NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 0499

STATE OF LOUISIANA

VERSUS

LEOPOLD LACOSTE, II

Judgment rendered NOV 12 2014

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Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 635,841
Honorable Randall L. Bethancourt, Judge

* * * * * *

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LEOPOLD LACOSTE, II

* * * * * *

BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Welch J. concurs and assigns reasons.

PETTIGREW, J.

The defendant, Leopold Charles "Chuck" Lacoste, II, was charged by amended bill of information with identity theft (victim over sixty years of age and value over $1000.00), a violation of Louisiana Revised Statutes, section 14:67.16. He pled not guilty and, following a jury trial, was found guilty as charged. He filed motions for a new trial and a postverdict judgment of acquittal, both of which were denied. The State filed a multiple offender bill of information. After a hearing, the defendant was adjudicated a fourth-felony habitual offender and sentenced to thirty years at hard labor without the benefit of probation or suspension of sentence. The defendant now appeals, alleging four assignments of error. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

FACTS

The defendant's father, Leopold Charles Lacoste, Sr. ("Polo"), testified at trial that he discovered a Citibank credit card in his name while running a credit check on himself. The address on the credit card application was that of his ex-wife, Linda Thibodaux.[1] Polo testified that he had not given Linda or either of their sons permission to use his identifying information to acquire this credit card.[2] On March 21, 2012, Polo contacted Citibank about the card. The matter was investigated by Chip Bulin, a fraud investigator at the company. According to Bulin's testimony, an online application for the credit card was submitted on September 26, 2011, and the primary applicant was listed as "Leopold C. Lacoste." The date of birth of the applicant was listed as May 28, 1941 (Polo's date of birth), the address was 4162 Highway 56 (Linda's residence), and the social security number provided was that of Polo. The email address provided was LCLinNo1@aol.com. Because further verification was requested, two utility bills issued to "Leopold C. Lacoste" at the Highway 56 address were submitted. According to the February/March 2012

[1] Polo and Linda divorced in the early 1990s.

[2] Polo and Linda have two adult sons, the defendant and William Thomas Lacoste, who goes by "Billy."

account statement, the balance on the credit card was $12,496.41.

Terrebonne Parish Sheriff's Office Detective James Prestenback also investigated the matter. Because a majority of the charges on the credit card were made in Houma, Detective Prestenback contacted the businesses there to determine who used the card. An employee at Gator Equipment Rentals stated that the defendant used the card to rent a concrete mixer under another person's account. The credit card was also used by the defendant to make a payment at A1 Unlimited Bail Bonds, a company in Houma. Based on this information, an arrest warrant was prepared for the defendant, and a meeting was arranged. Because the defendant did not appear for this meeting, officers prepared an affidavit and search warrant for the Highway 56 residence (Linda's residence), where the defendant was residing. When officers arrived, the defendant was outside. He was placed under arrest and transported to the police station. Officers then conducted a search of the defendant's room and bathroom in the residence.

Pursuant to their search, officers found Wal-mart receipts that corresponded with charges on the Citibank statement. The last four digits of the credit card used printed on the receipts were consistent with those for the account number. Officers also located a business card bearing the name "L.C. 'Chuck' LaCoste II" and the Highway 56 address. The business card listed the same email address and home telephone number as that used on the credit card application.

SUFFICIENCY

In cases such as this one, where the defendant has raised issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should preliminarily determine the sufficiency of the evidence before discussing the other issues raised on appeal. When the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must review the assignments of error to determine whether the accused is entitled to a new trial. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992). Accordingly, we will first address the defendant's fourth assignment of error, which challenges the sufficiency of the State's evidence. Specifically, the defendant

argues that the State failed to establish that he was the person who obtained the credit card at issue.

