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Evidence

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EVIDENCE

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RELEVANCY

Other Crimes Evidence—Categorizing or Pigeonholing Exceptions

A recurring issue that seems to concern members of the Louisiana Supreme Court revolves around the advantages and disadvantages of categorizing or "pigeonholing" exceptions to the other crimes exclusionary rule.[1] It seems clear that in the wake of *State v. Prieur*[2] the court, when it found it appropriate, has been willing to expand the very limited exceptions to the other crimes evidence exclusionary rule recognized in Louisiana Revised Statutes 15:445-446 (knowledge, intent, system).[3]

Because of the great difficulty in foreseeing the fact patterns that may emerge in the future, the writers certainly agree that the court should not be "iron-bound" to limit the exceptions to those listed in the statute, nor to the expanded listing previously recognized by the court. Nevertheless it seems very desirable and helpful for the court to continue to categorize or pigeonhole the exceptions, for to do so provides a salutary analytical restraint. The notion underlying the exclusionary rule is the concept that other crimes evidence is so dangerous that unless it has a peculiar relevancy—one that in context overbalances the inevitable prejudice—the evidence should be excluded. Rather than simply striking a balance, in general terms, between prejudice and relevancy, it sharpens analysis, it is believed, for court and counsel to identify the precise exception involved (*i.e.*, to categorize it), and to analyze precisely

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1. See, e.g., State v. Moore, 440 So. 2d 134, 139 (La. 1983) (Dennis, J., dissenting); State v. Germain, 433 So. 2d 110, 120 (La. 1983) (Lemmon, J., concurring). See also State v. Kahey, 436 So. 2d 475, 487 (La. 1983).

2. 277 So. 2d 126 (La. 1973).

3. See State v. Kahey, 436 So. 2d 475 (La. 1983) (discussing the exceptions thus far recognized by the Louisiana Supreme Court). See also Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence, 36 La. L. Rev. 651, 652 (1976), reprinted in G. Pugh, Louisiana Evidence Law 105 (Supp. 1978) [hereinafter cited as G. Pugh (Supp.)].

the reasons why the evidence in this context should or should not be admitted. There was a time in our jurisprudence, in the decade immediately prior to *Prieur*, when Louisiana courts were far too receptive to other crimes evidence.[4] *Prieur* was a reaction to and correction of that tendency. Identifying and categorizing exceptions, it is believed, helps to prevent a return to that overly lax era.

Character of the Victim in a Homicide Case

Prior to 1952, Louisiana Revised Statute 15:482 provided that: "In the absence of proof of hostile demonstration or of overt act on the part of the person slain or injured, evidence of his dangerous character or of his threats against accused is not admissible."[5] In that year, the provision was amended to substitute the word "evidence" for the word "proof." The obvious intent underlying the legislative change was to make it clear that the trial court is not to determine whether evidence introduced establishes or proves an overt act or hostile demonstration; it was rather that evidence thereof suffices to provide the foundation for the introduction of testimony of the dangerous character of the victim or the victim's prior threats against the accused. Courts, however, continued to show great reluctance to apply the more relaxed standard.[6]

In 1976, in *State v. Lee*,[7] the supreme court, expressly overruling contrary cases, held that "appreciable evidence" of the overt act or hostile demonstration suffices to meet the required statutory test. Further, the supreme court made clear that a trial court is not to reject evidence as to character of the victim because it finds the proffered evidence with respect to the required overt act or hostile demonstration incredible. The credibility question under the dictates of the statute, concluded the court, is a question for the jury.

The approach taken by the Louisiana Third Circuit Court of Appeal in *State v. Sylvester*,[8] appears to these writers to be contra to that prescribed in *State v. Lee*—its opinion in *Sylvester* seems to revert to

4. See the excellent discussion in Comment, Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc., in the Case in Chief, 33 La. L. Rev. 614 (1973), reprinted in G. Pugh, Louisiana Evidence Law 30 (1974) [hereinafter cited as G. Pugh].

5. La. R.S. 15:482 (1950) (emphasis added).

6. See Note, Character and Prior Conduct of the Victim In Support of a Plea of Self-Defense, 37 La. L. Rev. 1166 (1977), reprinted in G. Pugh (Supp.), supra note 3, at 62; Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence, 37 La. L. Rev. 575, 576 (1977), reprinted in G. Pugh (Supp.) supra note 3, at 68; Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence, 36 La. L. Rev. 651, 654 (1976), reprinted in G. Pugh (Supp.), supra note 3, at 70.

7. 331 So. 2d 455 (1975), aff'd on reh'g, 331 So. 2d 463 (La. 1976).

