NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0307

STATE OF LOUISIANA

VERSUS

CHARLES WILLIAM LANDRUM

Judgment Rendered: FEB 16 2018

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 8-12-0873

HONORABLE MICHAEL R. ERWIN, JUDGE
* * * * * * *

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

McDONALD, J.

The defendant, Charles William Landrum, was charged by amended bill of information with operating a vehicle while intoxicated, fourth or subsequent offense, a violation of La. R.S. 14:98(E), and pled not guilty.[1] After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to twenty-five years imprisonment at hard labor, to be served consecutive to any remaining balance of any sentence on a prior conviction.[2] The trial court denied the defendant's counseled and pro se motions to reconsider sentence. The defendant now appeals, assigning error in a counseled brief to the denial of the counseled motion to reconsider sentence, and to the constitutionality of the sentence. The defendant also filed a pro se brief wherein he claims error regarding the timeliness of the commencement of trial, the denial of his right to act as co-counsel, the failure of the State to produce exculpatory evidence, and the constitutionality of the trial court's jury instruction on reasonable doubt. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On July 13, 2012, Myrtle Watts, a clerk at the Circle K on Hooper Road in Baton Rouge, was working an overnight shift when a male customer, the defendant, attempted to purchase an alcoholic beverage and pay for gasoline. The defendant's credit card was initially declined at the pump, and again at the counter. After his card was declined at the counter, the defendant walked to the ATM

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[1] The defendant's status as a fourth or subsequent offender was based on the following guilty plea convictions: two prior DWI convictions on December 9, 1999, a DWI (third offense) conviction on November 13, 2000, and a DWI (fourth offense) conviction on October 14, 2009.

[2] As the defendant previously received the benefit of suspension of sentence and probation as a fourth offender (S-4), the entirety of his sentence is to be served without the benefit of suspension of sentence, probation, or parole. See La. R.S. 14:98(E)(4)(b) (prior to 2014 La. Acts No. 385, § 1). While the trial court did not state that any portion of the sentence would be served without the benefits, the restriction is automatic pursuant to La. R.S. 15:301.1.

located at the back of the store. Watts noticed that the defendant smelled of alcohol at the time and walked "uneven." The defendant briefly exited the store before reentering and going back and forth to the ATM machine. He ultimately exited, reentered his vehicle, and sped away with the nozzle of the gas pump still connected to his vehicle, causing sparks of fire on the road. Watts immediately called the police and reported the incident.

Corporal Jeffrey Norton of the East Baton Rouge Parish Sheriff's Office was on patrol at the time, responding to an unrelated incident. He made contact with the defendant at approximately 12:30 a.m., on Sullivan Road. He observed the gas nozzle flapping in the wind, hanging out of the side of the defendant's vehicle, a green Jeep Grand Cherokee. The defendant turned into a Chase Bank parking lot without using a turn signal. As Corporal Norton followed the defendant into the Chase Bank parking lot, he received the dispatch regarding someone driving away with a gas nozzle from the Circle K. The defendant and his vehicle fit the description provided in the dispatch. The defendant parked his vehicle, approached the ATM by foot, and remained in the ATM vestibule for less than five minutes. Corporal Norton called out to the defendant as he walked back toward his vehicle. After Corporal Norton brought the defendant's attention to the dangling gas nuzzle and began to question him, the defendant removed the gas nozzle and placed it in his backseat, and walked to the driver's door of his vehicle. As the officer continued his attempt to question the defendant, the defendant suddenly fled on foot.

Corporal Norton gave chase and apprehended the defendant, who became winded and fell down to the ground in the parking lot of a shopping center within the vicinity. The defendant had a strong odor of alcohol, glassy red eyes, and

slurred speech, and walked off-balance. After being advised of his **Miranda**[3] rights, the defendant declined field sobriety testing, and stated that he had only drank a couple of beers earlier that day.[4] The defendant was transported to the central substation where he was further advised of his rights and submitted to a chemical test of his breath. A sample he provided, at approximately 1:45 a.m., indicated his blood-alcohol level was 0.124.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In pro se assignment of error number one, the defendant argues that the statutory time limitation for commencement of trial expired in this case. He notes that he was arraigned on September 6, 2012, and that trial commenced over three years later, on October 19, 2015. The defendant cites La. Code Crim. P. art. 578(A)(2), in noting that the trial should have commenced within two years of the date of institution of prosecution. He further claims that he filed a pro se motion to dismiss in accordance with La. Code Crim. P. art. 581, that the motion was considered by the trial court at a hearing on October 15, 2015, and that the trial court did not rule on the motion. The defendant argues that there is no just cause for prosecution as the time limitations were exceeded. He further contends that he did not file any motions for continuances to delay trial, apparently contending that there were no suspensions or interruptions in this case.

