NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0327

STATE OF LOUISIANA

VERSUS

MARLON D. WASHINGTON

Judgment Rendered: MAY 04 2012

* * * * * * * * * *

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 05-08-0418

Honorable Donald Johnson, Judge Presiding

* * * * * * * * * *

Hillar C. Moore, III
District Attorney
Dylan Alge
Assistant District Attorney
Baton Rouge, LA

Counsel for Appellee
State of Louisiana

Frank Sloan
Louisiana Appellate Project
Mandeville, Louisiana

Counsel for Defendant/Appellant
Marlon D. Washington

* * * * * * * * * *

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

EJG - Gaidry, J. - concurs with reasons
McDonald, J. concurs for reasons assigned by Judge Gaidry

HUGHES, J.

The defendant, Marlon D. Washington, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty of the responsive offense of manslaughter, in violation of LSA-R.S. 14:31. The State filed a habitual-offender bill of information and after a hearing the defendant was adjudicated a third-felony habitual offender.[1] The trial court sentenced the defendant to seventy years imprisonment at hard labor to be served without the benefit of probation, parole, or suspension of sentence.[2] The defendant now appeals, assigning error to the trial court's playing of the 911 telephone call audio- recording in the presence of the jury during jury deliberations. For the following reasons, we affirm the conviction and habitual-offender adjudication, vacate the sentence, and remand for resentencing.

STATEMENT OF FACTS

On December 23, 2007 Harold Flowers, III (the victim), was shot and killed outside of his home on Leonidas Drive in Baton Rouge, Louisiana. A few minutes before the shooting took place, the victim approached a red vehicle that drove up to his residence while he was outside. The victim had an altercation with the passenger (the defendant) who exited the vehicle. Donald Carter, the driver, had been riding and smoking cigars with the defendant that day after picking him up at a store. Carter stated that when he drove up to a corner on Leonidas Drive, the victim approached the vehicle and began arguing with the defendant about marijuana. The victim's son, Jordan Young, was outside with his father at the

[1] The defendant's habitual-offender status is based on a May 15, 2002 guilty plea to theft at a value of three hundred dollars or more, but less than five hundred dollars (a violation of LSA-R.S. 14:67) and a May 17, 2007 guilty plea to accessory after the fact to first degree murder (a violation of LSA-R.S. 14:25 and LSA-R.S. 14:30).

[2] The illegality of the parole restriction in this case will be discussed in the sentencing error section.

time. After the brief altercation, the defendant reentered the vehicle and Carter drove away.

A few minutes later, the vehicle returned and the defendant exited the vehicle again and shot the victim four times. The defendant reentered the vehicle and Carter drove away from the scene. In identifying the defendant as the shooter, Jordan Young indicated that the defendant was the individual involved in the altercation with his father, and that the defendant, moments later, returned and shot the victim. The victim died as a result of the shooting, having sustained four gunshot wounds, including two fatal chest wounds.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In assignment of error number one, the defendant argues that the trial court erred in allowing the jury to rehear the audio-recording of the 911 telephone call during jury deliberations. The defendant argues that the 911 audio-recording unduly influenced the jury. The defendant concludes that the trial court was not vested with the discretion to make an exception to the requirement that jurors rely on their memory in reaching a verdict as provided in LSA-C.Cr.P. art. 793(A). In assignment of error number two, the defendant contends that the playing of the 911 telephone call to the jury during jury deliberations did not constitute harmless error. The defendant argues that the 911 recording was important evidence because the caller described the vehicle in which the shooter left the scene and provided a general description of the shooter. The defendant notes that the 911 caller did not identify herself and did not appear at trial. The defendant further notes that during closing and rebuttal arguments, the State stressed the importance of the 911 recording. Concluding that it cannot be said that the verdict actually rendered in the case was surely unattributable to the alleged error, the defendant asserts that the State's witness testimony as to the identification of the shooter was uncertain and lacked credibility.

During the trial, the State introduced the audio-recording of the 911 call made by an unidentified female at 4:13 p.m., immediately following the shooting. The defense attorney stated that he had no objection to the playing of the 911 call but noted his objection to the admission of the police dispatches following the caller's report of the shooting. The State agreed that the dispatch portion of the audio evidence would not be played. The State sought and received permission to publish the evidence. Just before resting its case, the State sought to play previously admitted evidence including recorded witness statements, a prison tape, and the 911 call. The defense objected, noting that the jury would be able to bring published evidence into the jury room, and further noting that anything testimonial in nature should not be published. The State agreed with the defense regarding the statements but disagreed as to the 911 call and the prison tape consisting of a telephone call, arguing that those items were nontestimonial. Ultimately, the defense acquiesced as to the 911 call only.[3]

The 911 caller reported, "Someone just got shot." The caller informed the 911 dispatcher of the location of the shooting. The caller further indicated that the victim was on the ground and the shooter was travelling in a red or burgundy vehicle, also occupied by another black male, with license plate number OVP269. The caller further indicated that one of the male occupants, whom she believed to be the shooter, wore a red hat, while the other had dreadlocked hair. Finally, the caller stated that the driver took a left turn after exiting the neighborhood.

