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Procedure: Evidence

George W. Pugh

James R. McClelland

EVIDENCE

George W. Pugh and James R. McClelland***

RELEVANCY

Character of the Accused—Cross Examination of Defendant's Character Witnesses and Preliminary Inquiry by Trial Judge

State v. Johnson[1] is an extremely important decision relative to character witnesses, and fulfills the promise of change heralded by Justice Dennis' excellent dissenting opinion in *State v. Bagley*.[2] Henceforth,[3] says the majority in *Johnson*, new rules are to control as to the cross-examination of defendant's character witnesses. No longer can the prosecution ask a defendant's character witness whether he "knows" of certain acts, convictions, arrests or rumors concerning the defendant seemingly inconsistent with the favorable testimony given by the character witness on the stand.[4] Instead, "have you heard" questions may be put to the character witness. In this respect, *Johnson* departs from prior jurisprudence. "The legitimate function of the prosecution in subjecting the character witness's testimony to the crucible of cross-examination . . . ," says the court, "can be performed without the suggestion or assertion of facts in such a way as to arouse undue prejudice within the jury."[5]

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* Professor of Law, Louisiana State University. The writers express appreciation to Calvin P. Brasseaux and Paul E. Brown, for very able assistance in the preparation of this article.

** Member, St. Mary Parish Bar.

1. 389 So. 2d 372 (La. 1980) (opinion by Dennis, J.).

2. 378 So. 2d 1356 (La. 1979), *discussed in* Pugh & McClelland, *Developments in the Law, 1979-1980—Evidence*, 41 LA. L. REV. 595 (1981) [hereinafter cited as *1979-1980 Developments*].

3. Because the supreme court found that the defendant's objections had not been urged properly in the trial court, it held that they could not be availed of on the appeal in this case, and hence affirmed the conviction. The majority stated, however, that "in future cases prejudicial error resulting from a trial court's failure to enforce the safeguards adopted herein during the cross-examination of character witnesses will require reversal, if properly objected to an (sic) assigned." 389 So. 2d at 377. As to waiver of objection to other crimes evidence discussed in *Johnson*, see the discussion at note 96, *infra* and accompanying text.

4. *See* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 447 (1974) [hereinafter cited *1972-1973 Term*], *reprinted in* G. PUGH, LOUISIANA EVIDENCE LAW 61-62 (Supp. 1978).

5. 389 So. 2d at 376-77.

Further, the trial judge is to conduct a detailed preliminary inquiry outside the presence of the jury to safeguard the rights of the defendant,[6] and to instruct the jury (either at the close of the testimony or in the final charge) as to the "exact purpose" of the character testimony.[7]

Character of the Accused—Absence of Reputation

Although recognizing that Louisiana jurisprudence had not been consistent on the point,[8] the court in what appeared to be a definitive opinion in *State v. Frentz*[9] stated in footnote:

> The better view expressed by all textwriters is that the reputation-witness should not only be permitted to testify that he had never heard the accused's reputation discussed, but also his own opinion that therefore, in his opinion, the accused's community reputation was good.[10]

Despite the pronouncements in *Frentz*, the court this past year in

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6. In this connection the court adopted the rules as formulated by the Superior Court of New Jersey in *State v. Steensen*, 35 N.J. Super. 103, 113 A.2d 203, 206 (1955):

> In determining whether to allow the cross-examination, the trial court should conduct a preliminary inquiry out of the presence of the jury and he should satisfy himself:
>
> (1) that there is no question as to the fact of the subject matter of the rumor, that is, of the previous arrest, conviction, or other pertinent misconduct of the defendant;
>
> (2) that a reasonable likelihood exists that the previous arrest, conviction or other pertinent misconduct would have been bruited about the neighborhood or community prior to the alleged commission of the offense on trial;
>
> (3) that neither the event or conduct nor the rumor concerning it occurred at a time too remote from the present offense;
>
> (4) that the earlier event or misconduct and the rumor concerned the specific trait involved in the offense for which the accused is on trial; and
>
> (5) that the examination will be conducted in the proper form, that is: "Have you heard," etc., not "Do you know," etc.

Id. at 376 (citations omitted).

7. In *Johnson* the court expressed continued adherence to the position that for a character witness to express his personal opinion as to the character of the defendant is not permissible. This does not, however, preclude the character witness from expressing an opinion as to the quality of the reputation. *See* Pugh, *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Evidence*, 17 LA. L. REV. 421 (1957), *reprinted in* G. PUGH, *supra* note 4, at 24 (1974).

8. *See* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Evidence*, 39 LA. L. REV. 955, 971 (1979) [hereinafter cited as *1977-1978 Term*].

9. 354 So. 2d 1007 (La. 1978), *discussed in 1977-1978 Term, supra* note 8, at 971-72.

