STATE OF LOUISIANA	*	**NO. 2000-KA-0360**
VERSUS	*	**COURT OF APPEAL**
FREDERICK ANAJE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 390-712, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge Dennis R. Bagneris, Sr.)

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AFFIRMED.

STATEMENT OF THE CASE

On July 10, 1997, the defendant, Frederick Anaje, was indicted for second degree murder, a charge to which he pled not guilty. On September 3, 1997, the trial court denied defendant's motion to quash the indictment. Following trial by a twelve-member jury on December 3-5, 1998, the defendant was found him guilty of manslaughter. On February 9, 1999, the trial court sentenced the defendant to twenty years at hard labor. The trial court denied the defendant's motion for new trial and his motion for reconsideration of sentence.

On appeal, the defense counsel raises three assignments of error. The defendant, in his pro se brief, assigns one error.

FACTS

Dr. Paul McGarry testified that he performed an autopsy on Collins Okah on June 18, 1996. He found four gunshot wounds: one wound entered the front of the left shoulder and went through the upper part of both lungs and the aortic arch; another wound entered the right side of the chest under

the right arm and traveled through the chest without hitting any vital organs; the third wound entered left side and went across the large arteries of the pelvis; and, the fourth wound, which went through the left elbow, could have been caused by the same bullet that caused the third wound. Dr. McGarry also found a large tear in the scalp on the left side.

Officer Roland Matthews testified that on June 17, 1996, at 10:35 p.m., he received a call of an aggravated battery by shooting in the 4400 block of Maple Leaf Drive. When he arrived at the scene, he found the body of Collins Okah which lay some twenty to twenty-two feet from his vehicle. Matthews found one witness at the scene, Nicovie Duplessis who was Okah's girlfriend, whom he described as hysterical. He got from her a description of the person who shot Okah, and Matthews testified that she told him that the shooter drove a silver or gray Volvo. Matthews further testified that Ms. Duplessis also told him that there had been an argument between Okah and the defendant and the defendant shot her boyfriend. She also told Matthews that the defendant and Okah had grown up together in Nigeria. Matthews testified that none of the people at the scene told him about a white male with a rifle who was seen running down the street.

Detective Karl Palmer testified that he photographed the scene and collected two pellets, one from the front left floorboard of a Peugeot and one

from the street. He also found a metal cross in the street.

Officer Bianca Simmons testified that on June 18, 1996, she responded to a call of a suspicious person at 716 Carrollwood Village apartments. She stated that the apartment manager had been told by a tenant, later identified as the defendant, that a suspicious person was hanging around; and, Officer Simmons then went to the defendant's apartment and met the defendant. The defendant told her that he had been receiving harassing telephone calls and that someone in the parking lot had been threatening him. The defendant played tape recordings of the phone calls, and she and the defendant exited the apartment. The defendant pointed to a woman in the parking lot and told Simmons that this was the suspicious person. Officer Simmons testified that she spoke briefly with this woman who was speaking on a phone. The woman handed the phone to the officer, and the person on the other end identified himself as a New Orleans police detective. The detective asked Officer Simmons if she was speaking with the defendant, and he told her that he had some questions for the defendant. He instructed Officer Simmons to take the defendant to the Detective Bureau, and, the defendant agreed to go with her to the bureau. Officer Simmons stated that she could hear cursing on the tape the defendant played for her, but she could not hear any threats.

Detective Pete Bowen testified that he investigated the homicide of Collins Okah; and that when he arrived on the scene, he saw a white Peugeot, which he learned belonged to the victim. He stated that the victim was about twenty feet behind the car and that a trail of blood led from the vehicle to where Okah lay. He found a metal crucifix on the ground at the rear of the vehicle and a pellet on the driver's side floorboard. He stated that the bullet had entered from the rear windshield, went through the headrest, and landed on the floor. He also stated that two parked cars had also been struck by a pellet. Bowen stated that he found no blood or gunpowder inside the car. He further stated that he reviewed the complaint history for the call and learned that the white male with a gun was actually one of the witnesses who had gone outside to investigate after hearing gunshots.

