NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0576

STATE OF LOUISIANA

VERSUS

RACHEL McKEE SMITH

Judgment Rendered: September 12, 2008.

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On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 04-06-0068

The Honorable Todd Hernandez, Judge Presiding

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Doug Moreau
District Attorney
Baton Rouge, La.
Aaron D. Brooks
Assistant District Attorney

Counsel for Plaintiff/Appellee,
State of Louisiana

Prentice White
Baton Rouge, La.

Counsel for Defendant/Appellant,
Rachel Smith

* * * * *

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

CARTER, C.J.

The defendant, Rachel McKee Smith, was charged by grand jury indictment with the second degree murder of Charles Jumonville, III, a violation of La. R.S. 14:30.1. The defendant entered a plea of not guilty. Prior to trial, the trial court held evidence that the defendant had shot the victim prior to the instant offense would be admissible at trial. The defendant applied to this court for supervisory relief concerning the ruling, but the writ application was denied. **State v. Smith**, 2007-0592 (La. App. 1 Cir. 5/24/07) (unpublished). The defendant then sought supervisory relief from the Louisiana Supreme Court, but that writ application also was denied. **State v. Smith**, 2007-1125 (La. 6/1/07), 958 So.2d 1178. The trial court also denied a defense motion to suppress statements made in connection with a videotaped interview with the defendant. This court denied the defendant's subsequent application for supervisory relief concerning that ruling. **State v. Smith**, 2006-2443 (La. App. 1 Cir. 12/22/06) (unpublished).

Following a jury trial, the defendant was found guilty as charged by unanimous verdict. She was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. She now appeals, contending that the trial court erred in allowing testimony from Robert Cobb and James Bagents concerning her bad attitude and unfavorable past because they did not witness the January 2006 shooting of the victim, and neither of them called the police to report the alleged crime. She also contends that the photographic line-up presented to Graydon Clemons was unduly suggestive because her photograph was the only one that showed more than just her head. Lastly, she contends her statements made after the police

stopped her in her vehicle were the result of her hysteria and her reaction to being detained, and not the result of her doing anything wrong.

For the reasons that follow, we affirm the conviction and sentence.

FACTS

On March 28, 2006, at approximately 7:45 a.m., Clemons discovered a woman burning something on his property in Amite. He spoke to the woman and noted her vehicle's license plate number before telling her she had to leave. The woman left two five-gallon kerosene containers and a shovel at the scene. After the woman left, Clemons discovered she had been burning the body of the victim, Charles Jumonville. On the day of the incident and in court, Clemons identified the defendant as the woman at the scene. The victim was the defendant's boyfriend and had shared an apartment in Baton Rouge with her. He had been shot to death. He had suffered four gunshot wounds, including two wounds to his back.

On March 28, 2006, between 8:30 a.m. and 9:30 a.m., the defendant contacted Ruby Edwards, a family member who lived near Clemons, and asked if there was any police activity on Clemons's property. The defendant told Edwards that she had accidentally hit a lady and that the lady had noted her license plate number.

Also on March 28, 2006, after being stopped by the police while leaving the apartment she had shared with the victim, the defendant confessed to shooting the victim. She later again confessed in a videotaped interview. The murder weapon, a .45 caliber handgun, still cocked, was recovered from the defendant's purse in the apartment she shared with the victim. There were bullet holes in the apartment. Four spent .45 caliber casings, which had

been fired from the defendant's gun, were recovered from a trash bag in the kitchen. Another .45 caliber casing, which was also matched to the defendant's gun, was found under the couch. A .45 caliber casing and a .45 caliber bullet, which were also matched to the defendant's gun, were in the trash can in the bathroom. A .45 caliber bullet, which was also matched to the defendant's gun, was found in the hallway door. A pillow in the apartment had a contact entrance hole, indicating a gun had been in contact with the pillow when fired. A .40 caliber handgun, not ready to fire, was recovered from the victim's bag.

EVIDENCE OF DEFENDANT'S PRIOR SHOOTING OF VICTIM

In assignment of error number one, the defendant argues her possible prior bad act of shooting the victim should not have been used to support the inference that she committed the instant offense because the evidence was unduly prejudicial.

It is well settled that courts may not admit evidence of other crimes to show the defendant as a person of bad character who has acted in conformity with her bad character. La. Code Evid. art. 404B(1). Evidence of other crimes, wrongs, or acts committed by the defendant is generally inadmissible because of the substantial risk of grave prejudice to the defendant. However, the State may introduce evidence of other crimes, wrongs, or acts if it establishes an independent and relevant reason such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. La. Code Evid. art. 404B(1). Upon request by the accused, the State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. Even when the

other crimes evidence is offered for a purpose allowed under Article 404B(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. The State also bears the burden of proving that the defendant committed the other crimes, wrongs, or acts. **State v. Rose**, 2006-0402, pp. 12-13 (La. 2/22/07), 949 So.2d 1236, 1243.