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, after 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. 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. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Prior to amendment by 2014 La. Acts No. 811, § 6, La. R.S. 14:67.16 provided, in pertinent part:

> B. Identity theft is the intentional use or possession or transfer or attempted use with fraudulent intent by any person of any personal identifying information of another person to obtain, possess, or transfer, whether contemporaneously or not, credit, money, goods, services, or any thing else of value without the authorization or consent of the other person.
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> C. (1)(b) Whoever commits the crime of identity theft when the victim is sixty years of age or older or a disabled person when the credit, money, goods, services, or any thing else of value is obtained which amounts to a value of one thousand dollars or more, shall be imprisoned, with or without hard labor, for not less than three years and for not more than ten years, or may be fined not more than ten thousand dollars, or both.

The defendant argues that the State put forth no evidence to prove that he intentionally used, possessed, transferred, or attempted to use the personal information of his father to obtain a credit card. He claims that investigators could not link him to the credit card application and that no cellular phone records, telephone calls, or computer

records from his seized computer were found to prove that he used Polo's identity to obtain the credit card.

The parties stipulated that Polo was seventy years old at the time of the alleged offenses and that the defendant used the credit card at issue to obtain goods and services in excess of $1,000.00. The State presented evidence that the Citibank card was obtained using Polo's social security number and birthday. The remaining information, including the email address, home address, and home telephone number were those of the defendant. The State put forth evidence that the defendant's email address was listed on the original online application. Citibank used that address to correspond with the applicant. It requested additional information and received documents in response to the email it sent to that address. There was no testimony that anyone other than the defendant had access to his email account. Linda testified that during the last week of September 2011, the defendant was living in her home, and Billy, the defendant's brother, was "in and out" but did not live with them.

The State established through other crimes evidence that the defendant had access to Polo's social security number and had used it multiple times in the past. Terrebonne Parish Sherriff's Officer Corey Brunet testified that in 2003, he interviewed the defendant in connection with a complaint from Polo in reference to identity theft on a utility bill. The defendant admitted having committed identity theft in the past and using Polo's identity to obtain vehicles and clothing. He was placed under arrest in connection with the investigation.

The State also established that the defendant used the identities of other close relatives and family friends to open accounts, obtain funds, and purchase goods. Houma Police Department Detective Jeffrey Lirette investigated a 2002 complaint involving the defendant in connection with forgery on Linda's checks on a closed account. Detective Lirette was contacted by a bank while the defendant was there attempting to cash a check on the account. He went to the bank and placed the defendant under arrest.

Detective Travis Theriot, also with the Houma Police Department, investigated a 2011 complaint from a truck stop owner that the defendant was using a stolen credit card

at his business. The investigation revealed that the defendant used the card belonging to someone else twenty-one times between May 15, 2011, and June 29, 2011, for $683.85 at one truck stop and $1,383.89 at another. The defendant was arrested and pled guilty to using the card.

Jefferson Parish Sheriff's Officer Scott Ortego testified that he encountered the defendant when he was working private detail at The Home Depot in Harahan on February 12, 2002. The defendant was attempting to open a credit card account in his grandfather's name and stating that it was for their business. The defendant presented a driver's license that listed his name as "Leopold Charles Lacoste" and a social security number ending with the same last four digits as that of Polo's social security number.

Della Dupre, owner of Captain Allen's Bait and Tackle in Terrebonne Parish, testified that the defendant periodically came into her store. In April 2011, he presented her with a check on Linda's account written for $300.00. She cashed the check for him, and he returned a few days later with another check for $175.00. She cashed the second check, and he presented her with a third check for $180.00. The three checks were returned due to nonsufficient funds. She contacted the defendant, and when he did not pay her, she notified the police. The defendant was placed under arrest.

Timothy Fanguy testified that he is the owner of A1 Unlimited Bail Bonds. The defendant called him from jail on August 12, 2011, and told him that his bail was set at $150,000.00. Fanguy posted bond for the defendant, and informed him that he owed him $18,055.00 on the bond. The defendant wrote a check to him for $5,000.00, which was returned due to nonsufficient funds. After the check was returned, the defendant made two payments using the credit card at issue for $1,300.00 and $3,100.00. Fanguy testified that he did not press criminal charges against the defendant.