A motion to quash is the proper vehicle to assert that the time limitation for the commencement of trial has expired. La. Code Crim. P. art. 532(7). Upon expiration of the time limitations provided in Article 578(A) for commencement of trial, the court shall, on motion of the defendant, dismiss the indictment, and there shall be no further prosecution against the defendant for that criminal conduct.

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[3] **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

[4] At trial, the defendant testified similar to his pretrial statement that he had a couple of beers that night before taking a nap and awaking to go to the ATM. However, in his trial testimony he further indicated that he drank hard liquor while in the Chase Bank parking lot. He denied being offered a field sobriety test.

The right of dismissal is waived unless the motion to quash is made prior to trial. See La. Code Crim. P. art. 581. Moreover, when the defendant has brought an apparently meritorious motion to quash based on prescription, the State bears a heavy burden to demonstrate either an interruption or a suspension of the time limit such that prescription will not have tolled. **State v. Lathers**, 2005-0786 (La. App. 1st Cir. 2/10/06), 924 So.2d 1038, 1043, writ denied, 2006-1036 (La. 11/3/06), 940 So.2d 659.

A review of the record reveals that the defendant did not file a motion to quash the bill of information asserting that the time limitation for the commencement of trial had expired. However, the defendant filed a motion for speedy trial on March 25, 2015, and a motion to dismiss on August 21, 2015, asserting the time limitations, which the trial court denied on October 15, 2015. The record shows that the defendant's motion was premature, as his trial commenced within the time limitations set forth in Article 578(A)(2). Specifically, Article 578 provides for a two-year time limitation (from the date of institution of the prosecution) within which the trial of a defendant accused of a non-capital felony must be commenced. Pursuant to La. Code Crim. P. art. 580(A), the statutory time limits are suspended when a defendant files a motion to quash or other preliminary plea. When the prescriptive period is suspended, the relevant period is not counted, and the running of the time limit resumes when the court rules on the pending motion, although in no case shall the State have less than one year after the ruling to commence trial. La. Code Crim. P. art. 580(A); **Lathers**, 924 So.2d at 1043. A preliminary plea is any pleading or motion filed by the defense that has the effect of delaying trial, including properly filed motions to quash, motions to suppress, or motions for continuance. **Lathers**, 924 So.2d at 1043. Joint motions to continue likewise suspend the period of limitation. **State**

v. Simpson, 506 So.2d 837, 838 (La. App. 1st Cir.), writ denied, 512 So.2d 433 (La. 1987).

Herein, the institution of the prosecution occurred when the bill of information was filed on August 27, 2012. As the defendant notes, the arraignment took place on September 6, 2012, and trial commenced on October 19, 2015. However, the defendant fails on appeal to acknowledge the motions for continuances made by the defense on December 13, 2012, March 25, 2013, May 20, 2013, and January 13, 2014. On March 3, 2014, prior to the expiration of the initial two-year time period, the defendant filed a pro se motion to quash contesting the predicate offenses. The defendant made another motion to continue on September 22, 2014, and a joint motion to continue was made on December 16, 2014. The pro se motion to quash contesting the predicate offenses was denied by the trial court on December 18, 2014, extending the time limitation for commencement of trial to December 18, 2015. Thus, the defendant's trial was commenced well within the time delay prescribed by Article 578, and no violation of the statutory time limitation occurred in this case. Pro se assignment of error number one is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In pro se assignment of error number two, the defendant argues that the trial court unconstitutionally denied his right to act as co-counsel in this case. He contends that he invoked his right to act as co-counsel due to his trial counsel's unwillingness to attack the credibility of a witness during cross-examination. The defendant further claims that his trial counsel failed to file necessary motions, asserting that all motions were filed pro se by the defendant. He claims that he was denied the right to dismiss counsel and have new counsel appointed to impeach or confront witnesses on the issue of credibility, thus suffering detrimental prejudice.

