

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2003-KA-1908**
VERSUS * **COURT OF APPEAL**
OSCAR L. TATE * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 433-577, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * *
Judge Patricia Rivet Murray
* * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

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**CONVICTION AFFIRMED, SENTENCE
VACATED, AND REMANDED FOR
RESENTENCING**

The defendant, Oscar Tate, appeals his conviction on three counts of armed robbery and his adjudication as a second felony offender. For the reasons that follow, we affirm his conviction, vacate his sentence, and remand for resentencing.

STATEMENT OF THE CASE

On October 1, 2002 the State filed a bill of information charging Oscar Tate with five counts of violating La. R.S. 14:64, armed robbery (counts one through five); and one count of violating La. R.S. 14:44.1, second degree kidnapping (count six). On October 9, 2002, Mr. Tate was arraigned and entered a plea of not guilty. Mr. Tate filed a motion to suppress identifications, which was denied. On April 8, 2003, he appeared for trial. After being advised of his right to a jury trial, he elected a bench trial. The State elected to proceed to trial on only three of the armed robbery counts (counts one, two, and four).

After hearing testimony, the trial court found Mr. Tate guilty as charged. On April 24, 2003, the court denied Mr. Tate's motion for new

trial and sentenced him to ten years on each count to run concurrently with each other. Mr. Tate moved for an appeal, which was granted, and the State filed a multiple bill charging Mr. Tate as a second offender. On July 15, 2003, Mr. Tate filed a motion to quash the multiple bill, alleging that the State failed to meet its burden of proving the ten-year period under La. R.S. 15:529.1(C) had not elapsed. On November 5, 2003, the trial court found Mr. Tate to be a second offender, vacated the previous sentence of ten years, and resentenced him to forty-nine and one-half years.

STATEMENT OF THE FACTS

This case involves a string of four armed robberies in which Mr. Tate was identified as a suspect. The first robbery occurred on July 13, 2002, at approximately 3:00 a.m., in the 700 block of Lyons Street. This robbery involved two victims, Lauren Vogt and her friend, Jill Gallagher, who were robbed while *en route* to Grits, a local bar. Ms. Vogt testified that she had been driving and that neither she nor Ms. Gallagher had been drinking. According to Ms. Vogt, she and Ms. Gallagher parked their car a few blocks from the bar. While they were walking to the bar, a male (later identified as Mr. Tate) exited from a side street. Armed with a gun, he approached each of them and demanded their purses. After they complied with his demand, he instructed them to walk away and not to look back. From the corner of

her eye, Ms. Vogt saw the robber enter the passenger side of a black Escalade; the Escalade was parked with the engine running and with someone else driving it. Ms. Vogt and Ms. Gallagher then went to the bar and called the police.

Ms. Gallagher similarly testified that the robbery occurred when she and Ms. Vogt were *en route* to Grits. She testified that they had parked their car on the side of the street and were only a few feet from the car when the robber approached them and demanded their purses. After they complied with his demand, he instructed them to go away. She saw the robber exit to their left and enter a vehicle.

The second robbery occurred on the next day (on July 14, 2002) in the prior block (in the 600 block) of Lyons Street. The July 14th robbery involved a similarly described perpetrator who used a similarly described type of gun. In the July 14th robbery, the victim's cell phone was stolen and used to place two phone calls. Detective Jeffrey Walls, who investigated the July 13th robbery, testified that he learned of the July 14th robbery from Detective David Osborne. He also learned through further investigation, including tracking the stolen cell phone records, that Mr. Tate had been in possession of the stolen cell phone and that Mr. Tate had given it to Tyrone Fisher. Based on this information, Detective Walls prepared photographic

line-ups that included Mr. Tate's photograph.

On July 20, 2002, Detective Walls conducted separate line-ups with Ms. Vogt and Ms. Gallagher. Both victims selected Mr. Tate's photograph from the array as the person who robbed them. Both victims were absolutely positive of their identifications. Both victims also positively identified Mr. Tate at trial as the person who robbed them.

