NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0134**
VERSUS	*	**COURT OF APPEAL**
PHILIP ROSENBLUM, A/K/A PHILIP ROMAN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 400-207, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)

MURRAY, J., CONCURS IN THE AFFIRMATION OF THE CONVICTION, AMENDMENT OF THE SENTENCE, AND AFFIRMATION OF THE SENTENCE AS AMENDED.

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Conviction Affirmed; Sentence Amended and Affirmed as Amended

Defendant Philip Rosenblum a/k/a Philip Roman was charged by bill of information on July 28, 1998 with theft, a violation of La. R.S. 14:67. Defendant pleaded not guilty at his August 10, 1998 arraignment. The trial court denied defendant's motion to suppress the evidence on August 28, 1998. On February 23, 1999, this court denied the State's writ application as to the trial court's denial of its motion to quash a subpoena duces tecum issued at the request of defendant. On February 24, 1999, the State amended the bill of information to increase the value of the property allegedly stolen from over five hundred dollars to over one thousand dollars. On July 21, 1999, defendant was found guilty as charged at the conclusion of a trial by a six-person jury. On February 4, 2000, the trial court sentenced defendant to eight years at hard labor, but suspended the sentence and imposed five years active probation, with special conditions, including restitution in the amount

of $295,000. Defendant now appeals.

FACTS

Defendant was convicted of the theft of antiques.

Franco Valobra testified that he was a partner of Morris Herman, and that Herman was the sole owner of a New Orleans antique store, the "Windsor Collection," located at 313 Royal Street, in a building owned by Herman. The Windsor Collection housed three showroom floors of antiques, furniture and other items. Some of the antiques were owned by Herman, while some were consigned to the store by others. The consignor was indicated by initials on a sales tag placed on the particular item. Handwritten records were kept, with each consignor having a folder. Valobra said he met defendant in 1998, when defendant approached Herman about renting space in 313 Royal Street. An agreement was perfected, and thereafter Valobra saw defendant a few times moving his furniture in and out of the building. Valobra testified that at some point Herman expressed to defendant a desire to terminate the agreement. Valobra believed it was a few days later that he was called to the store and found many items missing.

Valobra testified that the "Petite Royale" was a corporation set up by Pettigrew, one of the Windsor Collection's consignors from Dallas.

Valobra confirmed on cross examination that one of the items listed as stolen from the Windsor Collection belonged to Christine Bernard, who had consigned some items to a store located at 323-325 Chartres Street, which at that time was run by Valobra and Herman. Valobra identified a consignment agreement between himself and Ms. Bernard. Valobra said he was unaware Bernard had removed her items from the store prior to the date of the thefts. Valobra stated on redirect examination that defendant had been allowed to put his furniture on all three floors of the building at 313 Royal Street, but that he had most of his things on the first floor, where he would have a greater chance of selling them.

Richard Wilson testified that he was the general manager of Pettigrew and Associates, a Dallas wholesale furniture, lighting and decorative accessory company. He said that Petite Royale was a wholly-owned subsidiary company of Pettigrew, set up to and licensed to do business in Louisiana, then operating out of 323-325 Chartres Street. However, Petite Royale's first venture into the business in Louisiana was a consignment arrangement with the Windsor Collection. Wilson identified a copy of a physical inventory he performed of Petite Royale furniture located at the

Windsor Collection on April 7, 1998. Wilson was unable to say whether the items on the April 7, 1998 inventory list were still on consignment at the Windsor Collection on May 23-25, 1998. However, he said that a large number of the items were missing, and that to the best of his knowledge, they were missing from the Windsor Collection. Petite Royale's consignment agreement was with Morris Herman, the president and owner of the Windsor Collection. Wilson said he did not know defendant, and replied in the negative when asked whether Pettigrew and Associates or its subsidiary Petite Royale ever gave permission to defendant to take items on the inventory list from the Windsor Collection. Wilson identified a copy of a check in the amount of $45,000 made out to Pettigrew from its insurance company, covering its losses from the theft at 313 Royal Street. Wilson said the price reflected the price Pettigrew paid for the items. Wilson also identified a sworn statement from Pettigrew's president, stating that Pettigrew's total loss from the May 23 theft at the Windsor Collection was $66,656.20.

Wilson conceded on cross examination that he would not know whether or not the Windsor Collection sold some of Petite Royale's antiques between the April 7, 1998 inventory and May 25, 1998. He said no Petite Royale employees were working at the Windsor Collection during that

period. Wilson also admitted that none of Petite Royale's employees inventoried its items after the theft, but that the Windsor Collection had done an inventory for Petite Royale, and that inventory was the basis of its insurance claim. During the consignment period, the Windsor Collection would give Petite Royale an accounting of any item it sold under the consignment agreement, and remit a check for Petite Royale's cost of the item plus one-half of the profit. Wilson also said he talked with Windsor Collection people every day, and said he was very confidant that he knew where items were and what was being sold. Finally, Wilson said that to his knowledge there had never been any other thefts of Petite Royal items from the Windsor Collection.

Retired Judge Joseph Tiemann testified that in 1989 Morris Herman inventoried items from Jewel Toup's estate, which had been inherited by Tiemann, loaded them onto a truck, and took them off on consignment to sell in his antique store. Herman sent him a copy of the inventory list, and every time Herman sold an item, he would telephone Tiemann, who would cross that item off the list Herman had originally given him. Tiemann said Herman did the same thing with the list he retained. Herman would send Tiemann the sales price received, less a commission. Tiemann identified his copy of the inventory list, which was inside of an envelope from Herman

Galleries, the prior name of the business, which was postmarked September 25, 1989, and addressed to Tiemann at his home address. Tiemann answered in the negative when asked whether any of his items had ever been missing during the period from 1989 to May 23, 1998. Tiemann testified that he never gave defendant permission to take his items out of the store and never had a consignment agreement with defendant.

It was brought out on cross examination that the address on the envelope from Herman Galleries was 333 Royal Street. Tiemann agreed that the last time he saw his goods they were headed for 333 Royal Street, but said he recalled something to the effect that the business was moving to larger quarters. However, Tiemann said he was not told what was being moved there. He had never been to the antique store, and the only way he knew what was missing was from what Morris Herman told him.

Ben Khalil testified that his solely owned and operated company, Khalil Gem Importers, supplied antique jewelry to the Windsor Collection under a consignment agreement. It was his understanding that Deanie Richard handled his items for sale at the Windsor Collection. Khalil testified that he left two items on consignment at the Windsor Collection prior to May 1, 1998, a platinum diamond ring valued at $17,000 and an emerald and diamond ring valued at $4,000. He knew it was before May 1,

1998 because that was the date on an invoice he submitted to the Windsor Collection for $21,000. He indicated that he submitted the invoice because the Windsor Collection lost the two rings. When asked when he learned that the rings were missing, he said he thought it might have been after the Memorial Day weekend, but was not sure what weekend it had been. He received the news when he went to the store. Khalil said he did not enter into a consignment agreement with defendant, nor did he ever give defendant permission to take his rings out of the Windsor Collection. He had dealt with the Windsor Collection or Morris Herman for at least five years, and had never had any items disappear. Khalil said on cross examination that the Windsor Collection exhibited his jewelry in a jewelry case, that he assumed was locked, and that he would have been hesitant to leave his $21,000 worth of jewelry if the cases were not locked. He said he filled out the invoice after the theft, but could not explain why it was dated May 1, 1998 if the theft occurred May 23 or 24. Khalil reiterated that he gave only two items to the store, and did not know anything about additional information written at the bottom of his invoice indicating that his loss was $87,000, or that a six carat diamond ring was involved. Khalil stated on redirect examination that he assumed the date on the invoice indicated the day the consignment was written, but indicated again that he had created the

invoice to submit to the Windsor Collection to get compensated for his losses.