Bowen testified that the next day he was notified that Jefferson Parish was handling a disturbance call involving the defendant and that the defendant was turned over to the Jefferson Parish homicide division. Bowen stated that when he interviewed the defendant he seized a black leather cowboy hat from the defendant because the defendant was allegedly wearing the hat at the time of the murder. He also had the defendant's Volvo, as well as the red taxicab that the defendant drove, towed to Orleans Parish for processing. Bowen obtained a search warrant for the defendant's apartment

where he found another black cowboy hat, an empty box for a .38 caliber revolver, and registration papers for the weapon. He prepared a photographic lineup that he showed to Ms. Duplessis, and she chose the defendant's picture. He also showed the lineup to two other witnesses, but they were unable to make an identification. However, one of them did identify the Volvo. Bowen admitted that no evidence was seized from either of the defendant's vehicles. He also stated that he received an anonymous telephone call that the defendant was seen driving the red taxicab.

Detective Dwight Deal testified that he investigated the homicide at 4400 Maple Leaf Drive and that he interviewed one witness, Chris Spain. He determined that Spain, a white male, was not a suspect in the shooting of Okah. Deal testified that Spain stated that he heard shots and went outside with his gun. Spain also told Deal that he saw a gray Volvo driving slowly.

Joseph Tafaro, a criminalist, testified that he looked for gunpowder residue on the bullet holes in a multicolored shirt; and, he did not find any gunpowder residue. He further testified that gunpowder residue will be deposited around a bullet hole when the distance from the muzzle to the target is less than thirty inches.

Byron Winbush, a firearms examiner, testified that he examined two bullets from the scene and two bullets recovered from the victim during the

autopsy. He concluded that all four bullets were fired from the same weapon.

Troy Allen, supervisor of the auto pound, testified that the two cars seized from the defendant were sold at auction in March 1997.

Staci Holley testified that she and Chris Spain lived in the Maple Leaf Apartments in June 1996. She stated that she heard gunshots and that Spain ran outside with his gun, a .22 caliber rifle. She went outside and saw a man dead on the ground. She testified that about twenty minutes before the shooting, she went outside and saw a gray Volvo with a fin. She further testified that a tall black man was in the car and that he got out and went over to the mailboxes. She stated that this car left while she was still outside.

Chris Spain testified that on June 17, 1996, he was sitting in his house playing with his daughter when he heard a woman scream and gunshots. He got his rifle and went outside. He stated that he saw a man driving slowly away and looking at Okah who lay on the ground. He further stated that the man drove a gray Volvo with a fin on the back. Spain testified that the car's window was rolled halfway down and that he saw that the driver was wearing a black cowboy hat.

Nicovie Duplessis testified that Collins Okah was her fiancé and that

they lived at 4468 Maple Leaf Drive in June 1996. She also knew the defendant, whom she met through Okah. She testified that Okah went to Nigeria in March 1996 and returned the following month. She further testified that she and the defendant had become close friends and that he was her confidante. She stated that she and Okah were having problems and that he did not call her while he was in Nigeria. She also discovered that Okah had taken $10,000 with him to Nigeria. She admitted that she and the defendant had an affair while Okah was in Nigeria and that she ended the affair when Okah returned home in April. Ms. Duplessis testified that the defendant called and threatened that it could get violent for her when she refused to go to the motel with him and that she told him some "choice words" and hung up the phone. She also turned off the ringers on all of the phones in the house because she knew the defendant was going to tell Okah about the affair. The next morning, Okah discovered that the ringers were off; and, when he turned them back on, the phone rang. She stated that after Okah spoke to the defendant, she and Okah had a discussion after which they decided to set a wedding date.

Ms. Duplessis testified that on June 17, Okah insisted that they get a peace bond; they filled out the paper work for one. She further testified that she and Okah had gone to a premarital counseling session at church. She

also picked up her children and went fabric shopping that afternoon. She, Okah, and her daughter and son took her brother to the bus station; and they then dropped off her daughter at Ms. Duplessis' aunt's house before going home. She stated that as they drove down Tullis, she saw the defendant's car, a gray Volvo, going in the opposite direction. Ms. Duplessis testified that they reached their apartment and had parallel parked their car, a Peugeot, when the defendant pulled up alongside them. She stated that the defendant's car was about a foot away and that she had to squeeze out of the Peugeot to avoid hitting the defendant's car. She stated that she told Okah to drive away, but he refused to do so and told her to get their son and go inside. She further stated that the defendant's face was contorted and angry-looking. She testified that Okah asked the defendant what he wanted and that she then heard gunshots as she proceeded toward her apartment. She turned around, saw Okah who was at the back of the car, and saw the defendant who was behind the Peugeot. She saw two shots fired and that Okah went down on the second shot. She ran inside the apartment and called 911.