After the jury retired for deliberations, the trial judge received a note from the jury requesting to hear statement recordings and the 911 call again. The parties

[3] The record is unclear as to whether the 911 recording was played for the jury both at the time of its admission and again just before the State rested its case. The minutes indicate that it was only played once during the trial while the trial judge below and the State on appeal indicate that the recording was played twice before deliberations began.

agreed that the request should be denied as to other items, but disagreed as to the 911 call request. The State argued that the recording of the 911 call was not testimonial while the defense argued the opposite, contending that it provided a description of a past event. In overruling the defense objection, the trial court found that although the shooter had left the scene at the time of the call, the caller was under a state of excitement based on the tone of her voice and the closeness in time to the incident. The trial court allowed the State to replay the 911 call in open court before sending the jury back to the jury room for further deliberations.

Louisiana Code of Criminal Procedure article 793(A), in pertinent part, provides:

> [A] juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence at issue. Testimony shall not be repeated to the jury. Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.

The general rule as expressed by Article 793 is that the jury is not to inspect written evidence except for the sole purpose of a physical examination of the document itself to determine an issue that does not require the examination of the verbal contents of the document. **State v. Perkins**, 423 So.2d 1103, 1109-10 (La. 1982). The prohibition against repeating testimony to the jury is reflected in jurisprudence applicable in this state since the earliest times and was first codified by Article 395 of the Louisiana Code of Criminal Procedure of 1928. **State v. Freetime**, 303 So.2d 487, 488 (La. 1974). In **Freetime**, our Supreme Court explained the rationale of the article as follows:

> The policy choice thus represented [by Article 793] is to require jurors to rely on their own memory as to verbal testimony, without notes and without reference to written evidence, such as to depositions or transcribed testimony. The general reason for the prohibition is a fear that the jurors might give undue weight to the limited portion of the verbal testimony thus brought into the room with them. However, such prohibition is contrary to the growing trend to permit discretion in the

> trial court, in the absence of a statutory prohibition, to accede to jury requests to see exhibits and writings (except depositions).

303 So.2d at 488-89.

Article 793(A) addresses which evidence, once properly admitted at trial, may be reviewed by the jury during its deliberations.

The evidence in this case is the statement of a 911 caller who was not identified and unavailable at trial. The female caller witnessed the shooting, but was not a participant in, or victim of, the crime. We believe her statement was admissible at trial as an excited utterance, a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition, pursuant to LSA-C.E. art. 803(2).

The admission of this hearsay declaration does not run afoul of the Sixth Amendment right of confrontation as analyzed in **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The statement was not given to a police officer and there was no intent that it be used in a later judicial proceeding. See **State v. Heggar**, 39,915 (La. App. 2 Cir. 8/17/05), 908 So.2d 1245, 1249.

However, the words of the caller should not have been re-played during jury deliberations. The "testimony" referred to in Article 793(A) is commonly understood to mean words spoken from the witness stand, or in this case, words spoken outside the courtroom but allowed into evidence under an exception to the hearsay rule. It is not the equivalent of the "testimonial" evidence analyzed in **Crawford** to determine whether a witness needs to be present at trial subject to cross-examination in order to satisfy the Confrontation Clause.

We distinguish those cases where the 911 caller (or speaker who was video or audio recorded) was a participant in or victim of a crime as it was occurring. In these situations the evidence is considered "res gestae" and not "testimony" within the meaning of Article 793, and thus may be viewed during jury deliberations. In

State v. Davis, 92-1623 (La. 5/23/94), 637 So.2d 1012, 1025, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359, the Louisiana Supreme Court likened a videotape to a photograph, a reproduction of a physical object or scene, and permitted its viewing by a jury during deliberations. In **State v. Brooks**, 01-0785 (La. 1/14/03), rehearing denied, (La. 3/21/03), 838 So.2d 725, 727 (per curium), the supreme court addressed a videotape that included an audio rendering of a drug transaction as it happened, finding that a videotape/audiotape recording of a crime as it occurs is neither written evidence nor testimony under Article 793 and may be played during jury deliberations.

In the instant case, the speaker on the audiotape was not a participant or involved in the crime as it happened. She called and reported that "someone just got shot" and gave a description of the shooter and the car he was travelling in and stated that the car took a left turn after exiting the neighborhood. The caller was excited because she had just witnessed a shooting, but her words were not part of the event as it occurred. Her words were properly admitted at trial, even though the caller was unavailable, as an excited utterance, but allowing her words to be played again during deliberations amounts to allowing the jury to have a transcript of the testimony of a witness.

We conclude that the 911 tape should not have been played again for the jury during its deliberations. However, we also conclude the error was harmless.

Given the 911 tape was properly admissible in evidence and had been played for the jury during the trial, and considering the other evidence, including the eyewitness testimony of Jordan Young, we also conclude that the conviction was surely unattributable to the error, and thus affirm the defendant's conviction.