The parties stipulated that the defendant is the same Leopold Charles Lacoste, II, who pled guilty to (1) identity theft in Orleans Parish, docket number 445,985, on April 23, 2004 (in connection with the defendant writing counter checks on Polo's checking account); (2) forgery in Jefferson Parish, docket number 025,152, on February 19, 2004 (in connection with the Home Depot incident); (3) forgery (3 counts) in

Terrebonne parish, docket number 424,462, on May 23, 2005 (in connection with forging Linda's checks on the closed account); and (4) theft under $500.00 in Terrebonne Parish, docket number 602,075, on March 20, 2012 (in connection with forging Linda's checks at Captain Allen's Bait and Tackle).

After a thorough review of the record, 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 that the defendant was guilty of identity theft. The verdict rendered in this case indicates the jury rejected the defendant's theory that someone else applied for and acquired the credit card and that he simply used it. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987); see also **State v. Mack**, 2013-1311, p. 6 (La. 5/7/14), 144 So.3d 983, 989 (per curiam). No such hypothesis exists in the instant case. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. **State v. Lofton**, 96-1429, p. 5 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Additionally, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207, pp. 14-15 (La. 11/29/06), 946 So.2d 654, 662. 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, p. 2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Accordingly, this assignment of error is without merit.

OTHER CRIMES EVIDENCE

In his first assignment of error, the defendant argues that the State's notice of intent to use other crimes evidence was inadequate because the State failed to support the purpose for its use of the other crimes evidence. The defendant also contends that the State introduced other crimes at trial that it failed to prove at the pretrial hearing and that the district court erred by failing to instruct the jury on the limited use of other crimes evidence.

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. Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Further, 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. **State v. Tilley**, 99-0569, p. 18 (La. 7/6/00), 767 So.2d 6, 22, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001). Ultimately, questions regarding the admissibility of evidence are within the discretion of the district court and should not be disturbed absent a clear abuse of that discretion. **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992).

The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by **Prieur**.[3] Under **Prieur**, the State was required to prove by clear and convincing evidence that the defendant committed the other crimes. **Prieur**, 277 So.2d at 129. However, 1994 La. Acts 3d Ex. Sess. No. 51 added La. Code Evid. Art. 1104 and amended Article 404B. Article 1104 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

[3] See **State v. Prieur**, 277 So.2d 126 (La. 1973).

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. See **Huddleston v. U.S.**, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). 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 Article 1104. However, numerous Louisiana appellate courts, including this court, have held that burden of proof to now be less than "clear and convincing." **State v. Millien**, 2002-1006, p. 11 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 514; see also **State v. Williams**, 99-2576, p. 7 n.4 (La. App. 1 Cir. 9/22/00), 769 So.2d 730, 734 n.4.

Prior to trial, the State filed notice of intent to use evidence of other crimes. The defendant argues that the State's notice was inadequate because it failed to set forth the purpose for which the other crimes evidence was being offered. The notice provided by the State listed the nature of the other crimes, against whom they occurred, and when they occurred. The defendant was charged with identity theft of an individual over the age of sixty. His defense at trial was that he was not the person who applied for the Citibank credit card. The other crimes evidence involved charges of identity theft, forgery, unauthorized use of access cards, and theft under $500.00. A majority of the victims were elderly individuals. The other crimes evidence established that the defendant used the identities of close, elderly family and friends in order to obtain access cards, funds, and goods; and it specifically established that he used the social security number of the victim in order to obtain goods. It is clear that the State was notifying the defendant that it would use this other crimes evidence to demonstrate the defendant's knowledge, intent, plan, and motive to use the victim's social security number and other identifying information in order to obtain the Citibank credit card. "The rules of **Prieur** were not meant to be used as additional, technical procedures sacramental to a valid conviction." **State v. Lee**, 25,917, p. 7 (La. App. 2 Cir. 5/4/94), 637 So.2d 656, 662, writ denied, 94-1451 (La. 10/7/94), 644 So.2d 631, (quoting **State v. Banks**, 307 So.2d 594, 597 (La. 1975)). Substantial compliance with **Prieur** is all that required. **State v.**

