NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0001

STATE OF LOUISIANA

VERSUS

GLENN T. ELLIS, SR.

Judgment Rendered: June 6, 2008

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 412823, Division "A"

Honorable Raymond S. Childress, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Guidry, J. dissents and assigns reasons.

HUGHES, J.

The defendant, Glenn T. Ellis, was charged by bill of information with one count of possession of cocaine, a violation of LSA-R.S. 40:967(C), and pled not guilty. Following a jury trial, he was found guilty as charged. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging that he was a third-felony habitual offender.[1] The defendant agreed to the allegations of the habitual offender bill of information. The court adjudged the defendant to be a third-felony habitual offender, and sentenced him to seven years at hard labor. He now appeals, designating one assignment of error. We affirm the conviction, habitual offender adjudication, and sentence.

ASSIGNMENT OF ERROR

The trial court erred in excluding statements against interest by an unavailable witness.

FACTS

St. Tammany Parish Sheriff's Office Deputy Sean Beavers testified at trial. On April 12, 2006, he responded to a complaint of an attempted suicide on North Mill Road. Joanne Hemphill advised Deputy Beavers that her ex-boyfriend, Williams, had a mental illness, had cut himself, and had either gone into the residence or into the woods. Hemphill allowed Deputy Beavers into the residence. Deputy Beavers did not find Williams inside the residence, but did find the defendant and Laquisha Chatman-Montos. A computer check indicated that the defendant had an outstanding warrant, and Deputy Beavers arrested the defendant, handcuffed him, advised him of his

[1]Predicate #1 was set forth as the defendant's February 20, 2001 guilty plea, under Twenty-second Judicial District Court docket #286935, to possession of cocaine. Predicate #2 was set forth as the defendant's May 10, 2004 guilty plea, under Twenty-second Judicial District Court docket #373503, to possession of cocaine.

Miranda[2] rights, and escorted him outside. Deputy Beavers also arrested Chatman-Montos after learning she had outstanding warrants for possession of cocaine.

According to Deputy Beavers, he then searched the defendant outside and found four rocks of cocaine in the defendant's back right-side pocket. Also according to Deputy Beavers, the defendant stated that the pocket was not his pocket, the pants were not his pants, and "She put those there." Deputy Beavers claimed it would have been impossible for Chatman-Montos to put the cocaine into the defendant's pocket because after he (Deputy Beavers) disturbed the defendant and Chatman-Montos, they never left his eyesight. Deputy Beavers denied planting the cocaine on the defendant.

St. Tammany Parish Sheriff's Office Deputy Julie Boynton also testified at trial. She also responded to the complaint on North Mill Road on April 12, 2006, and went into the residence with Deputy Beavers. Deputy Boynton testified that she arrested Chatman-Montos and searched her, but did not find any contraband or weapons. According to Deputy Boynton, she saw Deputy Beavers pull "the baggie" out of the defendant's pocket and heard the defendant state, "That's not my pocket," and, "Those are not my pants." She indicated the baggie contained four rocks of suspected cocaine. According to Deputy Boynton, she maintained a constant observation of the defendant and Chatman-Montos after coming into contact with them and did not see anything placed into the defendant's pocket.

The defendant also testified at trial. He conceded he had two prior convictions for possession of cocaine. He claimed he was at the residence on North Mill Road to have his car repaired by Williams. He claimed the

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

police searched him inside the residence, turned his pockets inside out, put his money on the table in the living room, and then arrested Chatman-Montos. He claimed the police searched him a second time before placing him into the police car. The defendant claimed the police officer searching him claimed that cocaine had fallen out of his pocket and he (the defendant) told him, "This ain't from me." The defendant claimed the police officer stated, "Oh, it's yours now." The defendant claimed he stated, "You didn't get that out of my pocket." The defendant denied making the statements Deputy Beavers claimed he made. He also denied that the cocaine belonged to him or that it was in his pocket.

STATEMENTS OF LAQUISHA CHATMAN-MONTOS

In his sole assignment of error, the defendant argues the trial court erroneously excluded the several out-of-court statements of Chatman-Montos that corroborated the defendant's version of events, and thus, undercut his defense and denied him a fair trial.

