NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0250

STATE OF LOUISIANA

VERSUS

TRAVIS RICHARDSON

Judgment Rendered: November 3, 2006

* * * * * *

On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 10-02-394

Honorable Wilson Fields, Judge Presiding

* * * * * *

Hon. Doug Moreau
District Attorney
Office of the District Attorney
Baton Rouge, LA

By: Dylan C. Alge
Assistant District Attorney

Counsel for Appellee
State of Louisiana

Frederick Kroenke
Baton Rouge, LA

Counsel for Defendant/Appellant
Travis Richardson

Travis Richardson
Winnfield, LA

Defendant/Appellant
In Proper Person

* * * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Travis Richardson, was charged by bill of information with armed robbery in violation of LSA-R.S. 14:64. Defendant pled not guilty. After a jury trial, defendant was found guilty of the responsive offense of first degree robbery, in violation of LSA-R.S. 14:64.1. On August 27, 2003, defendant was sentenced to twenty-five years imprisonment at hard labor. At the conclusion of the sentencing hearing, the defense counsel advised the court of his intention to file an appeal. At the time defendant was sentenced, there were pending motions for new trial and for a post-verdict judgment of acquittal. Thereafter, on September 8, 2003, a motion to reconsider sentence was filed. An order of appeal was entered on October 21, 2003, without the trial court having ruled on the defendant's post-trial motions.

In his original appeal, defendant's first assignment of error alleged that the trial court erred in sending a written response to a jury inquiry after the jurors had retired to deliberate, and his second assignment of error alleged that the trial court failed to rule on the defendant's post-trial motions. In an unpublished opinion, finding merit in defendant's second assignment of error, we pretermitted consideration of the first assignment of error, vacated the sentence, and remanded the matter to the trial court for a hearing on the post-trial motions. **State v. Richardson**, 04-0365 (La.App. 1 Cir. 10/29/04).[1]

[1] The record indicates that while the case was in the process of being lodged on the original appeal, this Court noted the lack of a minute entry reflecting that rulings had been made on defendant's post-trial motions. A letter was sent to the clerk of court on February 2, 2004, asking that the record be corrected or for a clarification that the missing items did not exist. This Court did not remand the matter for a hearing on the motions or order that a hearing be held. Nevertheless, the record indicates that the trial court held a hearing on February 17, 2004, and ruled on defendant's outstanding motions. The trial court no longer had *jurisdiction* over the case at that time and, for that reason, the rulings made in February 2004 are a nullity. LSA-C.Cr.P. arts. 853 and 916.

On November 30, 2004, the trial court denied defendant's pro se "amended motion for acquittal notwithstanding the verdict" and granted the defendant's pro se amended motion for new trial. On February 3, 2005, the trial court reversed its previous ruling on the pro se amended motion for new trial, denied the motion to reconsider sentence, and again denied the pro se "amended motion for acquittal notwithstanding the verdict." The trial court resentenced defendant to twenty-five years imprisonment at hard labor. Defendant now appeals, relying on the following three assignments of error for reversal of his conviction and sentence:

1. The trial court erred in sending a written response to the jury, when such had not been requested and neither the defense lawyer nor the defendant was present.
2. Defendant was constructively denied his right to counsel under the sixth amendment to the U.S. Constitution and Article I, section 13 of the Louisiana Constitution.
3. The trial court erred in sentencing defendant after having granted him a new trial and not vacating that order.

Defendant's pro se brief also raises the above third claim as the sole pro se assignment of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS[2]

About 9:30 p.m. on April 10, 2002, Rosette Beasley drove to the Church's Fried Chicken Restaurant on North Acadian Drive in Baton Rouge to get supper for her elderly mother. No other cars were in the establishment's parking lot, but she observed a young man dressed in black leaning against a lamppost nearby. She noticed his face illuminated by the

[2] The statement of facts reproduced herein is taken from the original, unpublished appeal.

light and was somewhat concerned, noting that he was wearing a black knit winter cap even though the weather was warm. Rosette pulled into a well-lit parking place and went inside. When she returned to her car, she placed her purchases in the backseat and then opened the driver's side door to enter the vehicle. Just as she was getting in, she was accosted by defendant. Defendant was kneeling or squatting down. Rosette looked right at defendant's face and at the gun he pressed into her ribs. She dropped her keys, left her purse in the car, and ran back inside the fast food restaurant, calling out to the employees to call "911." Defendant drove away in Rosette's car.

