

STATE OF LOUISIANA

NO. 07-KA-288

VERSUS

**COURT OF APPEAL,  
FIFTH CIRCUIT**

FIFTH CIRCUIT

FELTON D. LAGARDE

COURT OF APPEAL

FILED OCT 30 2007

STATE OF LOUISIANA

  
CLERK

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 04-7083, DIVISION "G"  
HONORABLE ROBERT A. PITRE, JR., JUDGE PRESIDING

OCTOBER 30, 2007

**WALTER J. ROTHSCHILD  
JUDGE**

Panel composed of Judges Marion F. Edwards, Susan M. Chehardy,  
and Walter J. Rothschild

PAUL D. CONNICK, JR.  
DISTRICT ATTORNEY  
Twenty-Fourth Judicial District  
Parish of Jefferson  
TERRY M. BOUDREAUX  
THOMAS J. BUTLER  
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**AFFIRMED; CASE REMANDED  
WITH INSTRUCTIONS.**

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Defendant, Felton D. LaGarde, was indicted and charged with second degree murder in violation of LSA-R.S. 14:30.1 and he pled not guilty.<sup>1</sup> The case was tried before a 12-person jury which unanimously found defendant guilty as charged. Defendant filed a motion for new trial that was denied on February 9, 2007. On that same date, the trial court sentenced defendant to life imprisonment without benefit of parole, probation, or suspension of sentence to run concurrently with the sentence on his prior armed robbery conviction. Defendant filed a timely motion for appeal that was granted.<sup>2</sup>

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<sup>1</sup> Defendant was also charged with armed robbery in the same indictment. The State noted in its brief that the armed robbery and second degree murder charges were severed. On August 1, 2006, a jury found defendant guilty as charged of armed robbery. (07-KA-123). It is noted that this Court affirmed that conviction and sentence. State v. LaGarde, 07-123 (La.App. 5 Cir. 5/29/07), \_\_\_ So.2d \_\_\_, WL 1545652.

<sup>2</sup> The State mentions in its brief that the appellate record is incomplete because it fails to contain pre-trial pleadings and minute entries. However, it is noted that that information is contained in the record pertaining to defendant's prior conviction for armed robbery, 07-KA-123, which has been made part of the present record.

## FACTS

Robert McCrory testified at trial that, on August 3, 2004, at approximately 5:30 to 5:45 p.m., he was about to watch the evening news at home when he heard two gunshots. When he got up out of his chair and looked out of the blinds, he observed defendant standing at the back of the lot directly across the street with a gun in his hand shooting at the ground. McCrory could not see what defendant was shooting at because the weeds were too high. As he looked out the window, McCrory saw defendant shoot one or two more times, then defendant turned around to see if anybody was looking. McCrory explained that defendant subsequently reached into his pocket, pulled out a black mask, put it over his head, and ran away. After the incident, McCrory went outside and saw a man lying on the ground. He positively identified defendant in a photographic lineup and in court as the shooter. McCrory noted that, immediately before he went inside his house to watch the evening news, he noticed defendant and another "guy" headed toward the back of the lot.

Dr. Frasier MacKenzie, an employee of the Jefferson Parish coroner's office and a stipulated expert in the field of forensic pathology, testified that he performed the autopsy on the victim, Brian Scott, and found five gunshot wounds to the body, three of which were fatal (those to the head, right shoulder, and left shoulder).

Detective Dax Russo of the Jefferson Parish Sheriff's Office (JPSO) testified that, on or about August 4, 2004, he was assigned to investigate a claim regarding a stolen 1995 Toyota 4-Runner vehicle. When he searched that vehicle, he recovered a .25 caliber Raven semi-automatic silver handgun from under the front passenger seat.

Louise Walzer, a stipulated expert in the field of firearms identification, testified that the .25 caliber bullet recovered from the victim's back was fired from the weapon recovered from the stolen Toyota 4-Runner.

JPSO Sergeant Larry Dyess testified that, on August 4, 2004, at 2:29 p.m., defendant waived his rights and gave a statement. The statement indicated that defendant was advised he was under arrest for second degree murder and under investigation for armed robbery.

