NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1920

STATE OF LOUISIANA

VERSUS

ROCARLDO RAYNARD WEITERS

Judgment Rendered: JUN 13 2012

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 486455

The Honorable Reginald T. Badeaux, III, Judge Presiding

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Walter P. Reed
District Attorney
Covington, Louisiana

By: Kathryn Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Frank Sloan
Mandeville, Louisiana

Counsel for Defendant/Appellant
Rocarldo Raynard Weiters

Rocarldo Raynard Weiters
Angola, Louisiana

Defendant/Appellant
Pro Se

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

GAIDRY, J.

The defendant, Rocarldo Raynard Weiters ("Rico"), was charged by amended bill of information with one count of armed robbery, with a firearm, in violation of La. R.S. 14:64 and R.S. 14:64.3.[1] The defendant pled not guilty. The robbery occurred on January 7, 2010 at Grumpy's gas station and convenience store located on Robert Road in Slidell, where Ms. Keith worked as the store's clerk (referred to as the "Slidell Robbery").

Prior to trial, the State filed notice of its intent to introduce evidence, under La. Code Evid. art. 404(B), that the defendant and his co-defendant, Gary Gilmore, were involved in a similar armed robbery of an adult novelty store in Waveland, Mississippi (the "Waveland Robbery") the night after the Slidell Robbery.[2] See *State v. Prieur*, 277 So.2d 126, 130 (La. 1973); see also *State v. Millien*, 2002-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 514. Since the defense placed the defendant's intent at issue, the State sought the admission of evidence of the defendant's participation in the Waveland Robbery to prove the defendant's criminal intent in the instant charge. The notice also advised the State intended to introduce evidence, under La. Code Evid. art. 801(D)(4), that while under arrest for an unrelated matter, the defendant requested to speak to the police regarding information

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1 The amended bill of information also charged Gary A. Gilmore and Ionjaleic A. Cagnolatti with the armed robbery with a firearm of Sharon Keith in violation of La. R.S. 14:64 and La. R.S. 14.64.3. In addition, Ionjaleic A. Cagnolatti was charged as an accessory after the fact to the armed robbery of Sharon Keith in violation of La. R.S. 14:64 and La. R.S. 14:25. The record reveals that Gilmore and Cagnolatti were not tried with the defendant. We further note that, at times, the record mistakenly refers to Cagnolatti as "Cannolatti" and Rocarldo Weiters as Rocarldo "Weithers."

2 In the notice, the State also advised of its intent to use evidence that the defendant and Mr. Gilmore were also involved in the armed robbery of a Bay St. Louis, Mississippi gas station four weeks prior to the instant Slidell Robbery, and to show the defendant's intent, plan, and lack of mistake or accident in the instant offense. However, at the *Prieur* hearing, the State orally modified its notice and stated that it only intended to introduce evidence of the Waveland Robbery.

about the Slidell Robbery. The defendant made three recorded statements to the police that ultimately led to his being charged in the instant matter. Over defense's objection, the trial court ruled in favor of the State. The trial court further ordered an instruction be given to the jury concerning the limited purposes for which the jury could consider the "other crimes" evidence.

Following a jury trial, the defendant was convicted as charged. The State then filed a habitual offender bill of information, alleging the defendant had four prior felony convictions. The defendant objected. Subsequently, he stipulated to being a second-felony habitual offender. The defendant was sentenced to forty-four and one-half years at hard labor to be served without benefit of probation or suspension of sentence. The trial court ordered the sentence to be served concurrently with his sentence in docket number 438161 of the 22nd Judicial District Court for the Parish of St. Tammany.

The defendant now appeals, urging one counseled and two pro se assignments of error.[3] For the reasons set forth below, we affirm the defendant's conviction, adjudication as a second-felony habitual offender, and sentence.

COUNSELED ASSIGNMENT OF ERROR

In his sole counseled assignment of error, the defendant urges he was denied effective assistance of counsel. He alleges three acts of deficient performance by trial counsel.

(1) When "other crimes" testimony that implicated the defendant as a principal to obstruction of justice was solicited from co-defendant, Ionjaleic Cagnolatti, trial counsel failed to object or ask for a mistrial or at least an admonition that the jury should disregard the remark.

[3] The defendant filed a motion to dismiss appellate counsel's assignment of error, which this court denied.

(2) Trial counsel failed to object to hearsay testimony the prosecutor solicited from Detective Laura Stepro of the Waveland Police Department concerning co-defendant Gary Gilmore's statement to the Waveland Police that the defendant was the person with him during the Waveland Robbery.

(3) When trial counsel correctly objected to a question concerning other criminal activity the defendant may have discussed with Ms. Cagnolatti, trial counsel improperly argued the grounds for the objection in the presence of the jury.

PRO SE ASSIGNMENTS OF ERROR

1. The State failed to meet its constitutional burden of proof beyond a reasonable doubt in the defendant's conviction for armed robbery.