A defendant's right to the assistance of counsel is guaranteed by both our state and federal constitutions. See U.S. Const. amends. VI & XIV; La. Const. art. I, § 13; **State v. Brooks**, 452 So.2d 149, 155 (La. 1984) (on rehearing) (citing **Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). Louisiana Code of Criminal Procedure article 511, in pertinent part, also provides for a defendant's right to counsel as follows, "The accused in every instance has the right to defend himself and to have the assistance of counsel." The federal constitution further grants an accused the right of self-representation. **Faretta v. California**, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975); **State v. Penson**, 630 So.2d 274, 277 (La. App. 1st Cir. 1993). An accused has the right to choose between the right to counsel and the right to self-representation. **State v. Bridgewater**, 2000-1529 (La. 1/15/02), 823 So.2d 877, 894, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003).

A defendant who exercises the right of self-representation must knowingly and intelligently waive the right to counsel. **Penson**, 630 So.2d at 277. When a defendant requests the right to represent himself, his technical legal knowledge is not relevant in determining if he is knowingly exercising the right to defend himself. A trial judge confronted with an accused's unequivocal request to represent himself need determine only whether the accused is competent to waive counsel and is "voluntarily exercising his informed free will." **State v. Santos**, 99-1897 (La. 9/15/00), 770 So.2d 319, 321 (per curiam) (quoting **Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541).

In the instant case, the record reflects that the trial court appointed the Office of the Public Defender to represent defendant at his September 6, 2012 arraignment. The defendant was represented by counsel from the Public Defender's Office at every court appearance thereafter. The defendant filed a motion to act as co-counsel on February 27, 2015, claiming to have adequate

knowledge and the full ability to establish the facts of the case, and that the only way he would receive an optimum defense was by acting as co-counsel. On the morning of the trial on October 19, 2015, out of the presence of prospective jurors and prior to voir dire, the defendant argued in support of his motion to represent himself.[5] The defendant stated that he wished to obtain surveillance footage and to prove that he consumed alcohol after arriving at the bank and did not drive while under the influence thereafter, contending that he was in the parking lot when the police first saw him. The defendant stated that he wanted to be able to cross-examine witnesses during the trial and present his case to the jury himself. In denying the defendant's request, the trial court in part stated that the defendant's trial counsel would cross-examine the police and the jurors would have to make the decision as to whether or not the defendant was driving while intoxicated, or became intoxicated while in the bank parking lot. The defendant did not re-urge the motion to act as co-counsel at any point during the trial. The defendant testified at trial, presenting to the jury his version of the facts that night.

While a defendant has the right to counsel as well as the right to self-representation, he has no constitutional right to be both represented and representative. **State v. Bodley**, 394 So.2d 584, 593 (La. 1981); see also **McKaskle v. Wiggins**, 465 U.S. 168, 183, 104 S.Ct. 944, 953, 79 L.Ed.2d 122 (1984) ("**Faretta** does not require a trial judge to permit 'hybrid' representation of the type [petitioner] was actually allowed"). Under a hybrid form of representation, the defendant and counsel act as co-counsel with each speaking for the defense during different phases of the trial. Wayne R. LaFave, Jerold H. Israel,

[5] On May 4, 2015, the trial court denied defense counsel's oral motion to withdraw based on numerous complaints filed by the defendant to the disciplinary committee in regard to the court-appointed attorney and the previous court-appointed attorney, all of which apparently were determined to be unfounded.

Nancy J. King, & Orin S. Kerr, *3 Criminal Procedure*, § 11.5(g), p. 765 (4th ed. 2017).

Although a trial court is not prohibited from using hybrid arrangements, such arrangements present inherent difficulties. If the defendant has not waived the right to counsel and the attorney provides only partial representation, the issue of whether the accused was afforded adequate legal representation might be raised. If the accused has adequately waived his right to counsel, but counsel actively participates in the defense, questions of violation of the accused's right to self-representation might result. See **State v. Dupre**, 500 So.2d 873, 878 (La. App. 1st Cir. 1986), writ denied, 505 So.2d 55 (La. 1987). These hybrid representation issues arise when the arrangement allowed by the trial court falls somewhere between counsel providing the entire legal defense and the defendant acting as his only legal representative.