The next day when authorities recovered Rosette's vehicle, she pointed out to them that the black knit cap worn by her assailant and latex gloves left inside the car did not belong to her. About two months later, Rosette positively identified defendant in a photographic array. At trial, she again identified defendant.

Baton Rouge Police Officer Mindy Stewart was responsible for investigating Rosette's vehicle, including lifting a number of fingerprints from the vehicle and its contents. Captain Annie Michelli testified as an expert in fingerprint analysis. After comparing defendant's right index fingerprint to a right index fingerprint found on one of the latex gloves left in the stolen vehicle, she concluded that defendant's fingerprint was the same as the one on the glove.

The nineteen-year-old defendant took the stand in his own defense. He denied being involved in the robbery of Rosette Beasley. At the conclusion of trial, defendant was unanimously convicted of the responsive offense of first degree robbery.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, defendant contends the trial court committed reversible error when it provided the jurors with a written response to a jury inquiry after the jurors had retired to deliberate. Defendant avers his conviction must be reversed because no written response was requested, neither defense counsel nor defendant was present at the time the response was sent to the jurors, and defendant did not waive his right to be present.

The record reflects that after the jury was charged and retired to deliberate, the jurors sent a note to the trial judge asking for guidance on how to count votes to determine whether a verdict had been reached. [3] In chambers, the trial judge met with counsel for defendant and the prosecutor to formulate a response. He put the agreed upon response into writing and sent it to the jurors, without counsel realizing that he had done so. The trial judge then reconvened court and, in the presence of defendant and all counsel, proffered the written response to both attorneys for further comment. The response was further refined, but was not substantially altered. The trial judge asked if either counsel had an objection to the jurors taking the written response into the jury room. The defense counsel indicated that he did not believe it was proper to offer the written response unless the jurors first asked for it. However, he agreed that he had no objection to the written response being given to them if they requested it. The trial judge then called the jurors into the courtroom and read both their question and the response approved by all counsel in open court, in

[3] According to the record, the jury's note was specifically as follows: "After a vote when there are less than ten votes for a specific charge but those votes when added to the votes for a less (sic) included offense would be greater than ten, has the jury reached a verdict if all agree on the final vote? Example, eight willing to convict for armed robbery, four willing to convict for first degree robbery."

defendant's presence.[4] While the defense counsel objected to the trial judge's procedure in giving the jurors the written response, the defense counsel had no objection to the content of the written response. Also, no prejudice to defendant was claimed or demonstrated.

Louisiana Code of Criminal Procedure article 808 provides:

> If the jury or any member thereof, after having retired to deliberate upon the verdict, desires further charges, the officer in charge shall bring the jury into the courtroom, and the court shall in the presence of the defendant, his counsel, and the district attorney, further charge the jury. The further charge may be verbal, but shall be in writing if requested by any juror. No charge shall be reduced to writing at the request of a juror pursuant to this Article unless consent is obtained from both the defendant and the state in open court but not within the presence of the jury. The lack of consent by either the defendant or the state shall not be communicated to the jury. A copy of the court's written charge shall be delivered to the defendant, the state, and the jury.

Our law further establishes that a defendant charged with a felony has a right to be present in a trial by jury at all proceedings when the jury is present, unless the defendant voluntarily absents himself. LSA-C.Cr.P. arts. 831 and 832.[5]

---

[4] The response was read to the jury as follows: "It takes ten jurors to agree to render a verdict for armed robbery or any of the lesser and included offenses to armed robbery. One, attempted armed robbery, two, first degree robbery, three, attempt first degree robbery, four, simple robbery, five, attempt simple robbery. That is my charge to the jury, and further charge to the jury that it also takes ten to find the defendant not guilt (sic)."