8. 438 So. 2d 1277 (La. App. 3d Cir. 1983), cert. denied, 444 So. 2d 606 (1984).

the pre-*Lee* attitude. In *Sylvester*, a homicide case, the defendant testified that at the time of the incident in question, the victim threatened to kill him, picked up a pistol and pointed it at him. The court of appeal, noting that there were no eyewitnesses and that the defendant's testimony contradicted the physical evidence, held that there was not "appreciable evidence" of an overt act or hostile demonstration, and therefore affirmed the action of the trial court in refusing to permit the defendant to testify as to antecedent actions of the victim against the defendant. With deference, the writers disagree. Although the word "appreciable" was not defined in *State v. Lee*, it seems that the court of appeal in *Sylvester* gave it an erroneous interpretation. *Lee* made clear that, because of the 1952 legislation, the credibility question as to the presence or absence of an overt act or hostile demonstration is an issue for the jury to resolve, not one for the trial judge. Sworn testimony by a witness, even a biased witness, that the victim of a homicide had pointed a pistol at the defendant, certainly seems "appreciable evidence" of hostile demonstration or overt act. The subsequent treatment of the case by the Louisiana Supreme Court, although laconic, seems clearly to support this interpretation.[9]

Rape Shield Statute

State v. Vaughn[10] is a very important case relative to the constitutionality of applying Louisiana's rape shield statute in a particularized context. At the time of the alleged crime, the defendant was a 51-year-old man and the victim a 15-year-old girl. Although charged with aggravated rape, defendant had been convicted of forcible rape. On appeal to the supreme court, a divided court on original hearing voted to reverse defendant's conviction. On rehearing, the court, again divided, reversed itself and affirmed the conviction.

To sustain its charge of aggravated rape the prosecution was obligated to prove that the sexual acts in question were without the consent of the alleged victim. The accused's defense was that the girl had consented. The factual denouement is important.

The alleged victim, about two weeks before the incident in question, ran away from home in Shreveport. About a week later, she hitch-hiked to Alexandria with a girlfriend and a man she had met that day. In

9. The disposition by the Louisiana Supreme Court on writ application in the Sylvester case is reported as follows in 444 So.2d 606 (1984):

> Denied. The result is correct.
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> DIXON, C.J., and LEMMON, J., concur in the denial. R.S. 15:48 [*sic*] is misquoted and misapplied by the Court of Appeal in Assignment # 1. Nevertheless, the victim's dangerous character was well established, and the error was harmless.

10. 448 So. 2d 1260 (1983), rev'd on reh'g, 448 So. 2d 1266 (La. 1984).

Alexandria she spent at least one night in a cabin with that man and another man. Thereafter she met the defendant and voluntarily slept in the same bed with him and two other girls. She admitted that initially she voluntarily had sexual relations with defendant, but maintained that three days later he forced her to have sexual relations with him in the presence of two other girls. Later the same day she went to Lafayette with yet another man, but voluntarily returned to defendant's abode where, she testified, out of fear she again had sexual relations with defendant.

In his effort to show that the victim had consented, defendant sought to introduce evidence that, after running away from home, while *en route* from Shreveport to Alexandria, five days prior to the allegedly forced sexual act with the defendant, the young girl had had voluntary sexual relations with a man other than the defendant.

The majority of the supreme court on original hearing concluded that defendant's right of confrontation had been denied when he had been precluded from inquiring into a purported act of sexual intercourse with the third person. The court concluded that "the defendant was deprived of his constitutional right to confront and cross-examine witnesses because the cross-examination attempted by defense counsel was reasonably calculated to elicit evidence which was genuinely relevant, highly probative, and critical to the defense . . . ."[11] In so concluding, the then majority reasoned that "[t]he excluded evidence would have tended to demonstrate the complainant's sexual promiscuity in the course of her running away from home," that it "would have tended to show that her sexual intercourse with Vaughn was a part of this same pattern and was committed in furtherance of her running away from home."[12]

On rehearing, the majority of the court took a very different view, concluding that an act of voluntary sexual intercourse with another person, five days prior to the involuntary charged act with the defendant, simply was not relevant to show the consent claimed. It agreed, however, that under certain circumstances the rape shield statute must yield to the constitutional rights of the defendant. "Nevertheless," said the court, "before such evidence may be held admissible, the defendant must clearly demonstrate that the evidence of prior sexual conduct is genuinely probative of the issue of consent, rather than a reflection of the victim's promiscuity."[13]

In the opinion of the writers, the evidence in question was indeed relevant. The real question, it is submitted, is whether the prior act was sufficiently relevant to overbalance the type of considerations that prompted the adoption of the rape shield statute. The writers believe

11. Id. at 1262.
12. Id.
13. Id. at 1268.

that it was and that the inquiry should have been permitted. Had defendant been able to show the voluntary sexual intercourse with the third person, this taken with other testimony, would have been persuasive evidence that the charged act was voluntary.

