NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 2248

STATE OF LOUISIANA

VERSUS

JOHN FITZGERALD BONVILLAIN, SR.

Judgment Rendered: May 2, 2008

* * * * * *

On Appeal from the Thirty-Second Judicial District Court
In and For the Parish of Terrebonne
State of Louisiana
Docket No. 443,293

Honorable George J. Larke, Jr., Judge Presiding

* * * * * *

Joseph Waitz District Attorney Juan Pickett Assistant District Attorney Houma, Louisiana	Counsel for Appellee State of Louisiana
Bertha Hillman Louisiana Appellate Project Thibodaux, Louisiana	Counsel for Defendant/Appellant John Fitzgerald Bonvillain, Sr.
John Fitzgerald Bonvillain, Sr.	Pro Se

* * * * * *

BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, John Fitzgerald Bonvillain, Sr., was charged by an amended grand jury indictment with one count of second degree murder (count one) in violation of LSA-R.S. 14:30.1, and two counts of obstruction of justice (counts two and three) in violation of LSA-R.S. 14:130.1. He pled not guilty to all charges. Prior to trial, the state dismissed count three. Following a jury trial on counts one and two, the defendant was found guilty as charged. For his conviction of second degree murder, the defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. For his conviction of obstruction of justice, the defendant was sentenced to imprisonment at hard labor for forty years. The trial court ordered that this sentence be served consecutive to the life sentence imposed on the second degree murder conviction. The court ordered that both sentences be served consecutive to the sentence on any other convictions. The defendant now appeals urging the following assignments of error by counseled and pro se briefs:

1. The trial court erred in allowing hearsay testimony of statements made by the victim to police officers.

2. The trial court erred in not allowing the defendant to represent himself at trial.

3. The trial court erred by allowing evidence of a prior conviction on the face of the indictment.

Finding no merit in the assigned errors, we affirm the defendant's convictions and sentences.

FACTS

At approximately 10:00 p.m. on September 9, 2004, twenty-four year old Cheryle McCann Bonvillain (the victim), was awakened by her mother, Diane Eskine, to accept a telephone call from the defendant. The defendant

was Cheryle's husband of approximately two years. Although Cheryle had recently filed for a divorce from the defendant and moved in with her mother, she and the defendant conversed regularly. Cheryle accepted the defendant's telephone call and she and the defendant engaged in what Eskine later described as a heated argument. Eskine returned to her bedroom and went back to sleep. Cheryle was never seen alive by her family again.

On September 10, 2004, when Eskine awoke, she noticed that Cheryle was not at home. Later, when Cheryle failed to return, Eskine contacted the Houma Police Department and filed a missing persons report. Subsequently, on September 19, 2004, Larry Fitch, an acquaintance of the defendant, contacted the police and advised that the defendant was responsible for Cheryle's murder. According to Fitch, on September 10, 2004, the defendant asked Fitch to take a ride with him. The defendant told Fitch that defendant killed his wife and showed Fitch the box where defendant placed her body. The box was located in the den of a vacant house the defendant owned on Main Street in Houma. According to Fitch, the defendant opened the box and showed him Cheryle's body.

In response to the information received from Fitch, officials from the Houma Police Department searched the defendant's Main Street house. Cheryle's decomposing body was located inside a large black metal box located in a locked room. The box was secured with a padlock and sealed with duct tape.

An autopsy revealed that the cause of Cheryle's death was suffocation. Toxicology testing of fluids removed from the victim's body revealed the presence of Diazepam and Alprazolam (Valium and Xanax). Dr. Susan Garcia, a forensic pathologist, opined that the amount and combination

of these drugs was sufficient to render the victim asleep. Dr. Garcia further opined that the victim was probably asleep when she was placed inside the metal box. She subsequently suffocated due to insufficient oxygen.

The defendant did not testify at the trial. Through the testimony of several witnesses, the defense attempted to establish that Fitch was responsible for the victim's murder.

COUNSELED AND PRO SE ASSIGNMENTS OF ERROR ONE

In his first counseled and pro se assignments of error, the defendant contends the trial court erred in allowing hearsay testimony to be introduced at his trial. Specifically, the defendant argues that the trial court should not have allowed Houma Police Department Officer Karl Beattie and Terrebonne Parish Sheriff's Deputy Derek Santiny to testify regarding statements previously made by the deceased victim on two separate occasions. He argues that allowing these witnesses to relate statements of the deceased victim violated his confrontation rights under the Sixth Amendment to the United States Constitution.