Darlene Cappel testified that she was the assistant manager at the Terrytown Village Apartments on Carrollwood Village Drive and that the defendant had lived there. She recalled that a Spanish man came into her

officer asking where the defendant lived. She told the man that she could not give him that information, and he left her office. She saw him driving around the complex.

Linda Winfrey testified that she had known the defendant since 1980 and that she wrote some letters to him after he was arrested. One of those letters was written July 13, 1997; and in that letter, she informed the defendant that she knew he did not kill Okah and that Ms. Duplessis was lying. The letter further stated that Ms. Duplessis had explained to her what had happened and that she did not see the defendant pull out a gun or shoot Okah. Ms. Winfrey stated that in the letter, she was telling the defendant about a meeting she had had with Ms. Duplessis when Ms. Duplessis and two men approached her. On cross-examination, Ms. Winfrey admitted that she did not quote exactly what Ms. Duplessis had said because they had spoken so briefly. She further admitted that Ms. Duplessis did not actually explain to her what had happened.

The defendant testified that he was born in Nigeria and that he had lived in the United States for eighteen years. He further testified that Okah was his second cousin and had always confided in him as a brother would. He also stated that they were from the same village. As to his relationship with Ms. Duplessis, the defendant stated that he had met her about four

times and never had an affair with her. He further stated that he spoke with her once while Okah was on his visit to Nigeria and that on another occasion he got some medicine for her children. The defendant also stated that Ms. Duplessis was a well-known pathological liar. He said that he owned three vehicles, a red Chevrolet Caprice that was his taxicab, a gray Volvo, and a gold Volvo. He testified that the gray Volvo was broken and that he bought the gold Volvo for the parts he needed to fix the gray Volvo.

The defendant testified that on the night of June 17, he received a telephone call from Okah at about nine o'clock and that Okah told him about a fight that he (Okah) had had with Ms. Duplessis whom he had caught having sex with another man. Okah had a fight with the other man who ran from the apartment. The defendant stated that he then got three phone calls from a man who kept threatening him and who said that he was going to kill Okah after the defendant stated that Okah was his cousin. He testified that on the morning of June 18, he was told by the apartment manager that a woman and a Spanish man with a gun were looking for him. The manager told the defendant that she was going to call the police and that he should do so as well. When the deputy arrived, he told her about the man and the woman; and, the deputy told him that she saw a woman in the parking lot. He also played a tape recording of the threatening phone call for the deputy.

The defendant said that he went downstairs and recognized the woman in the parking lot as Ms. Duplessis and that she was with a Spanish-looking man. He stated that the deputy then told him that she had to take him to headquarters for questioning. He further stated that he was kept there for about two hours where he was asked about his cars and was asked for his apartment and car keys. The defendant admitted that he bought a gun in 1993 and that he last saw it on Mardi Gras of 1994. He stated that he had kept the gun between the seats of his cab and that he informed a police officer at the Taxicab Bureau about what had happened.

Loveth Orajiato testified that she was Okah's first cousin and that they were from the same village. She denied knowing the defendant and denied being related to him. She also stated that he was not from her village. Rajis Orajiato testified that he had known Okah since 1985 and that he and Okah went to Nigeria together in March 1996.

Solomon Ifansa testified that he had lived in the United States since 1983 and that he was a cab driver. He further testified that in December 1993, he got into an altercation with the defendant. He stated that the defendant pulled out a gun and threatened to blow off his head. Ifansa said that he backed off and returned to the cabstand.

Taiwo Ogungbe testified that he was a part-time cab driver and a

music producer and that he knew the defendant but did not consider him a close friend. He also testified that he knew Collins Okah but did not consider him a close friend, either. He stated that the night before Okah was killed, he was parked near the Riverwalk waiting to see if anyone needed a cab. He further stated that at about 2:00 a.m., the defendant pulled up behind him. The defendant then came over and asked him if he had talked to Okah because Okah owed him money. Ogungbe testified that the defendant said that he would kill Okah if Okah did not repay the money.

