NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 KA 2169

STATE OF LOUISIANA

VERSUS

ELLIOT JOSEPH

Judgment Rendered: December 28, 2006.

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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. 03-01-0202

The Honorable Louis Daniel, Judge Presiding

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Doug Moreau District Attorney Baton Rouge, La. Wick Cooper Dylan C. Alge Assistant District Attorneys	Counsel for Appellee State of Louisiana
Katherine M. Franks Slidell, La.	Counsel for Defendant/Appellant Elliot Joseph
Elliot Joseph	Defendant/Appellant In Proper Person

* * * * *

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

CARTER, C.J.

Elliot Joseph, defendant, was charged by grand jury indictment with one count of first degree murder, a violation of LSA-R.S. 14:30. Defendant entered a plea of not guilty, and the state provided notice of its intention to seek the death penalty. Defendant was tried before a jury and found guilty as charged; however, the jury was unable to unanimously agree on sentencing defendant to death. As a result of the jury's deadlock on the death penalty, the trial court imposed a sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

After considering defendant's appeal, we affirm his conviction and sentence.

FACTS

On January 4, 2001, shortly after 3:00 p.m., Sergeant Willie Vick of the Baton Rouge Police Department was dispatched to Our Lady of the Lake Hospital (OLOL) in response to a complaint of child abuse. Upon his arrival, Sergeant Vick spoke with Dr. Stephen Beasley, a pediatric emergency room doctor, who was treating the three-year-old victim, K.J. When K.J. arrived in the emergency room he was not breathing, in a coma, and close to being considered brain dead.

Sergeant Vick observed K.J. and noted the child had a laceration over one eye and a bruise over the other eye. There was bruising on the left side of the child's face, both arms were bruised, and multiple bruises were apparent on the child's chest and legs. K.J. also exhibited extensive burn scars on his legs and buttocks from an unrelated episode that occurred the

previous year.[1] Sergeant Vick observed fresh abrasions on K.J.'s existing scars, where the skin had been torn off. According to Sergeant Vick, there were imprints on the child where it appeared that objects had been used to strike him.

While at the hospital, Sergeant Vick spoke with K.J.'s mother, Monica Johnson, and K.J.'s stepmother, Latonya Joseph (the wife of defendant).[2] Sergeant Vick learned that K.J. had been visiting defendant and his family since the weekend before Christmas. Sergeant Vick directed Latonya Joseph and her fourteen-year-old brother, Andy Lewis, to go to police headquarters on Mayflower Street so they could be interviewed.

Two representatives of the Office of Community Services Child Protection Division, Bori Sunseri and Jessica Griffin, also had been called to the hospital. Sunseri and Griffin accompanied Sergeant Vick to the police station where they were present for the interviews regarding how K.J. was injured.

Andy Lewis initially told Sergeant Vick that K.J. had fallen in the tub while he (Lewis) was bathing him.[3] Latonya Joseph indicated that she was at work when she received a call from her husband, defendant, who asked

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[1] In March 2000, Leico Cole, the boyfriend of K.J.'s mother, Monica Johnson, placed K.J. in a tub of scalding hot water. The act caused K.J. to sustain first, second, and third degree burns over his buttocks and the back of his legs. K.J. spent two weeks in the hospital and experienced lingering problems with learning to use the bathroom and had keloid scars on his legs and buttocks. As a result of this act, Leico Cole was convicted of cruelty to a juvenile.

[2] Defendant and Monica Johnson had been involved in a prior relationship. As a result of their relationship, two children were born, a daughter, who was six-years old at the time of this incident, and K.J., who was born on December 15, 1997. Defendant and Johnson never married. At the time of this incident, defendant was married to Latonya Joseph, but they had divorced by the time trial commenced.