2. The trial court erred in admitting "other crimes evidence" where the State did not prove by clear and convincing evidence the defendant had committed another armed robbery.

FACTS

On January 7, 2010, Ms. Keith worked the night shift at Grumpy's. Around eleven p.m., Ms. Keith began preparing the store for closing. One of Ms. Keith's usual customers waited in the parking lot while she went outside to lock up the ice machine. The customer left once she was inside the store.

After she was inside, a stocky male, wearing black gloves and a black hooded jacket with a black balaclava and camouflage facemask, ran into the store and robbed Ms. Keith at gunpoint. Ms. Keith described the gun as looking like a "western gun." It had a "long handle, [with] parts in the handle." When the gunman reached over the counter, Ms. Keith opened the cash register and told him to take all the money. Because she was locking up for the night, there was not much money in the register. The masked gunman rushed around the counter, grabbed Ms. Keith by her neck, shoved her repeatedly, and said he was going to kill her. The gunman took the money in the cash register, about one hundred dollars. He fled on foot in the

same direction from which he entered the store. Surveillance cameras recorded the events. As the subsequent investigation unfolded, the police learned the masked gunman was co-defendant, Gary Gilmore.

<u>THE INVESTIGATION</u>

The defendant's first recorded statement

The Slidell Police Department did not have any suspects or leads in the case. However, that changed when the defendant, who was in police custody for an unrelated matter, asked to speak to the police about information he had concerning the Slidell Robbery. In a January 9, 2010 recorded statement, the defendant informed the police that on the night of the Slidell Robbery, he was visiting a female friend who lived on Walnut Street. Several other people were also there, including Mr. Gilmore, who the defendant said he only knew as "Gary." The defendant said everyone was teasing Mr. Gilmore about being one of the dumbest criminals.

Mr. Gilmore and a female, whose name the defendant claimed he did not know, began telling about Mr. Gilmore's bungled attempt earlier that night to rob a Slidell convenience store on Thompson Road in Slidell. Mr. Gilmore entered the Thompson Road convenience store wearing a mask. However, he got scared and ran out of the store before being noticed by the store clerks. After this ill-advised caper, Mr. Gilmore and his female companion surveilled another convenience store, but decided against robbing it. Next, they drove to Grumpy's gas station on Robert Road, where Mr. Gilmore robbed the store clerk at gunpoint.

The defendant gave a detailed account of the Slidell Robbery. According to the defendant, the female and Mr. Gilmore waited for the last customer to leave before the female dropped Mr. Gilmore off behind Grumpy's. Mr. Gilmore ran inside the store, robbed the clerk, and fled on

foot to meet up with the female who was waiting down the street. He further elaborated that, as they were driving away, Mr. Gilmore and the female were nervous because the police quickly responded to the crime scene with lights and sirens. The female was concerned that the police would stop them because Mr. Gilmore kept turning on the light in the car in order to count the money from the robbery. The defendant said Mr. Gilmore showed everyone the camouflage mask and the long-barrel revolver he used in the robbery. According to the defendant, everyone laughed when Mr. Gilmore said he only got about eighty dollars.

The details the defendant gave of the Slidell Robbery matched the account given by Ms. Keith. The defendant's statement also contained details of the crime that were not released to the public. This concerned the police, who thought the defendant knew more then he had disclosed in his statement. Having enough information at this point to obtain a search warrant for the Walnut Street residence, the police decided to interview the defendant again after executing the search warrant.

The defendant's second recorded statement

Slidell Police Detectives Brian Brown and Jeff Theriot executed the search warrant. They did not find the gun or any of the items used in the Slidell Robbery. However, the occupants confirmed that the defendant and Mr. Gilmore were there the night of the robbery. The occupants also volunteered that the defendant and Mr. Gilmore came back the next night. The detectives subsequently learned Mr. Gilmore lived in Slidell with his mother and that he had ties to a female who lived in the Bay St. Louis/Waveland, Mississippi area.

On January 12, 2010, the defendant voluntarily gave a second recorded statement. Unlike the first statement, the defendant placed himself in his car

with Mr. Gilmore before and after the Slidell Robbery. In his second statement, the defendant admitted knowing Mr. Gilmore. He told the detectives that Mr. Gilmore would occasionally call and ask the defendant for a ride when he wanted to see one of the females who lived at the Walnut Street residence. The defendant even picked out Mr. Gilmore from a photo line-up.

In this second version, Mr. Gilmore called the defendant and asked for a ride to a female's house. The defendant agreed, assuming Mr. Gilmore wanted to be dropped off at the Walnut Street residence. Before he picked up Mr. Gilmore, the defendant stopped and picked up a female companion, whose name he claimed he could not recall. After Mr. Gilmore got into the car, he asked to be dropped off at a different female's house located in a neighborhood off Robert Road behind Grumpy's. Mr. Gilmore instructed the defendant to turn off of Robert Road at a traffic light and then to turn into the neighborhood behind Grumpy's. The defendant said he dropped Mr. Gilmore off in the yard of the second house on the street.