Although a defendant's prior bad acts may be relevant and otherwise admissible under Article 404B(1), the court must still balance the probative value of the evidence against its prejudicial effects before the evidence can be admitted. La. Code Evid. art. 403. Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. **State v. Germain**, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. **Id**. See also **Old Chief v. United States**, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." **Rose**, 2006-0402 at p. 13, 949 So.2d at 1243-1244.)

Prior to trial, the State filed notice of other acts evidence setting forth that on January 14, 2006, the defendant shot the victim in the leg, and the victim fled from the Janice Street duplex yelling, "You shot me." The statement was heard by Robert Cobb. The notice indicated that defense counsel had previously been notified about the incident and provided with

the police reports concerning the incident. The notice also set forth that the other acts evidence was offered as evidence of the defendant's motive, intent, plan, identity, and absence of mistake or accident relevant to the principal crime before the court.

Robert Cobb testified at a hearing held in connection with the notice. Cobb had known the victim for over fifteen years and the defendant for approximately two years. He conceded he did not like the defendant. Cobb lived in the first of four duplexes on Janice Street. The defendant and the victim had lived in the fourth duplex, approximately seventy-five yards away from Cobb's duplex. In January 2006, Cobb heard a gunshot and ran outside with his gun to investigate. He saw the victim running out of his duplex, grabbing his leg, and telling the defendant, "Bitch, you shot me." The defendant was trying to apologize to the victim, but he told her to stay away from him. Cobb indicated the defendant and the victim often fought. Cobb went back into his duplex and came back out intending to offer to drive the victim to the doctor, but the defendant and the victim had already left to go to the hospital.

Cobb conceded he had heard gunshots in his neighborhood before. He also conceded he never saw anyone with a weapon on the night of the incident. He stated he did not report the shooting to the police because the victim did not want him to do so. He indicated the victim claimed the shooting was an accident, but he did not believe him.

James Bagents also testified at the hearing on the notice. He had been involved in a relationship with the defendant after meeting her in a strip club in Gonzales. He also helped her to purchase a car. He indicated three or

four days after the victim had been shot in the leg, the defendant stated, "I shot that son-of-a-bitch."

The trial court held that the evidence of the January 14, 2006, shooting of the victim was admissible. The defendant applied to this court for supervisory relief concerning the trial court's ruling, but the writ application was denied. **State v. Smith**, 2007-0592 (La. App. 1 Cir. 5/24/07) (unpublished). This court noted in pertinent part: "We find no error in the trial court's ruling that evidence of the victim's shooting in January 2006 is admissible at trial as other crimes, wrongs[,] or acts evidence." The defendant then sought supervisory relief from the Louisiana Supreme Court, but that court also denied her writ application. **State v. Smith**, 2007-1125 (La. 6/1/07), 958 So.2d 1178.

A thorough review of the evidence introduced at trial convinces us that our pretrial determination was correct. The State had an independent and relevant reason for presenting the Article 404B(1) evidence at issue, *i.e.*, to prove the defendant's motive, intent, plan, identity, and absence of mistake or accident. The prejudicial effect to the defendant from any challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence.

This assignment of error is without merit.

MOTION TO SUPPRESS IDENTIFICATION

In assignment of error number two, the defendant argues that even though Clemons took a short time to select her photograph from the photographic array, he had no choice but to select her photograph due to the

difference between the defendant's photograph and the other five photographs.

A defendant who seeks to suppress an identification must prove two things. First, she must prove that the identification itself was suggestive. Second, she must show that there was a likelihood of misidentification as a result of the identification procedure. The factors to be considered in assessing reliability are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the witness's level of certainty; and (5) the time between the crime and the confrontation. **State v. Caples**, 2005-2517, pp. 6-7 (La. App. 1 Cir. 6/9/06), 938 So.2d 147, 152, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684.

An identification procedure is suggestive if it unduly focuses a witness's attention on the suspect. Strict identity of physical characteristics among the persons depicted in a photographic array is not required; however, there must be sufficient resemblance to reasonably test the identification. **State v. Johnson**, 2000-0680, p. 7 (La. App. 1 Cir. 12/22/00), 775 So.2d 670, 677, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066.