10. 354 So. 2d at 1011 n.2. Although citing some contrary holdings, the court did not refer to the cases relied upon in the later decision of *State v. Toomer*, 395 So. 2d 1320 (La. 1981), discussed at note 11, *infra*, and accompanying text.

State v. Toomer,[11] relying on cases decided prior to *Frentz* and inconsistent with the above-quoted language, stated:

> In the instant case, the character witnesses testified that they had never heard any discussion of the reputation of the defendant as to moral qualities having pertinence to the crime of murder. There was then no other permissible question that could have been asked of them.[12]

In the opinion of the writers, the *Frentz* position represents the sounder view and it is hoped that in the future the court will reinstate clearly the doctrine of *Frentz*.

Character of Alleged Rape Victim

If construed literally, Louisiana's rape shield statute[13] would preclude any inquiry relative to prior sexual conduct of a rape victim with any person other than the accused. In certain contexts, such an interpretation would cause grave constitutional problems.[14] Very appropriately, the court in *State v. Langendorfer*[15] did not apply the statute literally.

In *Langendorfer* defendant's defense was based in part on the contention that sperm found in the victim was that of the victim's husband. To meet the contention, the prosecution in its case in chief, over objection of defendant, was permitted to ask the alleged victim when she had last had sexual intercourse with her husband before the rape. In a deft opinion authored by Justice Watson, a unanimous court, relying upon the purpose of the statute, held that the legislation did not prohibit the inquiry in question. To determine the scope to be given to the statute, the court quite properly looked to its underlying purpose.[16] The statute, said the court, "is intended to prevent rape victims from being attacked and impeached on the irrelevant issue of general unchastity" and "[o]nly evidence of prior sexual conduct which impeaches a victim's general 'reputation for chastity' is excluded by the statute."[17] Since no effort was being made to attack the character of the witness, and her answer would in no sense tar-

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11. 395 So. 2d 1320 (La. 1981).

12. *Id.* at 1327.

13. LA. R.S. 15:498 (Supp. 1975), *discussed in* Note, *Louisiana's Protection for Rape Victims: Too Much of a Good Thing?*, 40 LA. L. REV. 268, 271-72 (1979); G. PUGH, *supra* note 4, at 73 (Supp. 1978).

14. *See* Note, *supra* note 13, at 279.

15. 389 So. 2d 1271 (La. 1980).

16. *See* J. CUETO-RUO, JUDICIAL METHODS OF INTERPRETATION OF THE LAW, 153 *et. seq.* (1981); Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 227 (1968).

17. 389 So. 2d at 1274.

nish her character, the question was not barred by the statute. The writers fully agree.

Availability of Insurance

In *Suhor v. Gusse*[18] the Louisiana Supreme Court elucidated the ramifications of a defendant's invoking Louisiana's merciful "inability to pay" rule.[19] By invoking the rule, the defendant puts at issue his ability to respond in damages. The amount of defendant's liability insurance and the extent of other assets that might be available to satisfy a judgment then becomes admissible, says the court in *Suhor*.[20]

OTHER CRIMES EVIDENCE

"Signature" Crimes

The court in *State v. James*[21] reaffirmed its position as to "signature" crimes. The mere fact that a defendant has committed another crime substantially similar to the one charged does not mean that it automatically qualifies for admissibility as a "signature" crime. To qualify, the crime must be "so distinctively similar in system that one must logically say that both crimes are the work of the same person."[22] Further, said the court, the other crime must be relevant to an issue presented in the case, as, for example, identity, and this issue must be " 'real and genuine,' " not simply a fact put at issue by defendant's plea of not guilty.[23] In addition, the balancing test is to be applied and the probative value of the evidence of the other crime must be found to outweigh the risk of prejudice. Absent some special relevance, another sale of heroin between the same

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18. 388 So. 2d 755 (La. 1980).

19. The rule is discussed in detail in *Guy v. Tonglet*, 379 So. 2d 744 (La. 1980), which states:

> Under the Louisiana law, a defendant can assert evidence of his impecunious condition at the time of trial. The "inability to pay" rule dates back to *Loyacano v. Jurgens*, 50 La. Ann. 441, 23 So. 717 (1898) and has been applied consistently by Louisiana courts ever since. . . . The theory behind the rule was stated in *Cole v. Sherrill*, 7 So. 2d 205 (La. App. 2d Cir. 1942): "It has never been considered good policy to bankrupt one to pay another even though the award granted is not in line with other cases involving the same injuries and might not fully compensate the plaintiff for the injuries he received. Fair justice between both parties must be arrived at." 7 So. 2d at 211.

388 So. 2d at 746.

20. 388 So. 2d at 757.

21. 396 So. 2d 1281 (La. 1981).

22. *Id.* at 1287.

23. *Id.* at 1287 (quoting and relying upon State v. Moore, 278 So. 2d 781, 785 (La. 1973)).

parties under similar circumstances on a different day does not meet the test, held the court. The writers fully agree.