Considering the record herein, we find no error in the trial court's denial of the defendant's motion to act as co-counsel in this case. The defendant's request to represent himself was not a clear and unequivocal assertion of the right to self-representation. The defendant did not unequivocally indicate to the trial court that he wanted to represent himself in this prosecution without the assistance of any counsel. Instead, he requested to be allowed to act as co-counsel, in conjunction with his court-appointed attorney. As previously noted, an accused has the right to choose between the right to counsel and the right to self-representation. Furthermore, we have not found any way in which his defense was prejudiced because he did not participate as co-counsel. Therefore, the trial court did not err in denying the defendant the right to act as co-counsel under the facts and circumstances of this case. We find no merit in pro se assignment of error number two.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In pro se assignment of error number three, the defendant claims that the police and prosecution failed to disclose or produce material exculpatory evidence consisting of surveillance video footage. He specifically argues that surveillance footage at Circle K on the night in question could have been used to show that he was not at any time close enough to the clerk to enable her to smell alcohol on his breath. He further argues that surveillance footage at Chase Bank could have supported his claim that while he was drinking, and as he was approached by the police, he was outside of his vehicle. Thus, he claims that a traffic stop did not occur. The defendant contends that during a status hearing on May 7, 2014, assistant district attorney Sandra Ribes admitted to viewing surveillance footage of the Chase Bank parking lot. He concludes that he was denied the right to a fair trial and that confidence in the jury's verdict was undermined as a result of the discovery violation.

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the State's case against him in order to prepare his defense. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1st Cir. 1986), writ denied, 501 So.2d 228 (La. 1987). The State's failure to comply with discovery procedures will not automatically demand a reversal. **State v. Gaudet**, 93-1641 (La. App 1st Cir. 6/24/94), 638 So.2d 1216, 1220, writ denied, 94-1926 (La. 12/16/94), 648 So.2d 386. If a defendant is lulled into a misapprehension of the strength of the State's case by the State's failure to fully disclose, such a prejudice may constitute reversible error. **Roy**, 496 So.2d at 590.

The defendant has no general constitutional right to unlimited discovery in a criminal case. **State v. Lynch**, 94-0543 (La. App. 1st Cir. 5/5/95), 655 So.2d 470,

478, writ denied, 95-1441 (La. 11/13/95), 662 So.2d 466. Under the United States Supreme Court decision in **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State, upon request, must produce evidence that is favorable to the accused where it is material to guilt or punishment. **Brady**, 373 U.S. at 87, 83 S.Ct. at 1196-97. The test for determining materiality was firmly established in **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and has been applied by the Louisiana Supreme Court. See **State v. Rosiere**, 488 So.2d 965, 970-71 (La. 1986). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. **Kyles v. Whitley**, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995) (citing **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3381).

The State's constitutional obligation to disclose exculpatory evidence does not relieve the defense of its obligation to conduct its own investigation and prepare a defense for trial as the State is not obligated under **Brady** or its progeny to furnish the defendant with information he already has or can obtain with reasonable diligence. **State v. Harper**, 2010-0356 (La. 11/30/10), 53 So.3d 1263, 1271. Therefore, "[t]here is no **Brady** violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source, because in such cases there is really nothing for the government to disclose." **State v. Hobley**, 98-2460 (La. 12/15/99), 752 So.2d 771, 786 n.10, cert. denied, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed.2d 61 (2000). Moreover, to prove a **Brady** violation, the defendant must establish, inter alia, that the evidence in question was, in fact, exculpatory or impeaching. **State v. Garrick**, 2003-0137 (La. 4/14/04), 870 So.2d 990, 993 (per curiam). The mere possibility that an item of

undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense. **United States v. Agurs**, 427 U.S. 97, 109-10, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976).