After dropping Mr. Gilmore off, the defendant and his female companion got lost when they attempted to leave through the back of the neighborhood. When they could not find their way out of the back of the neighborhood, the defendant made a U-turn and made his way back to where they first entered the neighborhood. When they got to the front of the neighborhood, the defendant told the detectives he saw Mr. Gilmore casually walking toward the neighborhood, "brushing his hair." He stopped and offered Mr. Gilmore a ride. Mr. Gilmore asked to be taken to the Walnut Street residence.

The defendant said Mr. Gilmore was in the back seat of the car brushing his hair and "just being Gary." However, when they saw Slidell

police cars approach the intersection, the defendant said Mr. Gilmore suddenly dropped down in the seat. The defendant, who was drinking a beer, was concerned that Mr. Gilmore's actions might attract the attention of the police. So, he pulled over.

At this point, the defendant said he began thinking something was wrong. Mr. Gilmore began "tripping" and turned on the car light and started counting money. Mr. Gilmore kept repeating to himself that the store clerk would not give him the money, he had to slam her around, and he had to get out of here and go to Walnut Street. According to the defendant, Mr. Gilmore wanted the defendant to take some of the money, but he refused because he wanted no part of the robbery. As Mr. Gilmore was attempting to divide the cash, the defendant said he saw the barrel of Mr. Gilmore's gun.

The defendant told the detectives that he became concerned about Mr. Gilmore's state of mind because Mr. Gilmore was acting agitated and kept saying he was not going to jail. The defendant believed he may be in harm's way and felt like he had no choice but to take Mr. Gilmore to Walnut Street. When they got to the Walnut Street residence, Mr. Gilmore accidentally dropped a camouflage mask on the ground as he got out of the car.

The defendant said he left immediately after dropping Mr. Gilmore off at the Walnut Street residence. He dropped off his female companion at a house located off McArthur Street and went straight home to his family. The defendant's two children and the mother of the children, Heather, lived with her father, Donald Parks, at his home. The defendant also lived in Mr. Parks's home.

Throughout the interview, the defendant was adamant that he had no knowledge that Mr. Gilmore was intending to rob Grumpy's when he picked

up Mr. Gilmore from his home or when he later stopped to give him a ride. He told the detectives that he had not seen or talked to the female since that night. However, if the detectives could locate her, he was sure she would verify what occurred that night.

Investigation leading to the defendant's third recorded statement

By this point in the investigation, Detective Brown had contacted a narcotics officer he knew in Mississippi in hopes of finding Mr. Gilmore. The narcotics officer was aware of a similar style armed robbery of an adult novelty store in Waveland the night after the Slidell Robbery. The narcotics officer gave Detective Brown the names of two Waveland Police Department detectives, Laura Stepro and John Salterelli, who were investigating the Waveland Robbery, and suggested he contact them.

Detective Brown learned that two perpetrators committed the Waveland Robbery and the robbery was recorded by the store's video surveillance camera. One of the Waveland Robbery perpetrators wore a camouflage mask, black clothing, and was armed with a long-barrel gun. The other perpetrator wore camouflage overalls and a black balaclava that had one large open-area for the eyes and bridge of the nose. The Waveland detectives drove to Slidell and showed Detective Brown the video and some still photos taken from the Waveland Robbery video. They also showed Detective Brown a still shot taken from the store's surveillance camera about twenty minutes before the robbery. The photo taken before the robbery showed a man wearing a distinctive, black-hooded sweatshirt with a "skull and flames" on the front. Detective Brown immediately recognized the man wearing the "skull and flames" hooded sweatshirt as the defendant. He also recognized the defendant as the perpetrator wearing the camouflage overalls and balaclava.

The Slidell detectives obtained a search warrant for the defendant's vehicle. Accompanied by the Waveland detectives, they found the black "skull and flames" hooded sweatshirt and a black balaclava like the one worn by one of the perpetrators in the Waveland Robbery. The driver's license of co-defendant Ionjaleic Cagnolatti was also found in the defendant's vehicle.

At some point, Detective Brown began recording and monitoring the calls the defendant made from jail. He noticed that the defendant would call a specific number when he wanted to talk to his mother, brother, or friends. In a jailhouse call to that number, the defendant told a person, who was believed to be the defendant's brother, to tell "Ionjaleic" to get all of his things out of her apartment and to throw them away in the apartment complex's dumpster. Subsequently, Ms. Cagnolatti made a recorded statement, in which she admitted to being in the car with the defendant and Mr. Gilmore the night of the Slidell Robbery and to throwing away several items the defendant kept at her apartment, including a pair of camouflage overalls.