WITNESSES

Impeachment—When Permissible

When is "impeachment" permissible? The nature of impeachment is that it is a device available to attack the credibility of a witness. By this device, in order to neutralize adverse testimony, a party injured by the testimony may often bring in evidence not otherwise available. Since a party may in this way bring to the trier of fact evidence that would otherwise generally be inadmissible, the instances in which a party may be permitted to "impeach" a witness have traditionally been limited.[14] For example, to prevent a party from utilizing the impeachment device to bring to the attention of the jury evidence not otherwise admissible, it was traditionally held that one may not generally impeach one's own witness, absent exceptional circumstances.[15]

If a witness has neither affirmatively helped nor actually damaged a party, but has merely said he does not remember the fact to which the examiner wishes him to testify, it has traditionally been held that the examining party may not impeach the witness by some out-of-court statement, for to do so would be to permit a de facto circumvention of the hearsay rule.[16]

Although not discussing the above problem, *State v. Laprime*[17] seems to run contra to these principles. Very damaging testimony was introduced by the prosecution, over objection, ostensibly to "impeach" a prosecution witness who had said he did not remember the incident in question. As noted by Justice Lemmon in his concurring opinion, nothing in the out-of-court statement contradicted testimony given by the witness on the stand. Impeachment, therefore, by the out-of-court testimony, it is submitted, was improper.[18]

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14. See McCormick on Evidence § 38 (E. Cleary 3d ed. 1984) [hereinafter cited to this edition without reference to editor].

15. See La. R.S. 15:487 (1981). It should be noted, however, that Federal Rule of Evidence 607 permits a party to impeach his own witness without this traditional limitation.

16. See State v. Walters, 145 La. 209, 82 So. 197 (1919). See also 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607 [06], at 607-82 (1982). See also 3A J. Wigmore, Evidence in Trials at Common Law § 1043 (J. Chadbourn rev. ed. 1970) (taking the position that the law should be otherwise, irrespective of the jurisprudence).

17. 437 So. 2d 1124 (La. 1983).

18. See discussion in Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence, 37 La. L. Rev. 575, 584 (1977), reprinted in G. Pugh (Supp.), supra note 3, at 178.

It is not clear from the opinion whether the objection directed the trial court's and the supreme court's attention to the particular problem discussed above. In any event, the court found no error in the trial court's admission of the ostensibly "impeaching" evidence. Since the opinion does not discuss the above mentioned problem, it is to be hoped that in the future a witness's testifying that he does not remember a particular incident will not afford an "impeaching" party the right to introduce otherwise inadmissible out-of-court statements. Serious confrontation problems otherwise may be involved.[19]

Impeachment—Hostility

When may one's own witness be declared "hostile" so that he may be impeached by prior contradictory statements? The matter has given the courts problems through the years, and two cases decided during the past term, *State v. Laprime*[20] and *State v. West*,[21] mirror the difficulties.

In *State v. West*, a witness called by the prosecution testified, pursuant to a plea bargain, that the defendant had killed the victim and that he (the witness) had not participated in the actual killing. After the prosecution rested, the defense called the same witness and unsuccessfully sought to have the witness declared hostile so that the defense might ask the witness leading questions and impeach him by prior contradictory statements to the effect that the witness had previously stated to several persons that he, rather than the defendant, had killed the victim. The supreme court upheld the refusal of the trial court to declare the witness "hostile." The court, relying on prior cases,[22] stated that the criterion for "hostility" is "a showing that the witness's interest is on the side of the opposite party to such an extent that he or she is unlikely to give a true account of the transaction."[23] The court also seemingly approved finding a witness hostile if his answers are evasive or contradictory.[24]

In *State v. Laprime*, a burglary case decided the same day as *State v. West*, an alleged co-conspirator was called by the prosecution as a witness. At the witness's guilty-plea proceeding a year prior to defendant's trial, defendant had been implicated as a co-participant in the burglary. Prior to the *Laprime* trial the witness had notified the prosecution that he was unwilling to testify. When called by the prosecution,

19. 4 J. Weinstein & M. Berger, supra note 16, ¶ 801(d)(1)(A) [07] (1984).

20. 437 So. 2d 1124 (La. 1983).

21. 437 So. 2d 256 (La. 1983).

22. State v. Welch, 368 So. 2d 965 (La. 1979); State v. Willis, 241 La. 796, 131 So. 2d 792 (1961).

23. *West*, 437 So. 2d at 259.