SENTENCING ERROR

Under LSA-C.Cr.P. art. 920(2), which limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without

inspection of the evidence, we have discovered a sentencing error. In sentencing the defendant, the trial court indicated that the sentence would be served without the benefit of parole, probation, or suspension of sentence although neither the penalty provision of the underlying statute nor the habitual-offender law authorized such a restriction on the defendant's parole eligibility. LSA-R.S. 14:31(B); LSA-R.S. 15:529.1(A)(1)(b)(i). While LSA-R.S. 15:529.1(G) prohibits probation or suspension of sentence, it does not prohibit parole eligibility. Thus, the inclusion of the parole restriction rendered this sentence illegal.

In **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, 801-02, the Louisiana Supreme Court recognized that appellate courts have the authority to correct an illegal sentence, despite the failure of either party to raise the issue in the district court or on appeal if the correction is ministerial. LSA-C.Cr.P. art. 882(A). Herein, the sentencing error noted involves discretion. The penalty for manslaughter is imprisonment at hard labor for not more than forty years. LSA-R.S. 14:31(B). Thus, pursuant to LSA-R.S. 15:529.1(A)(1)(b)(i) and LSA-R.S. 15:529.1(G), the sentencing range herein is 26.6 years to 80 years imprisonment without the benefit of probation or suspension of sentence.[4] As the Supreme Court has previously admonished, "[t]o the extent that the amendment of defendant's sentence entails more than a ministerial correction of a sentencing error, the decision in **State v. Williams**, 00-1725 (La.11/28/01), 800 So.2d 790, does not sanction the *sua sponte* correction made by the court of appeal on defendant's appeal of his conviction and sentence." **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Thus, we must vacate the sentence and remand for resentencing.

[4] All references made herein to LSA-R.S. 15:529.1 are made to that provision as it formerly existed prior to its amendment by 2010 La. Acts Nos. 69 and 911.

CONVICTION AND HABITUAL-OFFENDER ADJUDICATION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0327

STATE OF LOUISIANA

VERSUS

MARLON D. WASHINGTON

GAIDRY, J., concurring with reasons.

Although I agree with the disposition as suggested by my colleague, I disagree with the reasoning related to the application of Louisiana Code of Criminal Procedure Article 793 and the replay of the 911 call to the jury found in the report, and therefore concur with the following reasons:

Article 793 of the Code of Criminal Procedure presumes that the jury will give undue weight to any written exhibit that it examines for its verbal contents during deliberations. *State v. Johnson*, 541 So.2d 818, 824-25 (La. 1989).

Black's Law Dictionary defines "testimony" as follows, "Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Black's Law Dictionary 1485 (9th ed. 2009). Under the plain language of Article 793, a video or audio recording of a crime as it occurs is neither written evidence nor testimony. *State v. Brooks*, 2001-0785 (La. 01/14/03), 838 So.2d 725, 727 (per curiam). An audio recording, or a

videotape recording that captures audio as well, is not considered testimony within the meaning of the statute. Subject to the explicit restrictions imposed by that statute, and by our jurisprudential rule precluding the use of a defendant's confession in permitting the jury's review of properly-admitted evidentiary exhibits during its deliberations, including audiotapes and videotapes. *Brooks*, 838 So.2d at 728.

In *Brooks*, the defendant was convicted of three counts of distribution of cocaine after the trial court permitted the jury to view videotapes of the drug transactions during deliberations. The court of appeal concluded on original hearing that "allowing the jury to view and listen to the tapes during deliberations was the same as having testimony repeated to the jury...." *State v. Brooks*, 2000-0953 (La.App. 5th Cir. 1/30/01), 777 So.2d 643, 648. On the State's application for rehearing, the court of appeal went further and stated that "[t]he viewing of the videotape during the deliberations constituted testimony repeated to the jury...." *State v. Brooks*, 2000-0953 (La.App. 5th Cir. 2/28/01), 781 So.2d 1266 (on rehearing) (per curiam). In reversing the court of appeal's opinion, the Louisiana Supreme Court noted the following: "[T]he audible portions of the videotape recorded not the testimony of the defendant or the undercover agent who made the transactions, but the res gestae statements made by the parties as the offense occurred." *State v. Brooks*, 838 So.2d at 727. The Court cited Louisiana Code of Evidence Article 801(D)(4) (excluding from the hearsay definition things said and done "through the instructive, impulsive and spontaneous words and acts of the participants . . . which are necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it

one continuous transaction.") and former La. R.S. 15:447[1] ("Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants....").

Herein, the statements captured on the 911 audio recording are not under oath, and they are not the product of questioning by a member of the bar. The evidence at issue is a record of events made under the immediate pressure of the occurrence, and, as in the normal course of human events, the spoken word is an integral facet of the events recorded. I find that the trial court did not abuse its sound discretion in permitting the jury's review of the properly-admitted audio recording during its deliberations. Furthermore, the trial court showed judicial restraint in not allowing the jury to take the exhibit into the deliberation room to listen as many times as desired. Instead, the audio recording was simply replayed in a controlled manner in open court in the presence of all the parties. It was not error to replay the 911 tape under the facts of this case.

[1] Repealed by 1988 La. Acts No. 515, Section 8 (which enacted the Louisiana Code of Evidence).