McDermitt, 406 So.2d 195, 201 (La. 1981). The State substantially complied with **Prieur** because the exceptions under which the other crimes evidence would be admitted at trial were clear. Moreover, at the **Prieur** hearing, the State clearly explained the exceptions under which the other crimes were being admitted, thus putting the defendant on notice before trial.

The court held a **Prieur** hearing to determine the admissibility of these other crimes pursuant to La. Code Crim. P. art. 404B(1). At the hearing, the defendant argued that the State failed to state the specific purpose for which it sought to introduce the other crimes. The State responded that the other crimes were relevant to show the defendant's guilty knowledge, intent, plan, scheme, pattern, and motive. The State presented evidence in support of each of the other crimes as follows:

2001 Identity Theft

The State introduced the bill of information, minute entry, and "Plea of Guilty" form, indicating that the defendant pled guilty to identity theft under Orleans Criminal District Court docket number 445,985 on April 23, 2004. The State also introduced the testimony of Polo, who stated the defendant used his social security number "time and time again," beginning in 2001, when the defendant wrote counter checks on his checking account in connection with this charge.

2002 Forgery

In connection with the defendant's forgery charges for stealing his grandfather's identity, in an attempt to obtain a Home Depot credit card in Jefferson Parish, in 2002, the State introduced the bill of information, minute entry, and police report detailing the incident. The officer who authored the report testified at trial. The State also introduced the "Waiver of Constitutional Rights Plea of Guilty," indicating that the defendant pled guilty on February 19, 2004, under 24th Judicial District Court ("JDC"), Jefferson Parish docket number 02-5152.

2002 Forgery & 2003 Identity Theft

In connection with the defendant's September 2002 forgery of three of Linda's checks, the State introduced the bill of information, minute entry, and police report. The

officer who authored the police report testified at trial. Also introduced were affidavits by Linda, stating that the signatures on the checks made payable to "L.C. Lacoste" were forgeries; copies of the checks; a search warrant for the defendant's vehicle; and a list of items found in the defendant's vehicle, including Linda's checkbook. The State included the transcript from the February 28, 2005 hearing where the defendant was advised of his **Boykin**[4] rights, and the defendant pled guilty to three counts of forgery under 32nd JDC, Terrebonne Parish docket number 424,462, on May 25, 2005. Pursuant to his plea agreement, the State dismissed another charge of identity theft. The dismissed charges were related to identity theft of Polo in Terrebonne Parish in 2003. Polo testified that the defendant used his social security number to purchase a Jeep, pay utility bills, and to purchase other items. Because of the plea agreement, there was no conviction. However, the State argued that the charges were relevant to show that the defendant used Polo's name and social security number to obtain credit. In addition to Polo's testimony, the State introduced the bill of information, arrest report, copies of telephone bills, and a witness statement form and identity theft affidavit filled out by Polo. The officer who authored the report testified at trial.

2011 Theft under $500.00

In connection with the defendant's charges for theft under $500.00, for forging Linda's name and cashing her checks at Captain Allen's Bait and Tackle, the State introduced a police report, bill of information, and minute entry. The owner of Captain Allen's testified as to the details at trial. On March 20, 2012, the defendant pled guilty to theft under $500.00, under 32nd JDC, Terrebonne Parish docket number 602,075.

The State argued that it was showing a pattern of the defendant's behavior for over a ten-year period in stealing the identity of elderly people, and explained that the next two charges were an integral part of the instant case.