As pointed out in *State v. Davis*,[24] the circumstance that the crime charged does not require a specific intent does not preclude admissibility of other crimes evidence. If the two crimes are "signature" crimes, evidence of the other crime may be admissible to prove identity, provided, of course, that identity is a real and genuine issue.[25]

Failure to Give The Prieur Notice

In two cases decided during the past term, *State v. Walker*[26] and *State v. Vernon*,[27] a majority of the court found that although the prosecution had violated the *Prieur* notice requirement, the failure was, under the circumstances, non-reversible error. Whether a prosecutorial error is reversible error is, of course, a very difficult problem.[28] It appears to these writers that failure to give a required *Prieur* notice is a violation of a substantial right of the accused within the meaning of Code of Criminal Procedure article 921.[29] Eight years have elapsed since the *Prieur* notice requirement was announced by the court, and the rule is presumably very well-known to all prosecutors. A requirement that it be fully complied with[30] does not appear unreasonable.

Other Crimes Evidence Offered by the Defendant

In *State v. Washington*[31] the court held that, under certain circumstances, to deny a defendant the opportunity to introduce evid-

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24. 389 So. 2d 71.

25. *See* State v. James, 389 So. 2d 71 (La. 1980), *discussed in* text at note 21, *supra*.

26. 394 So. 2d 1181 (La. 1981).

27. 385 So. 2d 200 (La. 1980).

28. *See* State v. Gibson, 391 So. 2d 424 (La. 1980); State v. Boutte, 384 So. 2d 773 (La. 1980); State v. Herman, 304 So. 2d 322 (La. 1974); State v. Michelli, 301 So. 2d 577 (La. 1974), *discussed in* Pugh, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 679 (1976) [hereinafter cited as *1974-1975 Term*]; *1979-1980 Developments*, *supra* note 2, at 623-24; Comment, *Harmless Constitutional Error—A Louisiana Dilemma?*, 33 LA. L. REV. 82 (1972), *reprinted in* G. PUGH, *supra* note 4, at 550-54 (1974).

29. LA. CODE CRIM. P. art. 921 provides: "A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."

30. *See* in this connection *State v. Michelli*, 301 So. 2d 577 (La. 1974), *discussed in 1974-1975 Term*, *supra* note 26, at 679, *reprinted in* G. PUGH, *supra* note 4, at 568 (Supp. 1978).

31. 386 So. 2d 1368 (La. 1980).

ence to show another's other crimes is fundamentally unfair. In *Washington* the prosecution contended that defendant was the perpetrator of a series of allegedly very similar sexual attacks upon young children. If the prosecution were to be permitted to show such a series of crimes, the defendant, said the court, had the right to try to show that the attacks continued after the defendant was taken into custody.[32]

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

Right to Recall Witness Under Cross-Examination

In *State v. Shannon*,[33] following the completion of his examination of a prosecution witness, defense counsel obtained additional information causing him to question the correctness of the witness's testimony on a vital point. He sought to recall the witness under cross-examination, but the trial court refused his request. Although reversing on other grounds, a unanimous court speaking through Justice Calogero, took pains to add that under the circumstances this ruling, too, was erroneous. In a very significant footnote, the court stated:

> The defendant's constitutional right to produce evidence in defense and to confront (cross-examine) the witnesses against him far outweighs the trial judge's discretion in maintaining an orderly presentation of the evidence. While we are mindful that the decision of whether a witness may be recalled for further cross-examination is left to the discretion of the trial judge, his ruling may be reversed where an abuse of discretion is shown.[34]

The writers fully agree.

ATTACKING CREDIBILITY OF WITNESSES

Prior Convictions – What Constitutes a "Crime"

One of the traditional methods of impeaching an opponent's witness is to bring out that the witness was previously convicted of a crime.[35] Is violation of a municipal ordinance to be deemed a

32. *Id.* at 1373. *See also* Justice Lemmon's interesting dissent in *State v. Stevenson*, 390 So. 2d 1292, 1296 (La. 1980), as to the admissibility, on a motion to suppress a confession, of other alleged acts of brutality by police when the officers have denied ever so abusing anyone.

33. 388 So. 2d 731 (La. 1980).

34. *Id.* at 735 n.6.

35. *See* C. MCCORMICK, EVIDENCE § 43 (Cleary ed. 1972).

"crime?" The matter was before the court in *State v. Ramos*.[36]

The court noted in *Ramos* that although Louisiana Revised Statutes 15:495, which provides the statutory authority for this method of impeachment in Louisiana criminal cases, does not define "crime," a definition of "crime" is given in article 7 of the Criminal Code.[37] The official comment to that article makes clear that the redactors of the Code intended to exclude violation of municipal ordinances from the definition of "crime" for purposes of the Criminal Code. In light of this exclusion, the court concluded that 15:495 does not authorize attacking a witness's credibility by showing that the witness was convicted of violating a municipal ordinance.