The detectives went to Mr. Parks's home to ask if he was missing any of his hunting gear. When the detectives showed Mr. Parks the photos of the Waveland Robbery, he recognized the defendant as the man in the "skull and flames" black hooded sweatshirt and in the camouflage overalls and black balaclava. Mr. Parks also recognized the long-barrel gun as his H&R long-barrel pistol. He said the gun is a replica of an 1870's long-barrel "cowboy" pistol. Mr. Parks informed the detectives that he had camouflage overalls and camouflage and black hunting masks like the ones worn in the Waveland Robbery photos. When he looked for his similar hunting gear, he discovered they were missing. Likewise, he discovered his H&R long-barrel

pistol and a box of ammunition for the pistol were missing from his locked gun cabinet.

The defendant's third recorded statement

The defendant made his third recorded statement on February 9, 2010, with trial counsel present. In this version, after he finished work, he picked up Ms. Cagnolatti, then Mr. Gilmore. The trio ended up in Mississippi to case the "joints" that Mr. Gilmore was considering robbing. Essentially, the defendant described a plan where Mr. Gilmore, armed with the gun, would go in and rob the store. The defendant would act as the getaway driver. Both he and Ms. Cagnolatti would act as lookouts. However, they decided not to rob these places and they left Mississippi and drove to Slidell.

In Slidell, the trio ended up at the Thompson Road gas station and convenience store. According to the defendant, Mr. Gilmore felt confident that he could rob it. The defendant and Ms. Cagnolatti dropped him off as planned. As they were pulling away from the gas station, Mr. Gilmore ran out of the store without robbing it. At first, they thought it was funny. Then, Ms. Cagnolatti said she wanted to go home. Mr. Gilmore was still pushing the issue because he needed money. According to the defendant, he told Mr. Gilmore that he would lend him some money and nothing more was said about robbing a store.

Mr. Gilmore asked to be dropped off at a girlfriend's house off Robert Road. Most of what follows was consistent with the corresponding post-robbery account the defendant gave in his second recorded statement. The defendant was adamant that he had no knowledge that Mr. Gilmore was planning to rob Grumpy's when he left Mr. Gilmore at the residence off Robert Road. Once again, the defendant maintained he had no knowledge that Mr. Gilmore had robbed Grumpy's when he later offered him a ride.

When he realized Mr. Gilmore had robbed Grumpy's, the defendant said they argued about Mr. Gilmore placing him in jeopardy of going to jail if the police stopped them and found the gun and the stolen money in his car.

Ionjaleic Cagnolatti's recorded statement

Ms. Cagnolatti gave a different account of the events that occurred on January 7, 2010. In her February 10, 2010 recorded statement, she told the detectives that when they picked up Mr. Gilmore, there was no talk about taking him to a girlfriend's house in the Robert Road area. She confirmed they dropped off Mr. Gilmore at the Thompson Road convenience store. Although she thought it strange when he came back out of the store without making a purchase, she said she had no idea of a plan to rob that store.

When they left the Thompson Road convenience store, Ms. Cagnolatti said the defendant drove to a wooded area behind Grumpy's and dropped off Mr. Gilmore. Before getting out of the defendant's car, Mr. Gilmore told the defendant to signal him by "honking" the horn when he returned to pick him up. The defendant then drove down a street in the neighborhood behind Grumpy's, made a U-turn at the end of the street, and drove back to where he left Mr. Gilmore. When the defendant signaled with the horn, Mr. Gilmore ran out of the wooded area and got in the car. Ms. Cagnolatti claimed she realized what was going on after Mr. Gilmore robbed Grumpy's.

Ms. Cagnolatti said there was no disagreement between the defendant and Mr. Gilmore. After the robbery, they drove to the Walnut Street residence. The defendant went in the house and she stayed in the car. When the defendant returned, they went to a daiquiri shop. After that, he took her home. Ms. Cagnolatti claimed she had no knowledge about the plan Mr. Gilmore and the defendant had to rob Grumpy's. However, she admitted to

throwing away the camouflage overalls the defendant left in her apartment, and that someone claiming to be the defendant's brother later called and asked her to throw away the items.

As a result of the investigation, the defendant, Mr. Gilmore, and Ms. Cagnolatti were charged as co-perpetrators of the Slidell Robbery. Ms. Cagnolatti was also charged with accessory after the fact.

COUNSELED ASSIGNMENT OF ERROR

Ineffective Assistance of Counsel

On appeal, the defendant claims ineffective assistance of counsel. A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. Nonetheless, where the record discloses evidence needed to decide the issue, and that issue is raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. *State v. Henry*, 2000-2250 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 538, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. The record before us is sufficient to decide this issue. Thus, in the interest of judicial economy, we choose to consider the defendant's arguments in his sole assignment of error. See *State v. Wilkinson*, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

The claim of ineffective assistance of counsel is to be assessed by the two-part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Fuller*, 454 So.2d 119, 125 n.9 (La. 1984). An ineffective assistance of counsel claim has two components: a defendant must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct.