24. Id. For this proposition the court relied on State v. Edwards, 419 So. 2d 881 (La. 1982), and State v. Bradford, 367 So. 2d 745 (La. 1978).

the witness maintained that he did not remember the incident. The trial court, over the defendant's objection, declared the witness hostile and authorized the prosecution to take steps to impeach him.[25] Without discussing the criterion recognized in *State v. West* and earlier cases, the supreme court upheld the witness's being declared hostile.

It seems to these writers that the difficulty experienced by the court in *West* and *Laprime* stems in part from the fact that the Louisiana statute, instead of requiring both hostility and surprise, speaks of them in the disjunctive.[26] If surprise (including affirmative damage)[27] were a conjunctive, rather than a disjunctive, requirement for impeaching one's own witness by showing a prior inconsistent statement, then hostility would not be such a hospitable back door for the admission of evidence otherwise inadmissible because of the hearsay rule.[28]

HEARSAY

Res Gestae—The Oft-Criticized Passkey to Admissibility

The "res gestae doctrine" is one of the most criticized in the law of evidence.[29] It is not inappropriate perhaps to consider the doctrine as Latin for "let it in." It has been well recognized that it subsumes, under its general catch-all character, several analytically separate exceptions.[30] Not surprisingly, it is often used by the courts to admit statements deemed trustworthy that are not perceived to fit within the demanding contours of one of the traditionally prescribed hearsay exceptions. One of the difficulties inherent in this practice is that such usage may constitute very dangerous precedent for the future. *State v. Washington*,[31] it is believed, is illustrative.

In *Washington*, following an armed robbery of a branch bank by two black men, the robbers were believed to have fled via a railroad right-of-way behind the bank. About two hours later and five and one-half miles away, two police officers saw two black men walking along

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25. As to whether such an impeachment was proper in light of the fact that the out-of-court statement did not contradict the testimony of the witness on the merits, see the discussion supra note 18 and accompanying text.

26. For criticism of the statute see the discussion in Pugh, The Work of the Louisiana Supreme Court for the 1960-1961 Term—Evidence, 22 La. L. Rev. 397 (1962), reprinted in G. Pugh, supra note 4, at 135.

27. See authorities cited supra note 16 and accompanying text.

28. Id.

29. Judge Learned Hand in United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) stated that "if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms"; see also McCormick on Evidence § 288, at 836; 6 J. Wigmore, supra note 16, § 1767, at 255.

30. See McCormick on Evidence § 288, at 835.

31. 444 So. 2d 320 (La. App. 1st Cir. 1983), cert. denied, 445 So. 2d 450 (1984).

the railroad right-of-way. After the officers asked the men "if they knew about the bank robbery,"[32] one of the latter helpfully "admitted they had committed the robbery and said he would show them [the police] where the money was located."[33] Subsequently, the declarant took the officers to where the pistols and the loot were hidden. The question presented to the court was whether the statement by the declarant was admissible, over a hearsay objection, against the defendant, declarant's companion. The Court of Appeals for the First Circuit ruled in the affirmative, holding that the declaration fell within the purview of Louisiana Revised Statutes 15:447-448 as constituting part of the res gestae—forming "in conjunction with [the criminal act] one continuous transaction."[34]

Because of the silence of the declarant's companion in face of the accusatory character of the declaration, especially when coupled with the subsequent discovery of the pistols and the loot, the declaration certainly seems to have great credibility, even as to the companion. However, to say that it forms part of the res gestae and is for this reason admissible, seems to these writers a very dangerous precedent.

To be contrasted with the expansive approach taken by the court of appeals in *Washington* is the very narrow ambit given the "res gestae" articles by the Louisiana Supreme Court in *State v. Mitchell.*[35] The "continuous transaction" language of Louisiana Revised Statute 15:448, it must be conceded, is a very vague, ambiguous test, but it is submitted that it is both inappropriate and dangerous to give it the expansive interpretation accorded it by the court of appeals in *Washington.*

Excited Utterance—Time Element

In *State v. Mitchell,*[36] a murder case, the Louisiana Supreme Court was called upon to decide whether decedent's neighbor could testify that defendant's brother "came to her residence about ten or fifteen minutes after the shooting and told her to call the police because 'his sister-in-law had got shot by his brother.'"[37] After analyzing the problem in terms of res gestae, the court held the testimony inadmissible as coming too long after the event in question. Because of other circumstances, however, it found the admission of the testimony non-reversible error.

