NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 2330

STATE OF LOUISIANA

VERSUS

RANNEL M. BROWN

Judgment Rendered: May 4, 2007

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 06-05-0833

Honorable Wilson Fields, Judge Presiding

* * * * * *

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Parro, J., concurs.

McCLENDON, J.

The defendant, Rannel M. Brown, was charged by a seven count grand jury indictment with second degree murder (count one), a violation of LSA-R.S. 14:30.1; armed robbery (count two), a violation of LSA-R.S. 14:64; possession of stolen things valued over $500.00 (count three), a violation of LSA-R.S. 14:69; possession of a Schedule 1 drug, methylenedioxymethamphetamine (MDMA) (count four), a violation of LSA-R.S. 40:966(C); possession of a firearm by a convicted felon (count five), a violation of LSA-R.S. 14:95.1; possession of a firearm while in possession of MDMA (count six), a violation of LSA-R.S. 14:95(E); and unlawful possession of body armor (count seven), a violation of LSA-R.S. 14:95.3. He pled not guilty to all charges. The defendant waived his right to a trial by jury and elected to proceed with a bench trial. At the conclusion of the bench trial, the defendant was acquitted on count two and convicted as charged on all of the other counts. The trial court sentenced the defendant as follows: count one, life imprisonment without benefit of probation, parole, or suspension of sentence; count three, five years at hard labor; count four, five years at hard labor; count five, ten years at hard labor; count six, five years at hard labor; and count seven, two years at hard labor. The court ordered that all of the sentences run concurrently.

The defendant now appeals, urging the following assignments of error:

1. After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could not have found the essential elements of the crime of second degree murder, or of possession of stolen property, beyond a reasonable doubt.

2. The conviction and sentencing of the defendant for possession of MDMA and possession of a firearm while possessing MDMA constitutes double jeopardy.

3. The trial court erred in failing to give the defendant the required twenty-four hour delay between denial of the motion for a new trial and sentencing.

After a thorough review of the record, we affirm the defendant's conviction on counts one, five, six, and seven. However, the sentences on these counts are vacated and the matter is remanded to the trial court for resentencing. Finding insufficient evidence to support the conviction on count three, we reverse the conviction and sentence. On count four, we vacate the conviction and sentence based on a violation of the double jeopardy clause.

FACTS

On April 15, 2005, at some time after midnight, two young women were walking in the area near the 300 block of Laurel Street in Baton Rouge when they observed a vehicle with a blown-out tire, the driver's door ajar, and someone inside. The women decided to approach the vehicle to see if the individual was asleep. They noticed that there was a bullet hole in the vehicle. Inside the vehicle, the women discovered the lifeless body of the victim, later determined to be Kirkland Robertson. The victim had several gunshot wounds to the head. The women immediately reported their discovery to a police officer on a nearby corner.

Chris Johnson of the Baton Rouge City Police Department, Homicide Division, was dispatched to the scene to investigate. The victim's body was found inside an Oldsmobile Cutlass in a parking lot on Fourth and Laurel Streets. According to detectives who were at the scene, the body appeared to have been pushed aside from the driver's side of the vehicle. A footprint was found on the inside of the vehicle's door. Spent shell casings were also found inside the vehicle.

An autopsy revealed the victim sustained three gunshot wounds to the head with brain trauma. He was shot in the ear, on the side of the head in front of the ear, and in the back of the head. A bullet casing was found embedded in the base of the victim's skull. Dr. Shannon Cooper, the East Baton Rouge Parish Coroner, opined that at least two of the wounds were close contact wounds. The cause of the victim's death was ruled a homicide.

Upon learning that the victim was last seen in the company of the defendant earlier that night, the police focused their investigation on the defendant, Rannel M. Brown. The victim's brother, Reginald Robertson, testified that he left the defendant, the victim, and an individual named Ken Armstead, at Mr. Robertson's residence at approximately 12:15 a.m. on the night of the murder. Robertson further testified that, although he did not personally observe the money, the victim had indicated that he had approximately $4000.00 on his person that night. Further investigation revealed that the defendant used the victim's cellular telephone to place a call to his girlfriend's sister's residence at approximately 1:11 a.m. on the morning in question. Also, the sole of the shoe worn by the defendant on the night of the victim's murder, which was provided by his girlfriend's sister, was determined to be "very similar in configuration" to the print found inside the victim's vehicle.