[3] Sergeant Vick testified that Lewis later gave a second statement and explained that he was taking the trash outside and that defendant was inside with K.J. In Lewis's second statement, he told the police that defendant called him into the room, and when he entered the room, K.J. was lying on the floor, and defendant asked him, "What did I do? What did I do?"

her to come home because something was wrong with K.J. The serious tone in defendant's voice made Latonya leave work immediately. When she arrived at her house, defendant led her to a bedroom where K.J. was lying on the floor and wheezing. Defendant told her that K.J. had slipped in the tub while bathing. After being unable to get a response from K.J., Latonya called 911. Defendant left shortly after Latonya called 911.

Defendant was not at the hospital, but Latonya contacted him on his cell phone after he picked up their other children from daycare. After indicating that the police needed to speak with him, defendant initially asked his wife if she "want[ed] him to go to jail." Defendant later arrived at the police station shortly after 5:00 p.m. and was taken to an interview room with Sergeant Vick, Sunseri, and Griffin.

During his interview, defendant stated that he was not at home when K.J. had fallen in the tub. Because defendant's statement regarding his whereabouts directly contradicted what his wife and Lewis had told the police, Sergeant Vick immediately advised defendant of his **Miranda** rights. Defendant indicated he understood these rights and continued speaking to Sergeant Vick.

Defendant then changed his statement and said that K.J. fell while he (defendant) was bathing him and that K.J. started having a seizure. Defendant also admitted that he had used a belt to whip K.J. earlier that day and on the two previous days and acknowledged K.J. would have bruises on his behind and legs from these whippings. Defendant explained that K.J. received the whippings because he continually soiled himself. Defendant stated that he did not realize whipping K.J. would tear the child's skin off.

Defendant stated that he used a spoon in an attempt to prevent K.J. from biting his tongue during the seizure and brought K.J. into the adjacent bedroom and laid him on the floor. Because he did not know what to do, defendant called his wife to let her know something was wrong with K.J. and to come home. After his wife arrived, defendant said she called EMS, and he left to go around the corner to get spark plugs for his vehicle. However, defendant later admitted he left out of fear. At the conclusion of the interview with defendant, Sergeant Vick placed defendant under arrest for cruelty to a juvenile and attempted murder.

On January 5, 2001, K.J. died, and the charges against defendant were upgraded to first degree murder. Later that night, at around 10:00 p.m., after defendant requested to speak with the police, he provided a second taped statement to Sergeant Vick and Detective Lonnie Lockett. After waiving his **Miranda** rights, defendant admitted he had not been honest in his previous statement. Defendant admitted that on the previous day, K.J. had soiled himself and that he had become frustrated with him and pushed his son in the face. Defendant said that the force of his push caused K.J. to fall and hit his head against a dresser, and K.J. began having seizures.

Dr. Alfredo Suarez performed the autopsy on K.J. and was accepted by the trial court as an expert in forensic pathology. According to Dr. Suarez, K.J. died as a result of multiple blunt traumas to the head. The type of trauma K.J. sustained was consistent with someone grabbing the victim and hitting his head against something heavy, such as a piece of furniture or a wall. Dr. Suarez noted that K.J. had injuries on his right forearm consistent with the pressure of being held. These forearm injuries were

inflicted contemporaneously with the injuries on the child's abdomen and forehead. According to Dr. Suarez, these injuries were not consistent with any type of accidental fall. Throughout his testimony, Dr. Suarez pointed out that K.J. had sustained several injuries that appeared to be four to five days old, in addition to the fresh bruising probably sustained the day he arrived at the hospital. However, Dr. Suarez opined that none of K.J.'s injuries were over ten days old.

Defendant did not testify but presented testimony from his mother, Dianne Joseph; his stepfather, Rodrick Hall; his younger sister, Dechita Joseph; his aunt, Charmaine Malvo; Georgia Johnson; and Trinette Phagans. The main focus of defendant's case revolved around refuting the state's contention that K.J. arrived at defendant's house the weekend before Christmas and that none of the witnesses had ever seen defendant use excessive force on any of his children.