Courts throughout the country have had great difficulty with the term "res gestae."[38] Rather than treat the matter under a single evi-

32. Id. at 322.
33. Id.
34. La. R.S. 15:448 (1981).
35. 437 So. 2d 264 (La. 1983), discussed infra text accompanying note 36.
36. Id.
37. Id. at 268.
38. See discussion supra note 29 and accompanying text.

dentiary rule, the writers feel that it is preferable, as has often been done in the case law, to divide "res gestae" into its several component parts and apply separate rules for each of the components. Analyzing the statement in question as to whether it fits under the excited utterance exception,[39] the writers conclude that it does. In context, the time limit does not seem overly long. The event was of an extraordinarily exciting nature. Although not a participant in it, as both the brother-in-law of the victim of the shooting and brother of the one accused, the declarant was presumably very moved by the event and there is nothing in the opinion to suggest that any fabrication was involved.

Much discussion in the books has been devoted to the question of timeliness. In an oft-cited comment in this Review, then student H. Alston Johnson, III, describing the case law in Louisiana and other jurisdictions, stated: "each case must turn on its own facts, and the circumstances must be such as reasonably to minimize the risk of fabrication of details about the event."[40] A similar position was taken by the Supreme Court Advisory Committee which provided the initial formulation of the Federal Rules of Evidence. Addressing the timeliness question, they quoted, with approval, Professor Slough: "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor."[41]

Applying these concepts, the writers believe that the declaration in question should have been held to qualify, assuming that declarant's firsthand knowledge could reasonably have been inferred from the circumstances.[42]

Present Sense Impression

Strikingly similar factual circumstances sometimes repeat themselves. Such are the facts of *State v. Doucet*[43] and those of the famous case of *Houston Oxygen Co. v. Davis*,[44] one of the nation's foundation cases

39. There are a number of Louisiana cases recognizing excited utterance as a separate exception to the hearsay rule. See, e.g., State v. Krolowitz, 407 So. 2d 1175 (La. 1981); State v. Brown, 395 So. 2d 1301 (La. 1981); State v. Bean, 337 So. 2d 496 (La. 1976); State v. Smith, 285 So. 2d 240 (La. 1973). See also Comment, Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana, 29 La. L. Rev. 661 (1969), reprinted in G. Pugh, supra note 4, at 494.

40. Comment, Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule In Louisiana, 29 La. L. Rev. 661, 671 (1969), reprinted in G. Pugh, supra note 4, at 494, 504.

41. J. Moore, Moore's Federal Practice—Rules Pamphlet (pt.2) R. 803[2], at 269 (1984).

42. See Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence, 38 La. L. Rev. 567, 589 (1978).

43. 443 So. 2d 777 (La. App. 3d Cir. 1983).

44. 139 Tex. 1, 161 S.W.2d 474 (1942).

relative to the admissibility of present sense impressions. As did *Houston Oxygen*, *Doucet*, a negligent homicide case, involved the admissibility of a statement by the occupant of a car overtaken by a vehicle that was shortly thereafter involved in an accident. The statement in *Doucet* was very similar to that at issue in *Houston Oxygen*. The witness in *Doucet*, over objection, was permitted to testify that a few seconds after their vehicle was passed by the one driven by the defendant, her husband stated: "The car was going to have a wreck, run over somebody driving like that."[45] In both cases, the statement was held admissible. Rather than speak in terms of present sense impression, as did *Houston Oxygen*, the *Doucet* court analyzed the problem in terms of res gestae. Present sense impression has been recognized by the Louisiana courts[46] as a specific exception to the hearsay rule and it is believed preferable to analyze the problem as such rather than under the more amorphous and less precise classification of "res gestae."[47]

Former Testimony

One of the requirements generally applicable to the admissibility of former testimony is that the declarant be "unavailable."[48] Is this requirement met if the witness who testified at the prior proceeding is present at the instant trial but maintains that he or she no longer remembers the circumstances of the event to which he or she earlier testified? The problem was presented in *State v. Nall*.[49] In *Nall*, the court, following what it found to be a trend throughout the country, held that a witness's loss of memory may be the basis for finding that the witness is "unavailable" for this purpose. In affirming the action of the trial court and admitting the former testimony, the court implied that the genuineness of the witness's purported loss of memory is a critical factor in determining admissibility and that such a question addresses itself to the sound discretion of the trial court. The writers agree that the question should be one for the trial court, subject to review by the appellate court.[50] However, the reason given in this case

45. *Doucet*, 443 So. 2d at 782.

46. State v. Smith, 285 So. 2d 240 (La. 1973), discussed in Pugh & McClelland, The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence, 35 La. L. Rev. 525, 549 (1975), reprinted in G. Pugh (Supp.), supra note 3, at 545.

47. For criticism of *res gestae* as a satisfactory evidentiary rule, see discussion supra note 29 and accompanying text.