Prior to trial, the state filed a "Motion to Admit Evidence or Prior/Other Acts/Crimes" seeking to introduce evidence of several prior bad acts committed by the defendant. In the motion, the state listed: 1) an April 20, 2004 Terrebonne Parish Sheriff's Office complaint, wherein Cheryle alleged that the defendant held a gun to her head, held her captive, and threatened to kill her; 2) a February 5, 2004 Terrebonne Parish Petition for Protection from Abuse filed by Cheryle against the defendant; 3) a February 4, 2004 Houma Police Department complaint, wherein Cheryle alleged that the defendant forcibly removed her from a car by her hair, dragged her into another car, and left the scene driving erratically; and 4) a May 4, 2002 incident, wherein the defendant became enraged with his ex-wife, Robin

Bonvillain, and shot her in the arm with a firearm. The trial court held a pretrial **Prieur** hearing to determine the admissibility of this evidence.[1]

During the **Prieur** hearing, Officer Beattie testified that on February 4, 2004, he was dispatched to investigate the domestic complaint involving the victim. Officer Beattie described his encounter with the victim. He explained that, in response to questioning regarding the source of the domestic violence complaint, the victim hysterically stated that she and the defendant had been involved in an altercation and he threatened to kill her and shoot her in the kneecaps. In connection with this testimony, the defense lodged a hearsay objection challenging the admissibility of statements made by the victim. At this juncture, the trial court overruled the hearsay objection finding that the statement was admissible at the hearing as an excited utterance and/or present sense impression.

At the same hearing, Deputy Derek Santiny testified, over the defendant's hearsay objection, that he investigated the April 20, 2004 domestic violence incident reported by the victim. He explained that he made contact with the "hysterical and scared" victim at a local store. When Deputy Santiny asked the victim why she was so afraid, the victim said, "I'm scared [the defendant] is going to kill me."

At trial, Officer Beattie and Deputy Santiny both provided testimony consistent with their testimony at the **Prieur** hearing. The testimony regarding statements made by the victim indicating that she was afraid that the defendant would kill her was again met with a hearsay objection by the defense. The trial court overruled the objections and ruled that the statements were admissible to show motive and/or intent.

---

[1] The trial court held that the Petition for Protection from Abuse document was inadmissible. The probative value of the document was outweighed by the highly prejudicial nature of its contents. The court also excluded evidence regarding the defendant's shooting his ex-wife in the arm as highly prejudicial.

On appeal, the defendant now seeks review of the trial court's ruling allowing the alleged hearsay evidence to be introduced at his trial.[2] In support of his contention that the trial court allowed the state to violate his right to confront his accusers, the defendant cites the U.S. Supreme Court's decision in **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which prohibits the introduction of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. In **Crawford**, the Court specifically declined to define the term "testimonial," stating only that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." **Crawford,** 541 U.S. at 68, 124 S.Ct. at 1374. However, in **Davis v. Washington**, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Court revisited **Crawford** and specifically addressed the issue of whether "statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." **Davis**, 547 U.S. at 817, 126 S.Ct. at 2270.

In **Davis**, the victim initiated a 911 call while involved in a domestic disturbance with her former boyfriend. In response to the 911 operator's questions, the victim identified her attacker as Davis and described the specifics of the ongoing assault. At trial, the court admitted the recording of the 911 call despite the fact that the victim did not testify. After noting that **Crawford** was not helpful in characterizing the victim's statements as testimonial or nontestimonial, the Court delineated the following framework:

---

[2] The defendant abandons any other crimes evidence challenge to this particular evidence made in the court below. Furthermore, the defendant does not argue that the evidence was inadmissible under our Code of Evidence. The defendant's sole argument is based upon an alleged violation of his constitutional right to confront his accusers.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822, 126 S.Ct. at 2273-74.

After applying this test to the facts in **Davis**, the Court concluded that the victim's statements in the 911 call at issue were nontestimonial. The Court reasoned that "[a] 911 call ..., and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." **Davis**, 547 U.S. at 827, 126 S.Ct. at 2276. The Court noted that the victim was "speaking about events *as they were actually happening*, rather than describ[ing] past events" and that, "[a]lthough one might call 911 to provide a narrative report of a crime absent any imminent danger, [the victim's] call was plainly a call for help against bona fide physical threat." Id. The Court also found that the nature of the questions posed by the 911 operator indicated that the purpose of the interrogation was to "*resolve* the present emergency, rather than simply to learn ... what had happened in the past." Id. Finally, the Court noted the fact that the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even ... safe," indicated that the statements were nontestimonial. **Davis**, 547 U.S. at 827, 126 S.Ct. at 2277.

