# NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 KA 0306

STATE OF LOUISIANA

VERSUS

HARDY ALLEN

Judgment Rendered: NOV 0 1 2017

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 02-15-0569

Honorable Louis R. Daniel, Judge

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**BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.**

**WELCH, J.**

The defendant, Hardy Allen, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning as error the trial court's denial of his motion for a hearing pursuant to **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and the trial court's denial of his motion to continue. For the following reasons, we affirm the conviction and the sentence.

## STATEMENT OF FACTS

On October 13, 2014, during the evening hours, officers of the Baton Rouge City Police Department (BRPD) were dispatched to the scene of a shooting at Madison Avenue. BRPD Detective Saundra Watts, who received the dispatch at approximately 8:44 p.m., arrived at the scene after the victim (Calvin Chrisentary) had been transported to the hospital. She observed, on the side of the road, a white lighter, suspected blood, and headphones. After receiving notice that the victim died from the shooting,[1] BRPD Detective Joseph Dargin went to the hospital and arranged for an autopsy. The next day, Detective Dargin went to the scene of the shooting where he located a shell casing alongside the road.

On October 15, 2014, Detective Dargin was contacted by Markeisha Elie, who was dating the defendant at the time of the offense. Markeisha also knew the victim, who fathered a child with her cousin. According to Markeisha, on the night of the murder, the defendant was at her house, but left for a few minutes. He

[1] The victim specifically died from a gunshot wound to the back according to the autopsy report. The victim also had a fresh laceration and abrasion in the palm of his left hand.

later returned to her house holding his jaw and had mud on his shoes.[2] The morning after the shooting, Markeisha called her cousin after seeing her cousin's post on social media regarding the victim's death. Her cousin informed her that the victim had been shot in the back on Madison Avenue, one block away from Markeisha's residence. Markeisha called the defendant to question him about the murder and he initially denied any involvement. She called him back and the defendant confessed, specifically stating that he shot the victim during his attempt to rob the victim. During the attempted robbery, the victim punched the defendant and the defendant shot the victim as the victim tried to run away. Detective Dargin presented Markeisha with a photographic lineup, at which point she identified the defendant and executed a photographic lineup statement. She further informed the police that the defendant had a black .40 caliber gun that he would regularly carry in his pants, or keep at his apartment.

Markeisha's brother, Marcus Elie, also spoke to the police and identified the defendant in a photographic lineup. Marcus indicated that he was walking home on the night in question when he saw the victim (his "cousin-in-law") walking. His sister's boyfriend, the defendant, was exiting the apartment as Marcus walked in and alerted Marcus that he was about to rob someone. The defendant walked back to the apartment and told Marcus that he (the defendant) had just shot someone, and that an ambulance was approaching. At that point, Marcus looked outside and saw an ambulance headed towards Madison Avenue. Marcus ran outside and saw the victim lying in the street.

The police obtained an arrest warrant for the defendant and a search warrant for his apartment. During the execution of the search warrant for the defendant's apartment, the police recovered a .40 caliber handgun and ammunition, among

[2] Markeisha stated that she could not recall all of the details by the time of the trial. She was allowed to listen to her recorded police interview to refresh her memory. She confirmed that the details given by her to the police two days after the shooting were truthful.

other potential evidentiary items. After the search, the defendant was advised of his **Miranda**[3] rights and interviewed at the detective's office. The defendant denied owning a firearm and stated that he was with Markeisha during the night in question.

BRPD Corporal Darcy Taylor processed the firearm located in the defendant's apartment, lifting a fingerprint from the magazine of the gun and swabbing various areas of the gun and magazine. Amber Madere, an expert in latent print comparisons from the Louisiana State Police Crime Lab (LSPCL), examined the fingerprint evidence and found three prints sufficient to make identifications. The latent palm print from the magazine of the gun was identified as the defendant's left palm print.

Patrick Lane, a LSPCL expert in firearms identification, examined the firearm and ammunition in this case. Lane noted that the firearm in evidence, was the same caliber as the cartridge cases.[4] He further test-fired the weapon and fired reference ammunition from the weapon for comparison to the ammunition in evidence. Lane determined that based on the quality and the quantity of markings that were present on the evidence cartridge case and the multiple test fires, the weapon in evidence fired the cartridge case in evidence.

## ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant argues that had the defense been allowed to challenge the methodology of the testing of the evidence in the case with his own expert, he would not have been convicted and sentenced to life imprisonment. The defendant notes that he filed a motion for a **Daubert** hearing to determine the admissibility of expert testimony by the crime lab

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[3] **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

[4] While Lane mistakenly referred to the .40 caliber handgun as a 9mm during his testimony, all other evidence and testimony in the record clearly indicates that the weapon he examined was the same .40 caliber handgun retrieved during the execution of the search warrant.

technician in the areas of firearm and handprint analyses.[5] The defendant further notes that the motion was based on a report, released by the President's Council of Advisors on Science and Technology (PCAST) three days before the motion was filed, which called into question the validity of feature-comparison models of testing forensic evidence.

The defendant cites two parts of the PCAST report in arguing that the methodology used by the expert witness was unreliable. First, the defendant notes that the report pointed out that there was only one study to measure the validity and estimate reliability of firearms analysis and therefore concluded that the current method of testing fell short of the criteria for foundational validity. Second, the defendant notes that the report indicated a high false-positive rate pertaining to fingerprint identification. The defendant argues that the historical practice of the methodology does not mean that it is proper or should not be tested when progress in the field is made to show it may be incorrect.

The defendant contends that the error was not harmless, arguing that the admission of expert opinion testimony that the slug found at the crime scene was fired by the gun found in the defendant's residence, and that the palm print on the gun's magazine belonged to the defendant resulted in the conviction. He claims that the remaining evidence consisted of a statement by his ex-girlfriend who vacillated on the stand as to what she could recall from that night, and contradictory statements of her brother who changed his testimony when he was caught in a lie. The defendant further argues that by not allowing the **Daubert** hearing and providing him the time to hire his own expert, the trial court prevented him from presenting a defense by refuting the methodology of the testing. The defendant concludes that he was denied the right to a fair trial.

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[5] In this case, the defendant filed a writ application for supervisory review of the trial court's ruling denying the motion to continue and request for a **Daubert** hearing. The defendant's writ was denied. **State v. Allen**, 2016-1264 (La. App. 1st Cir. 9/27/16).

In response, the State in part contends that because the issue was previously addressed by this court in a writ application, the principle of "law of the case" precludes review of this issue on appeal. The "law of the case" doctrine embodies the rule that an appellate court ordinarily will not reconsider its own rulings of law in the same case. **State ex rel. Div. of Admin., Office of Risk Management v. National Union Fire Ins. Co. of Louisiana**, 2013-0375 (La. App. 1st Cir. 1/8/14), 146 So.3d 556, 562-63; **Trans Louisiana Gas Co. v. Louisiana Ins. Guar. Ass'n**, 96-1477 (La. App. 1st Cir. 5/9/97), 693 So.2d 893, 896, writ not considered, 95-0853 (La. 4/21/95), 653 So.2d 555; **Sharkey v. Sterling Drug, Inc.**, 600 So.2d 701, 705 (La. App 1st Cir.), writs denied, 605 So.2d 1099, 1100 (La. 1992). It applies to all prior rulings or decisions of an appellate court or the supreme court in the same case, not merely those arising from the full appeal process. **Jones v. McDonald's Corp.**, 97-2287 (La. App. 1st Cir. 11/6/98), 723 So.2d 492, 494, writ not considered, 98-3057 (La. 2/5/99), 737 So.2d 738. The policy applies against those who were parties to the case when the former appellate decision was rendered and who thus had their day in court. **State v. Junior**, 542 So.2d 23, 27 (La. App. 5th Cir.), writ denied, 546 So.2d 1212 (La. 1989). We note that in this matter, however, the former decision was rendered when we exercised our supervisory, not appellate, jurisdiction. Nevertheless, judicial efficiency demands that this court accord great deference to its prior decisions unless it is apparent that the determination was patently erroneous and produced an unjust result. See **State v. Humphrey**, 412 So.2d 507, 523 (La. 1982) (on rehearing); **State v. Wilkerson**, 96-1965 (La. App. 1st Cir. 11/07/97), 704 So.2d 1, 5, writ denied, 97-3038 (La. 4/3/98), 717 So.2d 646. For these reasons, we are not precluded from reviewing the defendant's assigned error.