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[4] See **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

2011 Identity Theft

When the defendant was arrested for identity theft in connection with the use of a credit card belonging to another, in Terrebonne Parish, his bond was set at $150,000.00. That charge was later amended to theft under $500.00, and the defendant pled guilty on March 20, 2012, under 32nd JDC, Terrebonne Parish docket number 618,347. Fanguy at A1 Unlimited posted bail for the defendant. When the defendant was released from jail, he wrote a check in payment of his bail obligation to Fanguy in the amount of $5,000.00. The check was returned for nonsufficient funds, and the defendant used the credit card at issue in order to pay the debt. Fanguy did not press criminal charges. Defense counsel stated that she did not consider those offenses as being covered under "other bad acts or prior acts." She indicated that she did not object to those two offenses for purposes of the Article 404B notice, but that she was not waiving any objection to potential admissibility problems at trial. The district court agreed that defense counsel could still raise the objection during trial. It then opined that ruling on those two offenses was "kind of a moot, but I'm going to let it in. Obviously, I don't think I have a choice."

2012 Unauthorized Use of an Access Card

The last "other crime" that the State sought to introduce involved the defendant's use of Dr. George Lyons's credit card in 2012. Although the doctor gave his card to the defendant to purchase a hot water heater for his daughter (whom the defendant was doing repair work for), when the bill came in, there were over $3,500.00 worth of unauthorized charges. In support of this charge, the State introduced the police report and a copy of the credit card statement. However, testimony and evidence established that the victim of the offense chose not to press charges.

Convinced by the State's arguments, the district court allowed each of the crimes in, finding that they were relevant and showed a pattern. The State's intent to introduce these prior offenses to establish the defendant's pattern of using Polo's social security number and the identity of elderly family members and friends goes directly to rebut defenses the defendant may raise at trial that he did not use Polo's identifying information to obtain the Citibank credit card and demonstrates their independent relevancy besides

merely painting the defendant as a bad person. The other crimes evidence is also relevant to establish the defendant's knowledge of and plan to use Polo's identifying information. His motive for using Polo's identity in order to obtain funds to cover his expenses was also established through the introduction of the other crimes, *i.e.*, using the Citibank credit card at issue to pay for the bond expenses he incurred resulting from his theft charge in Terrebonne Parish.

Based on our review of the record, we find that the district court did not err or abuse its discretion in allowing the introduction of the other crimes evidence presented by the State. While the introduction of this other crimes evidence was certainly prejudicial, the probative value of the evidence—to show the defendant's knowledge of Polo's identifying information and motive for applying for the Citibank credit card—outweighed any prejudice.

The defendant also complains that the district court erred in failing to charge the jury at the close of trial as to the limited purpose of the other crimes evidence and that the defendant could not be convicted for any crime other than the one charged. When other crimes evidence is admitted in a jury trial, the court, upon the defendant's request, must charge the jury as to the limited purpose for which the evidence is to be considered. Moreover, the final jury charge must contain an instruction regarding the limited purpose for which the other crimes evidence was received. At that time, the court must instruct the jurors that the defendant cannot be convicted of any charge other than the one named in the indictment, or one responsive thereto. **Prieur**, 277 So.2d at 130.

Our review of the district court's final jury instructions reveals that there was no mention of the other crimes evidence. Prior to reading the instructions, the district court asked the parties if they were acceptable and defense counsel indicated that they were. The defendant neither requested a special jury charge nor timely objected to the final jury charges. The district court instructed the jury, "Remember that the defendant is on trial only for the offense charged. You may not find him guilty of this offense merely because he may have committed another offense." After it read the instructions to the jury, the

district court asked if there were any objections to the charge, and defense counsel stated that it had none.

Louisiana Code of Criminal Procedure article 801C provides:

> A party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error. The nature of the objection and grounds therefore shall be stated at the time of objection. The court shall give the party an opportunity to make the objection out of the presence of the jury.