The defendant was recalled to the witness stand to testify on surrebuttal. He stated that he and Okah were cousins because one of Okah's father's eight wives was related to his grandmother. He denied speaking to Ogungbe and stated that Ogungbe had been in and out of jail.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant complains that he received ineffective assistance of counsel because his trial counsel failed to object and failed to move for a mistrial due to the violation of the sequestration order by certain prosecution witnesses.

Generally, the issue of ineffective assistance of counsel is a matter

more properly raised in an application for post-conviction relief to be filed in the trial court where an evidentiary hearing can be held. State v. Prudholm, 446 So.2d 729 (La. 1984); State v. Sparrow, 612 So.2d 191 (La. App. 4 Cir. 1992). Only when the record contains the necessary evidence to evaluate the merits of the claim can it be addressed on appeal. State v. Seiss, 428 So.2d 444 (La. 1983); State v. Kelly, 92-2446 (La. App. 4 Cir. 7/8/94), 639 So.2d 888. The present record is sufficient to evaluate the merits of the defendant's claim.

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced him. With regard to counsel's performance, the defendant must show that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. As to prejudice, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, i.e. a trial whose result is reliable. Id., 466 U.S. at 687, 104 S.Ct. 2064. Both showings must be made before it can be found that the defendant's conviction resulted from a breakdown in the adversarial process that rendered the trial result unreliable. Id. A claim of ineffective assistance may be disposed of on the finding that either of the Strickland criteria has not been met. State v. James,

555 So.2d 519 (La. App. 4 Cir. 1989). If the claim fails to establish either prong, the reviewing court need not address the other. State ex rel. Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984).

If an error falls within the ambit of trial strategy, it does not establish ineffective assistance of counsel. State v. Bienemy, 483 So.2d 1105 (La. App. 4 Cir. 1986). Moreover, hindsight is not the proper perspective for judging the competence of counsel's decisions because opinions may differ as to the advisability of a tactic; and, an attorney's level of representation may not be determined by whether a particular strategy is successful. State v. Brooks, 505 So.2d 714 (La. 1987).

Deputy Tindal Murdock testified, outside the presence of the jury, that he brought to the attention of the court that the sequestration rule had been violated. He was asked about the last three witnesses who had testified, Loveth Orajiato, Rajis Orajiato, and Solomon Ifansa; and, he stated that the young lady, presumably Loveth Orajiato, was sitting in the courtroom during the defendant's testimony. He also stated that he saw the two men leave the courtroom and talk to a lady in the hall. Murdock identified this lady as Nicovie Duplessis, and he testified that the two men told what the defendant had been saying. After Murdock's testimony concluded, the trial judge stated that he did not think that there was anything there and that any

information given to Ms. Duplessis was disclosed after she took the stand under cross-examination.

We find that the defendant was not prejudiced by his trial counsel's failure to object or move for a mistrial when it was learned that three of the State's rebuttal witnesses had violated the sequestration order. These three witnesses were character witnesses, not eyewitnesses to the shooting; and, defense counsel thoroughly cross-examined them. Moreover, the trial judge allowed the defendant to testify on surrebuttal as to the testimony given by these witnesses.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant complains that the trial court erred in imposing an excessive sentence. The defendant argues that the sentence is excessive because this is his first offense and that the trial court should not have approached the defendant's sentence with the elements and penalties of first degree murder in mind.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Sepulvado, 367 So.2d 762 (La. 1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to

acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Lobato, 603 So.2d 739 (La. 1992); State v. Telsee, 425 So.2d 1251 (La. 1983). The trial court has great discretion in sentencing within the statutory limits. State v. Trahan, 425 So.2d 1222 (La. 1983). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D).

Generally, the reviewing court must determine whether the trial judge adequately complied with the guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. State v. Soco, 441 So.2d 719 (La. 1983); State v. Quebedeaux, 424 So.2d 1009 (La. 1982). If adequate compliance with Article 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case. State v. Egana, 97-0318 (La. App. 4 Cir. 12/3/97), 703 So.2d 223. The articulation of the factual basis for the sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions; and, where the record clearly shows an adequate factual basis for the sentence, resentencing is unnecessary even when there has not been full compliance with Article 894.1. Id.