In denying the pretrial motion for a **Daubert** hearing, the trial court noted that the defendant was challenging methodology that had been in existence for a

long time period as opposed to "new sciences." While the court conceded that methodology or a scientist's belief as to such is subject to change, the court further noted that opinions regarding such methodology are also subject to change, noting that someone can publish an article at any given time.

Preliminary questions concerning the competency or qualification of a person to be a witness, or the existence of a privilege, or the admissibility of evidence shall be determined by the court. La. C.E. art. 104. 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. La. C.E. art. 403. The trial court is vested with wide discretion in determining the competence of an expert witness, and its ruling on the qualification of the witness will not be disturbed absent an abuse of discretion. **State v. Trahan**, 576 So.2d 1, 8 (La. 1990).

Louisiana Code of Evidence article 702 dictates the admissibility of expert testimony as follows: "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." Notably, the supreme court has placed limitations on this codal provision in that, "expert testimony, while not limited to matters of science, art or skill, cannot invade the field of common knowledge, experience and education of men." **State v. Stucke**, 419 So.2d 939, 945 (La. 1982).

In **State v. Foret**, 628 So.2d 1116 (La. 1993), the Louisiana Supreme Court adopted the test set forth in **Daubert**, regarding proper standards for the admissibility of expert testimony which requires the trial court to act in a gatekeeping function to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. See **State v. Chauvin**, 2002-1188 (La.

5/20/03), 846 So.2d 697, 709. To assist the trial courts in their preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and can properly be applied to the facts at issue, the Supreme Court suggested that the following general observations are appropriate: 1) whether the theory or technique can be and has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error; and 4) whether the methodology is generally accepted by the relevant scientific community. **Daubert**, 509 U.S. at 592-594, 113 S.Ct. 2786, 125 L.Ed.2d 469. Thus, Louisiana has adopted **Daubert's** requirement that in order for technical or scientific expert testimony to be admissible under La. C.E. art. 702, the scientific evidence must rise to a threshold level of reliability. **Daubert's** general "gatekeeping" applies not only to testimony based upon scientific knowledge, but also to testimony based on "technical" and "'other specialized' knowledge." **Kumho Tire Co., Ltd. v. Carmichael**, 526 U.S. 137, 141, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999); **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181 (La. 2/29/00), 755 So.2d 226, 234.

The trial court may consider one or more of the four **Daubert** factors, but that list of factors neither necessarily nor exclusively applies to all experts or in every case. **Kumho Tire**, 526 U.S. at 141, 119 S .Ct. at 1171. Rather, the law grants a trial court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determinations. **Kumho Tire**, 526 U.S. at 142, 119 S.Ct. at 1171. The purpose of a **Daubert** hearing is to determine the reliability of an expert's methodology, not whether the expert has the proper qualifications to testify. **State v. Vidrine**, 2008-1059 (La. App. 3rd Cir. 4/29/09), 9 So.3d 1095, 1107, writ denied, 2009-1179 (La. 2/26/10), 28 So.3d 268. Because the determination regarding the competency of a witness is a question of fact, the trial judge is vested with wide discretion and, accordingly, rulings on the

qualifications of an expert witness will not be set aside absent manifest error. **State v. Young**, 2009-1177 (La. 4/5/10), 35 So.3d 1042, 1046, cert. denied, 562 U.S. 1044, 131 S.Ct. 597, 178 L.Ed.2d 434 (2010).

In this case, it is indisputable that the testimony offered by the State is relevant. Specifically, that a weapon recovered from the defendant's residence would match a projectile from the scene of the incident and that a palm print removed from the same weapon matched the defendant's left handprint is undeniably probative of the issue of the defendant's guilt. Thus, the issue before the court is reliability. For the following reason, we find no error in the admission of the testimony at issue.