48. McCormick on Evidence § 255, at 762; Pugh & McClelland, Developments in the Law, 1979-1980—Evidence, 41 La. L. Rev. 595, 618 (1981); Comment, The Admissibility of Former Testimony in Civil and Criminal Trials, 20 La. L. Rev. 146, 148 (1959), reprinted in G. Pugh, supra note 4, at 448.

49. 439 So. 2d 420 (La. 1983).

50. Under Federal Rule of Evidence 104(a), such questions concerning the admissibility of evidence are a matter for the court. To the same effect, see State v. Lee, 127 La.

by the witness for the claimed loss of memory — "that her former testimony had been based on a statement made to police while she was under the influence of tranquilizers and for that reason she could not remember what she had said at the first trial"[51] — seems to these writers very unpersuasive, for it does not seem to explain why she "remembered" at the first trial but not at the second.

Admissions—Silence After Arrest

Even prior to *Miranda v. Arizona*[52] and *Doyle v. Ohio*,[53] the Louisiana Supreme Court took the position that silence of an individual under arrest is generally inadmissible.[54] This position was reiterated in the recent case of *State v. Bell*,[55] but the court found an exception to be applicable. Bell was accused of forging his grandmother's name to three checks made out in his favor. The defense counsel's opening statement disclosed his client's defense—that the grandmother had authorized the defendant's action and that the defendant would take the stand to so testify; that defense counsel could not say why defendant was being prosecuted; that "people make mistakes. They don't investigate thoroughly. Possibly that's the situation here."[56] This imputation of a possible failure to investigate adequately, reasoned the court, lowered the protective bar that otherwise would have been available to the defendant, permitting the prosecution to show that after the defendant had been arrested and taken to the sheriff's office, he had refused to make a statement or tell of his involvement in the case. By thus casting an aspersion upon the adequacy of the investigation in the case, defendant was held to have opened the door to otherwise inadmissible testimony. In light of this case, defense counsel must be very careful in making arguments or presenting testimony which may be deemed to have "opened the door" (or should we say, Pandora's box?) to this type of testimony.

1077, 54 So. 356 (1911).

Federal Rule of Evidence 804(a)(3), in defining "unavailability," states that "'unavailability as a witness' includes situations in which the declarant . . . (3) testifies to a lack of memory of the subject matter of his statement." The House Judicial Committee made clear, however, that "the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory." Fed. R. Evid. 804(a)(3) (report of House Judicial Committee).

51. *Nall*, 439 So. 2d at 423.

52. 384 U.S. 436, 86 S.Ct. 1602 (1966).

53. 426 U.S. 610, 96 S.Ct. 2240 (1976).

54. See State v. Hayden, 243 La. 793, 147 So. 2d 392 (1962), discussed in Note, Evidence—Admissibility of Silence After Arrest as Implied Admission, 24 La. L. Rev. 115 (1963), reprinted in G. Pugh, supra note 4, at 323.

55. 446 So.2d 1191 (La. 1984).

56. Id. at 1194.

Statements by Co-conspirators

The rule authorizing the admission, under certain circumstances, over a hearsay objection, of co-conspirators' declarations finds its origins in the rule authorizing the admissibility of a party's admissions.[57] The theory was that under the circumstances specified in the co-conspirator rule, the co-conspirator is deemed to have been authorized by the defendant to make the statement in question. Just as a person is deemed responsible for the actions of his co-conspirator, so also, went the theory, he must answer for statements made by the co-conspirator during the conspiracy and in furtherance thereof.

The co-conspirator rule has been the subject of strong criticism.[58] *State v. Johnson*[59] seems to these writers a good example of an inappropriate use of the co-conspirator finesse of the hearsay rule. Defendant Johnson was convicted of an utterly heinous offense—the murder of his mother via the act of a hireling co-conspirator. Finding that there had been prima facie evidence of a conspiracy (*aliunde* the statement of the alleged co-conspirator), the supreme court held admissible a statement by a witness that the co-conspirator had stated to him that the defendant had told the co-conspirator that he would pay him $2,000 to kill the victim and another, and that he (the co-conspirator) wished to borrow the witness's sportcoat in order to wear it at the race track where the defendant would point out the victims-to-be. The admissibility of that part of the witness's testimony relative to what the witness said the co-conspirator said the defendant said seems to these writers an over-extension of the co-conspirator rule.[60] This seems particularly true when it is remembered that Louisiana has adopted a "prima facie" evidence requirement,[61] rather than insisting that the judge himself rule upon the existence of the conspiracy as a prerequisite to admitting the alleged co-conspirator's statement.[62]

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57. See McCormick on Evidence § 267, at 792.

58. See 4 J. Wigmore, supra note 16, §§ 1079, 1080, 1080(a), at 180-201. See also Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378 (1972); Morgan, The Rationale of Vicarious Admissions, 42 Harv. L. Rev. 461 (1929); Comment, The Co-Conspirator Exception to the Hearsay Rule: The Limits of Its Logic, 37 La. L. Rev. 1101 (1977).