As stated in **State v. Badeaux**, 95-1563 (La. 6/30/95), 657 So.2d 1306 (per curiam), the discovery provisions of the Code of Criminal Procedure and **Brady** impose no obligation on the State to obtain records over which it has never had custody or control. Defendants are entitled to compulsory process, which includes the issuance of a subpoena duces tecum ordering "a person to produce at the trial or hearing, books, papers, documents, or any other tangible things in his possession or under his control." La. Code Crim. P. art. 732. Documents and other tangible objects which may be helpful to the defense, but which are not within the custody of the State, are properly acquired through the mechanisms of compulsory process and not through pretrial discovery. See La. Code Crim. P. art. 731, et seq.; **Badeaux**, 657 So.2d at 1306.

Herein, at an October 15, 2015 hearing, the defendant (as opposed to counsel) addressed the trial court, claiming that assistant district attorney Sandra Ribes previously indicated in open court on September 22, 2014, that she viewed video footage from the scene. The defendant now on appeal asserts that on May 7, 2014, in open court Ribes admitted to viewing the video. The minutes for both dates indicate that the matter was continued on those dates, ex proprio motu by the trial court in May, and upon the motion of the defense counsel in September. At the October 15, 2015 hearing, after the defendant made the claim regarding the State purportedly viewing the video footage, the assistant district attorney present at the time, Michelle Lacoste, interjected in an attempt to make the record clear. As Lacoste noted, the defense had been diligently trying to obtain the video, as several motions for subpoena duces tecum had been filed (for Walgreens and

Chase Bank). Lacoste denied having a copy of the video, further noting that the videos obtained in response to the subpoenas went to the defense and were not provided to the State in reciprocal discovery. At that point, the defendant and defense counsel informed the trial court that the prior appointed defense counsel included the incorrect timeframe in the subpoenas. The defense counsel further noted that videos were nonetheless sent directly to the trial court for the timeframe requested, that those videos were subsequently forwarded to the defense, and that the defense subsequently made requests for subpoenas to obtain the correct surveillance footage.

Because the record does not show that the State ever had custody or control over the surveillance videotapes at issue, it had no obligation to produce them. We find that the defendant has failed to show that the State suppressed any exculpatory evidence in this case. We further note that even if a delay in discovery or a **Brady** violation did occur, it would not constitute reversible error without actual prejudice to the defendant's case. **Garrick**, 870 So.2d at 993; **State v. Gross**, 2016-1168 (La. App. 1st Cir. 4/18/17), 218 So.3d 1089, 1094. A reviewing court in Louisiana should not reverse a defendant's conviction and sentence unless the error has affected the substantial rights of the accused. See La. Code Crim. P. art. 921. In this case, the defendant has failed to show how he was prejudiced or denied a fair trial. Moreover, the record does not reflect any manner in which the defendant might have been lulled into a misapprehension of the strength of the state's case. The defendant has failed to raise any substantial claim of suppression of evidence by the State that would create a reasonable doubt which would otherwise not exist in the context of the whole record. Pro se assignment of error number three lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER FOUR

In pro se assignment of error number four, the defendant argues that the trial court gave a constitutionally deficient instruction to the jury on reasonable doubt. Based on his assessment of the facts in this case, the defendant argues a proper instruction on reasonable doubt would have caused the jury in this case to render a different verdict. As to the facts, he specifically claims that he was in the Chase Bank parking lot for over ten minutes, waiting for the ATM to register his account in order to withdraw cash to purchase gas. He contends that he drank an alcoholic beverage while waiting outside of his vehicle, prior to being approached by the officers who observed the gas pump nozzle that was hanging from his vehicle after it was accidentally broken. He claims that this case did not involve a routine traffic stop and that a field sobriety test was not conducted. Based on this rendition of the facts, the defendant argues that upon proper instruction, the jury could not have concluded that the State proved beyond a reasonable doubt that he was intoxicated while driving a vehicle.

Herein, the defendant has not with specificity supported his claim that the jury instruction on reasonable doubt was constitutionally deficient. We further note that the defendant did not object to the jury instructions or raise this issue below. Unless objected to contemporaneously, an irregularity or error in the charge to the jury may not be asserted on appeal. La. Code Crim. P. art. 801(C). Although the procedural law set forth in La. Code Crim. P. art. 801 states that the failure to assert a timely objection waives the issue on appeal, the jurisprudence has carved out an exception to this rule where such alleged trial errors raise overriding due process considerations. See **State v. Williamson**, 389 So.2d 1328, 1331 (La. 1980); **State v. Smith**, 46,343 (La. App. 2d Cir. 6/22/11), 71 So.3d 485, 488, writ denied, 2011-1646 (La. 1/13/12), 77 So.3d 950.

