim told the witness that the defendant was at the house. Instead, the witness testified he knew the defendant and his accomplice and had seen them together approximately an hour prior to the murder. The witness then testified that he spoke with the victim and asked him who was also at the house, although he did not testify as to what the victim told him. Nonetheless, the witness stated that he knew the people the victim mentioned and had seen them earlier that day.

On appeal, this court found that the testimony was impermissible "indirect hearsay" because the jury could infer that the people the victim mentioned were the defendant and his accomplice. This court further found that the admission of this testimony was not harmless because it corroborated the testimony of the accomplice, who testified for the State as a part of a plea agreement and who presented the only direct evidence of the defendant's involvement in the case. This court noted that the accomplice's veracity was in question because of the plea agreement and because of testimony the defense presented from seven inmates who stated that the accomplice told them that the defendant did not commit the murder. In addition, the defense presented several alibi witnesses. This court reversed

the defendant's conviction.

Similarly, in State v. Quatrevingt, 617 So. 2d 484 (La. App. 4 Cir. 1992), this court found hearsay testimony concerning a victim's statement to a witness was inadmissible. The victim was murdered in her apartment. The defendant was a maintenance man at the apartment building, and her mother testified that the victim told her approximately a month prior to the murder that she had awakened to find the defendant sitting on her bed, and he had told her that he was in the apartment to repair her air conditioner. On appeal, this court found the hearsay evidence did not fall within one of the exceptions, but unlike in Veals, this court found the error in admitting the evidence was harmless. The State had also introduced the defendant's statement wherein he admitted he had entered the apartment to check the air conditioner, only denying that he sat on the victim's bed. This court found that the hearsay testimony did not contribute to the verdict, and thus the error in admitting it was harmless.

Here, Cormier was permitted to testify that Williams received a phone call just prior to the murder wherein Williams told the caller to wait on the porch and he would pick him up shortly. In addition, Cormier testified that Williams told him that the person he was meeting was the male with whom he had seen Williams speaking a few weeks earlier. Cormier then identified

that person as the appellant. As in Quatrevingt and Veals, it appears this testimony was inadmissible hearsay. However, it also appears that the error in allowing its introduction was harmless. If Cormier had been the only person to tie the appellant to the murder, his claim would have more merit. However, Ricard, an eyewitness to the murder, positively identified the appellant as the man who shot Williams. In addition, the credibility problems present in Veals with the eyewitness/accomplice which led this court to reverse Veals' conviction are not present here with Ricard. Thus, any error in admitting Cormier's testimony did not contribute to the verdict, and thus the error was harmless. This assignment is without merit.

ASSIGNMENT OF ERROR 2

Next, the appellant argues that the trial court erred by restricting his cross-examination of Cormier concerning the details of his prior conviction for aggravated battery. During his direct examination, Cormier testified he had a prior conviction for aggravated battery from 1994. On cross-examination, defense counsel first asked Cormier if an aggravated battery conviction usually involves a weapon. The State objected, and the court sustained the objection, noting that the question called for a legal conclusion. Counsel then asked Cormier if his conviction involved a gun. The State objected, and the court sustained the objection, noting that Cormier

acknowledged the conviction. The appellant now argues that this evidence was necessary to impeach Cormier's credibility, and he contends that this impeachment was vital because Cormier's testimony linked him to the murder and because Cormier's aggravated battery conviction was committed with a gun, a fact of which the jury should have been apprised.

La. C.E. art. 609.1 permits the impeachment of a witness by evidence of a prior conviction. Subpart C provides:

> C. **Details of convictions.** Ordinarily, only the fact of a conviction, the name of the offense, the date thereof, and the sentence imposed is admissible. However, details of the offense may become admissible to show the true nature of the offense:
>
> (1) When the witness has denied the conviction or denied recollection thereof;
>
> (2) When the witness has testified to exculpatory facts or circumstances surrounding the conviction; or
>
> (3) When the probative value thereof outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury.

The appellant acknowledges that the first and second exceptions listed in subpart C do not apply to this case. He does however, argue that he should have been allowed to elicit evidence that the prior conviction involved a gun under the third exception, where the probative value of the evidence

outweighs any prejudice, confusion of the issues, or any possibility of misleading the jury. He contends that the court's refusal to allow him to elicit that information deprived him of his right to present a defense by restricting his right to confrontation.

In State v. Huckabay, 2000-1082, pp. 25-26 (La. App. 4 Cir. 2/6/02), 809 So. 2d 1093, 1108, this court discussed a defendant's right to confront his accusers:

> An accused is entitled to confront and cross examine the witnesses against him. La. Const. art. 1, § 16. La. C.E. art. 611(B) provides that a witness may be cross-examined on any matter relevant to any issue in the case. Due process affords a defendant the right of full confrontation and cross examination of the State's witnesses. *State v. Van Winkle*, 94-0947, p. 5 (La. 6/30/95), 658 So. 2d 198, 201-202. The trial court has the discretionary power to control the extent of the examination of witnesses as long as the court does not deprive the defendant of his right to effective cross-examination. *State v. Hawkins*, 96-0766 (La.1/14/97), 688 So.2d 473; *State v. Robinson*, 99-2236, p. 6 (La. App. 4 Cir. 11/29/00), 772 So. 2d 966, 971. It has been held that evidentiary rules may not supercede the fundamental right to present a defense. *Id.* However, evidence may be excluded if it is irrelevant. See *State v. Casey*, 99-0023, pp. 18-19 (La. 1/26/00), 775 So. 2d 1022, 1037. Further, confrontation errors are subject to the harmless error analysis so the verdict may stand if the reviewing court determines that the guilty verdict rendered in the particular trial was surely unattributable to the error. *State v. Broadway*, 96-2659, p. 24 (La. 10/19/99), 753 So. 2d 801, 817.