In his statement, defendant said that he and a white female were smoking crack cocaine in a crack house. He then asked the female to give him a ride, but she refused. Defendant explained that the female got into her vehicle and started it, and that he got in the back seat, put the vehicle in park, and grabbed the keys. A struggle ensued, and the female subsequently jumped out of the vehicle. Defendant then jumped in the front seat and pulled off. Defendant said that he had a .380 automatic weapon in his pocket but did not point it at her.

After defendant left, he went across the river and parked the vehicle somewhere downtown. Defendant told the detective that the keys to the vehicle were "in his property." He admitted that he was looking for a ride away from the area because someone told him that he had killed "Egghead."<sup>3</sup> Defendant explained that he and "Egghead" had gotten into an argument about \$500.00 that "Egghead" owed him. He indicated that this argument occurred on Heather by Wayne (Streets) at a stop sign. "Egghead" said something to defendant that made him angry, but he could not remember what it was, so he shot the (.380) gun one time into the ground.

Defendant stated that that was not the same gun he used in the "other incident" that he and the detective previously talked about. He said that he left that

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<sup>3</sup> Sgt. Dyess testified that "Egg" was the nickname of the victim, Brian Scott.

weapon, which was silver, “way down somewhere.” Defendant stated that his partner nicknamed “Lester” or “June” came up to him after he shot the gun and gave him some crack cocaine. Defendant then left and went to “get loaded.” The next thing defendant remembered was coming out of “the house” from “getting loaded” and walking up the street. Defendant stated that “Lester” or “June” then told him that people were looking for him because they said defendant had killed “Egghead.”

Defendant said that he did not remember whether he killed “Egghead.” He indicated that he left the clothes he was wearing when he got into the argument with “Egghead” (black pants and a gray shirt) at his home in the Magnolia projects. He said that he was also wearing a gray “do-rag” on his head, which he always wore. Defendant explained that a “do-rag” was worn by either women or gang members, and that he would fit into the gang member category.

Sgt. Dyess identified photographs of keys to the Toyota 4-Runner taken from “the property belonging to defendant.”

After the State rested, defendant testified that he knew the victim, Brian Scott, as they grew up together and were best friends. He explained that Scott was also known as “Egg.” Defendant remembered having an argument with Scott regarding money on the day in question. He testified that after he shot the gun into the ground, he went to the crack house, and Scott went somewhere else. Defendant said that Scott died approximately 30 to 40 minutes later. He initially testified that he did not shoot Scott, but he later admitted that he did not know whether he shot Scott.

Defendant also admitted that he was addicted to crack cocaine and heroin. He testified that he did not have crack cocaine prior to the argument with Scott. Defendant indicated that he did not remember giving a statement because he was

high on crack cocaine, heroin, and ecstasy at the time. Defendant also testified that after “Lester” told him that people were saying he had killed “Egg,” defendant stole a woman’s vehicle and left.

## **DISCUSSION**

By his first assignment of error, defendant argues that the trial court erred by allowing him to represent himself at the suppression hearing without first securing a valid waiver of his right to counsel. He contends that the trial court failed to advise him of the dangers and pitfalls inherent in self-representation, and that the trial court made no effort to ascertain whether he understood his actions. Therefore, defendant asserts that his waiver of his right to counsel was not knowingly and intelligently made.

The State responds that a “Faretta<sup>4</sup> hearing” is not required in pre-trial proceedings but only requires a waiver of counsel at trial. The State further responds that defendant is precluded from claiming he had inadequate representation during the suppression hearing because he acquiesced in the decision to represent himself at that hearing. The State also contends that defendant cannot show prejudice as a result of representing himself at the suppression hearing.

The record shows that, on January 17, 2007, the first day of trial, defendant advised the trial judge that he wanted new representation. The trial judge responded that defendant had to remain with John Benz, his Indigent Defender Board (IDB) attorney, whether he liked him or not. Defendant explained that his attorney had no defense for him other than to show evidence of his drug addiction. The trial judge countered that defendant’s attorney could not fabricate a defense, and that defendant had to provide one himself. Defendant said he tried to do that,

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<sup>4</sup> Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

but his attorney would not listen to him. He also added that he had just been convicted on his first violent offense with his IDB attorney and received a 99-year sentence.