Mohammed Moezzi testified that he owned Birjand International, a store located at 233 Royal Street which specialized in French tapestries, Persian rugs and many other types of floor coverings. He consigned some rugs to the Windsor Collection through an agreement with the owner he knew as Mr. Herman. He would regularly stop in the Windsor Collection to check on his rugs. Moezzi identified an invoice listing rugs he had consigned to the Windsor Collection, noting that the ones with initials next to them indicated ones that had been returned to him. He identified three rugs listed on the invoice that were missing, and he was told by the Windsor Collection that many things had been stolen from the store. He said that had been the first time he had entered into a consignment agreement with Mr. Herman. Moezzi said he did not know defendant, and had no association with him. He conceded on cross examination that the invoice listing the rugs he had consigned to the Windsor Collection was not dated, and he could not tell on what date it was written. Moezzi was asked on cross examination whether he was sure what rugs he consigned but had taken back at the time of the thefts, and he replied that he was not exactly sure, but later said that he knew that the three rugs highlighted on the invoice were

missing.

Deanie Richard testified that she managed the Windsor Collection for Morris Herman, and was the manager during April and May 1998, when defendant rented space in the store. She said defendant's items were only on the first floor, although she said he could have sold from the other floors. Richard said everything in the store was for sale, and that the store had on consignment items from Petite Royale, rugs from Birjand, jewelry from Khalil, pieces of silver and some jewelry from Roberta Goldberg, and antique furniture from Judge Tiemann. Morris Herman also owned some items. Petite Royale owned the majority of items on consignment. Defendant had approximately seventy-five pieces, mostly small, but including perhaps twenty-five pieces of furniture. Richard said she usually arrived at 10:00 a.m. and closed between 5:30 and 6:00 p.m. She gave defendant her alarm code, because he would stay late, until 9:00 or 10:00 p.m. She replied in the affirmative when asked whether defendant was "pretty much" the last person to leave the store.

During the weekend of May 23-25, 1998, Deanie Richard received a telephone call from ADT. Based on that call, she returned home from Houma, and then immediately went to the store. This was the day after Memorial Day. A large painting, that had been on the third floor, had been

placed in the front window so as to block any view of the interior of the first floor from the outside. Everything on the first floor had been removed, and other items were missing from the second and third floors. All of defendant's items had been removed, and items belonging to others were missing as well. Richard's handwritten record book, in which she listed items on consignment, was inside of a cabinet that was stolen. The consignors used to give an inventory list of the items they were consigning, and Richard said she had to ask those consignors to give her copies of their lists. However, she admitted that "mostly," she used her memory. Richard identified a list compiled by her reflecting the retail value of the items belonging to consignors that were stolen. She gave this list to New Orleans Police Det. Ronald Puigh.

Richard clarified that a particular ring had been returned to Ben Khalil, and that only two of his pieces had been stolen. Those two pieces had been packaged for shipment and were inside the drawer of a desk that was stolen. Richard said she was familiar with all of the items on the list, and offered to describe each one in detail. Richard identified a collection of sales tags, which she used to explain the identification system for items on consignment. She used the initials "JO," for John Orr, who owned Pettigrew and Associates, which in turn owned Petite Royale. Richard testified further

that the tags matched up with items she had listed as stolen. She said Det. Puigh brought the tags to her, after they were found at defendant's home. Deanie Richard replied in the negative when asked if, to the best of her knowledge, any of the stolen items had been removed by their consignors. Richard said she did not take the items out of the store. She also noted that defendant once removed one of his pieces, a large armoire, saying he had sold it. After the thefts, she went with police to defendant's hotel, the Downtown Hotel on Tulane Avenue, and was surprised to see the armoire there. She viewed pieces of furniture stored in a back room at the hotel, but said that those all belonged to defendant. None of the stolen items was ever recovered. Richard said the value of the stolen items was probably $600,000.

Deanie Richard testified that the last time she saw the sales tags that police found in defendant's home were on furniture located in the Windsor Collection. She said that after Det. Puigh showed her the tags, she matched them to the inventory list, and everyone of them matched an item that was stolen. Richard identified appraisal forms the store would give to customers for proof of an item's value for insurance purposes. She said the appraisal forms were inside of her desk, a piece of furniture on consignment from Pettigrew that was among the pieces stolen. Although the appraisal forms

stated Herman and Sons, which was the name of Morris Herman's other store, they were forms used by the Windsor Collection. She said defendant never would have needed the appraisal forms. The last time Richard saw the appraisal forms, they were in her desk; the next time she saw them was in court. Richard said that to the best of her knowledge, as manager of the Windsor Collection, defendant did not have permission or consent to remove from the store any items that were on consignment to the Windsor Collection.

Deanie Richard admitted on cross-examination that she did not know the terms of the lease agreement between Morris Herman and defendant. She did not know that defendant was going to be moving out that weekend, and it came as a surprise to her. She confirmed that had she known, she would have been there to make sure none of the Windsor Collection's things were moved out. Morris Herman was in the hospital at the time. She got the telephone call from the alarm company on Tuesday, the day after the Memorial Day holiday. Franco Valobra telephoned her afterward, after he had gone to the store. Another employee, Beth Watkins, had opened the store and called Morris Herman, who called Valobra to go to the store. Richard said neither Morris Herman nor Franco Valobra had keys to the store. Defendant had access to the store—keys and alarm code—but so did

several other employees.

Richard said the only items of jewelry stolen were the two pieces belonging to Ben Khalil. Richard admitted that she inadvertently included on the list of items stolen a six-carat diamond ring. She further admitted that the last time she saw the two pieces of jewelry they were packaged and addressed for shipping to two customers, and a girl working at the store, Veronica, was supposed to send the packages. Richard said it took her five minutes to look at the items at defendant's hotel and ascertain that all of them belonged to defendant. Richard was confronted with evidence that two chairs that had been on consignment from Christine Bernard had been sold rather than stolen. Richard conceded that she lied to Bernard, telling her the chairs had been sold, and paying her the alleged proceeds from the sale, claiming that she did it so she would not have to admit to Bernard that the chairs had been stolen.

Joseph E. Berrigan III, a full-time co-manager of the Windsor Collection with Deanie Richard, used to work part-time, after teaching high school and on weekends. He identified the tags that he said had been put on furniture at the store, including some of defendant's tags for his own furniture. Berrigan looked at two Windsor Collection tags and said they were for pieces owned by Deanie Richard and John Orr, the owner of

Pettigrew and Associates (Petite Royale). Berrigan said that none of the Windsor Collection tags belonged to any of defendant's pieces; defendant had his own tags. Berrigan said all of the tags had been on furniture that was in the store. Defendant kept the store open at night, telling the others at the store that many customers would come in at night, and that he had sold some things at night. Defendant specifically told Berrigan that he had sold the large armoire at 10:00 p.m. one night. Berrigan said he later saw the same armoire at defendant's hotel when he went there with police. Berrigan also said that he thought he recognized a piece belonging to John Orr at the hotel, and later told police about it. When he went back with police it was gone. Berrigan testified that it was defendant who suggested that the store be closed on Memorial Day, a Monday.

Berrigan stated on cross-examination that he was not privy to defendant's lease agreement. Berrigan was shown defendant's application for an occupational license to do business on the first, second and third floors of the store. Berrigan said on redirect examination that to the best of his knowledge defendant could have put his furniture on the second and third floors.