Prior to trial, the defendant moved to suppress the identification made by Clemons in selecting her photograph as the person who was at the scene with the victim's body and who drove off in a red Pontiac with Louisiana License LZZ991.

Clemons testified at the hearing on the motion. He owned timber lands and a sawmill in the Amite area. On March 28, 2006, at approximately 7:30 a.m., he saw a plume of smoke on his property and went to investigate. He

saw a red Trans Am parked at the back of his sawmill and drove to the vehicle. He saw a young woman he had never seen before tending to a fire. He saw no one else in the area. The woman approached his truck, and he asked her what she was doing there. The woman stated she would leave but asked if she could take her gas can with her. Clemons asked the woman where she was from, and she replied that she was from Amite. He noticed she was wearing a dark, pullover, nylon jacket. Clemons told the woman she could get her gas can, but she had to leave. The woman retrieved her gas can and placed it at the rear of her vehicle, but then drove away without the gas can. Clemons wrote down the license plate number of the vehicle and subsequently provided the information to the police. After the woman left, he discovered that she had been burning a body (later determined to be the victim) and reported the incident to the police.

Later that day, Clemons selected the defendant's photograph from a six-person photographic line-up within a minute or two. He indicated the police made no suggestion to him as to which photograph to select.

Clemons indicated he did not look at the woman that closely at the scene, but he remembered how she was dressed. When asked if he noticed that the picture he picked out was different than the other pictures, he stated, "Uh – I really didn't. You know, as I said I was just looking facially as to what I remember." He was sure the photograph he picked out of the line-up was the person he saw at the scene.

Hammond Police Officer Kevin Hauck also testified at the hearing on the motion. He and Tangipahoa Parish Sheriff's Office Detective Alex Richardson compiled the photographic line-up shown to Clemons. He entered

a suspect description, including height, race, sex, hair color, eye color, and other factors into the AFICS mug shot station, and the computer generated over a hundred photographs.

Detective Richardson testified that Chief of Detectives Charles Hicks instructed him to retrieve a photograph and driver's license information concerning a suspect. He obtained the information and then worked with Officer Hauck to compile a photographic line-up. He denied doing anything improper or anything to suggest to Clemons which photograph to select. He acknowledged that five of the photographs in the line-up were headshots, while the defendant's photograph was taken from slightly further away, but indicated he selected photographs that most closely resembled the defendant and none of the photographs produced by the computer showed more of the suspects than their heads. The trial court denied the motion to suppress, finding that the photograph of the defendant used in the line-up was not suggestive of identification.

There was no abuse of discretion in the denial of the motion to suppress identification. The photographic line-up consisted of photographs of six white females similar in age and appearance. There was sufficient resemblance among the persons depicted to reasonably test identification. Indeed, photograph #3 depicts a suspect who could easily be mistaken for the defendant. While the defendant is standing slightly farther away from the camera in her photograph, Clemons indicated this fact did not focus his attention on her photograph.

Further, the identification by Clemons was reliable. He had an excellent opportunity to view the woman at the scene where she was burning the

victim's body and spoke to her concerning what she was doing and where she was from. Although Clemons claimed he did not look at the woman that closely at the scene, he looked close enough to remember her clothes and how she was dressed. He expressed a high degree of certainty in his identification and made the identification only a few hours after observing the woman.

This assignment of error is without merit.

MOTION TO SUPPRESS STATEMENTS

In assignment of error number three, the defendant argues her statements made following her stop by the police and following her request for an attorney should have been suppressed.

Statements Following Vehicle Stop

Tangipahoa Parish Sheriff's Office Detective Steve Hebert testified at the hearing on the motion to suppress the defendant's statements. He indicated the license plate number provided by Clemons was matched to the defendant. Thereafter, Clemons selected the defendant's photograph from a photographic line-up as the woman he had confronted on his property. Detective Hebert then obtained a warrant to arrest the defendant for obstruction of justice.

Detective Todd Morris also testified at the hearing on the motion to suppress the defendant's statements. Pursuant to the arrest warrant, he stopped the defendant's vehicle as she left the residence she shared with the victim. As soon as Detective Morris asked the defendant whether she was Rachel Smith, she started speaking. Detective Morris told the defendant to wait until he had advised her of her rights. Detective Morris advised the defendant of her **Miranda**[1] rights, and she stated, "I [f-----] up. They made me do it. I had to

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

kill him." Detective Morris asked who the defendant was talking about, and she replied, "Charles," indicating she had shot the victim. The defendant then asked Detective Morris how he had found her. Detective Morris did not answer the defendant's question, and she further stated, "I've really ... fucked up. I've ruined my life." Detective Morris asked the defendant where she had put the gun she had used to shoot the victim. The defendant stated the gun was in her purse.