SIXTH AMENDMENT ISSUES

In his first assignment of error, defendant argues the trial court interfered with his Sixth Amendment right to counsel by denying defendant counsel of his choice; denying defendant his right to have qualified appointed counsel; and denying defendant his right to self-representation.

On March 14, 2001, defendant made his first court appearance. At that appearance, defendant waived arraignment, and the trial court appointed the Public Defender's Office as his counsel. Following the March 14 appearance, Author R. Joiner, an assistant public defender, began representing defendant and filed numerous motions on defendant's behalf.

The minute entry of August 1, 2001, indicates that John F. Martin[4] and R. Neal Wilkinson,[5] both private counsel, filed motions to enroll as co-counsels in this matter. On August 13, 2001, Joiner filed a motion to withdraw from the case because defendant and his family had retained Wilkinson. On August 24, 2001, the trial court granted Martin's and Wilkinson's motions to enroll but denied Joiner's motion to withdraw, ruling that the public defender (Joiner) needed to remain enrolled in the matter in order to provide investigative or resource services.[6]

Wilkinson and Martin remained on the case and made several court appearances from October 2001 until January 4, 2002. On January 4, 2002, Wilkinson filed a motion to withdraw as counsel, citing an inability to communicate with defendant. Wilkinson's motion relayed defendant's desire to remain represented by Martin. The trial court granted Wilkinson's motion to withdraw.

Following Wilkinson's withdrawal, the trial court informed the Public Defender's Office on January 11, 2002, that it would be assisting Martin as counsel. As a result, Joiner resumed active representation of defendant. At some point during this period, private counsel, William Bryan, also assisted in representing defendant, although no formal motion to enroll appears in the record.

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4 Martin's motion to enroll as co-counsel specified that he would be serving as second seat.

5 Defendant makes no contention regarding Wilkinson's qualifications to represent a capital defendant.

6 On September 21, 2001, Donald R. Dobbins filed a motion to enroll as counsel. On September 28, 2001, however, Dobbins withdrew his motion and was removed as counsel.

On October 28, 2003, the trial court considered a pro se motion by defendant to act as co-counsel in the case. At the hearing, defendant requested that Martin and Bryan be relieved as counsel. According to the minute entry for this date, the trial court called a recess in order for defendant to discuss the matter with his attorneys.

Following the recess, defendant withdrew his motion to act as co-counsel and requested that Martin and Bryan be relieved as counsel. The trial court ordered Martin and Bryan to file motions to withdraw as counsel and set a hearing on the matter for October 30, 2003.

On October 30, 2003, Martin and Bryan filed motions to withdraw, stating defendant had been unwilling to cooperate in a manner conducive to his own defense and had refused to provide payment for services rendered. Martin noted that defendant was still represented by the Public Defender. At the hearing, defendant rescinded his request to have Martin and Bryan withdraw and stated it was his desire that the attorneys stay as counsel. Martin and Bryan withdrew their formal motion to withdraw.

On November 23, 2003, defendant wrote a letter to the trial court seeking to "separate himself from counsel" and seeking to represent himself. Defendant specifically stated that he was not waiving his right to counsel. On December 18, 2003, the trial court denied defendant's request.

During this same time period, Joiner filed a second motion to be relieved as counsel based on the fact that Martin and Bryan were adequately representing defendant and that the Public Defender's Office had allocated funds for the case. Joiner's motion was withdrawn on February 6, 2004. No

further issues concerning counsel or self-representation arose, and Martin, Bryan, and Joiner continued representing defendant.

On April 18, 2005, *voir dire* commenced for defendant's trial. On the morning of the second day of *voir dire*, defendant requested that Martin be removed as counsel and only Joiner represent him. Joiner responded that he was certified by the Louisiana Supreme Court as only a second chair and he could not handle the case alone. Joiner also told the court that he had been working with Martin for at least two years, and that working together, they could adequately defend defendant.