The trial judge stated that just because defendant did not get the result he wanted did not mean his attorney was not doing his best. Defendant said all he had on his case were police reports and statements, and the trial judge responded that that was probably all that had been provided to his attorney. Defendant indicated that his attorney had filed no motions for discovery. He further stated that he had told his attorney he had been in mental hospitals, was on medication, and was illiterate. Defendant asked the trial judge for “some help” considering that he was facing a life sentence if convicted.

Defendant also said he had told Benz approximately one month prior that he wanted to represent himself. Benz then enumerated the dates he had met with defendant. Benz indicated that, after defendant told him he wanted to represent himself, he sent defendant a letter on December 19, 2006 telling him that he had filed a motion to that effect which the trial judge had approved.<sup>5</sup>

Benz further explained that he told defendant he intended to bring defendant's sister to court to testify, and that if defendant decided he wanted Benz to try the matter, to let him know, and also to let him know if defendant wanted any witnesses subpoenaed. Benz said defendant did not respond to that. Benz further stated that he had filed a motion for discovery, and that discovery was subsequently given to him. He indicated that he filed other motions and expected them to be heard on the day of trial as they usually were. When defendant asked what motions had been filed, Benz told him there was a motion to suppress

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<sup>5</sup> It is noted that no written motion requesting that defendant be allowed to represent himself could be found in either this record or the record involving defendant's armed robbery conviction (07-KA-123).

evidence, confession, and identification, and a motion for criminal history on all state witnesses. Defendant said Benz had not told him about any of those motions.

The trial judge then asked defendant if he wanted Benz to help him or if he wanted to represent himself. Defendant responded that he would rather represent himself. The trial judge stated that Benz was going to “sit there” anyway and assist him. Defendant and Benz said, “[a]ll right.” The trial judge also informed defendant that there were rules of evidence that he was not familiar with. Defendant told the trial judge he respected him, but that he wanted to take his chances and represent himself.

The trial judge responded that he did not think defendant was qualified to represent himself in this case. He said he was going to allow defendant to represent himself, but he again stated that he was going to ask Benz to assist defendant. He told defendant that this was a “serious” charge, and only defendant could decide whether he wanted to be tried by the judge or a jury. Defendant subsequently stated that he wanted a jury trial. He also stated that he thought the district attorney had to give him the evidence they had against him. The trial judge said that all the district attorney’s office had were police reports and statements, and that the evidence came from witness testimony.

Defendant indicated he could not read, noting that he dropped out of school in the fifth grade, went to “LTI” at 11-years-old, and at one time was in New Orleans General, a mental hospital. However, defendant said that, while he was imprisoned, people had read the witnesses’ statements to him. The record indicates that defendant and Benz talked, after which defendant said the trial judge might as well convict him now because Benz was not defending him. The trial judge responded that he had known Benz a long time, and that Benz did the best he could for everybody he represented. After additional discussion, defendant told the trial



judge that if the trial judge could give Benz something to work with, he would keep Benz as his attorney. Benz told defendant that they had already gone over the witnesses' statements.

Benz then told the trial judge that defendant had told him he did not remember anything about the incident. After more discussion, defendant agreed to go ahead with jury selection. Before the jury was selected and sworn, Benz told the jury that he would be assisting defendant in trying this matter. The jury was then selected and sworn and removed from the courtroom. The suppression hearing was subsequently held, after which the trial judge denied the motion to suppress the line-up and the statement. Following the trial judge's denial, the trial judge again suggested to defendant that he reconsider and let Benz handle this case. Defendant responded that he thought it would be better for Benz to handle the case.

A defendant's right to the assistance of counsel is guaranteed by both our state and federal constitutions. State v. Brooks, 452 So.2d 149, 155 (La.1984), citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution give a defendant the right to counsel as well as the right to defend himself. State v. Bruce, 03-918 (La.App. 5 Cir. 12/30/03), 864 So.2d 854, 857. "A defendant may represent himself only if he makes an unequivocal request to represent himself and knowingly and intelligently waives his right to counsel." Id., citing Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975), and State v. Bridgewater, 00-1529 (La.1/15/02), 823 So.2d 877, 893, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003).