Elizabeth Watkins was employed at the Windsor Collection in May 1998, working about four days a week. She was there the first day the store

opened, and consequently knew what furniture belonged to whom. She thought that she and Deanie Richard were the only ones who had keys to the store. Watkins stated that defendant put most of his furniture on the first floor, because that was where most of the customer traffic was. Furniture that was on the first floor when defendant moved in was taken to the second and third floors to make room for defendant's furniture. Watkins said she worked Thursday or Friday—of the week prior to the Memorial Day weekend. When she arrived at work at approximately 9:30 a.m. after the Memorial Day weekend, there were only two pieces of furniture on the first floor. On the second floor, only a large armoire remained. There were a couple of small chairs left on the third floor. A large painting had been placed in the window, blocking the view from outside. Upon discovering the thefts, Watkins attempted to contact Morris Herman, but was told to contact Franco Valobra, as Herman was in the hospital. She learned from the alarm company that the alarm had been turned back on an hour before she arrived. Watkins identified the Windsor Collection sales tags and defendant's sales tags, identifying his items as "French Quarter Antiques" pieces.

When asked on cross-examination who had worked that weekend, Watkins said that a young girl named Veronica worked on Saturday

morning. Asked whether the alarm was off until 8:30 or 9:00 a.m., Watkins answered that it had been turned on and off several times. She and Deanie Richard had the combination to the safe. Watkins said that while the jewelry was usually put back in the safe every night, pieces were sometimes left in a desk drawer if, for example, it they were going to be shipped out the next day. She also said they sometimes would put all of the jewelry back in the safe near closing time, but keep a piece in a desk drawer if a customer was expected to come back to purchase it. If the customer did not return to purchase the item, it might stay in the desk drawer overnight. Watkins thought that Ben Khalil's six-carat diamond ring had been left in the desk drawer over the Memorial Day weekend. Watkins reiterated on re-redirect examination that no piece of jewelry left in the desk drawer had ever disappeared prior to this occasion. On re-recross examination, Watkins admitted that Deanie Richard told her that the six-carat diamond ring had been in the desk drawer.

New Orleans Police Detective Ronald Puigh responded to a call at the Windsor Collection, 313 Royal Street, on what he said was the Monday of Memorial Day weekend, 1998. Det. Puigh, assigned to the Eight District, headquartered across Royal Street from the Windsor Collection, testified that it would not be unusual to see trucks moving in and out of Royal Street

over a Memorial Day weekend. No one in any of the businesses in that block had noticed anything unusual over the holiday, or saw anything being moved. Det. Puigh later noted that most of those businesses had normal operating hours, such as from 10:00 a.m. to 6:00 p.m. Det. Puigh attempted to contact defendant at home and his hotel, the Downtown Inn on Tulane Avenue, where Det. Puigh left his card. The next afternoon, Joseph Berrigan alerted Det. Puigh that he had seen what appeared to be a piece of stolen furniture at the Downtown Inn. Det. Puigh went to the hotel with Berrigan, Franco Valobra, Deanie Richard, and Dorothea Fitzgerald, another Windsor Collection employee. Defendant was present, and he advised Det. Puigh that he had removed only his antiques from the business, and that the only antiques he had removed were stored at his hotel. Deanie Richard told the detective that the antiques she viewed at the hotel belonged to defendant, and Joseph Berrigan informed him that the suspected stolen piece he earlier had observed in the lobby was gone. Det. Puigh subsequently interviewed Downtown Inn employees Stacie Samples, Richard Yates, Jack Mahoney and Steve Langle, who all had been involved in moving antiques out of the Royal Street store over the weekend. Based on the information he gathered from these individuals and the Windsor Collection employees, Det. Puigh obtained an arrest warrant for defendant. Det. Puigh later testified that he

left a message for defendant, who returned the call. Det. Puigh advised defendant that he had a warrant for his arrest, and defendant told him he would get an attorney and turn himself in, which he did.

Det. Puigh executed a search warrant at the Downtown Inn on June 8, 1998, with Deanie Richard along to help identify any stolen property. Defendant's residence was searched on June 10. Det. Puigh said he had had to wait for Windsor Collection employees to provide him with a detailed list of the stolen property to attach to the search warrants. At defendant's home, Det. Puigh recovered an envelope containing twenty-three "sales receipts" (the furniture tags), some receipts for a U-Haul, forty-two color photographs and negatives of antique furnishings, thirteen business cards associated with antique-related enterprises, fourteen blank appraisal forms in the name of "J. Herman Sons, Ltd.," and a four-page memorandum of understanding concerning a lease for the property at 313 Royal Street. Det. Puigh contacted the businesses named on the thirteen business cards in an attempt to locate any stolen property, but discovered no leads as where stolen merchandise might be located. Det. Puigh said that to the best of his knowledge, none of the stolen property had ever been recovered. Det. Puigh said he went through the twenty-three sales tags with Deanie Richard, and discovered that they were all from the pieces of stolen merchandise.

Det. Puigh testified on cross-examination that four different Windsor Collection employees, as well as Franco Valobra, informed him that defendant's furnishings should have only been on the first floor. In questioning Det. Puigh, defense counsel essentially read into the record the memorandum of understanding between defendant and Morris Herman. It recited that the consigned pieces occupying the retail space at the Windsor Collection would remain on the second and third floors for no more than ninety days, or until defendant was able to fill the store with furniture of his own, whichever date was later. The document further recited that defendant could decide where the consigned pieces were to be placed. Det. Puigh said that at approximately 6:00 p.m. on Tuesday, May 26, 1998, he received information from Franco Valobra that Joseph Berrigan had seen a piece of stolen furniture at the Downtown Inn at 2:00 a.m. that morning. Det. Puigh resolved that defendant committed the thefts after three of the four Downtown Inn employees told him that they had removed antiques from the second and third floors, and because Windsor Collection employees had told him that all of defendant's furniture was on the first floor, with items on consignment from others located on the second and third floors. One of those Downtown Inn employees, Stacie Samples, told him that he had moved furniture from all three floors, with defendant pointing out which

pieces to take and which pieces to leave.

Det. Puigh said on redirect examination that he was never told that defendant was forbidden to have his furniture on the second and third floors. Det. Puigh said on re cross-examination that one U-Haul receipt was dated April 22, 1998, and others were dated May 21 and 22, which would have been during the Memorial Day weekend.

Stacie Samples testified that on May 23-25, 1998, he was working for defendant and living at the Downtown Inn in New Orleans. He started working there in December 1997. About May 23 or 25, 1998, defendant asked him and others to move items out of the Windsor Collection antique store. Defendant took him and the others through the store and pointed out items he wanted to be loaded up. Some items he specified to be loaded onto one truck, some items onto another truck. Samples said he recognized some of the items, because he had seen them before at the hotel. Samples said he believed the moving occurred over a period of three nights, with either two or three trucks involved on each night, including rental trucks, a pickup truck and a van. Generally there were three or four people every night, although it varied from one night to the next. Defendant was present every night.

Samples said that during the move he was being paid, that he was “on

the clock." He removed items from all three floors. Specifically with regard to the second and third floors, defendant would go through, point out what he wanted, and take the tags off those items and put them into his shirt pocket. Samples said that as far as he knew, all of the items belonged to defendant. Samples viewed the Windsor Collection tags previously introduced in evidence, and testified that they were of the type defendant put into his pocket that night. Samples said the items from which defendant removed the Windsor Collection tags were loaded onto a rental truck at the direction of defendant. Defendant would drive off in that truck alone.