Defendant then tried to discharge both Joiner and Martin and told the trial court that he wanted two new attorneys. The trial court ruled that defendant was engaging in dilatory tactics and attempting to manipulate the system. Defendant's request was denied, and the trial proceeded with Joiner and Martin representing defendant.

Defendant's first assignment of error asserts that the trial court interfered with his Sixth Amendment right to counsel by denying defendant counsel of his choice; by denying defendant qualified appointed counsel; and by denying defendant his right to self-representation.

The Right to Qualified Appointed Counsel

Defendant argues that despite the finding that he was indigent, he was only appointed a single counsel (Joiner), who admitted during the proceedings that he was only qualified to be a "second chair" in a capital case. Defendant maintains that he was never appointed a "first chair" capital counsel.

Louisiana Code of Criminal Procedure article 512 provides:

> When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel.

Defendant also cites to Louisiana Supreme Court Rule XXXI, which defines standards for indigent defenders. Rule XXXI.A provides in pertinent part:

> (1) **Capital Litigation**. In all capital cases, the following standards shall be applicable to the defense of indigents:
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> (a) In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant. At least two of the appointed attorneys must be certified as qualified to serve in capital cases as provided below. The court shall designate one of the appointed attorneys to be lead counsel, the other(s) as associate counsel. The court shall only designate as lead and associate counsel those attorneys who have either been previously certified by the Louisiana Indigent Defender Board and whose certification is still in good standing or those attorneys who, after December 31, 1997, may be certified by the district court judge handling the case pursuant to Paragraph (b) of Subsection 1 of this Section. The certification of attorneys by district court judges shall remain in effect until such time as the Indigent Defense Supplemental Assistance Board is able to review and evaluate the standards and capital certification procedures for either continuation, discontinuation, or modification.
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> (b) Until such time as the Indigent Defense Supplement Assistance Board shall address this matter, each district judge, presiding over a capital case, shall maintain and enforce the capital certification procedures previously developed by the Louisiana Indigent Defender Board.

In response to defendant's argument that he was not represented by qualified capital counsel, we note that soon after determining defendant was indigent, Joiner was appointed to represent defendant. It is undisputed that

Joiner had more than five years experience at the time of his appointment. However, soon after Joiner's appointment, defendant retained the services of two private attorneys, Wilkinson and Martin. Accepting defendant's representation that Martin did not have five years experience at the time of enrolling as counsel, no such allegation is made concerning Wilkinson. Once Wilkinson withdrew, defendant was still represented by both Joiner and Martin. Arguably, since defendant had retained counsel, the indigent defender standards were not applicable. Moreover, even if those standards were applicable, there was no violation since defendant was represented at all times by two attorneys, with at least one of those attorneys having more than five years experience.

We also note that Supreme Court Rule XXXI shall not be construed to confer substantive or procedural rights in favor of any accused beyond those rights recognized or granted by the United States Constitution, the Louisiana Constitution, the laws of the state, and the jurisprudence of the courts. Nor shall Rule XXXI form a basis for a procedural or substantive attack in any case or proceeding pending or instituted in the Louisiana criminal justice system. Louisiana Supreme Court Rule XXXI.B.

This portion of defendant's first assignment of error is without merit.

Right to Counsel of Defendant's Choice

Defendant argues that the trial court "compelled [him] to accept a private attorney who was not his counsel of choice, in whom he had little confidence and who had limited experience in order to defeat the necessity of appointing capital-qualified counsel."

The record reflects that on October 28, 2003, during a hearing on defendant's pro se motion to act as co-counsel, that defendant made a verbal request that Martin and Bryan (his hired counsel) be relieved as counsel. Two days later, defendant withdrew that request. Defendant made no other attempts to change attorneys until April 19, 2005, when he attempted to fire Joiner and Martin. Defendant's request occurred on the second day of *voir dire*, and the trial court ruled defendant's request was a dilatory tactic and that he was attempting to manipulate the system.