Several days later, Baton Rouge City Police Officer Caan Castleberry, the same officer to whom the women had reported their discovery of the body several days earlier, was patrolling the area near Chippewa Street and Plank Road in Baton Rouge when he observed a white Chevy Impala with a black male driver with "twists." Castelberry recognized the vehicle and its driver as matching the description of the defendant provided in roll call earlier that day. Castleberry made a U-turn and attempted to conduct a stop.

The defendant accelerated and a vehicle pursuit ensued. The defendant eventually abandoned the vehicle and continued on foot. The defendant subsequently was tackled by Castleberry and arrested. During a search incident to the arrest, the officers discovered that the defendant was wearing a bulletproof vest under his shirt. Examination of the bulletproof vest revealed that it contained bullet fragments in the mid-chest area. Five tablets containing MDMA were recovered from the defendant's sock.

During a search of the vehicle abandoned by the defendant, a .40 caliber handgun was recovered from the front passenger seat. Ballistics testing of the weapon confirmed that it was the same weapon used to shoot the victim. Bullets fired from the weapon matched the bullets collected from the victim's brain. The bullets found in the bulletproof vest were also determined to have been fired from this gun.

At trial, the defendant testified on his own behalf. He admitted that he was with the victim on the night in question, but denied any involvement in the victim's murder. The defendant claimed he left the victim at the house. As explanation for why he was clad in body armor, the defendant explained that he learned that the victim's family had a "hit" out on him, so he felt he needed to protect himself. The defendant denied ever being in the victim's vehicle on the day of the murder.

Throughout his testimony, the defendant repeatedly claimed he did not do anything wrong. He also claimed that he did not have any drugs on him when he was arrested, he did not have a weapon with him inside the vehicle, and he did not own a pair of shoes similar to those matched to the footprint in the victim's vehicle. When asked why he fled when the police attempted to stop him, the defendant explained that he "always" runs from the police.

ASSIGNMENT OF ERROR 1

In his first assignment of error, the defendant challenges the sufficiency of the evidence presented in support of the second degree murder and illegal possession of stolen goods convictions.[1]

Second degree murder

The defendant's sufficiency argument is twofold. First, he argues that the state failed to prove that he was in any way connected with the victim's murder. Specifically, he asserts that the mere fact that he was in the victim's presence the night of his murder, without more, is insufficient to show that he participated in the murder. The defendant further argues that the state presented absolutely no evidence of intent to kill or to inflict great bodily harm.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La.1988). When analyzing circumstantial evidence, LSA-R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a

[1] The defendant does not challenge the sufficiency of the evidence in support of the possession of MDMA, possession of a firearm by a convicted felon, possession of a firearm while in possession of MDMA, or illegal use of body armor convictions.

rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885, pp. 3-4 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 159.

LSA-R.S. 14:30.1(A)(1) defines second degree murder as follows:

> A. Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm[.]

Thus, to support the conviction for second degree murder the state was required to show: 1) the killing of a human being; and 2) that the defendant had the specific intent to kill or inflict great bodily harm. **State v. Morris**, 99-3075, p. 13 (La. App. 1 Cir. 11/3/00), 770 So.2d 908, 918, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002).

"Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LSA-R.S. 14:10(1). "Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting the circumstances." **State v. Cummings**, 99-3000, p. 3 (La. App. 1 Cir. 11/3/00), 771 So.2d 874, 876.

Regarding the instant defendant's claim that the state failed to prove the essential element of specific intent to kill, it is well settled that a specific intent to kill or inflict great bodily harm can be inferred from a shooting that occurs at a fairly close range. See **State v. Cummings**, 99-3000 at p. 4, 771 So.2d at 876. Because the evidence in this case clearly establishes that the victim sustained more than one contact wound to his head, the jury certainly could have inferred that the shooter specifically intended to kill the victim.

Thus, the defendant's claim that there was no evidence of intent clearly lacks merit.

