NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1505

STATE OF LOUISIANA

VERSUS

JESUS GALLARDO, JR.

Judgment rendered March 28, 2007.

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Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 421,198
Honorable Randall L. Bethancourt, Judge

* * * * * *

HON. JOSEPH L. (JOE) WAITZ, JR.
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ATTORNEYS FOR
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ATTORNEY FOR
DEFENDANT-APPELLANT
JESUS GALLARDO, JR.

* * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Hughes, J., concurs.

PETTIGREW, J.

The defendant, Jesus Gallardo, Jr., was charged by bill of information with driving while intoxicated, third offense, a violation of La. R.S. 14:98. He pled not guilty. The defendant filed a motion to suppress the evidence. A hearing was held, and the motion to suppress was denied. Following a jury trial, the defendant was found guilty as charged. The defendant filed a motion for new trial and a motion in arrest of judgment. A hearing was held, and the motions were denied. The defendant was sentenced to one and one-half (1½) years imprisonment at hard labor and ordered to pay a $2,000.00 fine. The sentence, except for thirty days, was suspended with the defendant being placed on supervised probation for a period of four years. For his thirty-day imprisonment, the defendant was ordered to be housed in the parish jail. The defendant was ordered to undergo inpatient substance-abuse treatment and, upon successful completion of the treatment, the defendant was sentenced to home incarceration for the balance of his suspended sentence. Also, other conditions and fees were imposed. The defendant made an oral motion to reconsider sentence, which was denied. The defendant now appeals, designating nine assignments of error. We affirm the conviction and sentence.

FACTS

On August 12, 2003, at about 1:15 a.m., Louisiana State Police Trooper Carey Kimball was on patrol in the Eckerd's parking lot near Hollywood Road in Houma, Louisiana. Trooper Kimball heard tires spinning on a car. He looked down Hollywood Road and observed the defendant "fishtailing" in his car as he entered the road from a barroom parking lot.[1] Trooper Kimball pulled the defendant over and detected a strong odor of alcohol on the defendant's breath. Trooper Kimball gave the defendant his **Miranda** warnings and asked him how much he had to drink that night. The defendant responded that he had a couple of beers. Trooper Kimball conducted a field sobriety test, which the defendant failed. The defendant was arrested for DWI and was taken to the Houma Police Department. The defendant was brought to the Intoxilyzer room where he

[1] Trooper Kimball testified at both the motion to suppress and the trial.

was advised of his rights relating to taking a breath test. The defendant signed the rights form, but refused to take a breath test or answer any questions.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court erred in failing to grant his motion to suppress all evidence obtained by Trooper Kimball. Specifically, the defendant contends that the State failed to demonstrate that the defendant, after being **Mirandized** by Trooper Kimball, knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial court on a motion to suppress will not be disturbed absent an abuse of that discretion.[2] **State v. Long**, 2003-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005). In denying the motion to suppress, the trial court found that the defendant was given all the **Miranda** warnings and that he understood them. The trial court further found that the defendant's refusal to take the breath test and to "sign off on anything" indicated that he knew what he was doing.[3]

Trooper Kimball's police unit had a mounted camera in it that videotaped (with audio) the stop, field sobriety test, and arrest of the defendant. The videotape was submitted into evidence. The defendant contends that a review of the videotape reveals that Trooper Kimball's less-than-six-second enumeration of the **Miranda** warnings was unintelligible and that, at no time, did Trooper Kimball ask him if he waived his rights, specifically his right against self-incrimination.

Our review of the videotape indicates that shortly after Trooper Kimball stopped the defendant, he gave him his **Miranda** warnings. While the warnings were delivered quickly and clearly by rote, they were intelligible. As noted by the trial court, "Although

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[2] In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

[3] The defendant filed a writ application with this court seeking review of this issue. The writ was denied. **State v. Gallardo**, 2004-1375 (La. App. 1 Cir. 8/23/04) (unpublished writ action).

the rights were read fast, the Court finds that ... all the Miranda warnings were given to the defendant." We agree with the trial court that the defendant was adequately informed of his rights.

Upon **Mirandizing** the defendant, Trooper Kimball asked him if he understood these rights. The defendant nodded his head in the affirmative.[4] Trooper Kimball told the defendant why he stopped him. He then asked the defendant, "How much you had to drink tonight?" The defendant responded, "I had a couple of beers. About three or four beers." We find that the defendant waived his rights when he acknowledged that he understood his rights, and then, in response to Trooper Kimball's question, told Trooper Kimball he had been drinking.