2527, 2535, 156 L.Ed.2d 471 (2003). Counsel's performance is deficient when it can be shown that counsel made errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Counsel's deficient performance will have prejudiced the defendant if he shows the errors were so serious as to deprive him of a fair trial. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To carry this burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

"Other Crimes" Evidence / Obstruction Of Justice

During Ms. Cagnolatti's testimony, the prosecutor solicited testimony from her that she received a telephone call from someone identifying himself as the defendant's brother, asking her to throw away any items the defendant had left at her home. Because Ms. Cagnolatti testified that she did not know the defendant's brother, the defendant argues that the jury could conclude that the defendant instructed the caller to contact Ms. Cagnolatti. Therefore, the defendant contends Ms. Cagnolatti's answer implicated him as a principal to obstruction of justice.

The defendant urges trial counsel's performance was deficient during this line of questioning. He contends trial counsel should have objected or moved for a mistrial under La. Code Crim. P. art. 770(2), or at the least, requested the trial court to issue an admonishment to the jury to disregard this line of questioning. Moreover, the defendant argues trial counsel made matters worse during cross-examination, when counsel followed up and

asked Ms. Cagnolatti "isn't it true you threw [the defendant's] stuff away before you actually got a phone call from his brother?" The defendant argues this removed all doubt from the jurors' minds that the telephone call was actually from the defendant's brother. The defendant also argues this line of questioning was unnecessary to establish why Ms. Cagnolatti threw the camouflage overalls away, because she had already testified that she threw the items away prior to receiving the call.

Arguably, this line of questioning could be construed as soliciting inadmissible "other crimes" testimony from Ms. Cagnolatti. However, error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Thus, the defendant must also satisfy the "prejudice" prong of the *Strickland* analysis. To do this, the defendant must show that, but for counsel's failure to object to testimony concerning the telephone call Ms. Cagnolatti received, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 694-95, 104 S.Ct. at 2069. Our review of the record before us reveals that the defendant cannot show he was prejudiced by trial counsel's alleged mistakes.

At trial, Ms. Cagnolatti testified that she had known the defendant for about four weeks prior to the Slidell Robbery, he was at her apartment almost every evening, and the defendant left several of his things at her apartment. She had no doubt that the defendant was the man in the Waveland Robbery photos wearing the camouflage overalls and black mask. She also testified that the camouflage overalls the defendant was wearing in the Waveland Robbery photo looked like the ones the defendant left in her apartment that she threw away. In addition, Ms. Cagnolatti was present

during the Slidell Robbery and her testimony established the defendant and Mr. Gilmore were both involved in the planning and execution of the Slidell Robbery.

Mr. Donald Parks also had no doubt that defendant, who lived in his home and was the father of his two grandchildren, was the Waveland Robbery perpetrator wearing the camouflage overalls and black mask. His testimony also established that he owned the same type of hunting gear the defendant wore in the photos and that his similar hunting gear was missing. In addition, Mr. Parks's testimony established that his H&R long-barrel pistol was the one shown in the photos of both robberies, his pistol was missing from his locked gun cabinet, and the defendant had access to the pistol because he lived in his home. In light of the amount of evidence produced at trial that linked the defendant to the Waveland and Slidell Robberies, we find that the defendant cannot show a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Thus, this argument is without merit.

Detective Laura Stepro's Testimony

In the second argument, the defendant contends he received ineffective assistance of counsel because trial counsel failed to object, on redirect, to certain testimony the prosecutor solicited from Detective Stepro concerning Mr. Gilmore's statement to the Waveland detectives that the defendant was his co-perpetrator in the Waveland Robbery. Other than pointing out that Mr. Gilmore did not testify, the defendant did not develop this argument. That being said, for the reasons previously discussed, even if trial counsel's failure to object to this possible hearsay testimony was deficient performance, we find that the defendant cannot show a reasonable probability that, but for counsel's failure to object to this testimony, the

result of the proceeding would have been different. The jury had already learned that the defendant was the second perpetrator in the Waveland Robbery through the testimony of Ms. Cagnolatti and Mr. Parks. Therefore, this unobjected to testimony by Detective Stepro was merely cumulative. Thus, we find defendant's second ineffectiveness argument lacks merit. See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

"Other Crimes" Evidence / Cagnolatti's Redirect Testimony

During Ms. Cagnolatti's testimony on redirect, the prosecutor began to ask Ms. Cagnolatti whether the defendant ever made statements to her "about hitting a lick." Before the prosecutor finished the question, trial counsel objected to the question. The defendant contends that the objection was proper because the question was intended to solicit improper evidence of the defendant's involvement in other criminal activity. However, rather than approaching the bench to argue the grounds for the objection, in the presence of the jury, trial counsel argued, "Your Honor. This is talking about other offenses that we have already had hearings for." Trial counsel further stated, "This is something extraneous." The trial court sustained the objection and Ms. Cagnolatti did not respond to the question.