The requirements of **Prieur** notwithstanding, because the defendant failed to make a timely objection under Article 801, he failed to preserve the jury charge issue for review. See **State v. Nguyen**, 2004-321, p. 15 (La. App. 5 Cir. 9/28/04), 888 So.2d 900, 909-910, writ denied, 2005-0220 (La. 4/29/05), 901 So.2d 1064. Accordingly, we are precluded from addressing this issue.

This assignment of error is without merit.

HEARSAY STATEMENT

In his second assignment of error, the defendant argues that the district court erred in excluding hearsay testimony at trial that his brother, Billy, planned to frame the defendant. He argues that the exclusion of this evidence interfered with his constitutional right to present a defense.

The defendant sought to prove that it was actually Billy who applied for and obtained the Citibank credit card at issue. At trial, the defendant called Billy to testify. After a hearing was held outside of the jury's presence, Billy invoked his Fifth Amendment right to remain silent. The defendant then called Kimberly Fanguy to the stand in an attempt to introduce the statement made by Billy through her testimony. Kimberly was allowed to testify outside the jury's presence, and after she presented her testimony, the district court instructed her that when the jury returned, she was not to discuss anything related to Billy's statement to her regarding the credit card issue. The defendant proffered Kimberly's testimony.

Kimberly then testified in the jury's presence that she was married to the defendant's first cousin, and knew the defendant and Billy. One morning in October

2011, she woke up and found Billy lying on a sofa in a back room in her home. He told her that his mother kicked him out of her home because he and the defendant had gotten into an argument. According to Kimberly, Billy was very angry with the defendant, was screaming, and was not acting in his normal manner. She testified that Billy looked tired and unlike himself. She explained that Billy was angry because he needed to use his mother's vehicle earlier that day to go to a job interview because his vehicle had been repossessed. His mother refused to let him use the vehicle. Later that afternoon, Billy saw the defendant in the vehicle. Kimberly testified that Billy stated that he was going to "kick [the defendant's] ass[,]" "get him back[,]" and that he was "going to kill him[.]"

In her proffered testimony, Kimberly explained that Billy indicated that he wanted to rent a vehicle to go to his job interview. He told her that he had intercepted some credit cards from the defendant in the mail and that he was going to "fix [the defendant]" and use that in order to get the vehicle. Kimberly brought Billy to a car rental business that day, but he was unable to rent a vehicle. Billy told her that he believed the defendant would be blamed for the credit card incident because the defendant "has a record of that."

A defendant has a constitutional right to present a defense. U.S. Const. amend. VI; La. Const. art. I, § 16. "While hearsay should generally be excluded, if it is reliable and trustworthy and its exclusion would interfere with the defendant's constitutional right to present a defense, it should be admitted." **State v. Gremillion**, 542 So.2d 1074, 1078 (La. 1989); see also **State v. Van Winkle**, 94-0947, p. 6 (La. 6/30/95), 658 So.2d 198, 202. ("Evidentiary rules may not supersede the fundamental right to present a defense.") "Constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value can be admitted." **State v. Governor**, 331 So.2d 443, 449 (La. 1976).

Article 804 of the Louisiana Code of Evidence provides certain exceptions to the general rule against the unavailability of hearsay statements, where the declarant is unavailable. The article provides, in pertinent part:

> **A. Definition of unavailability.** Except as otherwise provided by this Code, a declarant is "unavailable as a witness" when the declarant cannot or will not appear in court and testify to the substance of his statement made outside of court.
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> **B. Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> **(3) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Admission of statements against interest, as a traditional exception to the hearsay rule, is based on necessity and trustworthiness. The unavailability of the declarant requirement generally establishes the need to admit his out-of-court statement. The "against interest" requirement assures some degree of trustworthiness, because a person ordinarily does not make a statement that is disadvantageous to himself without substantial reason to believe that the statement is true. **State v. Hammons**, 597 So.2d 990, 996 (La. 1992).