The defendant was found guilty of manslaughter which has a maximum sentence of up to forty years; thus, the defendant's twenty year sentence was in the middle of that range. In imposing the sentence, the trial judge stated that the case could have been one of first degree murder because there was a threat of bodily harm or death to more than one person. The judge further stated that if he had tried the case, instead of the jury, he would have found the defendant guilty as charged. The judge added that a person who had a family was no longer here because of the defendant's obsessive love which clouded the defendant's judgment and cost a human being his life.

In State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So.2d 813, the two defendants, who had been indicted for first degree murder and were both first offenders, each received thirty year sentences for manslaughter. This Court found that the sentences were not excessive, noting that the trial judge based the sentences on the egregiousness of the offense.

We find no abuse of the trial court's discretion in sentencing the defendant to twenty years at hard labor even though the defendant was a first offender. As noted by the trial judge, the facts of the case would have supported a conviction for second degree murder, which carries a sentence of life imprisonment.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant complains that the trial court erred in failing to grant his motion to quash the second bill of indictment. He argues that his right to a speedy trial was violated by the delays in this case.

The Louisiana Code of Criminal Procedure establishes two time periods relevant to the institution and prosecution of a criminal matter. La. C.Cr.P. art. 701 requires that trial commence within 180 days if the defendant is not in custody unless the State can show just cause for the delay. Failure to commence trial within these time periods results in the release of the defendant without bail or the discharge of bail obligation. La. C.Cr.P. arts. 571 and 572 require that trial commence within a certain number of years following the date of the offense, and La. C.Cr.P. art. 578 a certain number of years following the date of the institution of the prosecution. The remedy for violation of these articles is quashing the indictment. La. C.Cr.P. art. 581. These time periods have not been surpassed in the present case, and the State has not attempted to circumvent these articles by entering a nolle prosequi and then refiling the charges in a new bill of information. See La. C.Cr.P. art. 576.

In addition to the right to a speedy trial guaranteed by the Code of Criminal Procedure, a defendant also has a constitutional right to speedy trial. In State v. Johnson, 622 So.2d 845, 848 (La. App. 4 Cir. 1993), this court noted:

> The Sixth Amendment of the U.S. Constitution also provides a right to a speedy trial. This is a fundamental right which has been imposed on the states by the due process clause of the Fourteenth Amendment. Barker v. Wingo, 407 U.S. 514, 515, 92 S.Ct. 2182, 2184, 33 L.Ed.2d 101 (1972). Whether this right has been violated is determined by a four-part test: the length of the delay, the reason for the delay, the defendant's assertion of his or her right, and prejudice to the defendant. Barker, 407 U.S. at 530, 92 S.Ct. at 2192; State v. James, 394 So.2d 1197, 1200 (La. 1981).

In Barker, the Court noted that the length of delay is a triggering mechanism, and the other three factors need not be addressed unless the court finds the length of delay to be presumptively oppressive given the circumstances of the case. See also Doggett v. United States, 505 U.S. 647, 112 S.Ct. 2686 (1992).

In State v. Esteen, 95-1079 (La. App. 4 Cir. 4/3/96), 672 So.2d 1098, this court affirmed the trial court's granting of a motion to quash. The court found that a two and one-half year delay between the institution of prosecution and trial was presumptively prejudicial triggering an inquiry into the other factors. In Esteen, the case was continued twenty-two times,

mostly due to the state and the trial court. Twice, the State nolle prosequied the charges when it was not ready to begin the trial. Although the defendant did not move for a speedy trial nor object to any of the continuances, this court concluded that these omissions were not dispositive, and found that they were only one factor to consider. This court also found that the defendant was "clearly prejudiced" by the delays since he spent eleven months incarcerated and his defense was severely hampered by the death of a crucial witness.