Samples further testified that sometime in mid to late June, defendant told him that they were going to move some more furniture, which Samples said was not all that unusual. He got into a truck with a couple of other guys, and drove to a residence in Lake Vista, that Samples later testified he understood to be the home of defendant's brother. Work was being done on the residence. Samples said that there he saw the same furniture that defendant had driven away with in the rental truck in May. Defendant directed them to load it onto another rental truck, and defendant again drove it off to an unknown location. Samples said that as defendant was putting the Windsor Collection tags in his pocket when the furniture initially was being moved out of the store, several fell to the floor, and Samples picked

them up. He later gave them to the district attorney's office, after he left defendant's employ and moved out of the Downtown Inn. He identified those tags when they were introduced by the State. One was for a pair of gold columns with grapevine, tag number JO5123G, which went into the rental truck. He identified another tag, for a twelve-paneled Oriental screen, which he said they were unable to take because it was too large and heavy and they did not have the tools to disassemble it. Samples was asked if anyone not connected with the moving operation came in and out of the store during the moving. He said defendant hit a police car with a rental truck as he turned a corner one time, and subsequently an officer came to Samples as he was loading the truck. Samples directed him to defendant, and the officer came in, spoke to defendant, and then left.. Samples said he had nothing against defendant aside from defendant's having involved him in the case. Samples testified on cross examination that he once picked up furniture from an auction house and delivered it to the Windsor Collection.

Patricia Campbell, employed by defendant as a housekeeper at the Downtown Inn, testified that she went to the Royal Street antique store as often as three times a week to polish furniture and clean mirrors. She cleaned furniture throughout the store, and said defendant had furniture on the first, second and third floors. She identified photographs of three pieces

that were on the third floor, and two pieces that were on the second floor. Patricia Campbell stated on cross examination that she did this work after the store was closed, and only polished pieces that defendant pointed out to her. She did this during the month of May, and never saw any Windsor Collection employees.

Charles Geis testified that he lived at defendant's hotel for approximately three months during a separation from his wife. Geis, a sheetrock finisher and painter, said he moved furniture from the hotel to the Royal Street store in the latter part of April, along with Stacie Sample and others from the hotel. He said they put items on the first, second and third floors. Approximately one month later, they moved the same things back to the hotel, using a white "rent-a-van" and a blue pickup truck. Defendant drove the rental van, and the furniture on it was unloaded at the hotel. Geis said he no longer lived at the hotel or worked for defendant. Geis stated on cross examination that defendant told the men what to take out of the store, and which truck into which to place the items. Both the rental van and the pickup truck went to the hotel. Geis pointed out a number of pieces of furniture in photographs, stating with particularity the floors on which they were placed.

Clifford Stevens, a welder, testified that he helped defendant move

furniture into the antique store during the last week of April; it was placed on all three floors. He also helped move the same furniture out of the store at the end of May, using a U-Haul truck and a pickup truck. Defendant drove the U-Haul truck, but they unloaded it at the hotel. Stevens confirmed on cross-examination that some of the items had tags on them, but that he could not differentiate between the tags. Stevens said on redirect examination that the Windsor Collection sales tags and forms, and defendant's sales tags fell out of a drawer when they tilted it.

Barry Rosenblum, defendant's brother, testified that defendant never had any furniture delivered to his home, even in 1998. His home was not being renovated in 1998. He recalled a night when police came to his home telling him that it had been reported that defendant had taken antique furniture to his home.

Richard Yates testified that he had been working for defendant the last two years performing maintenance and painting work for him, and lived at the hotel. He helped defendant move furniture from the hotel to the antique store, and later moved the same furniture from the store to the hotel. Defendant drove the moving van, but it was unloaded at the hotel. Yates admitted a prior conviction for aggravated crime against nature, to having pled guilty to forcible rape, and to having served time in the penitentiary.

Yates said he had seen Stacie Samples the previous day, and that Samples "cussed [defendant] out." Yates also said Samples gave him suggestions regarding his testimony, but Yates declined to go into detail because he did not like "ratting" on someone. Yates agreed on cross examination that defendant told him which items to move. Yates said that he never saw anyone move anything from the hotel after they had moved it back from the antique store. He said defendant did not take any of the items they had moved from the store to the hotel after they had been moved to the hotel.

Defendant testified that he owned the hotel and was a general contractor. He said he had also bought and sold antiques for approximately ten years. He had never had a store of his own, but leased the store from Morris Herman for $9,000. Defendant said he leased the entire store—the first, second and third floors—with Morris Herman expected to retain a jewelry concession on the first floor. Defendant said the first floor was small, and had only nine-foot ceilings. He said he expected to have almost total use of the second and third floors, where he expected to do most of his business. He characterized the two upper floors as very impressive, with fourteen-foot ceilings. Defendant said he never had any trouble with customers going to the second and third floors, and made his only sale from the second floor, a large armoire. A couple gave him a check for $11,000,

but the check never cleared, and the armoire was never delivered to them. Defendant said he applied for an occupational license to do business as "French Quarter Antiques," but that the Vieux Carre Commission advised him on May 22 that his application had been denied because the second and third floors of the building had not been approved for retail sales. Defendant said he learned that on April 21 Morris Herman had obtained a license to operate only on the first floor. Defendant believed Herman had cheated him by renting him the entire store, knowing that defendant would not be able to use the second and third floors. Defendant said he knew he had no future at that location and had to get out. Defendant said that Morris Herman told him to just put up his sign, but defendant said he did not want to operate a business that could be shut down by the city at any time.

Defendant identified what was purported to be a statement from the St. Charles Auction House representing furniture that he purchased for $146,397 to put into the Royal Street store. He also identified what was represented as a receipt for other furniture he purchased in late March 1998 for $347,230, which he said he also planned to sell at the store. The trial court sustained the State's objections to the introduction into evidence of those two documents. Defendant identified an inventory list he prepared listing seventy-five pieces of his furniture. The total of the suggested retail

prices was $1,091,800.

Defendant said he began moving his things out during the last week of May, but that “they” objected to him moving stuff out while the store was open. Therefore, he decided to move out over the Memorial Day weekend to avoid any confrontations. Defendant claimed that he had asked Deanie Richard to use one of his desks for their sales and jewelry business, instead of the one she was using. He claimed the idea did not work out because Richard kept so much stuff on the desk that no one could see it. So, he moved the desk back upstairs. After he removed that desk from the store, he discovered the tags, forms, negatives and photographs inside of it. He boxed them up, planning to return them, but was arrested the next day before he could do so. Defendant denied taking any jewelry from the store, or taking any furniture or paintings that did not belong to him. He did not remove any rugs from the store. He did not transport any furniture to his brother’s residence on Killdeer Street.

Defendant conceded on cross-examination that Morris Herman had items on consignment at the antique store, but said he was in charge of them. He maintained that Morris Herman told him there were things in the store that he could place, at his discretion, on the second and third floors where they would remain for ninety days, until they were sold. Defendant said

there was a verbal agreement that if he sold these items he would receive a twenty percent commission. The two jewelry cases, the two desks, the secretary, and the two cabinets were to remain on the first floor. Defendant said Deanie Richard did not know what furniture he owned, that she never left the first floor. Defendant thought he had pleaded guilty in connection with carrying a gun in his car thirty-five years ago. Defendant conceded that it was probably true that he pleaded guilty to aggravated assault and simple criminal damage in 1979.

Defendant said on redirect examination that sixteen of the Windsor Collection tags along with his own tags were ripped, while nine were not.