Louisiana Code of Evidence art. 804, in pertinent part, provides:

> **A. Definition of unavailability.** Except as otherwise provided by this Code, a declarant is "unavailable as a witness" when the declarant cannot or will not appear in court and testify to the substance of his statement made outside of court. This includes situations in which the declarant:
>
> **(1)** Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;
>
> . . .
>
> **B. Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . .
>
> **(3) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him

> against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In **State v. Hammons**, 597 So.2d 990, 995 (La. 1992), the supreme court recognized that LSA-C.E. art. 804(B)(3) was closely patterned after Fed. R. Evid. 804, and thus, the history of the federal rule was pertinent to application of the state rule. At common law, only statements against pecuniary or proprietary interest were originally admissible as hearsay exceptions because of the fear that statements against penal interest would be fabricated. **Hammons**, 597 So.2d at 995-96. When the statement is one against the declarant's penal interest, the circumstances surrounding the making of the statement may be significant in determining its trustworthiness. If a declarant admits sole responsibility for a serious crime, the statement is generally prima facie against interest so as to satisfy this requirement of the rule. However, if the statement is clearly self-serving, as when the declarant is seeking favorable treatment for himself in return for cooperation, the statement may be deemed not against his interest and thus may fall outside the exception. **Hammons**, 597 So.2d at 996. When the statement tending to expose the declarant to criminal liability is offered to exculpate the accused, LSA-C.E. art. 804(B)(3) expressly requires corroborating circumstances indicating trustworthiness. The burden of satisfying the corroboration requirement is on the accused. **Hammons**, 597 So.2d at 996-97. That burden may be satisfied by evidence independent of the statement which tends, either directly or circumstantially, to establish a matter asserted by the statement. Circumstantial evidence of the veracity of the declarant as to the portion of the statement exonerating the accused is

generally sufficient. Typical corroborating circumstances include statements against the declarant's interest to an unusual or devastating degree, or the declarant's repeating of consistent statements, or the fact that the declarant was not likely motivated to falsify for the benefit of the accused. **Hammons**, 597 So.2d at 997.

Under compelling circumstances, formal rules of evidence must yield to a defendant's constitutional right to confront and cross-examine witnesses and to present a defense. Normally inadmissible hearsay may be admitted if it is reliable, trustworthy and relevant, and if to exclude it would compromise the defendant's right to present a defense. See U.S. Const. amend. VI; La. Const. art. I, §16; **Chambers v. Mississippi**, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973); **Washington v. Texas**, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967); **State v. Van Winkle**, 94-0947 (La. 6/30/95), 658 So.2d 198, 202; **State v. Gremillion**, 542 So.2d 1074, 1078-1079 (La. 1989); see also **State v. Juniors**, 2003-2425, p. 44 (La. 6/29/05), 915 So.2d 291, 325-326, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006).

Prior to the presentation of the defense case at trial, the defense requested that during its case, it be permitted to introduce into evidence, under LSA-C.E. art. 804(B)(3), the notarized statement of Chatman-Montos that the cocaine was found in her purse and the defendant knew nothing about the cocaine. The defense indicated that Chatman-Montos had exercised her Fifth Amendment right not to testify. The defense also indicated that it had two witnesses who would testify that Chatman-Montos told them the cocaine at issue was found in her purse, and the defendant had nothing to do with the cocaine. The defense further argued that, under **Chambers,** any hearsay problems would be insufficient to exclude the

affidavit. The trial court denied the defense motion to introduce the affidavit, finding that the affidavit was hearsay, the State did not have the opportunity to cross-examine Chatman-Montos, and the statement was untrustworthy because it "[went] clearly against" the testimony of two police officers. The trial court also denied the defense request to present testimony from the two witnesses it had referenced. The defense objected to the rulings of the court and proffered the affidavit and the excluded testimony.

The June 26, 2006, 5:30 p.m. affidavit of Chatman-Montos, in pertinent part, states:

> Upon arrival, the deputies recognized [the defendant] and arrested him on an outstanding warrant for non-child support [sic]. Laquisha was also arrested on a warrant for contempt of court charges, when the deputies found a bag which appeared to be an illegal substance in her purse. Ms. Chatman hereby states that [the defendant] had absolutely no knowledge of her possessing the illegal substance and that there were no drugs on him when arrested.