59. 438 So. 2d 1091 (La. 1983).

60. For an interesting recent case involving an analogous situation, see State v. Farber, 56 Or. App. 351, 642 P.2d 668 (1982) (*en banc*), rev'd on reconsideration, 59 Or. App. 725, 652 P.2d 372 (1982) (*en banc*), aff'd, 295 Or. 199, 666 P.2d 821 (1983) (*en banc*), where after extensive consideration and reconsideration by the Oregon Court of Appeal, the Oregon Supreme Court upheld the admissibility of an alleged co-conspirator's statement, in light of what were found to be particular guarantees of trustworthiness.

61. La. R.S. 15:455 (1981).

62. See in this connection United States v. James, 576 F.2d 1121 (5th Cir. 1978), aff'd on reconsideration, 590 F.2d 575 (5th Cir. 1979) (*en banc*), cert. denied, 442 U.S. 917 (1979).

Although it is reasonable perhaps to make one responsible for what his confederate did and said in furtherance of their common objective, it seems to stretch unduly the concept to make one responsible for what the confederate said the defendant said as to the origins of their nefarious association. It must be remembered that the genesis of the co-conspirator rule lies not in any notion that the circumstance of conspiracy engenders trustworthiness, but rather in the principle underlying the admissibility of admissions—that one should be held responsible for what he or his agent has said, i.e., forced to respond or suffer the consequences. The critical and troublesome question in the *Johnson* case is whether Johnson in fact had made the statement attributed to him by the person who actually did the killing. Testimony that an alleged co-conspirator had said that the defendant had hired him to do a killing is not particularly persuasive that the defendant in fact hired him.

The problem is analogous to a double hearsay question. It is not the usual double hearsay question, however, for the co-conspirator rule is not based upon notions of trustworthiness.[63] Since the admissibility of the co-conspirator's statement is not based upon trustworthiness,[64] there is an inherent difficulty in relying upon the co-conspirator "exception" to provide the needed evidence that the defendant in fact made the statement attributed to him by the out-of-court, unsworn, un-cross-examined statement of the co-conspirator.

If the co-conspirator had been on the stand, then of course he could have testified, over a hearsay objection, that the defendant had hired him to do the dastardly deed, for the defendant's out-of-court statement would then have been directly admissible as an admission. The alleged co-conspirator would have been on the stand, under oath, and subject to cross-examination—not so in the instant case. The co-conspirator may well have had reasons of his own for implicating the defendant quite apart from trustworthiness—reasons that the defendant was utterly unable to develop by cross-examination.

CONFESSIONS—THE FREE AND VOLUNTARY REQUIREMENT

The free and voluntary test has long been required in Louisiana for the admissibility of confessions. Years before *Miranda v. Arizona*[65] and earlier federal constitutional impositions,[66] Louisiana adopted a strongly

63. Under the Federal Rules of Evidence, the rule relative to double hearsay, rule 805, would technically be inapplicable because the provision relative to the admissibility of co-conspirators' statements is not a hearsay exception.

64. See McCormick on Evidence § 262, at 775; Fed. R. Evid. 801(d)(2)(E); see also advisory committee note to subdivision (d)(2) of Federal Rule 801 which states that "[n]o guarantee of trustworthiness is required . . . ."

65. 384 U.S. 436, 86 S. Ct. 1602 (1966).

66. See Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735 (1961); Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461 (1936).

worded free and voluntary requirement.[67]

State v. Wilms[68] presents what is for these writers an inappropriate application of traditional rules in this area. Shortly after defendant and his companion were arrested for armed robbery, defendant's wife and another woman in a van parked nearby were also arrested. Defendant's wife was two and one-half months pregnant. According to uncontradicted testimony, "a police officer hit [the wife] in the stomach and kicked her as she was climbing into the police van,"[69] apparently in the presence of the defendant. Further, according to the defendant, the police "tossed [his wife] around 'like a rag doll'"[70] After the arrestees were given a statement of their legal rights, another officer was placed in charge of interrogation. Although advised that the wife was pregnant, had been struck in the stomach by a police officer, was bleeding and needed medical attention, the officer, instead of securing medical attention for the woman, continued to investigate the case and secured a confession from defendant and a statement from his wife. It was not until the next morning, more than eight hours after the original incident, that defendant's wife received medical attention. Eight days later, the wife miscarried.

Upholding the action of the trial court in admitting the confession, the majority concluded that the trial court could properly have found that traditional free and voluntary requirements were met. Justice Lemmon, in a very persuasive dissenting opinion concurred in by Justice Dennis, argued that a "common sense" approach should be taken and that the confession should be deemed inadmissible.