Upon a thorough review of the record and the evidence contained therein, we are also convinced that the evidence presented at trial, viewed in the light most favorable to the state, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the other elements of second degree murder and the defendant's identity as the perpetrator of that offense against the victim. Although no one saw the defendant shoot the victim, the evidence presented by the state, particularly the ballistics evidence, provides sufficient evidence from which a reasonable fact finder could have concluded that the defendant was directly connected with the victim's murder. The victim's brother's testimony was sufficient to show that on the night in question the defendant was with the victim before he died. The footprint found inside the vehicle established that the defendant had been inside the victim's vehicle. There was also testimony indicating that the defendant used the victim's cellular telephone at approximately 1:11 a.m., after the victim's deceased body was discovered. Additionally, the ballistics evidence confirmed that the same gun found in the defendant's possession shortly before his arrest was the exact gun used in the victim's murder. This evidence was sufficient to connect the defendant to the murder weapon, and likewise, to the murder.

The judge, who was the trier of fact, obviously accepted the testimony of the state's witnesses and rejected the defendant's testimony claiming his innocence. As the trier of fact, the judge was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson,** 98-1407, p. 6 (La. App. 1 Cir. 4/1/99), 734 So.2d 800, 805, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439. Considering the defendant's testimony wherein he

adamantly denied possessing the drugs found on his person and the murder weapon found in plain view on the seat of the vehicle he was driving, the trier of fact was clearly justified in doubting the defendant's credibility and rejecting his claim of innocence. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La.1984).

This portion of the assignment of error lacks merit.

Illegal possession of stolen things

Next, the defendant contends that the evidence presented at trial was not sufficient to support the illegal possession of stolen things conviction. Specifically, the defendant argues that during his trial testimony, he gave a reasonable explanation for his possession of the vehicle, which he did not know had been stolen. He asserts that the state failed to prove he possessed the vehicle under circumstances indicating he knew or should have known that it was stolen.

LSA-R.S. 14:69(A) provides, in pertinent part:

> Illegal possession of stolen things is the intentional possessing, procuring, receiving, or concealing of anything of value which has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses.

Thus, in order to convict a defendant of this offense, the state must prove, beyond a reasonable doubt, that the defendant (1) intentionally possessed, procured, received, or concealed, (2) anything of value, (3) which has been the subject of any robbery or theft, (4) where circumstances indicate that the offender knew or had good reason to believe that the thing was the subject of

one of these offenses, and that (5) the value of the items stolen exceeds $500.00. **State v. Alexander,** 97-1199, p. 5 (La. App. 5 Cir. 9/29/98), 720 So.2d 82, 86, writ denied, 98-3109 (La. 4/9/99), 740 So.2d 628.

On the element of guilty knowledge, the Louisiana Supreme Court, in **State v. Chester**, 97-1001, pp. 2-3 (La. 12/19/97), 707 So.2d 973, 974 (per curiam), stated:

> 'In Louisiana, the "mere possession of stolen property does not create a presumption that the person in possession of the property received it with knowledge that it was stolen by someone else." **State v. Ennis**, 414 So.2d 661, 662 (La.1982); **State v. Nguyen**, 367 So.2d 342, 344 (La.1979); **State v. Walker**, 350 So.2d 176, 178 (La.1977). The state must therefore prove the defendant's guilty knowledge as it must every other essential element of the offense. **Ennis**, 414 So.2d at 662. Nevertheless, jurors may infer the defendant's guilty knowledge from the circumstances of the offense. See **Barnes v. United States**, 412 U.S. 837, 843, 93 S.Ct. 2357, 2362, 37 L.Ed.2d 380 (1973) ("For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods."). The inference of guilty knowledge arising from the possession of stolen property is generally a much stronger one than the inference the possessor committed the theft, **Cosby v. Jones**, 682 F.2d 1373, 1381 (11th Cir. 1982)[.]

In the instant case, the defendant was apprehended after abandoning a vehicle he claimed he had rented. The defendant does not contend that the state failed to prove that he possessed the vehicle, that the vehicle had value over $500.00, or that the vehicle had been the subject of a theft. Rather, the defendant contends the state's evidence failed to establish that he knew or had reason to believe that the vehicle he possessed was stolen. To support his argument, the defendant points out that the testimony presented at the trial established only that the owner of the vehicle loaned the vehicle to his daughter, and his daughter's female acquaintance stole the keys and the car. The defendant argues there was absolutely no evidence that he participated

in the theft of the vehicle or that he had any reason to know that the vehicle had been stolen.