Before a confession may be introduced into evidence, the State must establish that the accused was advised of his constitutional rights under Article I, § 13 of the Louisiana Constitution and the Supreme Court's decision in **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[5] In **State v. Brown**, 384 So.2d 425, 426-427 (La. 1980), the Louisiana Supreme Court stated:

> When a statement made during custodial interrogation is sought to be introduced into evidence the state bears a heavy burden to show that the defendant knowingly and intelligently waived his right against self-incrimination and the right to counsel. **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In **North Carolina v. Butler**, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), the United States Supreme Court reiterated that the state's burden is great and that the courts must presume that a defendant did not waive his rights. However, in **Butler** the Court also held that the waiver of **Miranda** rights need not be explicit but may be inferred from the circumstances surrounding the statement the words and actions of the person interrogated:

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[4] In his reasons for denying the motion to suppress, the trial court, in finding the defendant understood his rights, stated, "[The defendant] stated on the tape that he understood, and I wrote down, he said "I understand." Given the less than superior quality of the audio on the videotape, whether the defendant's affirmation was also spoken is unclear.

[5] We find that under these circumstances - where, pursuant to a DWI stop, the defendant was asked how much he had to drink, and was clearly not free to walk away from the encounter - the defendant's inculpatory statement was made during a custodial interrogation. If the defendant was not in custody or was free to walk away at the time he was interrogated, arguably **Miranda** would be inapplicable since "**Miranda** applies when an individual is subjected to 'custodial interrogation,' defined by the United States Supreme Court as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' **Miranda v. State of Arizona**, [3]84 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966)." **State v. Yates**, 357 So.2d 541, 543 (La. 1978).

> "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the **Miranda** case. As was unequivocally said in **Miranda**, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." 99 S.Ct. at 1757.

In **Moran v. Burbine**, 475 U.S. 412, 421, 106 S.Ct. 1135, 1140-1141, 89 L.Ed.2d 410 (1986), the United States Supreme Court stated:

> **Miranda** holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the **Miranda** rights have been waived. [Citations omitted.]

When the defendant was given his **Miranda** warnings and asked if he understood them, he acknowledged with a nod that he did and proceeded to respond to a question pertaining to the offense of DWI. The response by the defendant to the question of how much he had been drinking that night was immediate and without reluctance. There was no indication that the defendant wanted an attorney or did not want to answer Trooper Kimball's question. There is no evidence in the record or anything on the videotape to suggest that the defendant was intimidated, coerced, or deceived in any way that would have led him to waive his right to remain silent for any reason other than as a function of his free will. See **State v. Robertson**, 97-0177, p. 26 (La. 3/4/98), 712 So.2d 8, 30, cert. denied, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998).

This is not a case where the person being questioned was of low-level intelligence, caught by surprise in a type of situation he had never anticipated. The defendant had two years of college. See **U.S. v. James**, 528 F.2d 999, 1019-1020 (5th Cir. 1976), cert.

denied, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976). Moreover, this DWI stop was (at least) the third time the defendant had been arrested for DWI. As discussed in **Robertson**, 97-0177 at 26, 712 So.2d at 30:

> [A]n individual's prior experiences with the criminal justice system are relevant to this inquiry because they may show the individual has, in the past, and, perhaps, on numerous occasions, been informed of his constitutional rights against self-incrimination both by law enforcement and judicial officers. "One of the ways that people are educated and gain an understanding of things is through repetition, through repeated exposure, and it [is] permissible for the trial court to read [an individual's] **Miranda** waivers ... against [that individual's] criminal history." [Citation omitted.]

The defendant had been arrested and convicted on at least two prior occasions, giving rise to the permissible inference he was more than familiar with his right to remain silent. Under these circumstances, we find that at the time he gave his statement (or any statement thereafter) to Trooper Kimball, the defendant had been adequately informed of his rights, understood those rights, and his waiver of those rights could be clearly inferred from his actions and words. See **Brown**, 384 So.2d at 427-428. Accordingly, we find no abuse of discretion by the trial court in denying the defendant's motion to suppress. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOs. 2, 3, and 4

In these related assignments of error, the defendant argues that the trial court erred in allowing the State to amend the bill of information on the day of the trial; the trial court erred in denying him a requested continuance following rearraignment; and the trial court failed during the rearraignment to inform him of his right to waive trial by jury.[6]

On the day of trial, prior to voir dire, the State requested that it be allowed to amend a date in the bill of information. The unaltered bill of information indicated that the defendant pled guilty on June 18, 2003, to a DWI, second offense, committed on December 13, 2002. On the amended bill, the State changed the guilty plea date of June 18, 2003, to August 13, 2003. This was the only change made to the bill of information.