Defendant's right to the assistance of counsel is guaranteed by both state and federal constitutions. U.S. Const. amend. VI; LSA-Const. art. I, § 13. The right of a defendant to counsel of his choice has been implemented by LSA-C.Cr.P. art. 515, which provides in pertinent part that,

> Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned by the court.

However, a criminal defendant's right to counsel of his choice is not absolute. The jurisprudence has consistently interpreted this right as one that cannot be manipulated to obstruct the orderly procedure in our courts and that cannot be used to interfere with the fair administration of justice. The right of a defendant to counsel of his choice must be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage within the procedural framework of the criminal justice system. Once the day of trial arrives, the question of substitution of counsel rests largely within the discretion of the trial judge. **State v. Lee**, 364 So.2d 1024, 1028 (La. 1978).

Based on our review of the record, we cannot say the trial court erred in denying defendant's April 19, 2005, request to fire his attorneys.

Defendant's 2003 request to fire Martin had been withdrawn, and there were no other complaints by defendant for the next year and a half, until the second day of *voir dire*. Under these circumstances, we cannot say the trial court abused its discretion in denying defendant's request to fire his attorneys.

This portion of the assignment of error is without merit.

Defendant's Right to Represent Himself

In the final portion of this assignment of error, defendant argues that the trial court erred in denying defendant's request to act as his own counsel. While an indigent defendant has a right to counsel, as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative. See **Faretta v. California**, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). An accused has the right to choose between the right to counsel and the right to self-representation. An accused, however, will be held to have forfeited the right to self-representation if he vacillates between self-representation and representation by counsel. In light of the fundamental significance attached to the right to counsel, the jurisprudence has engrafted a requirement that the assertion of the right to self-representation must be clear and unequivocal. Courts are encouraged to indulge in every reasonable presumption against waiver, and requests that vacillate between self-representation and representation by counsel are equivocal. See **State v. Bridgewater,** 00-1529 (La. 1/15/02), 823 So.2d 877, 894, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003). Whether the defendant has knowingly, intelligently, and unequivocally asserted the right to self-representation must be

determined based on the facts and circumstances of each case. **Bridgewater**, 823 So.2d at 894.

After reviewing the record, we cannot say the trial court erred in denying defendant's requests to represent himself because these requests were not unequivocal assertions of the right to self-representation. At no time did defendant indicate to the trial court that he wanted to represent himself in this prosecution without the assistance of any counsel. Moreover, we must consider that this proceeding was a capital case, and defendant was best served with representation by counsel. Defendant's argument that his right to counsel of his choice was violated further indicates that he never intended to represent himself.

This portion of the assignment of error is without merit.

MOTION TO SUPPRESS STATEMENTS

In defendant's second counseled and in his sole pro se assignment of error, he argues that the trial court erred in denying the motion to suppress his January 4, 2001, statement and his January 5, 2001, statement. Defendant maintains that he was "arrested" from the beginning of his questioning by the police and that Sergeant Vick used the improper question-first technique condemned by the United States Supreme Court in **Missouri v. Seibert**, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

It is well settled that for a confession or inculpatory statement to be admissible, the state must affirmatively show it was freely and voluntarily given without the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. LSA-R.S. 15:451; LSA-C.Cr.P. art. 703D. Further, if the statement was elicited during a custodial interrogation, the

state must show that the defendant was advised of his constitutional rights. Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. Moreover, where conflicting testimony is offered, credibility determinations lie within the sound discretion of the trial judge, and his ruling will not be disturbed unless clearly contrary to the evidence. **State v. Williams**, 01-0944 (La. App. 1 Cir. 12/28/01), 804 So.2d 932, 944, writ denied, 02-0399 (La. 2/14/03), 836 So.2d 135.

In **Miranda v. Arizona**, the United States Supreme Court held that a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

An officer's obligation to administer **Miranda** warnings attaches only when there has been a restriction on a person's freedom so as to render him in custody. In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. **Stansbury v. California**, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528-29, 128 L.Ed.2d 293 (1994) (*per curiam*).