At the trial, the circumstances surrounding the theft of the vehicle and the defendant's coming into possession of the stolen vehicle were presented through the testimony of Norris Slocum (the owner of the 2004 Chevrolet Impala the defendant was driving when he was arrested), Deborah Slocum (Norris's daughter), and the defendant. Norris Slocum testified that on the day in question, he allowed Deborah to drive his vehicle to an interview. Slocum further testified that later that date, Deborah contacted him and advised that the vehicle had been stolen while she was visiting her boyfriend in Zachary. According to Norris, Deborah stated that the keys to the vehicle were taken from the bathroom vanity at the house Deborah was visiting. A female at the house, who Deborah later described as her boyfriend's sister, took the keys without Deborah's permission and left in the vehicle. Deborah immediately contacted Norris who, in turn, contacted law enforcement officers and reported the vehicle stolen. Later, upon her return to the residence, the female was arrested. She was not in the car when she returned. Slocum further testified that he did not know the defendant and did not give him permission to drive his vehicle.

Deborah Slocum also testified at the trial. Consistent with her father's testimony, Deborah stated that her father's vehicle was stolen while in her possession. Deborah stated that she did not know the defendant and did not give him permission to drive the vehicle. On cross-examination, Deborah testified that the defendant was not the individual who took the keys from her. It was her friend's sister who took the keys.

The defendant testified that he rented the vehicle for forty dollars from a female in his neighborhood. He explained that this practice was

"normal" in his neighborhood. He further explained that people in his neighborhood routinely rent vehicles for short-term use and return them to their owners when they are done. Although he admittedly did not know where the female lived, the defendant claimed he agreed to return the vehicle to her later that day in the same area where he acquired it. The defendant was arrested before he could return the vehicle.

The female who actually stole the vehicle was never identified by name by any of the witnesses. She did not testify at the trial.

Although we have considered the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could not have concluded beyond a reasonable doubt that the state proved the essential elements required to convict the defendant of illegal possession of a stolen thing valued over $500.00. The state's evidence failed to prove the defendant's guilty knowledge. There was no evidence that the steering column or any other part of the vehicle had been vandalized; in fact, the stolen keys were likely used to operate the vehicle. There was no evidence of broken windows or vandalized door locks. There was simply no evidence presented, direct or circumstantial, to refute the defendant's explanation of his possession of the vehicle or to indicate that the defendant should have had good reason to believe that the vehicle was stolen. As stated above, the defendant's mere possession of the vehicle is insufficient to prove guilty knowledge. The only indication of possible guilty knowledge was the defendant's flight from the officers. However, this flight could reasonably be explained as the defendant's attempt to avoid apprehension for the victim's murder or for the other crimes he committed (counts four-seven).

Accordingly, we reverse the defendant's conviction for illegal possession of a stolen thing valued over $500.00 and his sentence of five years at hard labor for that crime.

This portion of the assignment of error has merit.

ASSIGNMENT OF ERROR 2

In this assignment of error, the defendant contends that the prosecution for count four, possession of MDMA, and count six, possession of a firearm while in possession of MDMA, constitutes double jeopardy. In response, the state concedes that the defendant was subjected to double jeopardy by being prosecuted and convicted of the aforementioned offenses. Consequently, the state agrees that the conviction and sentence for possession of MDMA should be overturned.

The federal and state constitutions both provide that no person shall twice be put in jeopardy of life or liberty for the same offense. U.S. Const. amend. V; La. Const. art. I, § 15. The prohibition against double jeopardy protects the accused against multiple punishments for the same offense as well as subsequent prosecution for the same offense after acquittal or conviction.

In determining whether or not the double jeopardy prohibition has been violated, the Louisiana Supreme Court has recognized two different tests, i.e., the test established in **Blockburger v. United States**, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932), and the "same evidence" test.

The **Blockburger** test is as follows:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 U.S. at 304, 52 S. Ct. at 182.