Detective Morris indicated he had no reason to doubt the defendant's understanding of her rights. He did not make any promises of leniency to the defendant. He also denied physically or mentally abusing the defendant or denying her sustenance or bathroom privileges.

The defense argued the defendant did not know what she was being arrested for at the time of the stop. The trial court denied the motion to suppress the statements from the stop, finding there was a sufficient legal basis to stop the defendant's vehicle.

There was no abuse of discretion in the trial court's denial of the motion to suppress the statements from the stop. The stop was made pursuant to a valid arrest warrant, and the defendant was advised of her **Miranda** rights before she made the challenged statements.

Statements Following Request for Counsel

In **Miranda,** 384 U.S. at 444-445, 86 S.Ct. at 1612, the Supreme Court found that if a suspect indicates "in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." **Edwards v. Arizona,** 451 U.S. 477, 481-485, 101 S.Ct. 1880, 1883-1885, 68 L.Ed.2d 378 (1981), confirmed these views and, to lend them

substance, held that when an accused either before or during interrogation asks for counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated, custodial interrogation, even if he has been advised of his rights. The accused is not subject to further interrogation by the authorities until counsel is present, unless the accused himself initiates further communication, exchanges, or conversations with the police. **Edwards**, 451 U.S. at 484-485, 101 S.Ct. at 1884-1885. **State v. Montejo**, 2006-1807, p. 16 (La. 1/16/08), 974 So.2d 1238, 1251.

When an accused invokes his **Miranda** right to counsel, the admissibility of a subsequent confession or incriminating statement is determined by a two-step inquiry: did the accused initiate further conversation or communication; and was the purported waiver of counsel knowing and intelligent under the totality of the circumstances. See also La. R.S. 15:452 (no arrestee "shall be subjected to any treatment designed by effect on body or mind to compel a confession of crime."). Whether police have "scrupulously honored" an accused's right to silence is determined on a case-by-case basis under the totality of the circumstances. Factors entering into the assessment include who initiates further questioning; whether there has been a substantial time delay between the original request and subsequent interrogation; whether **Miranda** warnings are given before subsequent questioning; whether signed **Miranda** waivers are obtained; and, whether the later interrogation is directed at a crime that had not been the subject of the earlier questioning. **Montejo**, 2006-1807 at p. 17, 974 So.2d at 1252.

There are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to initiate any conversation

or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally initiate a conversation in the sense in which the word was used in **Edwards**. However, questions by the defendant about what is going to happen to him evince a willingness and a desire for a generalized discussion about the investigation, rather than merely being necessary inquiries arising out of the incidents of the custodial relationship. See **Montejo**, 2006-1807 at pp. 19-20, 974 So.2d at 1254-1255.

East Baton Rouge Parish Sheriff's Office Detective Bryan Hatch also testified at the motion to suppress the defendant's statements. After escorting the defendant to an interview room at the detective's office, he advised her of her **Miranda** rights, and she signed a rights-waiver form. He had no reason to doubt her understanding of her rights. He and Detective Hebert then conducted a videotaped interview with the defendant.

The videotape started recording on March 28, 2006, at 2:33 p.m. At 2:34 p.m., Detectives Hebert and Hatch entered the interview room and individually advised the defendant of her **Miranda** rights. The defendant also signed two consent to questioning/rights-waiver forms. She stated, "it's been going on for months." She claimed the victim and Karen Burch would hide in the attic and try to come down and shoot her. She claimed the victim had tried to make her go up into the attic, but she had refused because she thought he would shoot her. She claimed she shot the victim after he "pulled a gun." At

2:43 p.m., she stated, "I shot him." Detective Hatch asked if the defendant had taken the victim's body away from the apartment. The defendant nodded affirmatively. He then asked the defendant if she acted alone, and again, she nodded affirmatively. The defendant claimed the victim would take Burch into the attic to have sex with her. She complained the victim and Burch ruined her credit, ruined her sister's credit, and stole money from her. The defendant stated that she had made a mistake and should have called the police in the first place. She indicated she had taken the victim's body to the first secluded area she could find. She also indicated she ran into someone.