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[6] Following the verdict, the defendant filed a motion in arrest of judgment and supporting memorandum, asserting that the trial court did not conform with the requirements of La. Code Crim. P. art. 780, in that, at the time of arraignment, it did not inform him of his right to waive trial by jury. Following a hearing, the motion was denied.

Louisiana Code of Criminal Procedure article 487(A) provides as follows with regard to the amendment of an indictment:

> A. An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.
>
> Before the trial begins the court may order an indictment amended with respect to a defect of substance. After the trial begins a mistrial shall be ordered on the ground of a defect of substance.

In a jury trial, the trial begins when the first prospective juror is called for examination. La. Code Crim. P. art. 761. The law on amending bills of information is set out in **State v. Johnson**, 93-0394, p. 3 (La. 6/3/94), 637 So.2d 1033, 1034-1035 (per curiam):

> La. Const. 1974, Art. I, § 13 provides that "[i]n a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him." This requirement protects the accused's right to prepare a defense and exercise fully his rights of confrontation and cross-examination. The bill of information must therefore inform the defendant of the nature and cause of the accusation against him in sufficient detail to allow him to prepare for trial, as well as to allow the court to determine the admissibility of the evidence. Accordingly, the state may not substantively amend a bill of information to charge a new offense once trial has begun. [Citations omitted.]

In the instant matter, the State requested the amendment before the first prospective juror was called. Therefore, it was entitled to amend the bill. The trial court did not err in overruling the defendant's objection to the amendment. Following the rearraignment of the defendant, the defendant moved for a continuance, which the trial court denied.

Louisiana Code of Criminal Procedure article 489 provides in pertinent part:

> If it is shown, on motion of the defendant, that the defendant has been prejudiced in his defense on the merits by the defect, imperfection, omission, uncertainty, or variance, with respect to which an amendment is made, the court shall grant a continuance for a reasonable time. In determining whether the defendant has been prejudiced in his defense upon the merits, the court shall consider all the circumstances of the case and the entire course of the prosecution.

The purpose of the continuance is the prevention of prejudicial surprise to the defendant. The defendant has the burden of establishing that an amendment has prejudiced the defense. Further, the trial court has great discretion in deciding whether to grant a continuance, and his decision will remain unless he arbitrarily or unreasonably abuses that discretion. **State v. Davis**, 385 So.2d 193, 197-198 (La. 1980).

The defendant has failed to demonstrate that his defense was prejudiced as a result of the amendment to the bill. The defendant knew he was being tried for DWI, third offense. The present charge and the two predicate convictions were clearly set out in both the original bill of information and the amended bill of information. There was no element of surprise. See **State v. Ignot**, 29,745, pp. 17-18 (La. App. 2 Cir. 8/24/97), 701 So.2d 1001, 1014, writ denied, 99-0336 (La. 6/18/99), 745 So.2d 618. The only change to the original bill of information was to the date of the guilty plea for a predicate DWI committed on December 13, 2002. The date of the commission of the crime, the statute violated, the parish and city, and the bill of information number all remained unaltered. The change made to the bill of information was minor and non-substantive. As pointed out by the trial court:

> A review of this matter seems to me that there was a typographic error made on the bill concerning the date. To make it a hundred percent accurate, upon the request of the State, the Court allowed the bill to be amended, and the defendant was re-arraigned. Those are the facts.
>
> Everything was exactly the same. The charge was the same. Everything was the same. It was a mere technicality, a mere date that was changed. The Statute upon which the defendant was being tried was not changed, and absolutely changed nothing. The date didn't change the strategy, trial strategy. Could not change anything. Now, so we have a mere technicality that was amended, and that was all.

As there was no showing of prejudice to the defendant, the trial court did not err in denying the motion for continuance.