Stacie Samples testified on rebuttal for the State that Richard Yates assisted him loading items from the store onto trucks. Samples did not recognize the name of Charles Geis, nor did he recognize Geis when Geis stepped into the courtroom. Samples was positive that Geis was not with him when he loaded the trucks. Stacie Samples said he did not recognize the name of Cliff Stevens. When Stevens stepped into the courtroom, Samples said he might have seen him before, but that he was sure Stevens did not help load and unload the trucks. Samples said that these two men were definitely mistaken if they testified that they helped him remove items from the Windsor Collection antique store and load the items onto trucks. He

reiterated that the truck defendant drove alone did not return to the hotel. Samples also reiterated that after defendant instructed him what to do with an item, defendant removed the Windsor Collection tags from the item and put them into his shirt pocket. Samples also reiterated that after defendant directed them to load the Windsor Collection items onto the rental truck, defendant drove it away, with no one else in the vehicle. Samples further reiterated that defendant did not drive that truck to the hotel.

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 5

In this assignment of error, defendant claims the evidence was insufficient to support his theft conviction.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to

> the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Defendant was charged with theft of antiques valued at more than one thousand dollars, belonging to the Windsor Collection. La. R.S. 14:67(A) defines theft, in pertinent part, as the taking of anything of value which belongs to another, without the consent of the other, with an intent to permanently deprive the other person of whatever may be the subject of the taking. La. R.S. 14:67(B) provides for sentencing according to the amount of the theft, and subsection (B)(1) provides for the most severe sentence, in

cases where the value of the property that was the subject of the theft was five hundred dollars or more.

It is undisputed that defendant, as did at least two other Windsor Collection employees, Deanie Richard and Beth Watkin, had a key to the store and knew the code to turn the alarm on and off. It is undisputed that defendant entered the store over the Memorial Day weekend and removed items from the store, although he maintains he only removed items belonging to him. Any rational trier of fact could have easily concluded from all of the evidence that items which did not belong to defendant were also removed from the store over the Memorial Day weekend.

Richard Wilson, the general manager of Pettigrew, the parent company of Petite Royal, identified at trial a copy of a check made out to Pettigrew in the amount of $45,000, from its insurer, covering its cost for Petite Royal items that had been on consignment to the Windsor Collection on April 7, 1998, but which were missing after the Memorial Day weekend in late May 1998. The post-theft inventory of the items was done by Windsor Collection personnel, and Wilson said Pettigrew's insurance claim was based on that inventory. Considering this evidence, and all of the evidence, any rational trier of fact could have concluded beyond a reasonable doubt that the value of the items stolen over the Memorial Day

weekend easily exceeded five hundred or one thousand dollars.

Stacie Samples testified that during the moving process defendant directed him and other movers to remove Windsor Collection items and place them on a rented moving van, which defendant drove off in by himself. While defendant's own furniture was removed from the store to his Tulane Avenue motel, Stacie Samples said the Windsor Collection items were not. Samples further testified that in June 1998, defendant took him and some other men to the home of defendant's brother in Lake Vista, where they loaded onto a truck up some of the same Windsor Collection furniture Samples had seen defendant drive away from the store with over the Memorial Day weekend. Samples' testimony was contradicted by three individuals who said they helped defendant move only furniture that was taken back to defendant's hotel, and two of them said that this was the same furniture they had helped defendant move into the store. Samples said he did not recognize one of the men at all, and that while he might have recognized a second man, neither of those two men had helped him move the furniture out of the store. One of these men was also a convicted felon. Defendant's brother flatly contradicted Samples' testimony, in that he denied that defendant ever moved furniture into his residence. Defendant's brother also said he was not renovating his residence in 1998, while Samples

said that work was being done on the house when he went there in June 1998.

Police found Windsor Collection item tags at defendant's residence, and Deanie Richard, one of the co-managers of the Windsor Collection antique store, testified that all of the tags matched items stolen from the store. Defendant said they fell out of one of his desks after it was moved, and that a Windsor Collection employee must have put them in the desk while he was permitting the store personnel to use the desk. J. Herman and Sons appraisal forms that Deanie Richard testified had been inside of a Windsor Collection desk that was stolen were also found in defendant's home. Defendant testified that these forms also had been inside of the desk. The items were not concealed in defendant's residence, but were out in the open. Clifford Stevens, who said he helped defendant move items from the store to the hotel, testified that the tags and forms had fallen out of a desk they moved to the hotel. The testimony of Joseph Berrigan and Det. Puigh established that Berrigan had gone to defendant's hotel at 2:00 the morning after the day the thefts were discovered and saw what he believed to be a piece of the stolen furniture. When Berrigan returned later with Det. Puigh, that piece of furniture was gone. Not a single piece of the stolen property was ever recovered.

Viewing this and all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the State proved beyond a reasonable doubt that defendant took items valued at more than five hundred or one thousand dollars, belonging to another, without the consent of the other, with the specific intent to permanently deprive the other of the items. That any of the items that were the subject of the theft did not belong to the Windsor Collection, as charged in the bill of information, is of no matter. Proof of ownership of stolen property is not an essential element of the crime of theft; the State is required only to prove that the property belonged to someone other than defendant. State v. Rossi, 273 So. 2d 265, 268 (La. 1973)(indictment charged that property belonged to delivery driver rather than his meat packer employer). Any rational trier of fact could have rejected defendant's hypothesis of innocence—that someone other than him stole the items over the Memorial Day weekend. Accordingly, we find no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant claims that the trial court erred in failing to grant his motion to suppress evidence seized pursuant to the search warrant issued for his residence, for several reasons.

The general rules pertaining to search warrants were set forth by the

Louisiana Supreme Court in State v. Casey, 99-0023 (La. 1/26/00), 775 So. 2d 1022 as follows:

> A person is constitutionally protected against unreasonable search and seizure of his house, papers and effects. Thus, a search and seizure of such shall only be made upon a warrant issued on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and thing(s) to be seized. U.S. Const. amend. IV; La. Const. art. I, § 5 (1974). The general rule is that probable cause sufficient to issue a search warrant "exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched." La.C.Cr. P. art. 162; State v. Johnson, 408 So.2d 1280, 1283 (La.1982). The issuing magistrate must make a practical, common sense decision whether, given all the circumstances set forth in the affidavit, a fair probability exists that the evidence of a crime will be found in a particular place. State v. Byrd, 568 So.2d 554, 559 (La.1990). Additionally, a search warrant must establish a probable continuing nexus between the place sought to be searched and the property sought to be seized. State v. Weinberg, 364 So.2d 964, 968 (La.1978). Further, an affidavit must contain, within its four corners, the facts establishing the existence of probable cause for issuing the warrant. State v. Duncan, 420 So.2d 1105, 1108 (La.1982).

99-0023, pp. 3-4, 775 So. 2d at 1027-1028.

The defendant bears the burden of proving that evidence seized pursuant to the issuance of a search warrant should be suppressed. La. C.Cr.P. art. 703(D). State v. Hodge, 2000-0515, p. 12 (La. App. 4 Cir. 1/17/01), 781 So. 2d 575, 583. A trial court's ruling on a motion to suppress

the evidence is entitled to great weight because the court has the opportunity to observe the witnesses and weigh the credibility of their testimony. State v. Mims, 98-2572, p. 3 (La. App. 4 Cir. 9/22/99), 752 So.2d 192, 193-194. The trial court's factual findings during a hearing to suppress evidence should not be disturbed unless they are clearly erroneous. Casey, supra, 99-0023, p. 6, 775 So. 2d at 1029. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670, p. 11 (La. App. 4 Cir. 3/3/99), 729 So.2d 132, 137.