[5] Louisiana Code of Criminal Procedure article 831 provides in pertinent part:

> A. Except as may be provided by local rules of court in accordance with Articles 522 and 551, a defendant charged with a felony shall be present:
>
> * * *
>
> (5) In trials by jury, at all proceedings when the jury is present, and in trials without a jury, at all times when evidence is being adduced[.]

Louisiana Code of Criminal Procedure article 832 also provides in part:

> A. A defendant initially present for the commencement of trial shall not prevent the further progress of the trial, including the return of the verdict, and shall be considered to have waived his right to be present if his counsel is present or if the right to counsel has been waived and:

As previously noted, there was no objection to the substance of the supplemental charge given to the jurors. Defendant's complaint is confined to the fact that an admittedly acceptable supplemental charge was given to the jurors in writing without their first having asked for a written response and without defendant waiving his right to be present when they initially received it.

With respect to the argument concerning defendant's presence, it is clear that defendant was present when the supplemental charge was read to the jury in open court shortly after counsel met in chambers to discuss it, albeit after a written copy was sent into the jury room. In no event would defendant have had a right to be in the jury room when the jurors considered a written response to a query posed. Defendant was present when the jurors were present in the courtroom for a reading of the agreed upon charge. Thus, we cannot find that there was any violation of LSA-C.Cr.P. art. 831. See also **State v. Williams**, 98-1146, pp. 12-15 (La.App. 5 Cir. 6/1/99), 738 So.2d 640, 650-51, writ denied, 99-1984 (La. 1/7/00), 752 So.2d 176.

Defendant's reliance on **State v. Williams**, 260 La. 1153, 258 So.2d 534 (1972), and **State v. Carlin**, 529 So.2d 1365 (La.App. 5 Cir. 1988), writ denied, 535 So.2d 741 (La. 1989), on appeal, is misplaced.[6] In both of those cases, defendant was not present in the courtroom when the supplemental charge at issue was read to the jurors. **Williams**, 258 So.2d at 537; **Carlin**, 529 So.2d at 1370.

> (1) He voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to be present during the trial[.]

[6] We also note that the court in **Carlin** found no trial error as to the additional charge. **Carlin**, 529 So.2d at 1370.

With respect to the trial judge's transmission of a written response to the jury inquiry without the jurors first asking for it, we find it particularly noteworthy that defense counsel does not suggest any prejudice to defendant. Nor can we see how defendant could have been prejudiced under the circumstances presented herein.

Finally, since defense counsel does not challenge the substance of the charge given the jurors or allege that any prejudice resulted from the error assigned, we find that any technical error was harmless in this case. We are satisfied that the verdict rendered was surely unattributable to the transmission of a written supplemental charge to the jury that had been deemed acceptable by defense counsel, regardless of the fact that the transmission was made without first receiving a request for a written response from the jurors. LSA-C.Cr.P. art. 921; **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). We find no merit in this assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, defendant argues that he was constructively denied his right to counsel under the sixth amendment to the United States Constitution and Article I, section 13 of the Louisiana Constitution. In support of his argument, defendant specifically notes as follows. During voir dire examination, juror Leslie Defeo (juror number 49) made questionable comments, and defendant's trial counsel raised a challenge for cause. The trial counsel later withdrew his challenge and did not peremptorily challenge Defeo. Defendant argues that his counsel gave no meaningful assistance in this instance and may as well not have been there. At a post-trial hearing that took place on February 5, 2005, the defense counsel failed to "make an appearance" and, thus, participate in any

manner. Defendant notes that his counsel remained silent throughout the proceeding and made no attempt to advocate defendant's interests. Defendant specifically notes that he is not alleging ineffective assistance of counsel, but rather argues constructive denial of counsel. Citing **United States v. Cronic**, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), and **Childress v. Johnson**, 103 F.3d 1221 (5th Cir. 1997), defendant argues that prejudice should be presumed as to these instances.