A waiver of counsel, in order that an accused may enter into self-representation, must be clear and unequivocal. State v. Ormond, 00-13 (La.App. 5

Cir. 4/24/01), 786 So.2d 187, 191. Requests which vacillate between self-representation and representation by counsel are equivocal. State v. Leger, 2005-0011 (La.7/10/06), 936 So.2d 108, 147, cert. denied, --- U.S.---, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). A defendant who vacillates between self-representation and representation by counsel cannot be said to have waived his right to learned counsel. State v. Treadway, 97-901 (La.App. 5 Cir. 03/25/98), 710 So.2d 1121, writs denied, 98-1634 (La.09/25/98), 725 So.2d 490, 00-1197 (La.1/12/01), 780 So.2d 1067. Courts must indulge in every reasonable presumption against a waiver of counsel. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Before accepting a waiver of counsel, the trial court should advise the defendant of the nature of the charges, the penalty range for the charges, and the dangers and disadvantages of self-representation, such as the failure to recognize objections to inadmissible evidence and the inability to adhere to technical rules governing trials. Bruce, 864 So.2d at 857. In addition, the court should inquire into the defendant's age, education and mental condition, and should determine according to the totality of circumstances whether the accused understands the significance of the waiver. Id.

“Whether an accused has knowingly and intelligently waived his right to counsel is a question which depends on the facts and circumstances of each case.” State v. Strain, 585 So.2d 540, 542 (La.1991), citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

A criminal defendant does not have the right to act both as “represented and representative” due to the potential for disruption of the trial process. State v. Brown, 03-897 (La.4/12/05), 907 So.2d 1, 24, citing State v. Bodley, 394 So.2d 584, 593 (La.1981). However, “hybrid” representation does allow a defendant the

right to defend himself as co-counsel while standby counsel explains and enforces the basic courtroom rules, as long as standby counsel participation does not seriously undermine the defendant's appearance as representing himself before the jury. Brown, 907 So.2d at 21-24.

A defendant performs the core functions of an attorney's traditional role when he formulates his own trial strategy, determines his own theory of the defense, chooses the witnesses to subpoena and to call to the stand, formulates the questions to be asked of the witnesses, and performs the opening and closing statements. State v. Dupre, 500 So.2d 873, 877 (La.App. 1 Cir.1986), writ denied, 505 So.2d 55 (La.1987). An attorney functions in an advisory capacity when he is not the controlling strategist, but rather helps the defendant with procedural matters and proper courtroom conduct. Id.

When an attorney partially represents a defendant who assumes functions that are at the core of an attorney's traditional role, the defendant must still knowingly and intelligently waive his constitutional right to have his lawyer perform the core functions, in order to show that the defendant appreciates the possible consequences of mishandling the core functions that lawyers are more competent to perform. Dupre, 500 So.2d at 877. "Therefore, when an attorney is appointed as an advisor the accused must knowingly abandon his right to be represented by counsel." Id.

Once the defendant has made a clear request to represent himself, the trial court must determine whether the defendant is competent to waive counsel and is voluntarily exercising informed free will. State v. Santos, 99-1897 (La.9/15/00), 770 So.2d 319, 321. Only the defendant's competence to waive his right is at issue, not his competence to represent himself. Id.

Because there are no inflexible criteria or a magic-word formula for determining the validity of a defendant's waiver of the right counsel, the inquiry into validity of the waiver must take into account the totality of the circumstances in each case. State v. Stevison, 97-3122 (La.10/30/98), 721 So.2d 843, 845.

The trial court is given much discretion in determining whether the defendant's waiver was knowing and intelligent. State v. Mendez, 05-173 (La.App. 5 Cir. 1/17/06), 923 So.2d 189, 194. Since the trial court has had the opportunity to observe the defendant in court appearances and motions, the trial court is familiar with the defendant. Id. An appellate court should not reverse the trial court ruling absent an abuse of its discretion. Id.

In the instant case, we find that defendant knowingly and intelligently waived his right to counsel. The record reflects that the trial judge told defendant he was facing a serious charge, and that defendant knew he was facing a potential life sentence. The record also reflects that the trial judge advised defendant of the disadvantages of self-representation. The trial judge told defendant that he did not think defendant was qualified to represent himself in this case. He informed defendant that there were rules of evidence defendant was not familiar with and questions defendant had to be able to ask the witnesses. The trial judge further informed defendant that he had to be able to select a jury and understand the procedures. The record also indicates that defendant's IDB counsel told defendant that he would have to review witness statements, police reports, crime lab reports, and autopsy reports (which he gave defendant copies of) and be prepared to question individuals in connection with those statements and reports.