Defendant first argues that the warrant did not particularly describe the things to be searched for. The search warrant contained in the record describes the things sought as "NUMEROUS ANTIQUES ITEMS WHEREAS A DETAILED LIST IS ATACHED TO SAID WARRANT." There is no detailed list attached to the copy of the search warrant in the record. However, the State presented a list, and the trial court specifically asked Det. Puigh whether the inventory list he was presented with was in fact what was attached to his search warrant. Det. Puigh twice replied in the affirmative. Defense counsel made no objection regarding the inventory list, and the trial court denied the motion to suppress. Further, at trial Det. Puigh

testified that he attached an inventory list, which was presented to him, to his search warrants for a "certain description" of the property for which he was searching. The trial court presumably accepted Det. Puigh's testimony that the detailed descriptive inventory list was attached to his search warrant for defendant's home. Considering the detailed descriptions in the list, it cannot be said that the warrant as a whole did not particularly describe the items sought by the search warrant.

Defendant cites United States v. Klein, 565 F.2d 183 (1 Cir. 1977), for the proposition that the inventory list attached to the search warrant for his residence did not set out standards to differentiate "numerous antiques" from antiques owned by defendant in his residence. In Klein, the appellate court held that a search warrant authorizing seizure of "certain 8-track electronic tapes and tape cartridges which are unauthorized 'pirate' reproductions …" in violation of federal copyright laws was invalid in that it provided only a generic description of the goods to be seized from the retail music store to be searched. The court framed the issue as whether the generic description of a pirate tape was sufficient under the circumstances to comply with the Fourth Amendment. That alone differentiates Klein, which has not been followed by any Louisiana case, from the instant case. Klein would be analogous to the instant case if the warrant for defendant's residence simply had the

executing officers searching for “antiques,” the equivalent of the pirate 8-track tapes in Klein. Further, the business establishment in Klein was a music store, engaged in the business of selling items such as 8-track tapes. The search warrant at issue in the instant case was for defendant’s residence, which might or might not have contained legitimate antiques. It can be noted that police seized no furniture from defendant’s residence.

Most of the descriptions in the list that Det. Puigh attached to the warrant appear to be sufficient to allow a police officer to properly identify the items sought. It cannot be said that the trial court was clearly wrong in concluding that the list as whole was sufficiently descriptive. Moreover, as will be discussed, the most damaging evidence seized by police at defendant’s residence, the furniture tags and the J. Herman Son, Ltd. appraisal forms, should have been suppressed on other grounds.

Defendant next suggests that the warrant did not establish probable cause because the warrant itself recites that the affiant had “good reason to believe” that the stolen items would be at defendant’s residence, the place to be searched, as opposed to stating that the affiant had “probable cause” to believe that the stolen items were there. There is no merit to this argument, as probable cause sufficient to issue a search warrant exists when the facts and circumstances within the affiant's knowledge and of which he has

reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. State v. Casey, 99-0023, p. 4 (La. 1/26/00), 775 So.2d 1022, 1028. "Good reason to believe" as used in the New Orleans Police Department boilerplate search warrant equates to "a reasonable belief."

Defendant next argues that Det. Puigh's application for the search warrant contained a material misrepresentation and/or omission, as Det. Puigh omitted from it the fact that defendant had leased the complete building at 313 Royal Street, i.e., all three floors, and had a right to put his furniture on any floor he desired. Defendant further claims that Det. Puigh omitted from the application what defendant characterizes as untrue statements by Windsor Collection employees that defendant only had furniture on the first floor. The search warrant was issued based on a magistrate judge's finding that the information Det. Puigh placed in his affidavit established probable cause to believe that stolen property was at defendant's residence. At the time Det. Puigh applied for the warrant, one or more Windsor Collection employees had informed him that defendant's furniture was on the first floor only. While defendant asserts that subsequently Det. Puigh confronted him, and he told the detective that he

had a lease of the entire premises, including the second and third floors, the record does not reflect this fact. Det. Puigh testified that during the encounter at defendant's hotel defendant told the detective the only items he had removed from the building that weekend belonged to him, and that he had a lease agreement with the owner of the building, but that the lease agreement was at his residence. Neither Det. Puigh nor defendant testified that defendant informed the detective that defendant legitimately had furniture on all three floors.

Thus, as the evidence shows that at the time he completed his search warrant application for defendant's residence, Det. Puigh had no information that defendant had furniture on all three floors, or that defendant was authorized to have furniture on all three floors according to the terms a lease, it cannot be said that Det. Puigh omitted this information from his application. The information Det. Puigh had was to the contrary, and he had no reason to question the accuracy of the information from the Windsor Collection employees that defendant only had furniture on the first floor at the time of the thefts. There were no material omissions from the application in this respect that would have militated against a finding of probable cause, and thus, defendant suffered no prejudice.

Defendant's final attack on the search warrant is that the items seized

by Det. Puigh from defendant's residence were not mentioned in the search warrant, or the application therefor. Generally, a defendant bears the burden of proof at a motion to suppress evidence seized pursuant to a search warrant. Thus, on appeal a defendant is limited to seeking review of a trial court's denial of his motion to suppress the evidence only as to those grounds asserted in his motion to suppress or those grounds raised at the hearing on the motion to suppress. State v. Roach, 322 So.2d 222, 226 (La. 1975). Defendant's motion to suppress alleges that the search included the illegal search of containers, home safes, and other areas unrelated to the items identified in the application for the warrant.

None of the stolen goods were found at the residence. Rather, the return on the search warrant listed an inventory reflecting seizure of an envelope containing thirty-six "receipt slips," apparently the furniture tags, three rental truck receipts in defendant's name, forty-two color photographs of antiques, with negatives, thirteen business cards associated with antiques, gallery and jewelry businesses, fourteen blank appraisal forms in the name of J. Herman Son, Ltd., and a memorandum of understanding between Morris Herman and defendant regarding the lease of the premises.

La. C.Cr.P. art. 165 states that while in the course of executing a search warrant a police officer may "seize things whether or not described in

the warrant that may constitute evidence tending to prove the commission of any offense ….” However, it is clear that under the Fourth Amendment, La. C.Cr.P. art. 165 cannot be read to authorize the changing of a limited search warrant particularly describing the things to be seized, into a general warrant to rummage through and seize at will any property at the place being searched. In Minnesota v. Dickerson, 508 U.S. 366, 378, 113 S.Ct. 2130, 2138, 121 L.Ed.2d 22 (1992), the court stated: ”Where, as here, ‘an officer who is executing a valid search for one item seizes a different item,’ this Court rightly ‘has been sensitive to the danger ... that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will. (emphasis added)’” 508 U.S. at 378, 113 S.Ct. at 2138, quoting Texas v. Brown, 460 U.S. 730, 748, 103 S.Ct. 1535, 1546-1547, 75 L.Ed.2d 502 (1983)(Stevens, J., concurring in judgment). Rather, as reasoned in State v. Davis, 96-107 (La. App. 3 Cir. 10/23/96), 684 So. 2d 17, the seizure contemplated by La. C.Cr.P. art. 165 must be considered one based on the “plain view” doctrine. 96-107, p. 6, 684 So. 2d at 19. The plain view doctrine permits the warrantless seizure by police of private possessions where (1) the officer is lawfully in a position to view the object that is subsequently seized; (2) the officer discovers the incriminating object inadvertently; and (3) the officer

has probable cause to believe that the item observed is evidence of a crime, contraband, or otherwise is subject to seizure. Coolidge v. New Hampshire, 403 U.S. 443, 465-470, 91 S.Ct. 2022, 2037-2040, 29 L.Ed.2d 564 (1971) (stating that it must be immediately apparent that the item observed be evidence of a crime, contraband, or otherwise is subject to seizure); Arizona v. Hicks, 480 U.S. 321, 326-327, 107 S.Ct. 1149, 1152-1153, 94 L.Ed.2d 347 (1987) (holding that, absent some "special operational necessities," the lawful seizure of property under the plain view doctrine requires that an officer have probable cause to believe the item observed is evidence of a crime, contraband, or otherwise is subject to seizure). The incriminating nature of the item viewed must be immediately apparent, without close inspection. State v. Robichaux, 2000-1234, p. 15 (La. App. 4 Cir. 3/14/01), 788 So. 2d 458, 469, citing Coolidge v. New Hampshire.