In his third argument, the defendant contends trial counsel's performance in the manner in which he argued the objection was deficient. He contends counsel's failure to approach the bench effectively defeated the purpose of the objection, i.e., not letting the jury learn of Mr. Weiters's prior criminal offenses. As a result of this mistake, the defendant asserts trial counsel virtually announced to the jury that the defendant had committed other offenses that were being concealed from the jury.

The instant deficient performance argument implies that "hitting a lick" only refers to criminal activity. However, the record before us does not

indicate Ms. Cagnolatti interpreted the term in such a limited fashion. During her testimony, Ms. Cagnolatti was asked what the term meant. She responded that it could mean different things insofar as someone receiving money. Ms. Cagnolatti provided two examples, one involving a fortuitous event and the other involving criminal conduct. On the lighter side, she explained it could mean that someone happened to go to the casino and won big. On the sinister side, she said it could mean a person just sold somebody some drugs. While she acknowledged the term could mean criminal activity, Ms. Cagnolatti said, "It could mean [that] but not usually."

Even if the jury could infer from the question and trial counsel's alleged deficient performance that the defendant had engaged in criminal activity, based on the record before us, we are unable to determine if the question was directed at discussions the defendant may have had with Ms. Cagnolatti about the Slidell or Waveland Robberies, or some other "lick" that would have resulted in improper "other crimes" evidence. In this regard, the record reveals that trial counsel interrupted the second part of the prosecutor's question that may have shed some light as to what testimony the State was attempting to solicit from Ms. Cagnolatti. Because the trial court quickly sustained the objection, further argument was not presented.

Even if trial counsel's performance was deficient, for the same reasons previously discussed, we find the defendant cannot show he was prejudiced by trial counsel's alleged mistake in arguing the objection in front of the jury. Moreover, the record before us reveals that pursuant to its pretrial ruling on the admissibility of the Waveland Robbery evidence, the trial court provided a specific jury instruction on the limited purpose for which "other crimes" evidence could be considered. Also, our thorough review of the closing arguments presented to the jury reveals that the only

"other crimes" evidence to which the State referred in its closing argument was the Waveland Robbery evidence, the admissibility of which the defendant does not challenge on appeal. Thus, we find defendant's third ineffectiveness argument lacks merit. See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

For the foregoing reasons, we find the defendant's counseled assignment of error is without merit. The defendant has failed to carry his burden of showing there is a reasonable probability that, but for the complained about conduct of counsel, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

PRO SE ASSIGNMENTS OF ERROR

Sufficiency of the Evidence

In his first pro se assignment of error, the defendant urges the evidence was insufficient to support his conviction as a principal to armed robbery. The defendant argues the State failed to prove beyond a reasonable doubt that he had knowledge that Mr. Gilmore was planning to rob Grumpy's. He also contends there was insufficient evidence to link him to the weapon Mr. Gilmore used during the Slidell Robbery.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The *Jackson*

standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In the instant matter, the State's case-in-chief is built, in part, on circumstantial evidence. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See *State v. Patorno*, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statutes 14:64 provides in pertinent part:

> (A)Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

The parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. La. R.S. 14:24. The law of principals states that all persons involved in the commission of a crime, whether present or absent, are equally culpable. However, the defendant's mere presence at the scene is not enough to "concern" an individual in the crime. A principal may be connected only to those crimes for which he has the requisite mental state. *State v. Hampton*, 98-0331 (La. 4/23/99), 750 So.2d 867, 880, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999). The State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another. Under this theory, the defendant need not have actually performed the taking to be found guilty of a robbery. *State v. Smith*, 513 So.2d 438, 444-45 (La. App. 2d Cir. 1987). Further, a defendant convicted as a

principal need not have personally held a weapon to be found guilty of armed robbery. *State v. Dominick*, 354 So.2d 1316, 1320 (La. 1978).

Armed robbery is a general intent crime. In general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal. *State v. Payne*, 540 So.2d 520, 523-24 (La. App. 1st Cir.), writ denied, 546 So.2d 169 (La. 1989).

In his pro se brief, the defendant contends Ms. Cagnolatti's testimony is insufficient to prove he had knowledge of Mr. Gilmore's plan to rob Grumpy's. The defendant points out that Ms. Cagnolatti did not see Mr. Gilmore exit the defendant's vehicle with a gun or mask, and she testified there was no communication between Mr. Gilmore and the defendant about robbing Grumpy's.

As discussed in the counseled assignment of error, Ms. Cagnolatti's testimony established the defendant drove to an area behind Grumpy's and Mr. Gilmore got out of the defendant's car. Before Mr. Gilmore got out of the defendant's car, Mr. Gilmore told the defendant to "honk" the horn when the defendant returned to pick him up. The defendant then drove down a street in the neighborhood behind Grumpy's, made a U-turn, and returned to the area where he left Mr. Gilmore. When the defendant returned, Ms. Cagnolatti testified that the defendant signaled Mr. Gilmore as planned. Mr. Gilmore ran out of a wooded area and got into the defendant's car. After that, the defendant drove to the Walnut Street residence and the defendant and Mr. Gilmore went inside the residence.