The writers agree with the dissenting justices. In light of the uncontradicted testimony as to the initial violent handling of defendant's

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67. See La. Code Crim. P. art. 451 (1928); State v. Nelson, 3 La. Ann. 497 (1848); State v. Havelin, 6 La. Ann. 167 (1851). Interestingly, in 1804 the first session of the Legislative Council of the Territory of Orleans provided:

> [N]o person accused of any crime shall be forced to answer any interrogatories whatever, touching on the offence of which he shall be accused; but every justice of the peace, commandant, or other judicial officer, before whom any person, charged with the commission of any crime, may be brought for examination previous to commitment, shall take the voluntary declarations of such person so accused, and the answers, which, without menance or promise, he shall freely make to the questions which such officers shall propose, and reduce the same to writing, and cause the same to be subscribed by the declarant in his presence, and shall certify the same under the hand of him, the said justice, commandant or the judicial officer, as aforesaid; which declaration, so signed and certified, shall be evidence both to the grand and petit jury, on a presentment or indictment, and trial for such offence.

Acts Passed at the First Session of the Legislative Council of the Territory of Orleans, chap. VIII, § 1 (1805).

68. 449 So. 2d 442 (La. 1984).

69. Id. at 443.

70. Id.

wife by the arresting officers, the fact that the wife's condition was brought to the attention of the investigating officer before defendant's confession was obtained, and that medical attention was not afforded the wife until eight hours after she was struck by the police, the reasons underlying the free and voluntary requirement would seem to demand that an extraordinarily heavy burden be placed upon the prosecution to show that any confession taken under the circumstances be "free and voluntary." Such a showing, it is believed, was not made. One may anticipate that the case will find its way to the federal courts.

HARMLESS ERROR

The Louisiana Supreme Court decision in *State v. Banks*[71] is a very important pronouncement concerning "harmless" error. In the 1974 case of *State v. Michelli*,[72] the supreme court had made a strong statement as to the inappropriateness of regarding certain errors as "harmless." In *Michelli*, Chief Justice (then Justice) Dixon, speaking for the majority of the court, stated "'[h]armless error' is a doctrine which permits an appellate court to affirm a conviction in spite of error appearing in the record. It has been called a 'cop-out' for appellate judges — an abdication of the judicial function in criminal appeals."[73] In 1980, in *State v. Gibson*,[74] the court again displayed a stern attitude towards error. Despite these strong pronouncements, Louisiana courts have at times reflected what the writers regard as too indulgent an attitude towards error committed in the trial court.[75] In *State v. Banks*,[76] the Louisiana Fourth Circuit Court of Appeals, after reviewing *State v. Gibson*, stated:

> Since *Gibson*, however, several decisions have recognized a second device for weighing the effect of erroneously admitted evidence.
>
> Those cases hold that where erroneously admitted evidence is merely "cumulative" with that which was properly admitted at trial, a reviewing court will be warranted in finding the tainted evidence harmless beyond a reasonable doubt.[77]

Reversing the court of appeal decision, the Louisiana Supreme Court

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71. 439 So. 2d 407 (La. 1983), rev'g 428 So. 2d 544 (La. App. 4th Cir. 1983).

72. 301 So. 2d 577 (La. 1974).

73. Id. at 579.

74. 391 So. 2d 421 (La. 1980).

75. See Pugh & McClelland, Developments in the Law, 1982-1983—Evidence, 44 La. L. Rev. 335, 353 (1983); Pugh & McClelland, Developments in the Law, 1979-1980—Evidence, 41 La. L. Rev. 595, 622 (1981).

76. 428 So. 2d 544 (La. App. 4th Cir.), rev'd, 439 So. 2d 407 (La. 1983), discussed in Pugh & McClelland, Developments in the Law, 1982-1983—Evidence, 44 La. L. Rev. 335, 353 (1983).

77. *Banks*, 428 So. 2d at 546.

manifested a lack of enthusiasm for a "cumulative" evidence test, and distinguished and seemingly limited the post-*Gibson* cases, relied upon by the court of appeal. Further, it infused new life and vigor into *Gibson*. Significantly, in addition to finding the "cumulative" evidence exception "improperly applied in this case," the court characterized the cumulative exception as "tenuous." Concluding a strongly worded opinion, Chief Justice Dixon, speaking for five members of the court, stated: "It cannot be said, beyond a reasonable doubt, that the improperly admitted hearsay, which violated R.S. 15:434, United States Constitution, Amendment 6 and Louisiana Constitution, Article I, §16, did not contribute to the verdict."[78]

78. *Banks*, 439 So. 2d at 410.