Prior Convictions—Details of the Crime

In the 1975 decision of *State v. Jackson*,[38] a divided supreme court held that a witness on cross-examination who admits that he had previously been convicted of a crime properly may be questioned about the details thereof in order to show "the true nature of the offense." The recent case of *State v. Oliver*[39] indicates somewhat of a retreat from this unorthodox minority doctrine.[40] Although distinguishing *Jackson* as inapplicable under the facts presented, a unanimous court, in an opinion authored by Justice Watson noted that *Jackson* had been much criticized and that "[t]he trial court has the duty of restricting an inquiry into details of a conviction within reasonable bounds."[41] Further, the court stated: "*Jackson* must be narrowly, rather than broadly, construed and care must be taken to avoid prejudice to the rights of the accused by expansive reference to details of a former conviction."[42] It is to be hoped that in time the *Jackson* doctrine will be abandoned completely.

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36. 390 So. 2d 1262 (La. 1980).

37. Article 7 provides that:

> a crime is that conduct which is defined as criminal in this Code, or in other acts of the legislature, or in the constitution of this state.

CRIMINAL CODE: LA. R.S. 14:7 (1950).

38. 307 So. 2d 604 (La. 1975), *discussed in 1974-1975 Term*, *supra* note 28, at 662, *reprinted in* G. PUGH, *supra* note 4, at 171 (Supp. 1978); Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 578 (1978) [hereinafter cited as *1976-1977 Term*].

39. 387 So. 2d 1154, 1156 (La. 1980).

40. For analysis and criticism of the *Jackson* line of cases *see 1979-1980 Term*, *supra* note 2, at 605; *1976-1977 Term*, *supra* note 38, at 578; *1974-1975 Term*, *supra* note 28, at 662, 663-64 reprinted in G. Pugh, *supra* note 4, at 171 (Supp. 1978); Note, *Delving into the Details of Prior Convictions: The New Louisiana Rule*, 38 LA. L. REV. 899 (1978).

41. 387 So. 2d at 1155.

42. *Id.* at 1156.

Adjudication of Juvenile Delinquency

A divided court on rehearing in *State v. Toledano*[43] indicated that under certain circumstances, the juvenile record of a prosecutorial witness may have such discrediting value that defendant has a constitutional right to see and expose it.[44] The constitutional right of bringing such fact to the attention of the jury is, of course, a separate question from whether an adjudication of juvenile delinquency is a "crime" within the meaning of Louisiana Revised Statutes 15:495.[45] The court held that under the facts presented, defendant, having requested access to the records, was entitled to have the trial court determine whether the discrediting value of prior adjudication was so strong that disclosure of the records was essential to a fair trial.

Access to Rap Sheet of Prosecution Witness

The memorandum decision in *State v. Juan*[46] and the majority decision on rehearing in *State v. Toledano*,[47] apparently indicate that a majority of the court is of the view that a defendant in a criminal case is entitled to access to a prosecution witness's rap sheet in advance of trial.[48] The writers have difficulty, however, in reconciling the position taken by the majority in *State v. Williams*[49] which would limit such access to the rap sheets of prosecution witnesses who themselves were implicated in the crime.

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43. 391 So. 2d 817 (La. 1980).

44. *See* Davis v. Alaska, 415 U.S. 308 (1974), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 586 (1977) [hereinafter cited as *1975-1976 Term*], *reprinted in* G. PUGH, *supra* note 4, at 165 (Supp. 1978); Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 538 (1975) [hereinafter cited as *1973-1974 Term*], *reprinted in* G. PUGH, *supra* note 4, at 168 (Supp. 1978).

45. See discussion in notes 35-37, *supra*, and accompanying text. *See* State v. Roberts, 331 So. 2d 11 (La. 1976), *rev'd on other grounds*, 431 U.S. 633 (1977); *1975-1976 Term*, *supra* note 44, at 591 reprinted in G. Pugh, *supra* note 4, at 173 (Supp. 1978); LA. R.S. 13:1580.

46. 396 So. 2d 907 (La. 1981). "Defendant is entitled to conviction records of state's witnesses. *State v. Harvey*, 358 So. 2d 1224." *Id.* at 907.

47. 391 So. 2d 817 (La. 1980).

48. *See* the foundation case of *State v. Harvey*, 358 So. 2d 1224 (La. 1978), *discussed in 1979-1980 Developments*, *supra* note 2, at 606; Note, *The Prosecutor's Dilemma—A Duty to Disclose or a Duty Not to Commit Reversible Error*, 40 LA. L. REV. 513 (1980).

49. 389 So. 2d 60 (La. 1980).

PRIVILEGE

Physician-Patient

In a hard fought custody case may one parent, over a claimer of privilege, gain access to the psychiatric records of the other? Prior to adoption of legislation recognizing a physician-patient privilege for Louisiana civil cases, the Louisiana Supreme Court held in the affirmative.[50] In light of the recent statutory provisions relative to health care providers,[51] the First Circuit Court of Appeal in *Wing v. Wing*[52] held such material subject to a valid claimer of privilege.