Madere received a bachelor's degree in forensic science, completed at least a year of training in latent print comparison, and conducted independent casework. For the fingerprint comparison, she used known reference prints and compared them to latent prints processed at the scene with a loupe, which is akin to a small magnifier, and a computer scanner. The comparison results are subjected to a technical review and an administrative review. Madere explained that the level of details under the analysis phase has three levels: the overall pattern, the specific characteristics, and the ridge edges used in conjunction with the second level. Madere has compared thousands of prints in her career.

Lane has a bachelor's degree in biology with a minor in chemistry and physics. Lane is a member of the Association of Firearm and Tool Mark Examiners (AFTE), an organization that publishes peer-reviewed quarterly articles based on technical advices based on research or casework. His lab received accreditation in 2000. He initially completed apprenticeship training in the field of firearms before he began issuing reports. Lane's procedure included a basic function check followed by firing the gun in a water recovery tank to obtain specimens known to be fired from the firearm for the comparison process. Using

the comparison microscope, five specimens are examined for markings that provide a value for comparison.

In **Cheairs v. State ex rel. Department of Transp. and Development**, 2003-0680 (La. 12/3/03), 861 So.2d 536, 541 (rehearing granted in part on other grounds), the Supreme Court recognized a distinction between challenging the reliability of the methodology used by the expert, which is addressed by a **Daubert** inquiry, and the expert's qualifications to testify competently regarding the matters he intends to address. As noted in the State's brief, before the trial court's determination as to their qualification as experts and the admission of their expert testimony, Madere and Lane were thoroughly questioned as to their qualifications, and as to the reliability of the methodology they used, including the rates of false positives and error. The defendant was specifically allowed to reference the PCAST report during questioning. Thus, the trial court allowed a **Daubert** inquiry to take place in this case. The importance of the **Daubert** hearing is to allow the trial judge to verify that scientific testimony is relevant and reliable before the jury hears said testimony. Thus, the timing of the hearing is of no moment, as long as it is before the testimony is presented. **State v. Johnson**, 2010-209 (La. App. 5th Cir. 10/12/10), 52 So.3d 110, 122, writ denied, 2010-2546 (La. 4/1/11), 60 So.3d 1248.

Moreover, courts have long accepted expert testimony in the field of fingerprint analysis without a **Daubert** hearing. As discussed in **United States v. John**, 597 F.3d 263 (5th Cir. 2010), the Fifth Circuit found the district court did not err in dispensing with a **Daubert** hearing regarding fingerprint analysis:

> [W]e agree with a number of our sister circuits that have expressly held that in the context of fingerprint evidence, a **Daubert** hearing is not always required. As the Seventh Circuit has noted: "Those [courts] discussing the issue have not excluded fingerprint evidence; instead, they have declined to conduct a pretrial **Daubert** hearing on the admissibility of fingerprint evidence or have issued brief opinions asserting that the reliability of fingerprint comparison

cannot be questioned."

> ... "Fingerprint identification has been admissible as reliable evidence in criminal trials in this country since at least 1911." In terms of specific **Daubert** factors, the reliability of the technique has been tested in the adversarial system for over a century and has been routinely subject to peer review. Moreover, as a number of courts have noted, the error rate is low.

**John**, 597 F.3d at 274-275 (footnotes omitted).

The Second Circuit Court of Appeal, in **State v. Williams**, 42,914 (La. App. 2nd Cir. 1/9/08), 974 So.2d 157, 162-63, writ denied, 2008-0465 (La. 9/26/08), 992 So.2d 983, provided the following reasoning for allowing expert testimony in the field of firearm examination:

> The use of expert testimony to identify spent cartridge cases or bullets to a particular firearm has a long history in Louisiana and elsewhere and has been the subject of **Daubert** challenges in other jurisdictions. See, e.g., **U.S. v. Diaz**, 2007 WL 485967 (N.D.Cal. 2007) ("No reported decision has ever excluded firearms-identification expert testimony under **Daubert**."); **U.S. v. Monteiro**, 407 F.Supp.2d 351 (D.Mass. 2006) (collecting cases). The **Monteiro** case discusses the available literature and evidence regarding the error rate in firearms examination and identification and observes that the extant information about examiner error is limited in its usefulness by the methodology of the studies so far conducted on that topic.