When the statement is one against the declarant's penal interest, the circumstances surrounding the making of the statement may be significant in determining its trustworthiness. If a declarant admits sole responsibility for a serious crime, the statement is generally prima facie against interest so as to satisfy this requirement of the rule. However, if the statement is clearly self-serving, as when the declarant is seeking favorable treatment for himself in return for cooperation, the statement may be deemed not against his interest and thus may fall outside the exception. **Hammons**, 597 So.2d at 996.

When the statement tending to expose the declarant to criminal liability is offered to exculpate the accused, Article 804B(3) expressly requires corroborating circumstances indicating trustworthiness. The burden of satisfying the corroboration requirement is on the accused. That burden may be satisfied by evidence independent of the statement which tends, either directly or circumstantially, to establish a matter asserted by the

statement. Circumstantial evidence of the veracity of the declarant as to the portion of the statement exonerating the accused is generally sufficient. Typical corroborating circumstances include statements against the declarant's interest to an unusual or devastating degree, or the declarant's repeating of consistent statements, or the fact that the declarant was not likely motivated to falsify for the benefit of the accused. **Hammons**, 597 So.2d at 996-997.

The State argued that Kimberly could not corroborate the trustworthiness of Billy's statement. Defense counsel argued that the corroborating evidence was that Billy lived in Linda's home, had access to the computer, and that a Post-it note was found near Linda's computer with social security numbers written on it in handwriting other than that of the defendant.[5] The State responded that the only relevant evidence presented at trial was that there was sibling rivalry between the two brothers and argued that there was no evidence that Billy hated the defendant so much so that he was going to get him back, that he beat him, or constantly threatened him. After both parties presented their arguments, the district court ruled in the State's favor.

We have reviewed the record and find that the defendant failed to satisfy the corroboration requirement under Article 804B(3). There was no evidence that Billy followed up on his alleged threat. In fact, in Kimberly's proffered testimony, she indicated that Billy was unable to rent the vehicle he claimed he planned to rent on the stolen credit card. There was also no evidence that the credit card Billy was referring to was the Citibank credit card at issue. The parties stipulated that each month, multiple credit card solicitations are delivered to Linda's mailbox, which is accessible to the household residents as well as the general public. Additionally, Kimberly testified that Billy made this statement to her around the end of October. The application for the Citibank credit card at issue was submitted September 26, 2011. By the end of October, the defendant, who

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[5] Linda testified that between September 2011 and January 2012, she found a Post-it note near her computer (the defendant has his own computer in his room) that had her social security number and her husband's social security number written on it. She did not recognize the handwriting. As noted above, she and Polo had been divorced since the early 1990s.

stipulated to using the Citibank credit card, had already made charges exceeding the card's $12,000.00 limit. Moreover, Billy's statement was that he intercepted cards in the mail, not that he used Polo's information in order to apply for them. Because we find the statement by Kimberly that the defendant sought to introduce was not trustworthy, there was no violation of his constitutional right to present a defense. Accordingly, this assignment of error is without merit.

HABITUAL OFFENDER CONVICTION

In his third assignment of error, the defendant argues that the State failed to prove that he committed the predicate offenses used to support his habitual offender conviction. Specifically, he complains that the State's exhibits fail to prove his identity as the same person who pled guilty to the predicate offenses.

To obtain a multiple-offender adjudication, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. **State v. Payton**, 2000-2899, p. 6 (La. 3/15/02), 810 So.2d 1127, 1130. The Habitual Offender Act does not require the State to use a specific type of evidence in order to carry its burden at the hearing, and the prior convictions may be proved by any competent evidence. **Payton**, 2000-2899 at 8, 810 So.2d at 1132.

Herein, the habitual offender bill of information alleged the following prior convictions: (1) 2005 guilty plea to forgery (3 counts) under docket number 424,462 in the 32nd JDC, Terrebonne Parish; (2) 2004 guilty plea to forgery under docket number 02-5152 in the 24th JDC, Jefferson Parish; and (3) 2004 guilty plea to identity theft under docket number 445,985 in Orleans Parish.