Det. Puigh testified at trial that he discovered the "receipts" (these were actually the furniture tags) in an envelope on top of a desk in an office in defendant's residence. Because at least one of the items stolen was a desk, Det. Puigh lawfully could have been inspecting the desk. Det. Puigh said that the receipts had "Windsor Court Collection of Royal" on them, and a description of the property and a price. While Det. Puigh did not testify that he had to open the envelope to see the "receipts," he said they were in

an envelope, and it is apparent that he did not know what they were until he closely inspected them. Common sense suggests that he had to look inside of the envelope and take out the receipts or tags before he developed probable cause to believe they were evidence of the crime.

In State v. Brouillette, 465 So. 2d 124 (La. App. 4 Cir. 1985), police executing a warrant were searching for business records and accounts of a prostitution operation, when they came upon a clear plastic bag of drugs in a kitchen cabinet and more drugs wrapped in a shirt inside of a clothes dryer located on the patio of the residence. This court rejected the argument by defendant that the seizure of those items was unlawful because they were not described in the warrant, holding that a thorough search of the residence for those records could have included the areas where the drugs were found.

In the instant case, Det. Puigh could not have found a stolen piece of furniture inside of an envelope. Accordingly, these receipts or tags, which were not described in the search warrant, were not constitutionally seized, and should have been suppressed.

Det. Puigh said the J. Herman and Sons, Ltd. appraisal forms and some negatives, and presumably the forty-two photographs accompanying those negatives, were found “in a small table, inside a drawer,” in the living area of defendant’s home. Accordingly, as Det. Puigh presumably had to

open the drawer to find these items, they were not in plain view and were also unlawfully seized. They also should have been suppressed. As for the three rental truck receipts, it is unclear from where these were seized. However, defendant's witnesses testified that defendant used a rental truck in moving items out of the store. That fact is not disputed by defendant. Det. Puigh did not testify where he found the thirteen business cards. Thus, defendant has failed to show that those should have been suppressed. As for the memorandum of understanding, defendant used that piece of evidence in his defense.

Even though the furniture tags matching some of the stolen items, and the J. Herman and Sons, Ltd. appraisal forms and photographs and negatives that had been in a piece of furniture that was stolen should have been suppressed, considering the other evidence in this case, any error in admitting that evidence was harmless beyond a reasonable doubt. Considering the testimony of Stacie Samples, the circumstances of defendant admittedly removing furniture from the store immediately prior to the thefts, the evidence that Joseph Berrigan saw piece of the stolen furniture in the lobby of defendant's hotel, which had disappeared by the time he came to the hotel later that evening with police, and all of the evidence, the guilty verdict rendered in the instant case was surely unattributable to the error in

admitting this evidence.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, defendant claims that the trial court abused its discretion in ordering defendant to pay restitution. This claim is based on defendant's assertion that the trial court calculated restitution on the retail prices of the stolen items, while defendant argues that restitution should have been based on wholesale costs. The record does not reflect that the trial court ordered restitution based on retail prices, but rather that the trial court sought to order restitution based on the cost of the items vis-à-vis the Windsor Collection, which was liable to the consignors for the stated value placed on the item by the consignor at the time of consignment.

La. C.Cr.P. art. 895.1(A)(1) states that when a court places a defendant on probation it shall order restitution in cases where the victim has suffered any monetary loss pursuant to loss of property, with such restitution to be a reasonable sum not to exceed "the actual pecuniary loss to the victim." A trial court's decision in ordering restitution should not be disturbed absent an abuse of discretion. State v. Averette, 99 2054, p. 6 (La. App. 1 Cir. 6/23/00), 764 So.2d 349, 352; State v. Reynolds, 99-1847, p. 4 (La. App. 3 Cir. 6/7/00), 772 So. 2d 128, 131. There was evidence adduced at trial that the retail price set for items sold in antique stores is not

necessarily what the price for which the item will be sold. Therefore, defendant is correct that for purposes of restitution in this case, "actual pecuniary loss" cannot mean the retail price of the stolen items.

The State represented that the value of the stolen items was $541,802, a figure representing a total retail cost, based on figures supplied by the Windsor Collection. The State sought restitution to the Windsor Collection in the amount of $496,802, conceding that Pettigrew and Associates, Inc. received a $45,000 insurance payment for some of its items that were stolen. A representative of Pettigrew testified at trial that this amount represented Pettigrew's cost for the items.

The trial court ordered $45,000 in restitution to Trinity Insurance Co. and $250,000 to the Windsor Collection. Both Deanie Richard and Franco Valobra testified that one usually doubled the value placed on the item by the consignor to arrive at a retail price. Thus, the total retail cost represented by the State was double the price the Windsor Collection would pay had it purchased these pieces from the consignors for their set value. Using that one hundred percent markup as a guide, the $45,000 paid to Pettigrew accounts for approximately $90,000 of the $541,802 total retail figure quoted by the State. The remaining retail value of the stolen goods was $451,802, representing double the "cost." Dividing that figure by two, one

arrives at a "cost" figure for the remaining items, $225,901. The trial court ordered restitution to the Windsor Collection in an amount $24,099 greater than the cost of the stolen items which, under the circumstances of this case, was an abuse of discretion.

La. C.Cr.P. art. 895.1(A)(1) explicitly states that "any additional or other damages [beyond "actual pecuniary loss" pursuant to loss of property] sought by the victim and available under the law shall be pursued in an action separate from the establishment of the restitution order as a civil money judgment provided for in Subparagraph (2) of this paragraph." In the instant case there was no evidence introduced to justify a claim for any actual pecuniary loss to the Windsor Collection beyond the cost of the items stolen from the store. Any other incidental damages sustained by the Windsor Collection would need to be obtained by securing a civil judgment pursuant to La. C.Cr.P. art. 895.1(2), where the defendant is informed of his right to have a judicial determination of the amount of damages and a hearing is held. That was not done in the instant case.

Accordingly, the trial court's sentence must be amended to reduce from $250,000 to $225,901 the amount of restitution defendant was ordered to pay the Windsor Collection.

Defendant also claims that the trial court erred in failing to conduct a

hearing to determine a legitimate amount of restitution. La. C.Cr.P. art. 895.1 mandates a separate hearing only where the restitution order is to be considered a civil money judgment. La. C.Cr.P. art. 895.1(2)(a). As this was not done in the instant case, the restitution cannot be considered a civil money judgment.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, defendant claims the trial court erred in sustaining the State's hearsay objection to defendant's attempt to introduce into evidence a receipt purporting to reflect what defendant testified was his purchase of several hundred thousand dollars worth of antique furniture at an auction. Defendant asserts that the receipt was admissible pursuant to La. C.E. art. 804(B)(5), which provides for an exception to the general rule against the admission of hearsay for records of regularly conducted business activity. Defense counsel argued at trial simply that the receipt was received by defendant in the course of his regularly conducted business activities, and was therefore admissible.

The hearsay exception for records of regularly conducted business activities contained in La. C.E. art. 804(B)(5) was repealed by Acts 1995, No. 1300. The substance of that exception is now contained in La. C.E. art. 803(6), and provides:

(6) Records of regularly conducted business activity.