Additionally, we note that the trial judge was aware of defendant's education and mental condition when he allowed defendant to represent himself. Although defendant advised the trial judge that he dropped out of school in the fifth grade

and could not read, defendant indicated that many people had read the witnesses' statements to him while he was in prison. Defendant also advised the trial judge that he was in a mental hospital at one time. However, the trial judge presided over defendant's prior armed robbery trial and, therefore, he was familiar with defendant and knew that two doctors had found defendant competent to stand trial in that case.

We also find that defendant was not prejudiced by waiving his right to counsel at the suppression hearing, as defendant's IDB counsel assisted defendant at the request of the trial judge. Additionally, the record shows that defendant competently cross-examined the witnesses at the suppression hearing and made pertinent legal arguments in support of his positions after conferring with IDB counsel. The record further shows that IDB counsel made significant arguments on behalf of defendant's positions as well.

During the hearing on the motion to suppress identification, defendant attempted to elicit during his cross-examination of Detective Gorumba that the other men in the photographic lineup did not look like him. Following defendant's cross-examination, IDB counsel asked the trial judge to wait a minute, after which defendant asked another question of the detective. As such, we find that IDB counsel actively participated in assisting defendant with the questions. The record also shows that during the cross-examination of the eyewitness, Robert McCrory, defendant elicited relevant testimony from McCrory that he was a good distance from the lot when he saw defendant shooting the gun. Following the testimony, the trial judge denied the motion to suppress the "identification lineup."

The State subsequently moved to play the entire audiotape of defendant's statement, including the reference to the armed robbery committed by defendant. After conferring with IDB counsel, defendant made the appropriate objections as

to relevance, lack of notice, and no Prieur<sup>6</sup> hearing.<sup>7</sup> After hearing arguments, the trial judge overruled defendant's objection and denied the motion to suppress statement.

Defendant's IDB counsel then argued that there was evidence that should be suppressed, namely the gun. The prosecutor remarked that there had already been a suppression hearing during the armed robbery trial regarding the gun, but he would argue the motion again if necessary. The prosecutor added that if it was admissible at the last trial, it would be admissible at this trial. The trial judge said that it was not necessary for him to hear the motion again. Defendant's IDB counsel argued that they were trying a different crime at this time, that the two crimes were separate, and that what was admissible at one trial might not be admissible at this trial. The prosecutor responded that evidence regarding the recovery of the gun had not changed and, therefore, evidence of such was admissible. After hearing arguments of counsel, the trial judge overruled the objection.

In light of the foregoing, we find that defendant knowingly and intelligently waived his right to counsel at the suppression hearing. Therefore, the trial court did not abuse its discretion in allowing defendant to represent himself at the suppression hearing with assistance of IDB counsel.

By his next assignment, defendant argues that the trial court erred by admitting into evidence his audiotaped statement which included reference to the armed robbery for which he was previously convicted. He contends that the trial court permitted the evidence to be heard by the jury without requiring the state to comply with notice requirements, and without requiring the state to show some

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<sup>6</sup> State v. Prieur, 277 So.2d 126 (La.1973).

<sup>7</sup> See Assignment of Error Number Two for a more detailed discussion of the exchange among the trial judge, defendant, and IDB counsel.

independent probative value for the evidence. Defendant asserts that the trial court's error in admitting the evidence was not harmless on the basis that it was cumulative, as he would not have testified had the trial court allowed him a continuance to secure the presence of a witness.

The State responds that the evidence was admissible without prior notice to the defense because it constituted an integral part of the crime, and because it explained the sequence of events leading to defendant's arrest. The State further responds that the evidence was cumulative.

After the trial judge denied defendant's motion to suppress identification, the State noted that it intended to play the entire audiotape of defendant's statement without redacting anything, including the references to the armed robbery defendant committed and for which he was convicted prior to the instant trial. The State indicated that there was no surprise as to the contents of that tape, and that both crimes occurred within a short period of time of one another. The State further indicated that it was going to introduce the clothes and the gun recovered from the stolen vehicle.