To determine whether such an overriding consideration is implicated, it is necessary to examine the instruction in light of the requirements of the Due Process Clause. The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. The Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury. **Victor v. Nebraska**, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994). In the instant case, including language in accordance with Louisiana's treatise on criminal jury instructions,[6] the trial court instructed the jury on the concept of reasonable doubt as follows:

> In considering the evidence, you must give the defendant the benefit of any and every reasonable doubt arising out of the evidence or out of the lack of evidence. If you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty. It is your duty to give the defendant the benefit of every reasonable doubt arising out of the evidence or lack of evidence in the case. While the State must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is a doubt based on reason and common sense, and is present, when after you've carefully considered all of the evidence, you cannot say that you are convinced of the truth of the charge. A reasonable doubt is not a mere slight misgiving or a possible doubt. You may say it's self-defining; it's a doubt that a reasonable person could entertain; it's a sensible doubt. And while it is true that the State must prove the guilt of the accused beyond a reasonable doubt, this does not mean that the State has to prove the guilt of the accused to one hundred percent perfection or to an absolute certainty. The law recognizes that human nature, being what it is, that all human endeavor falls short of perfection; and therefore, it is sufficient, if after full consideration of all of the evidence, you are convinced that the accused has been proven guilty beyond a reasonable doubt. As I have said, a reasonable doubt can arise from the evidence or lack of evidence in the case.

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[6] Cheney C. Joseph, Jr. & P. Raymond Lamonica, *17 La. Civ. L. Treatise, Criminal Jury Instructions* § 3:3 (3d ed. 2012).

In **State v. Smith**, 91-0749 (La. 5/23/94), 637 So.2d 398, cert. denied, 513 U.S. 1045, 115 S.Ct. 641, 130 L.Ed.2d 546 (1994), the jury was given the following charge on the "beyond reasonable doubt" standard:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal.
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> * * *
>
> This doubt must be a reasonable one, that is one founded upon a real, tangible, substantial basis and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt.
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> * * *
>
> A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt for which you could give a good reason.

Id. at 399. After deliberating for over three hours, the jury found Smith guilty as charged of second degree murder. The defense did not make a contemporaneous objection to the jury charge, but argued on appeal that the beyond reasonable doubt charge was unconstitutional.

In interpreting the decisions in **Victor** and **Cage v. Louisiana**, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (per curiam) (overruled on other grounds by **Estelle v. McGuire**, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)), the Louisiana Supreme Court in **Smith** stated:

> Terms like "moral certainty" and "substantial doubt" were included in the **Victor** jury charges, and they have passed constitutional muster in this most recent expression on the reasonable doubt instructions by the United States Supreme Court. However, while **Cage** focused on the presence of the suspect terms in the instruction, the **Victor** court considered the relationship of the terms to the instruction as a whole to determine whether the jurors were reasonably likely to have misapplied the instruction. The Court found that each charge (and the same can be said although perhaps to a lesser degree regarding the **Cage** instruction) contained an interplay of concepts and supplemental instructions which put the reasonable doubt focus in a proper perspective.

Smith, 637 So.2d at 403. Citing **Victor**, the supreme court concluded that "considering the instruction as a whole," the jury instruction was not constitutionally deficient. **Smith**, 637 So.2d at 406.

In the instant case, we find that the jury instruction taken as a whole, correctly conveyed the concept of reasonable doubt to the jury and did not suggest a higher degree of doubt than that required under the reasonable doubt standard. We conclude that a reasonable person of ordinary intelligence would have no difficulty in understanding the definition of reasonable doubt based on the jury instructions given in this case. Thus, we find no constitutional violation. Pro se assignment of error number four lacks merit.

COUNSELED ASSIGNMENTS OF ERROR

In counseled assignment of error number one, the defendant argues that the trial court erred in denying his motion to reconsider sentence. In counseled assignment of error number two, he argues that the sentence is unconstitutionally excessive. In a combined argument on both assignments of error, the defendant contends that he is a fifty-two year old man who will likely spend much of the remainder of his life incarcerated due to the imposed sentence. He contends that he was given "close to the maximum sentence" for an offense that did not involve an accident, damage to property, or injury to others. The defendant argues that the sentence goes beyond any societal purpose in punishing the defendant and will exact needless pain and suffering to the defendant and his family.