In general, a defendant asserting an ineffective assistance of counsel claim must demonstrate that counsel's performance was deficient and also that this deficient performance prejudiced the defense. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In **Cronic**, decided the same day as **Strickland**, the Supreme Court created a very limited exception to the application of **Strickland's** two-part test in situations that "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." **Cronic**, 466 U.S. at 658, 104 S.Ct. at 2046. The Supreme Court identified three situations implicating the right to counsel where prejudice will be presumed. First are situations in which a defendant petitioner is denied counsel at a critical stage of a criminal proceeding (complete denial of counsel). Second are situations in which a defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing[.]" **Cronic**, 466 U.S. at 659, 104 S.Ct. at 2047. Finally, prejudice is presumed when the circumstances surrounding a trial prevent a petitioner's attorney from rendering effective assistance of counsel. **Cronic**, 466 U.S. at 659-60, 104 S.Ct. at 2047 (citing **Powell v. Alabama**, 287 U.S. 45, 57-58, 53 S.Ct. 55, 59-60, 77 L.Ed. 158 (1932)).

In **Bell v. Cone**, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), the Supreme Court clarified the scope of the **Cronic** exception to **Strickland** with regard to the failure to test the prosecution's case. The Court reiterated that the failure must be "complete," and is only applicable when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." **Bell**, 535 U.S. at 696, 122 S.Ct. at 1851 (quoting **Cronic**, 466 U.S. at 659, 104 S.Ct. at 2047). Although counsel is present, "the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided." **Cronic**, 466 U.S. at 654 n.11, 104 S.Ct. at 2044 n.11 (quoted in **Tucker v. Day**, 969 F.2d 155, 159 (5th Cir. 1992)).

Constructive denial of counsel as described in **Cronic** affords only a narrow exception to the requirement that prejudice be proved. A constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all. **Childress**, 103 F.3d at 1229. The United States Fifth Circuit Court of Appeals has refused to presume prejudice under **Cronic** in cases where counsel failed to pursue a challenge based on racial bias in jury selection; where counsel's trial preparation was "somewhat casual"; where defense counsel investigated certain issues but not others; and, where counsel failed to object to a variation between the indictment and the jury charge. See **Harris v. Johnson**, 81 F.3d 535, 540 n.16 (5th Cir.), cert. denied, 517 U.S. 1227, 116 S.Ct. 1863, 134 L.Ed.2d 961 (1996); **McInerney v. Puckett**, 919 F.2d 350, 351-53 (5th Cir. 1990); **Woodard v. Collins**, 898 F.2d 1027, 1029 (5th Cir. 1990); **Ricalday v. Procunier**, 736 F.2d 203, 207-09 (5th Cir. 1984).

Constructive denial of the right to counsel was found in **Tucker**, 969 F.2d at 159. In that case, the transcript of the petitioner's resentencing hearing indicated that counsel remained silent throughout. Tucker alleged that the transcript was incomplete, that he had asked aloud at one point, "Do I have counsel here?" and that counsel had responded, "Oh, I am just standing in for this one." **Id.** Tucker alleged that his appointed counsel acted as a "mere spectator," and the Fifth Circuit agreed. The court noted that Tucker was unaware of the presence of counsel, counsel did not confer with Tucker whatsoever, and counsel made no attempt to represent his client's interests. **Id.**

In **Childress**, the Fifth Circuit found that counsel appointed merely to stand by, listen to the judge, and respond to any contingencies that might arise while the defendant waived the right to jury trial on burglary charges was not assistance at all, as required by the sixth amendment, and thus the defendant's burglary convictions could not be used to enhance his sentence for a later conviction for leaving the scene of an automobile accident. The court emphasized that they were not expanding the reach of the constructive denial of counsel doctrine. The court stated:

> Our holding is rooted in the unusual circumstances of this case, particularly the long-since abandoned state procedure of appointing counsel solely to waive the defendant's right to jury trial, together with the state court's determination that counsel in fact did nothing to represent appellant's interests.
>
> * * *
>
> We break no new ground by declaring that a defense lawyer who fails to actively assist the defendant during a critical stage of the prosecution is not the counsel whose assistance is contemplated by the Sixth Amendment.

Childress, 103 F.3d at 1231-32.