Defendant's IDB counsel asked the trial judge to allow him to explain to defendant what was happening. After he did so, defendant objected. The trial judge responded that they had already had a trial, which would be similar to a Prieur hearing. He said that he was going to go ahead and allow the tape to be played considering the close space in time between the two crimes, and because the evidence would have been allowed had there been a Prieur hearing. Defendant countered that the armed robbery was a separate crime, that the State did not give him notice they were going to admit evidence of that crime, and that no Prieur hearing had been held.

The trial judge informed defendant that he already had notice because he had been convicted of the armed robbery. Defendant said he did not see the relevance, again arguing that these were two separate incidents occurring in separate places. The trial judge overruled his objection and allowed the statement to be played in its entirety. Defendant noted his objection. The trial judge then denied the motion to suppress statement.

Evidence of other crimes, wrongs or acts may be introduced when it is independently relevant or when it relates to conduct, formerly referred to as *res gestae*, that "constitutes an integral part of the act or transaction that is the subject of the present proceeding." LSA-C.E. art. 404(B)(1). A close connexity between the charged and uncharged conduct is required to ensure that " 'the purpose served by admission of other crimes evidence is not to depict the defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.' " State v. Noten, 01-1818 (La. 6/25/01), 791 So.2d 607, 609 (*per curiam*), internal citations omitted. Evidence that constitutes an integral part of the crime is admissible without prior notice to the defense. State v. Charles, 00-1586 (La.App. 5 Cir. 6/27/01), 790 So.2d 705, 708.

The test for integral act (*res gestae*) evidence is therefore not simply whether the state might somehow structure its case to avoid any mention of the uncharged act or conduct, but whether doing so would deprive the state's case of narrative momentum and cohesiveness, " 'with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.' " State v. Colomb, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076, quoting Old Chief v. United States, 519 U.S. 172, 186, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997). *Accord*, State v. Taylor, 01-1638 (La.



1/14/03), 838 So.2d 729, 741-742, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004).

In a similar case, State v. Edwards, 406 So.2d 1331, 1350-1351 (La. 1981), cert. denied, 456 U.S. 945, 102 S.Ct. 2011, 72 L.Ed.2d 467 (1982), defendant, who was convicted of first degree murder, argued that the trial judge improperly admitted evidence of other crimes attributable to him. In that case, the testimony indicated that defendant and another accomplice arrived at a third person's house, and that defendant suggested they "go make a hit." They first went to a grocery store where defendant stole some wine, and then they ultimately went to the victim's house, killed her, and sped away from the scene in the victim's automobile. The testimony also indicated that they subsequently followed another woman to a college campus in an attempt to snatch her purse but abandoned the plan when she saw them coming. Afterwards, they went to a convenience store looking for still another "hustle" until the appearance of a police officer terminated the night's activities. The Louisiana Supreme Court found that the other crimes evidence was properly admitted under the *res gestae* exception, noting that the sequence of events formed "one continuous transaction" with the crime for which defendant was being tried. Id. at 1351.

In the instant case, we find that the armed robbery incident was admissible without prior notice because it constituted an integral part of the crime that is the subject of the present proceeding. The record indicates that there was a close temporal connection between the two incidents. Defendant shot the victim, went to a "crack house" to smoke crack cocaine, then stole a woman's vehicle to escape the area when he heard that people were saying that he had killed the victim. Additionally, the weapon used in the shooting was recovered from the stolen

vehicle. Further, the evidence was cumulative, as defendant testified that he was serving a 99-year sentence for the armed robbery incident.

However, even if the trial court erred in allowing evidence of the armed robbery, the introduction of inadmissible other crimes evidence is subject to a harmless error analysis. State v. Johnson, 94-1379 (La.11/27/95), 664 So.2d 94, 102; State v. Washington, 03-1135 (La.App. 5 Cir. 1/27/04), 866 So.2d 973, 980. An error is harmless when the verdict is "surely unattributable to the error." State v. Johnson, supra, at 102.