> A memorandum, report, record, or data compilation, in any form, including but not limited to that which is stored by the use of an optical disk imaging system, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if made and kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and to keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. This exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule. The term "business" as used in this Paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports which are specifically excluded from the public records exception by Article 803(8)(b) shall not qualify as an exception to the hearsay rule under this Paragraph.

Although defendant failed to proffer a copy of the receipt in question, clearly it was a receipt issued by a seller to defendant purporting to reflect defendant's receipt of antiques he purchased from the seller. Even assuming defendant kept the receipt as a business record in the course of his regularly conducted business activity, the receipt does not reflect recorded information furnished to defendant's business by a person who was routinely acting for the business in reporting the information. The admission of the receipt would require the seller or his representative to identify the receipt as reflecting a record of its regularly conducted business activity. Therefore,

the trial court properly sustained the State's hearsay exception and refused to admit the receipt. The receipt constituted hearsay—an out of court statement offered to prove the truth of the matter asserted, i.e., that defendant had in fact purchased the antiques. Accordingly, we find that there is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 4

In this assignment of error, defendant claims that the trial court erred in failing to order Franco Valobra and/or Morris Herman, on behalf of the Windsor Collection, to present "proofs of purchase" for each and every item constituting the Windsor Collection. Defendant filed a subpoena duces tecum seeking this information. The State filed a motion to quash the subpoena insofar as it sought this material. The trial court denied the motion to quash. The State filed an application for supervisory writs in this court, which this court denied. Defendant then filed a motion for contempt after the information was not turned over to him by the State.

At the hearing on the motion for contempt, Franco Valobra, appearing on behalf of Morris Herman, who was ill with a heart condition, testified that he turned over to the defense a list of things that were at the Windsor Collection, but that the Windsor Collection could not turn over "proofs of

purchase." Valobra explained that most of the items in the custody of the Windsor Collection that were stolen had all been on consignment from others—the Windsor Collection had not purchased them. He thought some of the items had actually been purchased by the Windsor Collection, but he was not sure which ones, and referred those question to Deanie Richard, who was not in court that day because of illness. Valobra said that for the Windsor Collection to furnish proofs of purchase to defendant it would have to acquire that information from those consignors. Valobra testified that Pettigrew, for example, which had the largest number of items on consignment, would not turn over such information, emphasizing for the court that in the antique business a company such as Pettigrew zealously guards its sources of antiques. Valobra testified that he had brought with him in response to the subpoena lists of items that had been on consignment that were prepared by Deanie Richard and the consignors. These had retail prices for the items listed, and Valobra testified that the standard in the industry was to markup items one hundred percent, double the cost.

Counsel for defendant informed the court that it would need to get proofs of purchase from Morris Herman, who had items on consignment in his own store, and from Pettigrew, Ben Khalil, the jeweler, etc. Counsel for the State responded that Franco Valobra said he did not have this

information, and the trial court sustained the objection. The court noted that it would permit a wide latitude during its cross examination of witnesses at trial. The court found that there had been compliance under the law, and that it would not require the Windsor Collection to provide any further documents. The hearing concluded with counsel for defendant asking for a continuance so that it could issue subpoenas to the consignors for their records, and the trial court granted defendant until the following Monday to do so. Counsel for defendant asked for a clarification by the trial court as to its ruling on the matter at issue, asking if the trial court upheld any kind of privilege, and the trial court responded that although it had thought about using that word, it purposely did not, noting that it was a unique situation.

The record reflects no error by the trial court insofar as its ruling was that Mr. Valobra did not have to provide "proofs of purchase" for the items on consignment to the Windsor Collection, as, based on his testimony at the hearing, neither he, Morris Herman nor the Windsor Collection had such information. Only the consignors had this information, and the trial court permitted defendant to issue subpoenas to the consignors for that information, if it wished to do so. The trial court did not create a "judicial privilege." Accordingly, we find no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 6

In this assignment of error, defendant claims the trial court erred in failing to rule on his objection to the prosecutor's question as to whether defendant had a prior conviction from 1979 for aggravated assault. After the prosecutor asked the question, defense counsel objected on that the ground that it was a misdemeanor that happened twenty-five years ago, and thus it was not relevant. The trial court responded that if defense counsel was objecting concerning the date of the conviction, that the date went to the weight of the evidence.

On appeal, defendant argues that evidence of the conviction was inadmissible as other crimes evidence under La. C.E. art. 404(B), and also that the State failed to give notice that it intended to introduce evidence of other crimes. La. C.Cr.P. art. 841(A) requires that a defendant make known the grounds for his objection, and he is limited on appeal to those ground articulated at trial. State v. Brooks, 98-0693, p. 9 (La. App. 4 Cir. 7/21/99), 758 So. 2d 814, 819; State v. Buffington, 97-2423, p. 9 (La. App. 4 Cir. 2/17/99), 731 So. 2d 340, 346. As defense counsel objected to the prosecutor's inquiry into defendant's prior conviction only on the grounds of relevance, he is precluded from arguing the issue on appeal based on inadmissible evidence of other crimes. Further, La. C.E. art. 609.1 provides that in a criminal case, every witness by testifying subjects himself to

examination relative to the fact of any prior conviction, the name of the offense, the date thereof, and the sentence imposed. Thus, the evidence was admissible pursuant to La. C.E. art. 609.1. Accordingly, we find no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 7

In this last assignment of error, defendant cites as error the prosecutor's continued reference to defendant at trial as "Phillip [sic] Rosenblum alias Phillip [sic] Roman," after the trial court acquiesced in defendant's request made at a hearing eleven months prior to trial that defendant be referred to as Philip Roman, his legal name for thirty years. Defendant cites ten alleged instances in the record of such conduct, by page number. However, in eight of the cited instances, there was no reference to an alias or to Philip Roman; the prosecutor simply used the name Philip Rosenblum when questioning various witnesses about defendant. Defense counsel lodged no objections on these occasions. In the ninth cited instance, the prosecutor asked a witness if he had met a man named Philip Rosenblum or Philip Roman, but there was no objection lodged by defense counsel. On one occasion, the prosecutor asked a witness on redirect examination whether he had testified on cross-examination that he spoke to Philip Rosenblum, and the witness noted that Philip Rosenblum was Mr. Roman.

The prosecutor followed up with "a/k/a Mr. Roman." Defense counsel objected, stating that Mr. Roman's name was legally Mr. Roman.

Defendant argues that this was prejudicial error, as it probably created in the mind of the jury that defendant had something to hide by operating under an "alias," perhaps going so far as to infer guilt. The jury knew that defendant was referred to by both names, based on the testimony and questioning of numerous witnesses. It also knew from testimony by defendant's brother, Barry Rosenblum, that defendant had changed his name from Philip Rosenblum to Philip Roman. Finally, when making his objection to the prosecutor's alias comment, defense counsel informed the jury that defendant had legally changed his name to Philip Roman. Considering these circumstances, defendant has failed to show why the guilty verdict rendered in this case was attributable to this single reference to Philip Roman as defendant's alias. We find the error was harmless. See State v. Snyder, 98-1078, p. 15 (La. 4/14/99), 750 So. 2d 832, 845 (to determine whether an error is harmless, the proper question is whether the guilty verdict actually rendered in this trial was surely unattributable to the error). Accordingly, we find no merit to this assignment of error.

For the foregoing reasons, the defendant's conviction is affirmed. The defendant's sentence is amended to reduce from $250,000 to $225,901 the

amount of restitution defendant was ordered to pay to the Windsor Collection. The sentence is affirmed as amended, and in all other respects.

Conviction Affirmed; Sentence Amended and Affirmed as Amended