Considering the facts of the instant case, in light of the Court's decision in **Davis**, we find that the statements in question were nontestimonial. The statements do not come within the purview of any of the classes of testimonial statements mentioned in **Crawford.** As the state

correctly notes in its brief, each of the statements in question was made in the course of police interrogation and for the sole purpose of resolving the ongoing domestic situation. According to the officers, at the time of the statements, the victim was visibly shaken and afraid. Each time she was running from the defendant and she feared for her life. Furthermore, the questions posed by each officer and the victim's responses thereto were necessary to evaluate the situation under investigation at that particular time. See **United States v. Clemmons**, 461 F.3d 1057, 1060 (8th Cir. 2006) (finding that a police officer's questioning of a gunshot victim about who shot him at the scene, but after the shooting, was nontestimonial in that the primary purpose was to "enable [the officer] to assess the situation and to meet the needs of the victim."). Contrary to the defendant's assertions, the statements were nontestimonial in nature and, therefore, were not precluded by **Crawford's** Confrontation Clause analysis.

These assignments of error lack merit.

COUNSELED AND PRO SE ASSIGNMENTS OF ERROR TWO

In these assignments of error, the defendant contends the trial court erred in denying his request to act as his own counsel at trial. The defendant argues that because such an error is not subject to harmless-error analysis, his conviction must be reversed and the matter remanded for a new trial. We disagree.

The federal constitution grants an accused the right of self-representation, as does our state constitution. See U.S. Const. Amends. VI & XIV; LSA-Const. art. 1, § 13; **Faretta v. California**, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975); **State v. Penson**, 630 So.2d 274, 277 (La.App. 1 Cir. 1993). An accused has the right to choose between the right to counsel and the right to self-representation. **State v.**

Bridgewater, 2000-1529, p. 17 (La. 1/15/02), 823 So.2d 877, 894, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003). A defendant who exercises the right of self-representation must knowingly and intelligently waive the right to counsel. **Penson**, 630 So.2d at 277. See also **State v. Dupre**, 500 So.2d 873, 877 & 879-80 n.4 (La.App. 1 Cir. 1986), writ denied, 505 So.2d 55 (La.1987). When a defendant requests the right to represent himself, the defendant's technical legal knowledge is not relevant in determining if he is knowingly exercising the right to defend himself. A trial judge confronted with an accused's unequivocal request to represent himself need determine only if the accused is competent to waive counsel and is "voluntarily exercising his informed free will." **State v. Santos**, 99-1897, p. 3 (La. 9/15/00), 770 So.2d 319, 321 (per curiam) (quoting **Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541). Error in denying a defendant the right to self-representation is not subject to harmless-error analysis and results in reversal of conviction. See **Santos**, 99-1897 at p. 5, 770 So.2d at 322.

The record reflects that approximately one week before his scheduled trial, the defendant moved to dismiss his court-appointed counsel and requested that he be allowed to represent himself. At the hearing on the motion, which was held on the first day of trial, the defendant explained that he was dissatisfied with his counsel's representation in an unrelated case and no longer wished to have this counsel represent him in the instant case. Counsel for the defendant also advised the court of the dissension between him and the defendant, and asked to be allowed to withdraw.

Before ruling on the defendant's motion to represent himself at the trial, the court questioned the defendant as to whether he wished to have his counsel represent him on the pretrial motions that were scheduled to be heard that day. Ultimately, the defendant agreed to allow counsel to

continue representation at that point, since defendant was unfamiliar with the motions filed by counsel. The defendant stated, "I guess you can let him finish his work." The court denied counsel's request to withdraw on the pretrial motions and noted that it would later revisit the defendant's motion to represent himself as it related to the trial. Counsel objected to the court's ruling.

After ruling on the defendant's pretrial motions for change of venue and other crimes evidence, the trial court asked if the defendant still wished to represent himself. The defendant replied, "[y]es, I mean, I have no other choice." The defendant repeatedly indicated that he no longer trusted his counsel. After further questioning regarding the defendant's request to represent himself and the defendant's repeated insistence that he felt that he was being "forced" to represent himself, the court denied the defendant's request for self-representation and his counsel's motion to withdraw. The court reasoned that it "cannot feel 100 percent sure that [the defendant] clearly and unequivocally . . . wants to represent himself." The trial court was also concerned that defendant could not adequately represent himself on the murder charge, that is, he was not intelligently waiving his right to counsel. To protect the defendant's constitutional right to self-representation, the trial court assured the defendant that, if at any point during the trial he became dissatisfied with his counsel's representation in the instant case, the court would again entertain a motion from the defendant asserting his right to self-representation. In denying counsel's motion to withdraw, the court explained that counsel had a duty to represent his client.