Nevertheless, the Louisiana Supreme Court has principally relied on the "same evidence" test when evaluating double jeopardy claims. Under the "same evidence" test, if the proof required to support a finding of guilt of one crime would also support conviction of another crime, the prohibition against double jeopardy bars a conviction for more than one crime. See **State v. Leblanc**, 618 So.2d 949, 957 (La. App. 1 Cir. 1993), writ denied, 95-2216 (La. 10/4/96), 679 So.2d 1372.

The statute at issue, LSA-R.S. 14:95(E), provides, in pertinent part:

> If the offender uses, possesses, or has under his immediate control any firearm, or other instrumentality customarily used or intended for probable use as a dangerous weapon, while committing or attempting to commit a crime of violence or while in the possession of or during the sale or distribution of a controlled dangerous substance, the offender shall be fined not more than ten thousand dollars and imprisoned at hard labor for not less than five nor more than ten years without the benefit of probation, parole, or suspension of sentence.

The Louisiana Supreme Court addressed a similar issue in **State v. Sandifer**, 95-2226 (La. 9/5/96), 679 So.2d 1324. In **Sandifer**, the defendant had been charged with and pled guilty to possession of marijuana in violation of LSA-R.S. 40:966(D)(1). He was also charged with possession of cocaine in violation of LSA-R.S. 40:967(C)(2) and possession of a firearm while in possession of marijuana and cocaine in violation of LSA-R.S. 14:95(E). The trial court granted a motion to quash the bill of information regarding the gun charge on the grounds of double jeopardy, insofar as the defendant had already pled guilty to possession of marijuana, which formed an underlying offense for the violation of LSA-R.S. 14:95. The Louisiana Supreme Court reversed the trial court's decision, finding that the state should be allowed to amend the bill of information to delete the reference to marijuana. See **State v. Thomas**, 99-2219 (La. App. 4 Cir.

5/17/00), 764 So.2d 1104 (convictions of possession of cocaine with intent to distribute and possession of a firearm while in possession of the same cocaine violated double jeopardy). The court reasoned that the defendant had not yet been convicted of the possession of cocaine and, thus, that conduct could serve as the underlying offense for the violation of LSA-R.S. 14:95(E). However, the supreme court noted that, "[a]s long as defendant is not separately prosecuted for the possession of cocaine offense, no double jeopardy prohibition exists." **Sandifer**, 95-2226 at p. 7, 679 So.2d at 1330.

Additionally, in **Leblanc**, the defendant was charged with possession in excess of 400 grams of cocaine and distribution of the same cocaine. This court found that his subsequent convictions of attempted distribution of cocaine and possession of cocaine in excess of 400 grams violated double jeopardy, because the same package of cocaine from the sale transaction was used to convict the defendant with possession. **Leblanc**, 618 So.2d at 957.

In the instant case, it is undisputed that the defendant was found to be in possession of five tablets containing MDMA and a loaded handgun. The tablets were found inside the defendant's sock, and the gun was found on the front seat of the vehicle he was driving. Because the defendant's convictions for count four, possession of MDMA, and for count six, possession of a firearm while in possession of MDMA, arose out of the same arrest and the same MDMA was used as the evidence to support both convictions, we conclude that defendant's convictions for possession of MDMA and possession of a firearm while in possession of MDMA violate double jeopardy. See **Sandifer**, 95-2226 at pp. 6-7, 679 So.2d at 1329-30; **Leblanc**, 618 So.2d at 957; see also **State v. Harris**, 98-2932 (La. App. 4 Cir. 5/3/00), 761 So.2d 662 (conviction of both distribution of cocaine and possession of a firearm while distributing the same cocaine violated double

jeopardy); **State v. Warner**, 94-2649 (La. App. 4 Cir. 3/16/95), 653 So.2d 57, writ denied, 95-0943 (La. 5/19/95), 654 So.2d 1089 (convictions of possession of cocaine and possession of a handgun while possessing the same cocaine violated double jeopardy).