Ms. Cagnolatti's testimony contradicts the exculpatory statements the defendant made to the police in his third recorded statement. Ms. Cagnolatti testified that Mr. Gilmore did not ask the defendant for a ride to a female's house in the neighborhood behind Grumpy's. The defendant did not get lost

in the neighborhood behind Grumpy's after Mr. Gilmore exited the defendant's vehicle. The defendant did not have a disagreement with Mr. Gilmore after the robbery. Ms. Cagnolatti's testimony established that the defendant knew in advance that Mr. Gilmore was going to rob Grumpy's. The defendant's actions suggest that, not only was he aware that Mr. Gilmore was going to commit the armed robbery, but that he and Mr. Gilmore had planned this crime in advance.

The defendant also contends that there was insufficient evidence linking him to the gun Mr. Gilmore used in the Slidell Robbery. He challenges Mr. Parks's identification of the gun used in the Slidell and Waveland Robberies as being his missing H&R long-barrel pistol. The defendant asserts that Mr. Parks identified the weapon from surveillance photographs that were "grainy at best," which cast serious doubt on Mr. Parks's identification of the weapon. The defendant also contends that Ms. Keith's description of the gun as being "brownish" in color does not match the actual color of Mr. Parks's missing pistol. However, the defendant did not provide the court with a record cite to support this assertion.

The defendant's characterization of Mr. Parks's identification of the pistol used in the Slidell and Waveland Robberies as being suspect due to the "grainy" quality of the surveillance video is not supported by a review of the record. Mr. Parks identified the pistol in the surveillance photographs as being his missing pistol by the weapon's distinct characteristics. The record also shows that Ms. Keith's description of the weapon as looking like a "western gun" is consistent with Mr. Parks's detailed description of the gun and with the photographs of the Slidell and Waveland Robberies. In addition, Mr. Parks's and Ms. Cagnolatti's testimony identified the defendant as one of the perpetrators in the Waveland Robbery photographs.

We further note that at trial, the jury heard the defendant's third recorded statement in which he explained to the police that he had no knowledge that Mr. Gilmore was going to rob Grumpy's. In the third recorded statement, the defendant offered an exculpatory reason as to how Mr. Gilmore came to be in the defendant's vehicle after the Slidell Robbery. It is obvious from the finding of guilt that the jury concluded the testimony of Ms. Cagnolatti, Mr. Parks, and the Slidell detectives was credible and reliable enough to establish the defendant's guilt. In finding the defendant guilty, it is clear the jury rejected the explanation the defendant provided to the police in his third recorded statement that he was unaware of, and in no way helped Mr. Gilmore plan the Slidell Robbery.

An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. *State v. Taylor*, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. *State v. Mitchell*, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. *Taylor*, 721 So.2d at 932.

After a thorough review of the record, we find the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of armed robbery. In

reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See *Ordodi*, 946 So.2d at 662. Furthermore, an appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. *State v. Calloway*, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). This pro se assignment of error lacks merit.

"Other Crimes" Evidence

In his second pro se assignment of error, the defendant challenges the trial court's ruling that allowed the State to introduce evidence of the Waveland Robbery. The defendant contends the State failed to show by clear and convincing evidence that he was Mr. Gilmore's co-perpetrator in the Waveland Robbery. He also contends the probative value of the evidence was outweighed by its prejudicial effect.

Generally, evidence of other crimes committed by the defendant is inadmissible due to the substantial risk of grave prejudice to the defendant. To admit "other crimes" evidence, the State must establish that there is an independent and relevant reason for doing so, i.e., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act. See La. Code Evid. art. 404(B)(1). The Louisiana Supreme Court has also held other crimes evidence admissible as proof of other crimes exhibiting almost identical modus operandi or system, committed in close proximity in time and place. Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at

issue and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *Millien*, 845 So.2d at 513-14.

Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. See *Old Chief v. United States*, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). *State v. Jarrell*, 2007-1720 (La. App. 1st Cir. 9/12/08), 994 So.2d 620, 629-30.

The procedure to be used when the State intends to offer evidence of other criminal offenses used to be controlled by *State v. Prieur*, 277 So.2d 126 (La. 1973). Prior to its repeal by 1995 La. Acts No. 1300, § 2, La. Code Evid. art. 1103 provided that the notice requirements and clear and convincing evidence standard of *Prieur* and its progeny were not overruled by the Code of Evidence. Under *Prieur*, the State was required to give a defendant notice, both that evidence of other crimes would be offered against him, and upon which exception to the general exclusionary rule the State intended to rely. Additionally, the State had to prove by clear and convincing evidence that the defendant committed the other crimes. *Millien*, 845 So.2d at 514.

However, 1994 La. Acts 3d Ex. Sess. No. 51, § 2, added La. Code Evid. art. 1104, which provides that the burden of proof in pretrial *Prieur* hearings, "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." The burden of proof required by Federal

Rules of Evidence Article IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of La. Code Evid. art. 1103 and the addition of La. Code Evid. art. 1104. However, numerous Louisiana appellate courts, including this court, have held that burden of proof to now be less than "clear and convincing." *Millien*, 845 So.2d at 514.