In State v. Leban, 611 So.2d 165 (La. App. 4 Cir. 1992), the State appealed the quashing of an arson charge against the defendant. In its review, this court looked to the four Barker factors and found the sixteen-month delay between the filing of the bill and the quashing of the charge to be presumptively prejudicial, thereby triggering consideration of the three remaining Barker factors. This court noted that of the seven continuances in the case, four were on request of the State, one of which was granted when one state witness was not served. Two continuances were by the trial court, one due to the judge's absence and one due to an ongoing trial. The defense continuance was due to an emergency involving the defense counsel's family. In addition, the State had nolle prosequied the charge once when its motion for continuance had been denied. With respect to the third factor,

there was no indication that the defendant had objected to any of the continuances, nor did the defendant invoke his right to speedy trial until he filed his motion to quash the charge. With respect to the prejudice factor, the defendant, although on bond, had missed sixteen days of work because of court appearances.

Taking all these factors into consideration, this court found that the trial court did not abuse its discretion by quashing the charge against the defendant. It noted the State's multiple continuances due to the absence of witnesses and due to the State's failure to determine the identity of a potential witness. This Court also noted: "An additional consideration is the concern voiced by the trial judge that it would not be fair to a defendant to allow the State to reinstitute prosecution after dismissing a bill of information because the judge denied the State a continuance." Leban, 611 So.2d at 169-170. This Court then found that the trial court did not err by granting the motion to quash.

In another similar case, this Court granted the defendant's motion to quash after a seventeen month delay between the filing of the first bill of information and the granting of the motion to quash the fourth bill; during that period, the State nolle prosequied three bills of information against the co-defendants. State v. Firshing, 624 So.2d 921 (La. App. 4 Cir. 1993).

This Court found the seventeen months "presumptively prejudicial" under the first factor of Barker v. Wingo. Under the second Barker factor, the reasons for the delays, in Firshing there was one joint motion for a continuance, two requests by the State, and one on the court's own motion. However, as in Leban, the nolle prosequi in Firshing was entered because the state requested a continuance and trial court refused the request. Under the third Barker factor, the defendant's assertion of his right to a speedy trial, the first complaint in the record was the motion to quash. As to the fourth Barker factor, the prejudice to the defendant, the defendant contended he had to appear in court continually and to retain counsel over a long period of time; moreover, he lost the live testimony of two witnesses who moved away during the delay. Considering those factors, this Court was unable to say that the trial court abused its discretion in granting the motion to quash. Firshing, 624 So.2d at 927.

In two other cases, however, this Court has found that the right to a speedy trial was not violated by a nineteen month delay and a twenty-two month delay between the filing of the bill of information and the defendant's motion to quash. In State v. Brown, 93-0666 (La. App. 4 Cir. 7/27/94), 641 So.2d 687, there were eight continuances during the nineteen months between the institution of prosecution and the granting of the motion to

quash, and only two were directly attributable to the State; furthermore, the defense did not object to the delays until the filing of its motion to quash, and no prejudice to the defendant was shown.

In State v. Johnson, 622 So.2d 845 (La. App. 4 Cir. 1993), the defendant argued in a pro se assignment of error on appeal that he had been denied a speedy trial. Although there was a twenty-two month delay between the date of arrest and the day of trial, this Court found that much of the delay was due to the failure of the defendant to appear in court. Additionally, he did not argue that he was prejudiced by the delay.

In State v. DeRouen, 96-0725 (La. App. 4 Cir. 6/26/96), 678 So.2d 39, the State entered a nolle prosequi one year after the filing of the bill of information when the trial court denied the State's motion for a continuance. The State reinstituted the charges a few days later, and the trial court granted the defendant's motion to quash three months later. This Court granted the State's writ application and reversed the granting of the motion to quash. This Court noted that although fifteen months had elapsed between the institution of prosecution and the granting of the defendant's motion to quash, the record showed that only two of the seven scheduled trial dates had been upset by the State. The other delays were due to a flood, the trial court's calendar, and the other co-defendants.