At trial, the parties stipulated that the defendant is the same Leopold Charles Lacoste, II, who pled guilty to the offenses listed in the habitual offender bill of information. The district court could properly take that stipulation into account in finding

that the State thus presented sufficient proof at the habitual offender hearing that the defendant was the same person who had pled guilty to the predicate offenses. See **State v. Brown**, 2011-1656, p. 2 (La. 2/10/12), 82 So.3d 1232, 1234 (per curiam).

Moreover, at the habitual offender hearing, for each of these convictions, the State submitted into evidence certified copies of the bills of information and minute entries. The State also called Angela Hebert, employed with the Department of Public Safety and Corrections, Division of Probation and Parole, to testify. Hebert testified that their records contain certified court minutes of the conviction, arrest report, rap sheet, fingerprint cards, AFIS photographs (booking photographs), background information, and any forms signed by the defendant. She did not supervise the defendant, but the officer who supervised the defendant most recently was deceased at the time of the habitual offender hearing.

In connection with the defendant's 2004 guilty plea to identity theft, Hebert's records indicated that the individual who pled guilty to that offense had a date of birth of April 13, 1966, and that the last four digits of his social security number were "2056." Her records contained a photograph of the individual who pled guilty to that offense, and she identified the defendant as that individual.

In connection with the 2004 guilty plea to forgery, Hebert's records indicated that the individual who pled guilty to that offense had a date of birth of April 13, 1966, and the same social security number as that as the individual who pled guilty to the 2004 guilty plea to identity theft in Orleans Parish.

In connection with the 2005 guilty plea to forgery, Hebert indicated that the individual who pled guilty had a date of birth of April 13, 1966, and that the last four digits of his social security number were "2056." She identified the defendant as being the same individual as that in the photograph in the record as well as being the same individual in the photographs in the records for the other two predicates.

The State introduced evidence of the defendant's prior convictions that contained identical personal information about the defendant as the personal information found in the bill of information of the defendant's instant conviction. The bills of information for

the instant offense and two of the predicate offenses list the defendant's race as white, his sex as male, and his date of birth as April 13, 1966. The bill of information under docket number 445,985 does not include any information related to race, sex, or the defendant's date of birth. Hebert's testimony corroborated the State's exhibits establishing the defendant's identity on the predicates. Additionally, Hebert identified the person in the photographs in her records for all three predicates as the defendant.

Accordingly, the evidence introduced by the State at the habitual offender hearing was sufficient to establish that the defendant was the same person who pled guilty to the three prior offenses. Therefore, this assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

VERSUS

LEOPOLD LACOSTE, II

NO. 2014 KA 0499

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

Welch, J., concurs.

I agree with the majority opinion on all issues, except with regard to the exclusion of hearsay testimony by the trial court. The defendant sought to prove that it was actually Billy who applied for and obtained the credit card at issue. When the defendant called Billy to the witness stand, Billy asserted his 5th amendment right against self-incrimination. At that point, the defendant called Kimberly to the witness stand in an attempt to introduce the statement made by Billy through her testimony. The trial court refused to allow the testimony in the presence of the jury apparently on the basis that it constituted hearsay testimony. The testimony was proffered and essentially established that Billy was extremely angry at the defendant because the defendant had gotten him kicked out of their mothers' home and that Billy was going to get back at the defendant by using credit card that Billy had intercepted in the mail and that the defendant would be blamed since he had a record of such conduct. Once Billy invoked his 5th amendment right to remain silent, Billy's statements to Kimberly were admissible as a statement against interest—an exclusion to the hearsay rule. See La. C.E. art. 804 (B). However, since the defendant had already conceded to using the credit card prior to the statement being made by Billy, the error in not admitting the statement was harmless. See La. C.E. art. 103(A).

Therefore, I respectfully concur.