Jurors as Witnesses—Ambit of Permissible Testimony

La. R.S. 15:470 seemingly establishes a one-way street relative to juror testimonial disqualification, *i.e.*, making a juror incompetent "to testify as to his own or his fellows' misconduct," but competent "to rebut any attack upon the regularity of the conduct." Such interpretation creates serious constitutional problems.[53] The first time *State v. Wisham* reached the supreme court,[54] the court held that despite the provisions of 15:470 jurors could properly testify to "unauthorized communications or prejudicial conduct tantamount to unauthorized communications"[55] of third parties (the arrest of one of the defense witnesses shortly after he testified, in the presence of some of the jurors). On remand of the case, the trial court, over defense objection, permitted the jurors also to testify that the conduct had had no effect upon their deliberations. Arguably, such testimony was permissible as testimony to rebut "an attack upon the regularity" of the jury proceedings. In *Wisham II*,[56] a majority of the supreme court held that such testimony was impermissible. In the opinion of the writers, 15:470 needs reformulation.[57]

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50. *See* Moosa v. Abdallah, 248 La. 344, 178 So. 2d 273 (1965), *discussed in* Pugh, *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Evidence*, 26 LA. L. REV. 606, 614 (1966); Note, *Physician-Patient Privilege*, 27 LA. L. REV. 361 (1967).

51. *See* LA. R.S. 13:3734 (Supp. 1972 & 1978). *See also* LA. R.S. 37:2366 (recognizing a psychologist-patient privilege).

52. 393 So. 2d 285 (La. App. 1st Cir. 1980).

53. *See* a previous discussion of these problems in *1979-1980 Developments*, *supra* note 2, at 612.

54. 371 So. 2d 1151 (La. 1979).

55. *Id.* at 1154.

56. 384 So. 2d 385 (La. 1980).

57. For a further discussion of the matter, *see 1979-1980 Developments*, *supra* note 2, at 612.

Juror Testimony Impeaching Verdict

Does the statutory prohibition against testimony of a juror impeaching his verdict[58] prohibit jurors' testimony that during their deliberations jury members consulted an obsolete law book found in the jury room giving a pertinent, but erroneous, statement of law? The question was presented to the court in *State v. Sinegal.*[59] The court noted that "[a]n exception to this [prohibition] exists when there is an unauthorized communication or overt act by a third person which creates an extraneous influence on the jury,"[60] and that the Fifth Circuit had held in *Durr v. Cook*[61] that "when the statutory prohibition infringes on a defendant's constitutional right to a fair trial, jurors are competent to testify about juror misconduct."[62] Concluding that "[t]he written word of a legal volume is more of an intrusion than a verbal communication because of its imprimatur of authority,"[63] the court held that testimony by the jurors as to their action was not barred by the rule. The writers fully agree.

HEARSAY

Hearsay vs. Non-Hearsay—Complaint to Authorities

To what extent may a law enforcement or security officer testify to information he received from third persons which caused him to act in a particular way? The matter has given[64] and continues to give difficulty. It is submitted that whether such testimony is subject to a valid hearsay objection depends upon the issue to be proved at the hearing.[65] Two cases decided during the past term deal with the problem.

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58. *See* LA. R.S. 15:470 (1950); *discussed in 1979-1980 Developments, supra* note 2, at 612-13.

59. 393 So. 2d 684 (La. 1981).

60. *Id.* at 686.

61. 589 F.2d 891 (5th Cir. 1979), *rev'g* State v. Durr, 343 So. 2d 1004 (La. 1977), *discussed in 1979-1980 Developments, supra* note 2, at 612-13.

62. As to the incompetency of a juror to testify to juror misconduct of less egregious character (pre-charge discussion of the case among themselves), *see State v. Poree*, 386 So. 2d 1331, 1339-40 (La. 1980).

63. 393 So. 2d at 686.

64. *See 1977-1978 Term, supra* note 8, at 980; *1975-1976 Term, supra* note 44 at 606, *reprinted in* G. PUGH, *supra* note 4, at 530 (Supp. 1978).

65. *See* Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954), *reprinted in* G. PUGH, *supra* note 4, at 412 (1974); Comment, *Hearsay Evidence and Federal Rules: Article VIII—I. Mapping Out the Borders of Hearsay*, 36 LA. L. REV. 139 (1975), *reprinted in* G. PUGH, *supra* note 4, at 491 (Supp. 1978).

State v. Bazile[66] concerned the admissibility of testimony by a police officer, at a hearing on a motion to suppress, as to information he had received from others that led to his making a contested arrest. Via a very lucid opinion authored by Justice Calogero, the court held that such testimony is not subject to a valid hearsay objection. The question at the suppression hearing directly concerned the state of mind of the officer, *i.e.*, whether the officer had probable cause to believe defendant had committed the crime for which he was arrested, not whether what the officer may have had reason to believe was in fact true.[67] Hence, as the writers see it, the court was clearly correct in holding the testimony admissible, non-hearsay evidence.