The only relevant inquiry in determining whether there was a formal arrest or restraint on the freedom of movement of the degree associated with an arrest is how a reasonable man in the suspect's position would have understood the situation. See **Berkemer v. McCarty**, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). It is well settled that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question of whether the individual is in custody for purposes of **Miranda**. The police officer's beliefs are relevant only to the extent that they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action. See **Stansbury**, 511 U.S. at 324-325, 114 S.Ct. at 1529-30.

In the present case, Sergeant Vick was dispatched to OLOL Hospital in response to a report of child abuse. While at the hospital, Sergeant Vick, viewed K.J. with Dr. Beasley and observed that K.J. had bruises and contusions over his body. Dr. Beasley told Sergeant Vick that this was the worst case of child abuse he had ever seen. With just the brief information Sergeant Vick learned from K.J.'s relatives while at the hospital, Sergeant Vick was aware that Leico Cole, the man who had caused K.J. to suffer severe burns less than a year earlier, was still involved with K.J.'s mother. Sergeant Vick returned to the Mayflower Street police station to interview family members to determine how the child had been injured.

When Sergeant Vick arrived at the police station, he interviewed Andy Lewis, defendant's brother-in-law, who was fourteen years old at the time. Lewis told Sergeant Vick that he (Lewis) was bathing K.J. when the

child slipped and hit his head in the tub. Sergeant Vick also interviewed Latonya Joseph, who said that defendant called her at work and indicated she had to come home because there was a problem with K.J. Latonya Joseph said that when she arrived home, K.J. was severely injured, and she called 911. According to Sergeant Vick, at this point in time everyone was a suspect, but he needed to interview everyone associated with the child and the scene to determine what happened.

Sergeant Vick testified that defendant was not under arrest when he arrived at the police station. According to Sergeant Vick, he told defendant that they were going to conduct an interview, and he would like to get a taped statement from defendant regarding what he knew about the case. Sunseri and Griffin both confirmed that the interview was taped from the beginning and was conducted in a calm and cordial manner. Neither Sunseri nor Griffin observed Sergeant Vick threaten or promise defendant anything in order to obtain a statement from defendant or act in any inappropriate manner towards defendant. Further, no one present in the room observed defendant in handcuffs.

Sergeant Vick testified that during the interview defendant provided information indicating that he was not present in the house when K.J. was injured. Because this information directly contradicted what had been learned from Lewis and Latonya Joseph, Sergeant Vick advised defendant of his **Miranda** rights.

According to Sergeant Vick, Sunseri, and Griffin, defendant appeared to understand his rights. After being advised of his rights, defendant continued to speak with Sergeant Vick. Defendant changed his statement

and admitted that he was bathing K.J. when K.J. fell in the tub. Defendant also admitted that he had whipped K.J. with a belt that day and on the two previous days. Defendant claimed he left the house after 911 was called because he was afraid he would go to jail because of all the bruises on K.J. Before the interview concluded, defendant told Sergeant Vick that he would accept a charge of cruelty to a juvenile but not attempted murder. When the interview was over, Sergeant Vick placed defendant under arrest.

Following K.J.'s death on January 5, 2001, the charges against defendant were upgraded to first degree murder. Defendant requested to speak with the police in order to "ease his mind." Defendant was transported from the East Baton Rouge Parish Prison to the Mayflower Street police station and advised of his rights. Defendant waived his rights and told Detective Lonnie Lockett and Sergeant Vick that he had struck K.J. in the face and that K.J. fell against a dresser and went into seizures. Defendant also apologized to Sergeant Vick for lying in his initial statement.