As to the defendant's contention that he was prejudiced because the trial court did not advise him, upon rearraignment, of his right to waive trial by jury, the issue is not properly before us. Under La. Code Crim. P. art. 555, any irregularity in the arraignment, including a failure to read the indictment, is waived if the defendant pleads to the indictment without objecting thereto. When the defendant was rearraigned, he pled not

guilty. The only objection upon rearraignment was to the trial court's denial of a continuance. Because the defendant did not object to not being informed by the trial court of his right to waive trial by jury, the issue is waived. See **Ignot**, 29,745 at 18, 701 So.2d at 1014.

Moreover, we find that, the waiver issue notwithstanding, the defendant's rearraignment was wholly unnecessary. Where the amendment of a charging instrument is made to cure deficiencies, not to alter the nature of the crime, a defendant is without a right to be rearraigned and is not entitled to an opportunity to file the usual pretrial motions upon the amended bill. **State v. Strother**, 362 So.2d 508, 509 (La. 1978). Furthermore, under these circumstances, the defendant's guilty plea at his arraignment on his original indictment applied to the amended indictment. See **State v. Bluain**, 315 So.2d 749, 752 (La. 1975). Thus, given the minor amendment made to the bill of information, which had no effect on the present charge or the two predicate convictions, the defendant had no right to be rearraigned and was not entitled to a continuance.

These assignments of error are without merit.

ASSIGNMENTS OF ERROR NOs. 5, 6 and 7

In these related assignments of error, the defendant argues that the trial court erred in denying his motion in limine[7] and admitting into evidence his refusal to take an Intoxilyzer test; and the trial court erred in instructing the jury that his refusal to submit to a chemical test may be considered in determining guilt.

During trial, Trooper Kimball testified that after he arrested the defendant for DWI, he took him to the Houma Police Department. The defendant was brought to the Intoxilyzer room where he was read his rights relating to taking a breath test. The defendant signed the rights form. Trooper Kimball offered the defendant the Intoxilyzer test. The defendant refused to give him a breath sample for the test.

[7] In his motion in limine, the defendant sought to prevent the introduction into evidence of his refusal to take a breath test.

At the time of the offense, La. R.S. 32:666(A)(2)(c) specifically provided for the admissibility of the defendant's refusal to take a chemical test:[8]

> Evidence of his refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person, regardless of age, was driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of alcoholic beverages or any abused substance or controlled dangerous substance as set forth in R.S. 40:964.

Accordingly, we find the trial court did not err in admitting the defendant's refusal into evidence. See **State v. Washington**, 498 So.2d 136, 138 (La. App. 5 Cir. 1986). The ruling on the motion in limine was correct.[9]

The defendant further contends that the trial court erred in instructing the jury that his "refusal to submit to a chemical test may be considered in determining" his guilt.[10] This statement mischaracterizes the trial court's jury charge relating to the defendant's refusal to submit to a chemical test. In charging the jury on this issue at the conclusion of the trial, the trial court stated the following:

> In all other cases, a person under arrest for driving while intoxicated may refuse to submit to a chemical test. If you find that the defendant did refuse to submit to a chemical test, you may consider that fact in determining whether he was driving under the influence of alcohol. Although you may consider the fact that defendant refused to take a chemical test, the refusal creates no presumption that the defendant was intoxicated. In other words, if the defendant refused to take a chemical test, that fact alone is not sufficient to prove that the defendant is guilty. Evidence of refusal to take a chemical test may be considered in light of all of the other evidence and you, as triers of fact, shall determine what weight, if any, you think such verdict deserves.

Evidence of refusal to submit to a chemical test is relevant and admissible, and the weight of such evidence, as pointed out by the trial court, is to be determined by the trier

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[8] A chemical test includes a test of the person's blood, breath, urine, or other bodily substance for the purpose of determining the alcoholic content of his blood. La. R.S. 32:661(A)(1).

[9] In his brief, the defendant asserts that La. R.S. 32:666 provides that only in the event where a person has previously twice refused to take a chemical test is his present refusal to take a test admissible in evidence. The defendant misreads the law. Under La. R.S. 32:666(A)(1)(a)(i), a person may not refuse to submit to a chemical test if he has refused to submit to such test on two previous and separate occasions of any previous such violation. However, while the taking of the chemical test becomes mandatory after so many refusals, the person's refusal to submit to a chemical test, regardless of whether it is his first, second, or subsequent refusal, is admissible as evidence in any criminal action or proceeding. See the 2003 version of La. R.S. 32:666(A)(2)(c).