Herein, defendant seeks to apply the constructive denial of counsel doctrine based on two instances. First, during voir dire examination, juror Defeo was initially challenged for cause by defense counsel, but counsel later withdrew the challenge. When counsel for defendant asked prospective jurors whether they would be able to keep an open mind, Defeo responded as follows, "I have trouble with why can't people take responsibility for their own actions. And why do you --- why does this even have to happen?" Defense counsel then attempted to explain to Defeo that the purpose of a trial is to "decide what reality is" in situations. Defense counsel used a mistaken identity example wherein a defendant claims he did not do something and the state says he did. Defense counsel requested Defeo to ask another question to ascertain her state of mind. Regarding the burden of proof being on the state, Defeo questioned defense counsel as follows, "Why can't you prove that he is innocent? I mean I know that he is innocent until proven guilty, but why can't it be 50/50?" Defense counsel explained that in certain situations, it is not possible to prove a negative, reiterating that the burden of proof is and should be on the state. The colloquy proceeded as follows:

> Q. (Defense Counsel) I mean, if it were your relative how sure would you want a jury to be that they had done something inappropriate that was going to land them in Angola on a rock pile for twenty or thirty years, much less ninety-nine. And should it be the burden of your relative to prove hey, it wasn't me. And have to go on their own to prove all of these different things in order to not have to go to Angola.
>
> A. (Defeo) In (sic) they could prove it, I think they should.
>
> Q. (Defense Counsel) Sure. But sometimes you just can't prove that.

When later asked whether she would hold the state to their burden of proof, Defeo responded positively.

In challenging Defeo for cause, defense counsel argued that Defeo did not understand the burden of proof and believed that defense counsel had to prove defendant innocent. The state argued that while Defeo would apparently prefer evidence or proof of innocence, she understood the burden of proof and should not be challenged for cause. The trial court noted its concern as to whether Defeo understood that defendant did not have the burden of proving himself not guilty. However, the trial court also noted Defeo's expressions as the defense counsel asked her how she would feel if her relative was being charged with a crime. The trial court believed that Defeo was having second thoughts as to the fairness of requiring a defendant to prove himself not guilty. The state expressed its desire to further question or rehabilitate Defeo and the trial court stated its intention to call Defeo to the bench and question her. The trial court further stated that the state would be allowed to question Defeo at that time. At this point, the defense counsel withdrew his challenge.

The second instance noted in support of defendant's constructive denial of counsel claim involves the resentencing hearing that took place on February 3, 2005. Defendant argues that his counsel failed to appear at the hearing. Confusingly, defendant also notes that his counsel remained silent throughout the hearing. During the hearing, the trial court stated its rulings on defendant's post-trial pro se motions. Defendant directly addressed the trial court regarding its prior ruling on the motion for new trial. The trial court explained that it previously granted defendant's motion for new trial in error, believing that this Court had ordered it to do so, on remand. Defendant requested the grounds for the trial court's denial of the post-trial

motions. Based on its subsequent reading of this Court's October 29, 2004 opinion, the trial court reiterated its denial of defendant's motion for new trial. The trial court stated its grounds for denying the post-trial motions as follows:

> The court in its discretion denied your motion for reconsideration of sentence because the court feels that it was an appropriate sentence. The motion for new trial the court denied because the court feels that there are no grounds in which a new trial should be granted. And also the motion for acquittal, likewise, the court feels there is (sic) no grounds for which an acquittal should be had in this matter.

After defendant confirmed that he was ready to be sentenced, the trial court resentenced defendant to twenty-five years imprisonment at hard labor, the same term originally imposed. The trial court informed defendant of the delays for filing an appeal, motion to reconsider sentence, and post-conviction relief. Defendant requested and received further clarification as to the delay for filing an appeal.

In citing the above instances, defendant seemingly presents a two-fold argument: first, that he was completely denied counsel at a critical stage of a criminal proceeding, and, second, that defendant's trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. As to the first instance, despite her questionable commentary, juror Defeo confirmed that she would hold the state to its burden of proof. While it may be debatable as to whether defense counsel should have allowed the juror to be further questioned or rehabilitated, further pursued the initial challenge of the juror, or exercised a peremptory challenge, we do not find that this situation falls within **Cronic's** narrow exception to **Strickland**. As to the second instance, it is clear that defense counsel appeared. While the record reflects that counsel did not speak during the hearing, under the instant circumstances we are unable to conclude that defendant was constructively

denied counsel. Unlike in **Tucker**, defendant herein does not allege that the counsel appointed to represent him at the resentencing did not consult with him or was unaware of the facts. Moreover, defendant concedes that he was aware of the presence of his counsel. Defendant addressed the trial court regarding its denial of the post-trial motions and its grounds therefor.