In the present case, the defendant was originally indicted on July 25, 1996, in Case No. 384-267. On August 5, 1996, the case was set for trial on November 13, 1996, and on August 20, 1996, the defendant filed a motion for speedy trial. On October 29, 1996, the trial court granted a defense motion for a continuance and set the case for hearing on defense motions on November 20, 1996. On November 20, 1996, the trial court heard the defense motions and held the matter open until December 5, 1996. On December 5, 1996, the trial court continued the matter because the State was proceeding with another trial. The motion hearing was reset for January 6, 1997; and, on that date, more evidence was heard on the defendant's motions. The trial court denied the defendant's motions and set the case for trial on April 2, 1997. On March 18, 1997 both the State and the defendant moved for a continuance; and, the trial court set the case for hearing on various motions on April 11, 1997 and for trial on May 5, 1997. The minute entry for May 5, 1997 states that the matter was set in error, and the case was set for a motion hearing on May 8, 1997. On that date, both the State and the defendant moved for a continuance. The case was set for a hearing on June 9, 1997 and for trial on July 10, 1997.

On July 10, 1997, the State entered a nolle prosequi; and, the defendant was again indicted for second degree murder that same day. On

August 22, 1997, the trial court granted the State's motion to continue the status hearing. On September 3, 1997, the defendant filed a motion to quash the indictment which was denied that same day; and, on October 31, 1997, the trial court granted the defendant's motion for a continuance and cancelled the trial date of November 4, 1997. The case was set for a status hearing on January 23, 1998; but, the minute entry for that date states that court was not held on that date. A status hearing was held on February 6, 1998, and a pretrial conference was set for March 2, 1998. The pretrial conference was held that date, and the case was set for trial on May 4, 1998. On May 4, 1998, the trial court granted the defendant's motion for a continuance and reset the case for trial on October 26, 1998. The docket master states that on October 22, 1998, the trial date was cancelled and that the case was set for a status hearing. On November 13, 1998, the trial court set the case for trial on December 3, 1998, on which date trial commenced.

Because nearly two and one-half years elapsed between the final of the original indictment and trial, the delay is presumptively prejudicial; but, it should be noted that the defendant filed his motion to quash some thirteen months after the original indictment. As to the reasons for the delay, both the State and the defendant, both separately and jointly, moved for continuances both before and after the motion to quash the indictment.

Thus, the delay is not attributable to the State alone. The defendant did assert his right to a speedy trial shortly after he was indicted; and, he filed his motion to quash shortly after the charges were reinstituted against him. However, it should be noted that the defendant did not reassert the motion to quash in the fifteen month period following the denial of his motion to quash. The defendant asserts that he was prejudiced by the delay because the State sold his two cars. At the hearing on the motion to quash, defense counsel noted that she had filed a rule to show cause regarding the sale of the defendant's cars. The rule to show cause states that the cars were sold on March 20, 1997. Considering the fact that the cars were sold less than one year after the defendant's initial indictment, it does not appear that the loss of this allegedly exculpatory evidence was due to the delay in trying this case. Moreover, the testimony at trial established that no evidence of any kind was found in either vehicle. Therefore, the defendant has failed to establish that his constitutional right to a speedy trial was violated.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 1

In his pro se brief, the defendant complains that the State failed to prove his guilt beyond a reasonable doubt. He points to the 911 call about the white man, Christopher Spain, with the gun and asserts that Nicovie

Duplessis was going to marry Spain. He has also attached a copy of his telephone bill which he claims shows that he was on the phone with someone from Dallas at the time of the shooting.

The standard of reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Rosiere, 488 So.2d 965 (La. 1986). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.2d 1268 (La. App. 4 Cir. 1989).

Manslaughter is a homicide which would be either first or second degree murder, but the killing is committed in "sudden passion or heat of blood caused by provocation sufficient to deprive an average person of his

self-control and cool reflection." La. R.S. 14:31(A)(1). "Sudden passion" and "heat of blood" are not separate elements of the offense but are mitigating factors which exhibit a degree of culpability less than that present when the homicide is committed without them. State v. Lombard, 486 So.2d 106 (La. 1986).

The State presented sufficient evidence of the defendant's guilt. Nicovie Duplessis saw the defendant, whom she knew, shoot Collins Okah. Other witnesses saw a gray Volvo, which the defendant owned, at the scene at the time of the shooting. The report of the white male with a gun, who was revealed to be Christopher Spain, was investigated; and, Spain was found not to have been the shooter. Clearly, the jury found the testimony of Ms. Duplessis and the other prosecution witnesses to be credible; and, this credibility determination was not an abuse of discretion.

This assignment of error is without merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.