Defendant argues that the January 4, 2001, statement was improperly admitted because the police used the "question-first" technique condemned in **Missouri v. Seibert**, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). In **Seibert**, the Supreme Court held that a two-step, question-first technique employed by the police was an improper circumvention of the **Miranda** requirement. The scenario under scrutiny in **Seibert** involved a situation whereby a defendant was arrested and questioned until he provided an inculpatory statement. A short time later, the defendant would be **Mirandized**, and a second taped statement would be obtained. **Seibert**, 542 U.S. at 616-617, 124 S.Ct. at 2612-2613.

We agree with the state that **Seibert** is not applicable to the present situation. **Miranda** applies only to custodial interrogations. In the present case, defendant was not in custody until Sergeant Vick determined that he lied about his presence in the house. Following this determination, the tape indicates that Sergeant Vick immediately advised defendant of his **Miranda** rights, which defendant freely and voluntarily waived. It was only after defendant waived his rights that he admitted to striking K.J. Moreover, the January 5, 2001, statement also was given after defendant was advised of his rights and freely and voluntarily waived those rights.

Under these circumstances, we cannot say the trial court erred in denying defendant's motion to suppress his statements. Clearly, defendant was not in police custody at the time he began his interview. Defendant voluntarily arrived at the police station, and his freedom of movement was not restricted in any manner prior to the time he was advised of his rights.[7]

This assignment of error is without merit.

JURY SEQUESTRATION

In his third assignment of error, defendant argues the trial court erred in failing to obtain a joint waiver of sequestration because the record does not contain an affirmative waiver by the defense of the right to a sequestered jury during the jury selection or trial. Louisiana Code of Criminal Procedure article 791 provides:

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[7] Defendant testified during the hearing on his motion to suppress, that he appeared at the police station on January 4, 2001, because his wife told him that she was being sent to jail and that he was immediately handcuffed upon his arrival at the police station. Latonya Joseph never testified that she was threatened with imprisonment. In addition, Sergeant Vick and Sunseri both denied that defendant was handcuffed at any point during the January 4, 2001, interview. In denying the motion to suppress, the trial court obviously determined that defendant's version of events was not credible and accepted the testimony of Sergeant Vick, Sunseri, Griffin, and Latonya Joseph. As noted above, such credibility determinations will not be overturned on appeal.

> A. A jury is sequestered by being kept together in the charge of an officer of the court so as to be secluded from outside communication, except as permitted by R.S. 18:1307.2.
>
> B. In capital cases, after each juror is sworn he shall be sequestered, unless the state and the defense have jointly moved that the jury not be sequestered.
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> C. In noncapital cases, the jury shall be sequestered after the court's charge and may be sequestered at any time upon order of the court.

After reviewing the record, we find there is ample evidence of a joint agreement by the parties that the jury would not be sequestered. The trial court continually referred to such an agreement between the lawyers, and at no time did any lawyer object to the trial court's representation to the jury that such an agreement was in existence.

Defendant seeks to impose the requirement that such an agreement be written; however, the statute does not mandate such a requirement. The supreme court has recognized that such waivers can be verbal. See **State v. Taylor**, 93-2201 (La. 2/28/96), 669 So.2d 364, 380-81, cert. denied, 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996).

Once deliberations began, the jury was sequestered. Defendant contends that the jury had "no place to go" and deliberated until 2:00 a.m., which had the effect of causing the jurors to relinquish their beliefs just to be able to end the deliberation process. A close reading of the record does not support defendant's account of the circumstances of the jury's deliberation.

The jury began deliberating in the early evening of April 27 and continued past midnight, into the early morning hours of April 28, 2005. The trial court indicated that if progress stopped at any point during deliberations that they could inform the court and hotel arrangements would

be made. At no point did the jury inform the trial court that they were not making any progress in the deliberation process. Following the rendering of the guilty verdict, the jury was informed that they would remain sequestered until the conclusion of the penalty phase. The following day, the penalty phase concluded, and the jury was released after being unable to reach a decision on whether to recommend the death sentence.

After reviewing the record, we find this assignment of error to be without merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.