The proffered testimony of Cecilia Ellis, in pertinent part, states that she is the mother of the defendant; that Chatman-Montos was trying to be the defendant's girlfriend; that, after the defendant was arrested, Chatman-Montos told Cecilia Ellis that, "it was in [Chatman-Montos's] purse" and, "it belonged to [Chatman-Montos] and not [the defendant,]" and that Chatman-Montos then went to the justice of the peace "to verify the stuff in her purse was hers and not [the defendant's.]" Cecilia Ellis identified defense proffer #1 as Chatman-Montos's statement to the justice of the peace and indicated Chatman-Montos showed the affidavit to her after executing the affidavit.

The proffered testimony of Cassandra Ellis, in pertinent part, states that she is the sister of the defendant; that Chatman-Montos was dating the defendant; that after the defendant was arrested in April of 2006, Chatman-Montos telephoned Cassandra Ellis and stated that the police had arrested

the defendant, "charged him," and placed him into a police car before they arrested Chatman-Montos; that when the police "charged [Chatman-Montos,]" they found "the bag in her purse supposed to be crack[;]" and that the police then took the defendant out of the police car, searched him again, and found "the bag" on him. Cassandra Ellis indicated, at Chatman-Montos's request, she had taken Chatman-Montos to a justice of the peace and had been present when she executed the affidavit.

The trial court correctly excluded the affidavit of Chatman-Montos. In order to introduce the affidavit into evidence under LSA-C.E. art. 804(B)(3), the defendant had to first establish that Chatman-Montos was unavailable by calling her as a witness and attempting to question her. If Chatman-Montos testified to the substance of the affidavit, there would have been no need to introduce the affidavit. If she recanted her statements made in the affidavit, she could be impeached with her prior statement. If she claimed her Fifth Amendment privilege against self-incrimination, then perhaps the proffered matters would be admissible. However, the defendant failed to establish that Chatman-Montos was unavailable, and thus, her affidavit was inadmissible under LSA-C.E. art. 804(B)(3). See **State v. Bailey**, 2004-85, pp. 9-14 (La. App. 5th Cir. 5/26/04), 875 So.2d 949, 957-60, writ denied, 2004-1605 (La. 11/15/04), 887 So.2d 476, cert. denied, 546 U.S. 981, 126 S.Ct. 554, 163 L.Ed.2d 468 (2005).

The affidavit of Chatman-Montos was also inadmissible under LSA-C.E. art. 804(B)(3) because the defendant failed to present corroborating evidence to indicate the trustworthiness of the admission against interest made by Chatman-Montos. Chatman-Montos was either the defendant's girlfriend or was trying to become the defendant's girlfriend. In either case, she was motivated to falsify for the benefit of the accused. Neither Cecilia

Ellis nor Cassandra Ellis was present at the incident referenced in the affidavit, and their proffered testimony merely contained the hearsay statements of Chatman-Montos. Further, Cecilia Ellis and Cassandra Ellis, like Chatman-Montos, had reason to be less than truthful because of their personal relationship with the defendant. See **State v. Dabney**, 91-2051 (La. App. 4th Cir. 3/15/94), 633 So.2d 1369, 1379, writ denied, 94-0974 (La. 9/2/94), 643 So.2d 139. Lastly, the exclusion of the proffered evidence did not prevent the defendant from presenting his defense, *i.e.*, the cocaine allegedly recovered from his pocket was planted on him by the police.

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

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VERSUS

GLENN T. ELLIS, SR.

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

The trial court impermissibly impaired the defendant's right to present a defense to the crime for which he was charged. The defendant's defense was that the cocaine allegedly recovered from his pocket was planted on him by the police. The fact that Chatman-Montos's affidavit contradicted the testimony of the police officers testifying at trial did not render the affidavit untrustworthy. The credibility of the affidavit, as well as the excluded defense testimony, should have been placed before the jury. See State v. Gremillion, 542 So.2d 1074, 1079 (La. 1989). Therefore, I respectfully dissent from the majority's opinion.