Based on our review of the record, we find defendant has failed to establish constructive denial of counsel. Defendant was not completely denied counsel, nor was there a failure to oppose the prosecution as a whole. Thus, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his final assignment of error, defendant avers that the trial court erred in resentencing him after having granted his motion for new trial. Defendant notes the trial court's misinterpretation of this Court's October 29, 2004 opinion. As a result, the trial court granted defendant's motion for new trial on November 30, 2004. On February 3, 2005, the trial court denied said motion. Defendant now argues that in doing so, the trial court failed to vacate its prior order.

In his pro se brief, defendant argues that the trial court's granting of his motion for new trial was within its discretion and not based on a misinterpretation of this Court's October 29, 2004 opinion. Defendant avers that the trial court, prior to granting his motion for new trial, asked him what he wanted the court to do. According to defendant, he responded by informing the trial court that he wanted it to grant him a new trial or throw out the verdict. After the defense counsel and prosecutor spoke to the court, defendant's motion was granted. Defendant further avers that the trial court stated its grounds for granting the motion for new trial. Defendant argues that the trial court abused its discretion in resentencing him after his

conviction was vacated as a result of the trial court's granting of his motion for new trial. Finally, defendant concludes that he should be released from custody.

As heretofore stated, this Court vacated the trial court's original sentence and instructed the trial court to rule on defendant's post-trial motions. Thus, the case was remanded for further proceedings. On remand, during the November 30, 2004 hearing, the trial court noted that it reviewed this Court's order. The trial court in pertinent part stated that it was granting the new trial "as directed by the first circuit." The trial court also used the language, "according to the first circuit" in further discussion. Before the February 3, 2005 hearing, the trial court reread this Court's opinion and denied defendant's motion for new trial (and the other post-trial motions). After defendant referenced the November 30, 2004 hearing, the trial court stated, in part, as follows:

> You came on November the 30th, and I think it may have been prior to the court receiving the information from the – no, the court had received the information from the first circuit, however the court's reading of the order from the first circuit was erroneous. The court thought the first circuit was ordering this court to give you a new trial. But that's not what the first circuit was ordering. The first circuit only was ordering this court to vacate the sentencing until the court disposed of the motions first. And also the first circuit recognized that the court did dispose of the motions on February the 17th, but that was after the date in which the court sentenced you. So therefore the November 30th, where the court brought you back was suppose to have come back on December the 14th to see whether or not there was going to be a new trial. After rereading and rereading the first circuit's order, the first circuit was not ordering a new trial. So since the first circuit has not ordered a new trial, the court has denied your motions that you filed previously. . . .

Upon the denial of the motions, defendant confirmed that he was ready to be resentenced.[7]

[7] The trial court did not wait the required twenty-four hours after denial of defendant's motion for new trial. However, defendant arguably implicitly waived the twenty-four

As noted by the trial court, this Court's October 29, 2004 opinion merely directed the trial court to hold a hearing and rule on defendant's post-trial motions. In his pro se brief, the defendant misrepresents the colloquies of the November 30, 2004 hearing. Based on the record before us, it is clear that the trial court misinterpreted this Court's opinion in granting defendant's motion for new trial. We find that on February 3, 2005, the trial court effectively reversed its prior ruling granting defendant's motion for new trial. We find no error or abuse of discretion in this regard. The third counseled and sole pro se assignments of error lack merit.

CONVICTION AND SENTENCE AFFIRMED.

---

hour waiting period. See **State v. Lindsey**, 583 So.2d 1200, 1206 (La.App. 1 Cir. 1991), writ denied, 590 So.2d 588 (La. 1992). Moreover, as footnoted by defendant in his appeal brief, defendant does not wish to raise any issue in this regard "so as not to further impede this appeal."