To be contrasted with *State v. Bazile* is *State v. Turner*.[68] The defendant in *Turner* was charged with taking contraband (Valium pills) into the state penitentiary. The pills apparently had been found on defendant's person during a visit to her two inmate sons after a criminal investigator had ordered that all persons visiting the sons be "thoroughly searched." The supreme court ruled that the criminal investigator, over a hearsay objection, could properly testify that he had ordered the search because he had received reports that the inmate sons had "possibly" been "receiving contraband of some type of drugs."[69] The court held that such testimony was not hearsay but was admissible as a fact "to show his reason for ordering a search of all of the Turner brothers' visitors."[70]

With deference it is submitted that the testimony in *Turner* should have been held inadmissible hearsay because the issue *at the trial* was not *why* the search was ordered, but whether the defendant had committed the crime charged. On the other hand, if the same testimony had been offered at a motion to suppress hearing, the testimony, as in *State v. Bazile*, should have there been held admissible non-hearsay, for at such hearing the issue would have been *why* the criminal investigator did what he did.[71]

Statements by the Victim

State v. Doze[72] is an interesting sequel to *State v. Raymond*,[73]

66. 386 So. 2d 349 (La. 1980).

67. *See* authorities cited in notes 64 & 65 *supra*.

68. 392 So. 2d 436 (La. 1980).

69. *Id.* at 440.

70. *Id.*

71. *See* authorities cited in notes 64 & 65, *supra*.

72. 384 So. 2d 351 (La. 1980).

73. 258 La. 1, 245 So. 2d 335 (1971), *discussed in* Pugh, *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 352-55 (1972), *reprinted in* G. PUGH, *supra* note 4, at 425, 426-27 (1974).

State v. Weedon,[74] and *State v. Johnson*[75] relative to the admissibility of testimony tending to show the state of mind of the victim of a homicide. In an effort to show defendant's motive for killing his landlady, the prosecution, over objection, was permitted to adduce testimony as to a conversation the witness had had with the victim the day of the homicide, during the course of which the deceased had indicated an intent to evict the defendant. In an opinion authored by Chief Justice Dixon, the court stated that "declarations of mental state are generally admissible, as an exception to the hearsay rule, if introduced to prove the state of mind of the *declarant*, when that state of mind is at issue."[76] The state of mind of declarant's landlady, however, was not at issue, noted the court, and there was no evidence that the deceased landlady's intent to evict the defendant had been communicated to the defendant. The court held that in the absence of such a link, the evidence was inadmissible. Because of the peculiar circumstances presented in the case,[77] the majority concluded that the admission of the statement was harmless error.

Admission—Opinion Statement Made by Agent Without Personal Knowledge

The general American view is that relevant non-privileged statements made by a party litigant or his agent, when offered by his opponent, are admissible as an admission even though the declarant may have had no personal knowledge of the circumstances adverted to, and his statement was in the form of an opinion.[78] Here, the reasons underlying the hearsay rule and the opinion rule are said to be inapplicable.[79] In *American Employer's Insurance Co. v. Honeycutt Furniture Co.*[80] the third circuit appears to have departed from this view. In a suit against the City of Sulphur for negligent acts allegedly committed by the Captain of the Fire Department, the

74. 342 So. 2d 642 (La. 1977), *discussed in 1976-1977 Term, supra* note 38, at 584-85.

75. 381 So. 2d 436 (La. 1980), *discussed in 1979-1980 Term, supra* note 2, at 614-15.

76. 384 So. 2d at 353.

77. As a majority of the court saw it, the inadmissible out-of-court statement was consistent with the defendant's defense (that the landlady had attacked the defendant with a kitchen knife); the court reasoned that the contents of the out-of-court statement showed a basis for the landlady to be angry or upset with the defendant. *Id.* at 354. In dissent, Justice Dennis argued that the inadmissible out-of-court statement brought prejudicial information to the attention of the jury. *Id.* at 355 (Dennis, J., dissenting).

78. *See* C. MCCORMICK, EVIDENCE § 263 at 632 (Cleary ed. 1972).

79. *Id.*

80. 390 So. 2d 255, 259 (La. App. 3d Cir. 1980).

plaintiff relied heavily on a letter written by the Mayor and considered at a Civil Service proceeding against the city employee in question. In this letter, the Mayor had made "a statement to the effect that" the subject employee had been negligent at the time of the incident.