At 2:48 p.m., the defendant stated, "I don't want to talk about this anymore. I want a lawyer present." Detective Hatch stated, "Okay, that's fine." The defendant then stated, "It was self-defense I'm telling you." Detective Hatch asked, "It was self-defense because he pulled a gun on you first?" The defendant complained that "this has happened several times before." She also complained that the police never came when she called them. The defendant claimed that she was "set up." Detective Hebert asked who "set up" the defendant. The defendant stated she did not know, but speculated that maybe "other people ran money out on my head." At 2:49 p.m., Detectives Hebert and Hatch left the interview room.

At 2:55 p.m., Detective Hatch returned to the interview room without Detective Hebert. He gave the defendant the soft drink and cigarette that she had requested when he left. The defendant asked, "What's going to happen to me now?" Detective Hatch replied that some paperwork would have to be completed. The defendant made an inaudible comment, and Detective Hatch replied, "That depends if it happened the way you say it did." The defendant

stated that if the police checked for fingerprints in the attic, they would find the fingerprints of the victim and Burch, and also find bullet holes. At 2:57 p.m., as the defendant lit a cigarette, Detective Hatch asked her how she had removed the victim from the apartment, but she did not reply. Detective Hatch asked, "You took him out alone?" The defendant replied, "It was hard." Detective Hatch asked, "How long the two of you been together?" The defendant indicated she and the victim had been together for three years. Detective Hatch stated, "You want to continue talking to me or what? Totally up to you.... Sometimes it relieves the soul if you get it out." The defendant claimed the victim chased her around the apartment with guns. She claimed a drug lord she had been trying to bring down had placed a $100,000 bounty on her head. She claimed she was not thinking when she shot the victim, and if she had been thinking, she would not have shot him. She stated, "Even though everything he did to me.... I still can't bring myself to think what I did was right." The defendant stated that she should have stopped shooting the victim after the first shot because he never fired his gun. Detective Hatch asked the defendant what kind of gun she had, and she indicated she had a ".45." Detective Hatch asked the defendant what she thought should happen now. The defendant replied she did not know, and asked who sent "Tangipahoa" to her apartment. At 3:11 p.m., the defendant stated she "shouldn't even have tried to clean it up." Detective Hatch asked the defendant how much time passed between her shooting the victim and her placing his body in the car. The defendant stated she did not know and did not want to think about it. The defendant then volunteered that the gun was in her purse along with a small knife. She stated, "[T]hey hired him to do what he did because they knew he

wouldn't be able to finish it." The defendant again asked what would happen to her. At 3:17 p.m., Detective Hatch left the room to see if he could get the defendant another cigarette. At 3:31 p.m., the defendant left the room, returning at 3:36 p.m. The videotaping ended at 3:53 p.m.

Detective Hatch indicated that when he came back into the interview room, he had no intention of questioning the defendant any further because, "[W]e had our confession[,]" but the defendant initiated the conversation.

The trial court denied the motion to suppress the statements made in connection with the videotaped interview with the defendant. The defendant applied to this court for supervisory relief concerning the trial court's ruling, but the writ application was denied. **State v. Smith**, 2006-2443 (La. App. 1 Cir. 12/22/06) (unpublished).

The totality of the circumstances indicate that the videotaped interview was properly terminated and the defendant's rights scrupulously honored before her retraction of her request for counsel by evincing a willingness and a desire for a generalized discussion about the investigation. The statements made by the police to the defendant, after she invoked her right to counsel and before they left the room, were responses to the defendant's claims of self-defense and being set up.

An express written or oral statement of waiver of the right to counsel is neither inevitably necessary nor sufficient to establish waiver. The question is whether the defendant, in fact, knowingly and voluntarily waived her **Miranda** rights. **Montejo**, 2006-1807 at p. 23, 974 So.2d at 1257. Further, **Miranda**'s presumption of compulsion arises only when the police ask questions of a suspect in custody without administering the **Miranda**

warnings, and even an unwarned statement creates no presumption of coercive effect where the statement is voluntary. See **Oregon v. Elstad**, 470 U.S. 298, 317-318, 105 S.Ct. 1285, 1297-1298, 84 L.Ed.2d 222 (1985) ("[T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of **Miranda**, was voluntary.")

Suppression of the statements following the defendant's invocation of her right to counsel is not warranted on this record. The statements were voluntary and were initiated by the defendant after numerous **Miranda** warnings had been administered to her. At the time the defendant asked what would happen to her, she had been advised of her **Miranda** rights four times, including two **Miranda** warnings less than one-half hour earlier. Also less than one-half hour earlier, she had signed two consent to questioning/rights-waiver forms. Further, when the defendant began speaking to Detective Hatch after requesting counsel, he specifically asked her if she wanted to continue talking to him.

This assignment of error is without merit.

CONCLUSION

For the above stated reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.