This court discussed relevant evidence in State v. Hall, 2002-1098, p. 8 (La. App. 4 Cir. 3/19/03), 843 So. 2d 488, 495-496:

> Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. La. C.E. art. 401. Relevant evidence is generally admissible. La. C.E. art. 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403.
>
> A trial court's ruling as to relevancy will not be disturbed absent a clear abuse of discretion. *State v. Lewis*, 97-2854 (La. App. 4 Cir. 5/19/99), 736 So.2d 1004; *State v. Badon*, 95-0452 (La. App. 4 Cir. 11/16/95), 664 So.2d 1291. A trial court is vested with much discretion in determining whether the probative value of relevant evidence is substantially outweighed by its prejudicial effect. See *State v. Lambert*, 98-0730 (La. App. 4 Cir. 11/17/99), 749 So.2d 739; *State v. Brooks*, 98-0693 (La. App. 4 Cir. 7/21/99), 758 So.2d 814.

In support of his argument that the trial court unduly restricted his right to present a defense, the appellant cites State v. Van Winkle, 94-0947 (La. 6/30/95), 658 So. 2d 198, where the Court found that the trial court erred by refusing to allow the defendant to introduce evidence which would have cast suspicion for the defendant's son's murder on another person. The defendant's son was found suffocated in his bedroom, and the defendant was

arrested for the murder. The defense's theory was that a man who lived in the apartment was a homosexual hustler who brought home another man, and these two men accidentally killed the boy during forced attempted homosexual activity. In furtherance of this theory, the defendant sought to question: (1) the roommate about his sexual activities and source of income; (2) the coroner about the condition of the victim's anal orifice; (3) the State's chemist as to why the absence of sperm in the anal swabs containing seminal fluid did not necessarily disprove sexual activity; (4) the bartender of the bar where the roommate hung out as to what he meant by the bar being a "hustler" bar; and (5) another bartender of the bar as to whether the bar was a gay bar. The district court refused to allow counsel to question the witnesses as to these areas, and the defendant was convicted of her son's murder. The appellate court affirmed her conviction. On review, the Court reversed, finding the trial court's ruling prevented the defendant from presenting a defense. The court discussed earlier cases addressing the issue of the curtailment of the right to present a defense by limiting cross-examination of a witness:

> In *State v. Gremillion*, [542 So.2d 1074 (La.1989)], the defendant attempted to introduce evidence that third parties, rather than the defendant, had killed the victim. The evidence consisted of a statement that the victim had made to a sheriff's deputy who investigated the crime. The statement was that he had been attacked and

> beaten by three white males. The trial court and the Court of Appeal both held the statement was inadmissible hearsay. We agreed that the statement was hearsay and that it did not meet any applicable exception (res gestae, dying declaration, business records). However, we concluded that normally inadmissible hearsay may be admitted if it is reliable, trustworthy and relevant, and if to exclude it would compromise the defendant's right to present a defense. *See Chambers v. Mississippi*, 410 U.S. at 302, 93 S.Ct. at 1049. Exclusion of the statement in *Gremillion* impermissibly impaired the defendant's fundamental right. 542 So.2d at 1079, citing *State v. Washington*, 386 So.2d 1368 (La.1980).
>
> Similarly, in *State v. Vigee*, [518 So.2d 501 (La.1988)], we held that hearsay evidence supporting the defendant's theory of the case and undermining the State's lead witnesses was relevant; excluding it mandated reversal. The defendant may *always* assert that someone else committed the crime. *Chambers v. Mississippi, supra; State v. Ludwig*, 423 So.2d 1073 (La.1982).

State v. Van Winkle, 94-0947 at pp. 5-6, 658 So. 2d at 202. The Court, finding that the evidence which the trial court refused to admit was relevant to the issue of whether someone else may have committed the murder, stated: "[b]y abridging the cross examination of these witnesses, the trial court impaired [the defendant's] constitutional right to present a defense." Id. at 7, 658 So. 2d at 202. The Court further held this error was not harmless because it found a reasonable possibility that the excluded evidence might have contributed to the verdict. The case against the

defendant was based upon circumstantial evidence, and the defense theory (that the roommate and another man who was seen leaving the apartment early on the morning of the murder committed the murder) may well have given the jurors reasonable doubt of the defendant's guilt. The Court reversed the conviction and remanded for a new trial.

The appellant argues this case is similar to Van Winkle because he sought to introduce the details of Cormier's prior conviction to show that someone other than the appellant could have committed the crime for which he was charged. However, unlike in Van Winkle, here there is no indication that Cormier was anywhere near the scene of the murder at the time Williams was shot. In addition, the State presented only circumstantial evidence to link Van Winkle to the murder. Here, by contrast, the State presented direct evidence from Ricard, the eyewitness, that he watched Williams and the appellant engage in sexual activity, and although he did not actually see the shot being fired, he heard the shot, saw the flash, and saw the appellant backing away from Williams while holding a gun in his hand. Given these differences, it does not appear that Van Winkle is controlling because it is unlikely that the introduction of the fact that Cormier's prior aggravated battery conviction involved a gun was really relevant to the present murder or would have showen that Cormier could have been the

person who shot Williams. As such, the court's refusal to permit defense counsel to elicit this evidence cannot be said to have violated the appellant's right to present a defense. Thus, this assignment is without merit.

ASSIGNMENTS OF ERROR 3

On the third assignment of error, the appellant requests a review of the record for errors patent. Such review reveals there are none.

CONCLUSION

Accordingly, the appellant's conviction is affirmed.

AFFIRMED