The federal jurisprudence on this issue is comprehensive. For example, in **U.S. v. Otero**, 849 F.Supp.2d 425 (D.N.J. 2012), the defendants sought to exclude the testimony of the government's firearms witnesses, which testimony included assertions that a projectile and a shell were discharged from a specific weapon. In providing the obligatory review of the **Daubert** standard, the **Otero** decision noted that "the reliability of expert testimony does not turn on the grounding of the expert's opinion in scientific principles." **Otero**, 849 F.Supp.2d at 431. Further discussing and validating the "testability" of the theory used by the government witnesses in reaching their conclusion, the **Otero** opinion described the AFTE as "the leading international organization for firearms and toolmark examiners." **Otero**, 849 F.Supp.2d at 431. Under the AFTE theory of examination, an examiner

can "conclude that two bullets or two cartridges are of common origin, that is, were fired from the same gun, when the microscopic surface contours of their toolmarks are in 'sufficient agreement.'" **Otero**, 849 F.Supp.2d at 431. The court also noted that there exists "a subjective component" in such a standard as it "must necessarily be based on the examiner's training and experience." **Otero**, 849 F.Supp.2d at 432. In further support of its finding that the methodology was testable, the court noted the "industry standard" requiring that "one examiner's findings must be reviewed by another examiner to confirm, or possibly disagree, with those findings," a process known as "peer review." **Otero**, 849 F.Supp.2d at 433.

The **Otero** opinion found the methodology had been subject to peer review and publication, with reference to the AFTE journal. It also reviewed the literature on error rates, concluding, "while a definitive error rate has not been calculated, the information derived from the proficiency testing is indicative of a low error rate." **Otero**, 849 F.Supp.2d at 434. **Otero** further found that the law enforcement agency in question maintained a manual of procedures which followed the AFTE standard, which required the examiner to, among other things, "establish reproducibility of class and individual characteristics," consider "the entire evidence surface," and submit his or her examination to peer review. **Otero**, 849 F.Supp.2d at 434-45. Finally, the court found the theory previously described had been "widely accepted in the forensic community." **Otero**, 849 F.Supp.2d at 435. The opinion noted that some courts which have "criticized the bases and standards" of the discipline have permitted identification testimony, "albeit with limitations." **Otero**, 849 F.Supp.2d at 435. Notably, **Otero** was decided after the release of a congressionally-funded 2009 report of the National Academy of Sciences, "Strengthening Forensic Science in the United States: A Path Forward" ("NAS Report"). Despite its recognition of the NAS Report's conclusion that

"claims for absolute certainty ... may well be somewhat overblown[,]" the court nonetheless allowed the witnesses to link the projectile/casing to a specific weapon. **Otero**, 849 F.Supp.2d at 435.

In **U.S. v. Ashburn**, 88 F.Supp.3d 239, 250 (E.D.N.Y. 2015) the court permitted identification testimony of the government's witness, but precluded the witness from declaring absolute certainty about a match. Instead, the court suggested language such as "the conclusion was reached to a 'reasonable degree of ballistics certainty' or a 'reasonable degree of certainty in the ballistics field.'" A similar result was reached prior to publication of the NAS report in **U.S. v. Monteiro**, 407 F.Supp.2d 351, 355 (D. Mass. 2006). Considering the foregoing, it cannot be said that the jurisprudence supports the defendant's assertion that the methodology and theory of firearms identification should be rejected. The jurisprudence has addressed, in detail, the reliability of such testimony and ruled it admissible, albeit to varying degrees of specificity.

While the principles underlying fingerprint identification have not attained the status of scientific law, they nonetheless bear the imprimatur of a strong general acceptance, not only in the expert community, but in the courts as well. **United States v. Crisp**, 324 F.3d 261, 268 (4th Cir. 2003), cert. denied, 540 U.S. 888, 124 S.Ct. 220, 157 L.Ed.2d 159 (2003). In **United States v. Mitchell**, 365 F.3d 215, 246 (3rd Cir. 2004), cert. denied, 543 U.S. 974, 125 S.Ct. 446, 160 L.Ed.2d 348 (2004), the Third Circuit found that a district court would not abuse its discretion in dispensing with a **Daubert** hearing altogether if no novel challenge was raised to the admissibility of latent fingerprint identification evidence. The court in **Crisp** noted that under **Daubert**, a trial judge need not expend scarce judicial resources reexamining a familiar form of expertise every time opinion evidence is offered. **Crisp**, 324 F.3d at 268. See **United States v. Sherwood**, 98 F.3d 402, 408 (9th Cir. 1996). See also **United States v. Cooper**,