In the opinion of the writers, the court of appeal clearly was correct in rejecting plaintiff's contention that the letter constituted a judicial confession *binding* the city.[81] On the other hand, with deference, it is submitted that the court erred in concluding that the letter was "hearsay and cannot be considered,"[82] that the letter had "no evidentiary value,"[83] and that it "was nothing more than an opinion based on facts admittedly not within his own knowledge."[84] Since the statement was relevant and non-privileged, and was made by defendant's agent acting within the scope of his authority, it is believed the statement should have been admissible against the defendant as an admission,[85] and that the Mayor's lack of personal knowledge of the facts and conclusory pronouncements should have gone to the weight of the evidence rather than to its admissibility.[86]

Erroneous Admission of Hearsay Evidence Not Cured or Waived by Opponent's Later Calling Declarant as Witness

State v. Boudreaux,[87] authored by Justice ad hoc Schott,[88] affords an excellent discussion of an important hearsay question. Where a hearsay statement has been admitted improperly, is the error cured or waived by the declarant's later being called as a witness by the opponent? To show defendant's alleged complicity in a bicycle theft, the prosecution called a police officer who, over defense objection, was permitted to read a statement made by an alleged co-conspirator given after the latter's arrest during the course of which the purported co-conspirator stated that the defendant had assisted him in the crime. This statement was clearly inadmissible hearsay, said the court. It was not admissible as a confes-

81. *Id.* at 260. *See* Pugh, *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Evidence*, 28 LA. L. REV. 429, 438-39 (1968) [hereinafter cited as *1966-1967 Term*], *reprinted in* G. PUGH, *supra* note 4, at 438 (1974).

82. 390 So. 2d at 259.

83. *Id.* at 260.

84. *Id.*

85. *See* C. MCCORMICK, *supra* note 78, at § 267, at 640-41; FED. R. EVID. 801(d)(2).

86. *See* 4 J. WIGMORE, EVIDENCE § 1053, at 18. (Chabourn rev. 1972) ("A person's assertions regarding his own affairs have always some testimonial value regardless of the exactness of his personal observation of the data leading to his belief.").

87. 396 So. 2d 1303 (La. 1981).

88. Sitting by special appointment under article V, section 5(A) of the Louisiana Constitution.

sion; the declarant had not been joined as a co-defendant. It was not admissible as a statement by a co-conspirator in furtherance of a crime; it was made after the termination of the alleged conspiracy.

To counter the statement, defendant himself called declarant as a witness. Although admitting having made the statement, the declarant said he had "messed up" as to that portion implicating the defendant. The prosecution, relying on the post-*Bruton* line of cases relative to defendant's right of confrontation,[89] contended that any error in the admission of the statement was rendered harmless when defendant called declarant to the stand and "thereby gained an opportunity to confront and examine"[90] him. The post-*Bruton* line of cases was inapplicable, said the court, for the issue was not whether defendant's constitutional rights had been violated; instead, the issue was the impropriety of admitting the inadmissible hearsay evidence. Further, the court said that the admission of the hearsay statement violated a substantial right of the defendant—his right not to have prejudicial hearsay evidence admitted against him.[91]

In the opinion of the writers, the court in *Boudreaux* clearly was correct.[92] Even if the state on cross-examination of the alleged co-conspirator had then sought to introduce the witness's prior statement, it could have done so only as impeaching evidence,[93] not as substantive evidence.[94]

PRESERVING RIGHTS FOR APPEAL

Necessity for Contemporaneous Objection

Generally a defense counsel "waives" or loses his client's right to object to a trial court or prosecutorial action unless he interposes an objection.[95] Further, the general rule is that announced last term in *State v. Baylis*[96]—when a defendant's objection has been sustain-

89. *See* Nelson v. O'Neal, 402 U.S. 622 (1971), *discussed in 1977-1978 Term, supra* note 8, at 984-87.

90. 396 So. 2d at 1304.

91. LA. CODE CRIM. P. art. 921 provides: "A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." *See also 1979-1980 Developments, supra* note 2, at 622-24.

92. In this regard, *see* the discussion of *State v. Johnson*, 381 So. 2d 436 (La. 1980), in *1979-1980 Developments, supra* note 2, at 613.

93. LA. R.S. 15:497 (1950).

94. *See* State v. Hathorn, 395 So.2d 783 (La. 1981) State v. Williams, 258 La. 251, 246 So. 2d 4 (1971); *1979-1980 Developments, supra* note 2, at 162.

95. *See* LA. CODE CRIM. P. art. 841, *discussed in 1975-1976 Term, supra* note 44, at 611, reprinted in G. PUGH, *supra* note 4, at 578 (Supp. 1978).

96. 388 So. 2d 713 (La. 1980).

ed, if he wishes an admonition to disregard or a mistrial he must ask for it or he is entitled to no relief on appeal. In *State v. Williamson*,[97] because of the gravity of the error involved (an erroneous jury instruction as to the definition of the crime), the court granted relief on appeal despite defendant's failure to interpose an objection.