We conclude that the verdict was "surely unattributable to the error," as there was ample other evidence to convict defendant of second degree murder. Robert McCrory testified that he observed defendant shooting a gun into the ground, but that he could not see what defendant was shooting at because the weeds were too high. Afterwards, McCrory saw defendant turn around to see if anybody was looking, then put on a mask and run away. When McCrory went outside, he saw a man lying on the ground. Defendant admitted at trial that he and the victim got into an argument, and that he shot a gun into the ground. Defendant also testified that he did not remember whether he killed the victim. Additionally, one of the guns used in the shooting was recovered from the vehicle defendant stole to escape the area after the shooting.

In light of the foregoing, we find that the trial court did not err by admitting the entire audiotaped statement of defendant into evidence. This assignment is without merit.

Defendant next argues that the trial court erred by denying his oral motion for a continuance to secure the presence of a material witness.<sup>8</sup> He contends that

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<sup>8</sup> It is noted that defendant's motion for a continuance should have been styled "motion for recess" since trial had already begun. See LSA-Cr.P. art. 708, infra. It is also noted that defendant in his brief cites to Louisiana Code of Civil Procedure articles 1601 and 1602 to support his contention that the continuance should have been

the trial court's ruling forced him to testify on his own behalf, a strategy he would not have otherwise chosen. The State responds that the trial court did not abuse its discretion in denying the motion, noting that defendant did not satisfy the criteria set forth in LSA-C.Cr.P. art. 709.

On January 17, 2007, after the State rested its case, defense counsel informed the trial judge that his witness, defendant's sister, would not be available until the next day. He also informed the trial judge that he wanted to keep Det. Gorumba on call. The trial judge asked defense counsel what time his witnesses would be there, and defense counsel responded that if they were going to come, they would be there for 9:00 or 9:30 a.m.

Defense counsel indicated that defendant's sister was coming by train from the west coast, and that she had left on Sunday. The trial judge noted that that trip would take three days. Defense counsel responded that she should be there today, that she was supposed to call when she got in, but that he had not heard from her. An unrecorded off-the-record bench conference was held, after which the trial judge informed the jury that they would have to return the next day to hear testimony from two additional witnesses. The minute entry indicates that court was adjourned at approximately 4:30 p.m.

On January 18, 2007, at approximately 10:00 a.m., the second day of trial, a bench conference was held. Defense counsel asked that the trial be continued until that afternoon, as defendant's sister was somewhere between Gretna and Chicago on a train. Defense counsel explained that the witness had no control over when she got there since she was coming by train. When the trial judge asked defense counsel whether he had any other witnesses, defense counsel responded negatively, remarking that defendant was going to have to testify since his sister was not there.

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granted. However, those articles and the case law cited along with those articles involve civil cases, not criminal, and, therefore, are inapplicable to the instant case.

The trial judge inquired as to whether defendant's sister was a fact witness, and defense counsel stated that she was going to testify as to defendant's drug problem. The trial judge said that if defendant was going to testify, that he could cover that area. Defense counsel explained that if defendant's sister was there, defendant might not have to take the stand. He noted that he had heard from defendant's sister yesterday, that she was in Chicago at that time, and that she was supposed to have gotten into town at approximately 4:00 or 5:00 a.m. The trial judge denied defense counsel's motion, saying that defendant's sister would have had "plenty enough time" to get there if she were coming. Defense counsel noted his objection.

Both the Sixth Amendment of the United States Constitution and Article I, Section 16 of the Louisiana Constitution (1974) guarantee a criminal defendant the right to compulsory process and to present a defense. A defendant's right to compulsory process is the right to demand subpoenas for witnesses and the right to have those subpoenas served. State v. Gordon, 01-734 (La.App. 5 Cir. 11/27/01), 803 So.2d 131, 148, writs denied, 2002-0362 (La.12/19/02), 833 So.2d 336 and 2002-0209 (La.2/14/03), 836 So.2d 134.

LSA-C.Cr.P. art. 708 defines continuance and recess as follows:

A continuance is the postponement of a scheduled trial or hearing, and shall not be granted after the trial or hearing has commenced. A recess is a temporary adjournment of a trial or hearing that occurs after a trial or hearing has commenced.

Pursuant to LSA-C.Cr.P. art. 709, a defendant must state the following in order to be entitled to a continuance for securing the presence of a witness:

- (1) Facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial;
- (2) Facts and circumstances showing a probability that the witness will be available at the time to which the trial is deferred; and

(3) Facts showing due diligence used in an effort to procure attendance of the witness.