In the instant matter, the State met its burden of proving the defendant was a co-perpetrator of the Waveland Robbery. As previously discussed, at trial Mr. Parks and Ms. Cagnolatti identified the defendant as one of the perpetrators of the Waveland Robbery from the photographs taken from the surveillance video. Mr. Parks identified the camouflage and black facemasks and the camouflage overalls as his missing hunting gear. Ms. Cagnolatti testified that she threw away a pair of camouflage overalls that the defendant kept at her apartment. She testified that the ones she threw away looked like the ones the defendant was wearing in the photographs of the Waveland Robbery. Mr. Parks and Ms. Cagnolatti also testified the defendant was the person in the Waveland Robbery surveillance photograph that was taken shortly before the robbery.

We also find the other crimes evidence of the Waveland Robbery was not unduly prejudicial to the defendant. A review of the record supports the conclusion that the probative value of the "other crimes" evidence outweighed its prejudicial effect. The other crimes evidence was used as proof of the defendant's intent in the Slidell Robbery and proof that his presence and involvement in the Slidell Robbery was not due to mistake or

accident. Futhermore, the trial court gave the jury a limiting instruction regarding the "other crimes" evidence. The jury was instructed as follows:

> Evidence that the defendant was involved in the commission of an offense, other than the offense for which he is on trial, is to be considered only for a limited purpose. The sole purpose for which such evidence may be considered is whether it intends to show:
>
> That the accused possessed the requisite specific intent to commit a criminal act on a later occasion, or to show such things as motive, opportunity, preparation, plan, or absence of mistake, or accident.
>
> Remember, the accused is only on trial only for the offenses charged. You may not find him guilty of this offense merely because he may have committed another offense.

In light of the foregoing, we find that the trial judge did not err in admitting the "other crimes" evidence. This pro se assignment of error lacks merit.

SENTENCING ERROR

In accordance with La. Code Crim. P. art. 920(2), all appeals are reviewed for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found two sentencing errors. See *State v. Price*, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

The defendant was convicted of armed robbery while using a firearm, violations of La. R.S. 14:64 and La. R.S. 14:64.3. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. La. R.S. 14:64(B). Because a firearm was used in the armed robbery, La. R.S. 14:64.3(A) mandates the offender shall be imprisoned at hard labor for an additional period of five years without benefit of parole, probation, or suspension of sentence and this

additional sentence shall be served consecutively to the sentence imposed under the provisions of La. R.S. 14:64.

In addition to the sentencing provisions in La. R.S. 14:64 and La. R.S. 14:64.3, for an adjudicated second-felony offender, La. R.S. 15:529.1(A) provides that a second-felony offender's sentence shall be for a determinate term of not less than one-half the longest term and not more than twice the longest term for the underlying offense. Thus, the minimum term of imprisonment for an adjudicated second-felony offender convicted of armed robbery while using a firearm is forty-nine and one-half years at hard labor, pursuant to La. R.S. 14:64(B) and La. R.S. 15:529.1(A), plus an additional, consecutive period of imprisonment of five years at hard labor, pursuant to La. R.S. 14:64.3(A), for a total minimum enhanced sentence of fifty-four and one-half years at hard labor. Although La. R.S. 15:529.1(G) does not restrict parole eligibility, the conditions imposed on the sentence are those called for in the referenced statute. See *State v. Bruins*, 407 So.2d 685, 687 (La. 1981). As both La. R.S. 14:64(B) and 14:64.3(A) require the period of imprisonment imposed under these statutes to be served without benefit of parole, under *Bruins*, the defendant's enhanced sentence for his conviction of armed robbery while using a firearm is to be served without benefit of parole.

In this matter, the trial court sentenced the defendant to a total imprisonment of forty-four and one-half years at hard labor, to be served without benefit of probation or suspension of sentence. We find this sentence is illegally lenient because the sentence imposed, forty-four and one-half years of imprisonment, is less than the statutory minimum sentence. We also find this sentence is illegally lenient because the trial court failed to order the defendant's sentence to be served without benefit of parole.

However, since the sentence imposed as a result of these sentencing errors is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See *Price*, 952 So.2d at 123-25; see also *Bruins*, 407 So.2d at 687.[4] Thus, for the reasons stated above, we affirm the defendant's conviction, adjudication as a second-felony habitual offender, and sentence.

DECREE

For the reasons set forth herein, the defendant's conviction, adjudication as a second-felony habitual offender, and sentence are all affirmed.

CONVICTION, ADJUDICATION AS A SECOND-FELONY HABITUAL OFFENDER, AND SENTENCE AFFIRMED.

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[4] In any event, the defendant's parole restriction should be self-activated under La. R.S. 15:301.1(A). See **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, 799.