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless

infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454.

The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. However, the goal of Article 894.1 is the articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). Therefore, even in the absence of adequate compliance with Article 894.1, it is not necessary to remand the matter for resentencing when the sentence imposed is not apparently severe in relation to the particular offender or the particular offense. **State v. Holts**, 525 So.2d at 1246.

As a general rule, maximum or near maximum sentences are to be reserved for the worst offenders and the worst offenses. Maximum sentences permitted under a statute may be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Reado**, 2012-0409 (La. App. 1st Cir. 11/2/12), 110 So.3d 1082, 1084-85.

On a fourth-offense DWI, the trial court was required to impose a fine of five thousand dollars and imprisonment at hard labor for not less than ten nor more than thirty years. See La. R.S. 14:98(E)(l)(a) (at the time of the instant offense). As further provided by La. R.S. 14:98(E)(4)(b) (at the time of the instant offense),

if the offender has previously received the benefit of suspension of sentence, probation, or parole as a fourth offender, no part of the sentence may be imposed with benefit of suspension of sentence, probation, or parole. The record herein, including a presentence investigation report (PSI), establishes the defendant received the benefits of a suspended sentence and probation for his prior fourth-offense DWI conviction. Therefore, the defendant was ineligible for probation, parole, or a suspended sentence for the instant offense and the applicable sentencing range mandated by statute is ten to thirty years.

In imposing the sentence of twenty-five years imprisonment at hard labor herein, the trial court noted that the defendant's criminal history consisted of five DWI offenses and at least three other felony convictions. The PSI classifies the defendant as a fifth-felony offender and includes guilty pleas to possession of controlled dangerous substances offenses. As the trial court also noted, the PSI recommended the maximum term of imprisonment allowed by statute, thirty years. The PSI further notes that the fact that the defendant was on active, supervised probation at the time of his arrest for the instant offense demonstrates that he is unwilling to follow the law.

Considering the defendant's criminal record, it is apparent that he has failed to become a productive, law-abiding citizen. Under the various sentencing provisions in La. R.S. 14:98, the legislature, in its wisdom, struck a balance between the benefits society receives when a DWI offender participates in court-ordered substance abuse treatment and the serious threat a serial DWI offender, who continues to drive while intoxicated, poses to the health and safety of the public. The defendant was on probation for fourth-offense DWI when the current offense occurred and had been given several chances to address and treat his alcoholism. While the defendant contends on appeal that this case did not involve damage to property, he does not contest (and provides as such in his statement of

facts) the trial testimony showing that he drove off with the Circle K gas nozzle still connected to his vehicle, thereby damaging store property (Watts noted that the nozzle, which was returned by the police, had to be serviced for reattachment) and creating a potentially hazardous situation. We note that the twenty-five year sentence imposed by the trial court, while certainly at the higher end of the sentencing range, is lower than the maximum term allowed by statute of thirty years. While the sentence is, arguably, near maximum, the record shows that the defendant poses an unusual risk to the public safety due to his past conduct of repeated criminality. There is no indication the trial court abused its vast discretion when it sentenced the defendant to twenty-five years imprisonment at hard labor for operating a vehicle while intoxicated, fourth offense, and subsequently denied the defendant's motions to reconsider sentence. Accordingly, the imposed sentence is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. Thus, the counseled assignments of error lack merit.

PATENT ERROR REVIEW

In conducting our review of the record as required by La. Code Crim. P. art. 920(2), we note the existence of a sentencing error. As noted, the penalty provision for driving while intoxicated fourth or subsequent offense, in pertinent part, includes a mandatory fine of five thousand dollars. See La. R.S. 14:98(E)(1)(a) (at the time of the offense). The record reflects the trial court failed to impose a fine. Under the general provisions of La. Code Crim. P. art. 882(A), an illegal sentence "may" be corrected at any time by an appellate court on review. Because the trial court's failure to impose the fine was not raised by the State in either the trial court or on appeal, and the defendant is not prejudiced by the trial court's failure to impose the mandatory fine, we decline to amend the sentence

imposed by the trial court. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.