Counsel represented the defendant throughout the entire trial. The defendant did not lodge any further objection to his counsel's representation or re-urge the motion to represent himself at any point during the trial.

While it is clear from our review of the record that counsel wished to withdraw from the defendant's case, the defendant's request to proceed pro se was not so clear. The defendant indicated that he wished to dispense with his counsel only because he did not believe he had another option; he felt forced to represent himself. The defendant's primary complaint was counsel's alleged failure to cooperate and the dissension that developed between them. However, it appears from the record that, if a level of reasonable cooperation could be restored, the defendant would not have opted to represent himself. At one point during the argument on the motion to represent himself, it was the defendant who requested a brief recess to confer with counsel to determine if an amicable relationship could be established.

The right to counsel is a fundamental one. For this reasons, the jurisprudence has engrafted a requirement that the assertion of the right to self-representation must be clear and unequivocal. Courts are encouraged to indulge in every reasonable presumption against waiver of counsel, and requests that vacillate between self-representation and representation by counsel are seen as equivocal. See **Bridgewater**, 2000-1529 at p. 19, 823 So.2d at 895.

Considering the equivocal nature of the defendant's request, especially in light of the trial court's concern over defendant's ability to adequately assume representation on the first day of trial, and willingness to hear another motion to dismiss if defendant was not satisfied with counsel's performance, we find the trial court's rulings to be reasonable. Moreover, we observe that this proceeding was a murder case, and the defendant was better served with representation by counsel. Accordingly, under the

particular facts and circumstances of this case, we find that the trial court did not err in denying the defendant the right to represent himself.

These assignments of error lack merit.

PRO SE ASSIGNMENT OF ERROR THREE

In his final pro se assignment of error, the defendant contends his conviction should be reversed because the amended indictment contained prejudicial information regarding a prior conviction. Specifically, the defendant points to count three of the amended indictment, which charged a second count of obstruction of justice. This count involved the unlawful and intentional tampering with evidence in the criminal investigation of the death of Ashley Scivicque.[3] Prior to the commencement of the defendant's trial, count three was dismissed and stricken from the amended indictment. On appeal, the defendant argues that the prosecutor's strike-through of the printed text of count three was insufficient to cure the prejudice caused by the inclusion of the unrelated charge in the indictment. Allowing the printed text of the charge to remain visible on the face of the indictment in this case, the defendant argues, was a prejudicial tactic utilized by the prosecutor to gain a conviction.

This pro se assignment of error is clearly without merit. While the defendant is correct in his claim that the prosecutor merely placed an "X" through the printed text of count three on the indictment, he is incorrect in his assertion that a new indictment, without any reference to count three, was necessary. Contrary to the defendant's assertions, the record before us reflects that the jury was never aware of the existence of count three in the indictment. As previously noted, count three was dismissed prior to the commencement of the defendant's trial. During the trial, when the

[3] Prior to trial in this matter, the defendant was convicted of manslaughter in connection with the murder of Ashley Scivicque.

indictment was read to the jury pursuant to LSA-C.Cr.P. art. 765, the minute clerk did not make any reference to the stricken charge. Thus, the jury was not made aware of the stricken text that remained on the indictment document at this time. Insofar as the defendant claims that a juror, upon "viewing the evidence after trial," actually viewed the indictment document and "in amazement" showed the stricken text to other jurors, we note that this claim is unsupported by the record. The record before us reflects that, at the conclusion of the presentation of evidence by the parties, the trial judge stated:

> At this time, Ladies and Gentlemen, what y'all can do is maybe break up into some little groups or whatever or just one at a time – I mean, y'all can stand up. We have all the items, ***the exhibits, pieces of evidence*** that's been allowed here. You can look at the pictures and read the statements.

(Emphasis added).

Thereafter, the jury viewed the evidence. Because the indictment is not evidence, it would not have been included in the items presented to the jury for viewing at this time. Since the record does not support the defendant's assertion that the jury was allowed to view the indictment document as evidence, and the jury was not made aware of the deleted charge during the reading of the indictment, the defendant has not established any prejudice from the text remaining on the amended indictment document.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.