A motion for recess is evaluated by the same standards as a motion for a continuance. State v. Warren, 437 So.2d 836, 838 (La.1983); State v. Rodriguez, 02-334 (La.App. 5 Cir. 1/14/03), 839 So.2d 106, writ denied, 03-0482 (La.5/30/03), 845 So.2d 1061. The decision to grant a recess lies within the discretion of the trial court and will not be overturned absent an abuse of that discretion. State v. Hampton, 98-0331 (La. 4/23/99), 750 So.2d 867, 877, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999); State v. Stevenson, 02-0079 (La.App. 5 Cir. 4/30/02), 817 So.2d 343, 345.

In the instant case, it is initially noted that the trial judge did, in fact, adjourn the proceedings after defense counsel said that his witness would not be available until the next day, if she was going to come. Thus, defense counsel was given additional time to locate his witness and bring her to court. Apparently, defendant is arguing in his brief that the trial judge erred by denying his request for a recess when his witness failed to appear the next day.

The record shows that defendant did not satisfy the requirements of LSA-Cr.P. art. 709. Although defense counsel informed the trial judge that defendant's sister was going to testify as to defendant's drug problem, the trial judge apparently thought that such testimony was either not material or unnecessary. As the State noted in its brief, there is no evidence such testimony would have been relevant or permitted. Defendant also failed to state facts and circumstances showing a probability that the witness would be available at the time to which the trial was deferred. The witness allegedly left the west coast on Sunday, January 14<sup>th</sup> and still had not arrived in court by the morning of Thursday, January 18<sup>th</sup>. As the trial court correctly noted, the witness had enough time to

come to court had she so desired. Additionally, we find that defendant failed to use due diligence in an effort to procure the attendance of the witness, as there was no evidence presented at trial that defense counsel attempted to subpoena the witness.

Finally, defendant has failed to show that he was prejudiced by the failure of the witness to testify. The witness's testimony was not relevant to defendant's guilt or innocence, and the record reflects that defendant testified regarding his drug problem. Also, there is no evidence that defendant would not have testified had his sister done so.

In light of the foregoing, we find that the trial court did not abuse its discretion in denying defendant's motion for a recess to secure the presence of a witness.

By his final assignment of error, defendant argues that the trial court erred by sentencing him immediately after denying his motion for new trial without first securing a waiver of the 24-hour statutory delay. The State responds that defendant impliedly waived the delay when he told the trial judge that he was ready for sentencing.

The record shows that defendant did not expressly state that he was waiving the 24-hour delay period required by LSA-C.Cr.P. art. 873.<sup>9</sup> However, when the trial court asked defense counsel if he was ready for sentencing, defense counsel affirmatively answered, "Ready for sentencing, Your Honor." This was an implied waiver of the delay. See State v. Ferrell, 94-702 (La.App. 5 Cir. 5/30/95), 656

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<sup>9</sup> Art. 873. Delay between conviction and sentence

If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled. If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

So.2d 739, 745, writ denied, 95-2360 (La. 4/18/97), 692 So.2d 433. The trial court did not err in sentencing defendant.

**ERROR PATENT DISCUSSION**

The record was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). The review reveals one error patent in this case.

The trial judge did not advise defendant of the prescriptive period for post-conviction relief as provided in LSA-C.Cr.P. art. 930.8. Therefore, we remand this matter to the trial court to properly inform defendant of the prescriptive period by sending defendant written notice within ten days of the rendition of the opinion and to file written proof in the record that defendant received such notice. State v. Knight, 01-881 (La.App. 5 Cir. 2/13/02), 811 So.2d 947, 951.

**AFFIRMED; CASE REMANDED  
WITH INSTRUCTIONS.**

EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

THOMAS F. DALEY  
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SUSAN M. CHEHARDY  
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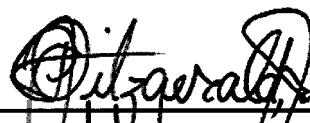
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**NOTICE OF JUDGMENT AND  
CERTIFICATE OF MAILING**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **OCTOBER 30, 2007** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



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PETER J. FITZGERALD, JR.  
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**07-KA-288**

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