This past term in *State v. Johnson*,[98] defense counsel, for the first time on a motion for new trial, had raised the issue of what appears to have been clearly improper cross-examination of the defendant by the prosecution as to defendant's prior arrests. The supreme court in *Johnson* held that because of defense counsel's failure to interpose a timely objection at trial, the right to raise the objection had been waived. In light of *Williamson* and the recent Fifth Circuit habeas corpus case of *Nero v. Blackburn*,[99] arguably the prosecutorial cross-examination of defendant was so improper[100] that defendant should be able to raise the error on a motion for new trial or in a habeas corpus proceeding.[101]

Necessity for Contemporaneous Objection—Implied Objection

State v. Marcal[102] holds that to preserve his rights, defense counsel must object to a trial court's ruling sustaining a prosecutorial objection. Although not an unreasonable interpretation of the literal provisons of article 841 of the Code of Criminal Procedure as amended in 1974,[103] it seems to these writers an unnecessarily technical one. If a defense counsel puts a question to a witness and because of the trial court's sustaining the prosecution's objection he

97. 389 So. 2d 1328 (La. 1980).

98. 389 So. 2d 372 (La. 1980), discussed in note 1, *supra*, and accompanying text.

99. 597 F.2d 991 (5th Cir. 1979), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Evidence*, 40 LA. L. REV. 779, 780-81 (1980). In *Nero* the federal court granted a Louisiana defendant relief because his counsel had failed to request a mistrial after his objection to inadmissible other crimes evidence had been sustained. The court reasoned that under the circumstances the defendant had been denied effective assistance of counsel.

100. *See* LA. R.S. 15:495 (1950); LA. CODE CRIM. P. art. 770.

101. *See e.g.*, FED. R. EVID. 103(d); *1976-1977 Term*, *supra* note 38, at 593-94. *See also* State v. Smith, 388 So. 2d 801 (La. 1980).

102. 388 So. 2d 656 (La. 1980).

103. Article 841 provides in part:

> An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor. . . .

LA. CODE CRIM. P. art. 841, *discussed in 1975-1976 Term*, *supra* note 44, at 611, *reprinted in* G. PUGH, *supra* note 4, at 578 (Supp. 1978).

is precluded from eliciting the desired information, it is submitted that an objection to the court's ruling could properly, and should, be inferred from the circumstances.[104]

Although the court in *Marcal* did not mention its earlier decision in *State v. Boutte*,[105] it seems to these writers that *Boutte* reflects a very different, and we believe, a more desirable interpretation of Code of Criminal Procedure article 841. In *Boutte*, with respect to the prosecution's claim that defendant had forfeited his right by failing formally to object to the trial court's decision sustaining the prosecution's objection to any testimony being given by a defense witness (on the ground that the witness had violated the court's sequestration order), the court said:

> The contemporaneous objection rule, now stated in C. Cr. P. art. 841, did away with the requirement that a party file formal bills of exceptions and states: "It is sufficient that a party . . . makes known to the court the action which he desires the court to take. . . ." The trial judge here was fully cognizant that defendant was asking that [the witness] be allowed to testify.[106]

Under the circumstances, defense counsel's failure to state "I object" was deemed to be of no significance. The writers fully agree with the position taken in *Boutte* and hope it will be followed in the future.

JUDICIAL NOTICE

Proof of Prior Conviction

On writs to the supreme court in *State v. Valentine*,[107] defendant complained that he had been convicted improperly of driving while intoxicated, second offense. He contended that there was insufficient evidence at trial to establish the earlier conviction. Actually, at trial the only "evidence" of the earlier conviction was a statement by the trial judge, "Well I think that the first conviction took place in this court."[108] Applying an expansive view of judicial notice, a majority of the court, over a very persuasive dissent by Justice Dennis, upheld the conviction. The majority reasoned that the trial court could properly rely upon the preliminary examination proceedings, at which a court minute entry had been introduced, without objection, showing

104. *See* 1 J. WIGMORE, EVIDENCE § 20 (1980); C. MCCORMICK, EVIDENCE § 52 (Cleary ed. 1972).

105. 384 So. 2d 773 (La. 1980).

106. *Id.* at 777.

107. 397 So. 2d 1299 (La. 1981).

108. *Id.* at 1299-1300.

an earlier conviction. The dissenting opinion notes, however, that "[t]here is nothing to indicate that the trial judge referred to the record of the preliminary hearing in making this remark" and "the record of the preliminary hearing was never introduced into evidence at the trial of this case."[109] Since the trial was one before a judge sitting without a jury, and the offense charged was relatively minor, it is not surprising that the proceedings in question may have been somewhat informal. The dissenting opinion, however, expresses well-grounded fear that the doctrine adopted by the majority is a

> dangerous judicial notice rule which may permit many defendants to be convicted and imprisoned on the basis of a faulty but legally unassailable judicial memory. As such, the rule of this case sweeps far beyond that of modern notions of judicial notice and contains none of the procedural safeguards usually afforded.[110]

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109. *Id.* at 1300 (Dennis, J., dissenting).
110. *Id.* at 1300-01 (Dennis, J., dissenting).