To remedy a violation of double jeopardy, the Louisiana Supreme Court has followed a procedure of vacating the conviction and sentence of the less severely punishable offense, and affirming the conviction and sentence of the more severely punishable offense. **State v. Doughty**, 379 So.2d 1088, 1091 (La.1980). In **State ex rel. Adams v. Butler**, 558 So.2d 552, 554 (La.1990), the supreme court addressed the remedy for double jeopardy violations and found the following:

> Although this general rule will provide a clear resolution in most cases, resentencing according to the original sentencing scheme will not be possible in all cases. Restrictions on the original sentence, such as limitations on parole, probation or suspension of sentence, may prevent the restructuring of a new sentence that is not more severe than the original one. Likewise, plea bargains conditioned on specific sentences may also prevent the restructuring of the sentence. When restructuring the sentence under the general rule is not feasible, courts should have the flexibility to implement the original sentencing scheme to the greatest extent possible. To accomplish this, courts should affirm the conviction with the more severe *actual* sentence, even though it may require vacating the conviction for the more severely *punishable* offense. The exception eliminates the double jeopardy violation and effectuates the original scheme of punishment to the greatest extent possible, without violating due process or plea bargains conditioned on specific sentences.

In the instant case, the firearm conviction is clearly the more severely punishable offense. Although both of the applicable statutes, LSA-R.S. 40:966(C)(3), possession of MDMA, and LSA-R.S. 14:95(E), possession of a firearm while in possession of MDMA, subject the defendant to a maximum period of ten years imprisonment, 14:95(E) subjects the defendant to a minimum sentence of five years, and requires that the entire sentence be

served without probation, parole, and suspension of sentence. Consequently, we affirm the defendant's conviction on count six for possession of a firearm while in possession of MDMA and vacate the defendant's conviction and sentence of five years at hard labor on count four, the possession of MDMA offense.

ASSIGNMENT OF ERROR 3

In his final assignment of error, the defendant argues that the trial court erred in failing to comply with LSA-C.Cr.P. art. 873. Louisiana Code of Criminal Procedure article 873 provides that "[i]f a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled."

The record reveals that the motion for new trial was denied on August 18, 2006. The record further reflects that, after denying the defendant's motion for a new trial, the trial court specifically asked the defendant if he was ready to proceed with the sentencing. The defendant unequivocally replied that he was not. Thus, it is clear the defendant did not expressly or implicitly waive the statutorily required delay. However, despite the defendant's failure to waive the mandatory twenty-four hour delay, the trial court proceeded with the sentencing.

In **State v. Augustine**, 555 So.2d 1331, 1333-34 (La.1990), the Louisiana Supreme Court held that a trial court's failure to observe the twenty-four hour delay is not harmless error if the defendant challenges the sentence on appeal. The supreme court also implied that the error would not be harmless if the issue itself is raised by the defendant on appeal. However, in the event the issue is not assigned as error or the sentence is not challenged, the error is not reversible unless the defendant can show he was prejudiced. **State v. Augustine**, 555 So.2d at 1334; **State v. Claxton**, 603

So.2d 247, 250 (La. App. 1 Cir. 1992). In the instant case, although the defendant does not challenge his sentences, he does assign the trial court's failure to observe the twenty-four hour delay as error on appeal. Thus, according to the supreme court, the error is not harmless, and we must vacate the sentences. Accordingly, we remand the matter to the trial court for re-sentencing. See **State v. Claxton**, 603 So.2d at 250.

For the foregoing reasons, the defendant's convictions on counts one, five, six, and seven are affirmed. The sentences on these counts are vacated and the matter is remanded to the trial court for resentencing.[2] Further, we reverse the conviction and sentence on count three, and vacate the conviction and sentence on count four.

CONVICTIONS ON COUNTS ONE, FIVE, SIX, AND SEVEN AFFIRMED; SENTENCES ON THESE COUNTS VACATED AND REMANDED FOR RESENTENCING. CONVICTION AND SENTENCE ON COUNT THREE REVERSED. CONVICTION AND SENTENCE ON COUNT FOUR VACATED.

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[2] Because the matter is being remanded for resentencing, we note two sentencing errors. According to the transcript of the sentencing, on count one, second degree murder, the trial court failed to impose the sentence at hard labor as required by LSA-R.S. 14:30.1(B). On count five, possession of a firearm by a convicted felon, the trial court failed to impose the statutorily mandated fine. See LSA-R.S. 14:95.1(B).