91 F.Supp.2d 79, 82 (D.C. 2000) ("Although the Court must ensure that expert testimony is reliable and admissible, there is nothing in **Kumho Tire** or **Daubert** that requires the Court to conduct a pre-trial evidentiary hearing if the expert testimony is based on well-established principles.")

The **Daubert** Court noted that well-established propositions are less likely to be challenged than those that are novel, and theories that are so firmly established as to have attained the status of scientific law, properly are subject to judicial notice. **Daubert**, 509 U.S. at 592 n. 11, 113 S.Ct. at 2796 n. 11. Considering the firmly established reliability of fingerprint evidence and firearm examination analyses, the expert witness's comparison of the defendant's fingerprints, not with latent prints, but with known fingerprints, and, as noted by the trial court, the defense counsel's full right to cross-examine the expert witnesses before the admission of the expert testimony, we find no error in the lack of a pretrial **Daubert** hearing, nor do we find any error in the admission of the testimony in question.[6] This assignment of error is without merit.

## ASSIGNMENT OF ERROR NUMBER TWO

In assignment of error number two, the defendant notes that the same day that he filed the motion for a **Daubert** hearing, he also filed a motion to continue the trial in order to obtain an expert for the hearing. He notes that his trial counsel, an indigent counsel, indicated that he was unprepared to sufficiently explain the issues to the court and had received approval for the funds to pay for an expert but needed additional time to hire one for the hearing. The defendant argues that the trial court erred in denying the motion to continue, noting that the reason for the continuance request did not exist until less than one week prior to trial. The

[6] Further, we note that the PCAST report did not wholly undermine the science of firearm analysis or fingerprint identification, nor did it actually establish unacceptable error rates for either field of expertise. In fact, the PCAST report specifically states that fingerprint analysis remains "foundationally valid" and that "whether firearms should be deemed admissible based on current evidence is a decision that belongs to the courts."

defendant further argues that the lack of his own expert prevented his counsel from being prepared to present a persuasive argument on the issue at trial. On this basis, the defendant concludes that he was prejudiced by the trial court's denial of the motion to continue.

Louisiana Code of Criminal Procedure article 709 sets forth the requirements for a motion for a continuance to locate witnesses. These requirements are:

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

Louisiana Code of Criminal Procedure article 712 commits a motion for continuance to the sound discretion of the trial judge, and his ruling will not be disturbed on appeal absent a showing of abuse and specific prejudice. **State v. Gaskin**, 412 So.2d 1007, 1011-12 (La. 1982); See also **State v. Simon**, 607 So.2d 793, 798 (La. App. 1st Cir. 1992), writ denied, 612 So.2d 77 (La. 1993). Herein, the motion to continue was filed on the morning of the trial date. While La. C.Cr.P. art. 707 provides for a motion for continuance to be in writing and filed at least seven days prior to commencement of trial, where the occurrences that allegedly made the continuance necessary arose unexpectedly, and the defendant had no opportunity to timely prepare a written motion, the trial judge's denial of the defendant's motion for a continuance is properly before this court for review. See **State v. Parsley**, 369 So.2d 1292, 1294 n.1 (La. 1979).

In the instant case, there is no specific showing that the defendant was prejudiced. The defense counsel did not state for the record facts to which the absent witness was expected to testify, showing the materiality of the testimony

and the necessity for the presence of the witness at the trial as required by La. C.Cr.P. art. 709(1). Further, as noted by the State, the defendant was provided with the evidence in this case, including the results of the fingerprint and firearms analyses, over a year before trial. Nonetheless, the defendant has not produced facts showing due diligence used in an effort to procure attendance of an expert witness leading up to the trial. Based on the foregoing, we find no abuse of the trial court's discretion in its denial of the motion to continue trial. This assignment of error lacks merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

**CONVICTION AND SENTENCE AFFIRMED.**