[10] The defendant does not brief this jury charge issue, which is raised in assignment of error 6. We, nevertheless, address the issue.

of fact. See **Washington**, 498 So.2d at 138; La. R.S. 32:666.[11] The jury charge was proper.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 8

In his eighth assignment of error, the defendant argues that the trial court erred in allowing him to be fingerprinted during trial so the State's expert could compare those prints to the defendant's prints from the two predicate convictions. Specifically, the defendant contends that taking his prints violated his privilege against self-incrimination.

Following the dismissal of the jury and prior to opening statements, the State informed the trial court that it needed to fingerprint the defendant so that its fingerprint expert could compare and match those prints to the prints on the bills of the defendant's prior DWI convictions. The defendant objected on the grounds that giving his fingerprints was "[g]iving evidence against himself." The trial court overruled the objection and allowed the defendant's fingerprints to be taken.

A defendant's privilege against self-incrimination is not violated by taking his fingerprints in open court. Requiring a defendant to supply evidence of his identity does not violate the Fifth Amendment. **State v. House**, 320 So.2d 181, 182 (La. 1975). Accordingly, the trial court did not err in allowing the defendant to be fingerprinted.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 9

In his ninth assignment of error, the defendant argues that the trial court erred in failing to grant a mistrial when the testifying arresting officer commented about what was being shown on the videotape of the defendant's DWI arrest. Specifically, the defendant contends that Trooper Kimball's extemporaneous comments to the jury about what he felt the arrest tape showed constituted a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law.

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[11] See also **State v. Walker**, 2005-0875, p. 4 (La. App. 4 Cir. 3/29/06), 930 So.2d 94, 96, where the court stated: "Refusal to take the Intoxilyzer test is admissible as evidence of intoxication under La. R.S. 32:666."

At trial, the prosecutor played for the jury the police videotape of the defendant's field sobriety test and subsequent arrest by Trooper Kimball. As the videotape was initially played, the prosecutor asked Trooper Kimball: "Trooper, generally can you tell us what we're going to be looking at, please." As Trooper Kimball began explaining what was happening during the first few moments of the videotape, the defendant objected, stating: "I'll object to the Officer extemporizing over the tape, because he's giving his personal opinion of what he sees to the jury. The tape should speak for itself. We do not need someone to tell the jury what they're supposed to be seeing."

Following argument, the trial court sustained the defendant's objection stating: "So it's the ruling of this Court that the Trooper will not be allowed to narrate over the videotape." The trial court further explained that after the videotape was played in its entirety, "the State will be allowed to question the witness concerning any portions of the tape."

At this point, the defendant moved for a mistrial under La. Code Crim. P. art. 775. The defendant argued that, because of Trooper Kimball's describing the events on the videotape to the jury before he had an opportunity to object, there was a legal defect in the proceedings that would make any judgment entered on a verdict reversible as a matter of law.[12] The trial court denied the motion for a mistrial, finding that "the statements, if any, would not be prejudicial to the defendant's case." The trial court did not admonish the jury.

Louisiana Code of Criminal Procedure article 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. However, a mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. **State**

[12] See La. Code Crim. P. art. 775(3).

v. Berry, 95-1610, p. 7 (La. App. 1 Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

The testimony in question, described by the defendant as Trooper Kimball "extemporizing over the tape," is the following:

> At this point here I'm behind with my lights and he's pulled into the Exxon Station. I just advised him to get his driver's license, registration and insurance. At this point right here I had a personal . . . from when the car was on, I failed to turn it on. Sometimes I forget to turn the button or to get the mike to work at the total beginning of the stop. The mike you're picking up is the one that's on my car right there.

Initially, we find that Trooper Kimball was responding to a direct question asked by the prosecutor and not extemporizing, as asserted by the defendant. Trooper Kimball's testimony was introductory in nature and served to orient the jury as to what it was viewing. Moreover, Trooper Kimball explained what he was telling the defendant immediately after stopping him, i.e., to get his license, etc., because there was no audio on the videotape at this point. The rest of Trooper Kimball's testimony, before the defendant's objection, is simply a brief explanation of why there is no audio on the videotape.

We find nothing in the limited, explanatory testimony of Trooper Kimball that so prejudiced the defendant that he was deprived of any reasonable expectation of a fair trial. There was no legal defect in the proceedings that made the judgment of guilty reversible as a matter of law. We find no abuse of the trial court's discretion in denying the motion for a mistrial. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.