The third robbery occurred on August 2, 2002, at about 2:00 p.m., at the Spur station, located on the corner of South Claiborne Avenue and Eagle Street. The victim of this robbery was Ms. Delichia Aguilard. As part of her job as a safety inspector for the health department, Ms. Aguilard was going to the Spur station to conduct an inspection. When she arrived, she spotted Mr. Tate next to a young boy, who was about ten years old. She stated that the boy was on a bicycle, that Mr. Tate was walking away from the store, and that she did not think anything of this. Ms. Aguilard then began gathering the paperwork she needed to conduct the inspection and unlocked her car door. From out of nowhere, Mr. Tate appeared, opened her driver side door, pulled out a gun, and demanded she give him her money. After Ms. Aguilard replied that she had no money, he demanded she give him her car. She exited her car; Mr. Tate entered her car, and drove off in it. She then ran inside the store and told them to call the police to report the robbery

and car jacking.

Detective Kevin Bell investigated the August 2nd robbery. He testified that he developed Mr. Tate as a suspect mainly because Detective Brian Danigole had developed him as a suspect in another robbery that had occurred in the same area around the same time frame and that had involved a very similarly described perpetrator. He further testified that “[a] cell phone was taken in that robbery which led to Mr. Tate.” Detective Bell, however, denied that Detective Danigole’s investigation was the sole basis for his identifying Mr. Tate as the suspect; rather, he testified that he was aware of “a total of three cases in which Mr. Tate was identified in three robberies at the same location all having very similar circumstances.” He further testified that although he was aware that Mr. Tate was identified in the other robbery through certain cell phone records, he was unaware of the identity of the victim of that robbery, of the exact circumstances of that robbery, or of the arrest of Reginald Mitchell while driving the vehicle stolen in one of Detective Danigole’s cases. Detective Bell stressed that Mr. Tate had not just been tentatively identified by Ms. Aguilard when he showed her the photographic line-up, but had been “immediately and positively identified.” Finally, he testified that Ms. Aguilard’s vehicle was recovered in the 3100 block of Monroe Street, which is in the Carrollton

area; however, no physical evidence or fingerprints were recovered from the vehicle.

The fourth robbery occurred on August 3, 2002, at about 5:00 p.m., at the intersection of South Claiborne and Eagle Street around a gas station; it involved an armed robbery and a kidnapping of Shannon Heltz. Detective Danigole investigated this robbery. Ms. Heltz identified Mr. Tate in a photographic line-up as her robber. But, on the morning of trial, she informed the district attorney's office that she was no longer positive in her identification of Mr. Tate as the person who robbed her. This occurred after she was shown that morning, outside of the courtroom, a photograph of Mr. Mitchell, who was arrested two days after her robbery (on August 5, 2002) driving her stolen vehicle. As a result, the parties stipulated that, if called to testify, Ms. Heltz would state that she could no longer positively identify Mr. Tate as her robber.

The State then proceeded to trial on only three counts of armed robbery, *i.e.*, the July 13th robbery of Ms. Vogt and Ms. Gallagher and the August 2nd robbery of Ms. Aguilard. At trial, defense counsel showed each of the three victims Mr. Mitchell's photograph and presented him to them in person in open court. The victims all testified that they had never seen him before.

Defense counsel also asked each of the victims to view two parts of Mr. Tate's body; to wit: his forearm, where he had a tattoo; and his mouth, where he had a gold front tooth. The victims all testified that they did not recall their robber as having either a tattoo or a gold tooth.

The defense also presented two witnesses. First, Detective Danigole, who investigated Ms. Heltz's robbery, testified that he was led to 8126 Belfast Street through Ms. Heltz's cell phone records. He further testified that he ran that address, and it came back to a "Singleton," which is an alias Mr. Tate used. Based on a prior investigation involving Mr. Tate, Detective Danigole stated he was familiar with the name. Detective Danigole was also shown Mr. Tate's rap sheet by defense counsel and testified that it reflected Mr. Tate's alias was Oscar Singleton and that Mr. Tate had never listed Belfast Street as his residence. Second, Detective Sandra Contreras testified that she assisted in Detective Danigole's investigation. Detective Contreras was shown Mr. Mitchell's rap sheet by defense counsel and testified that it reflected Mr. Mitchell had listed 8126 Belfast Street as his home address. She further testified that a SWAT team arrested Mr. Mitchell at that address and that he was presently charged with fourteen or fifteen unrelated armed robberies.

In rebuttal, the State recalled Detective Walls, who detailed how Mr.

Tate became the prime suspect in the July 13th robberies of Ms. Vogt and Ms. Gallagher. He testified that in the July 14th robbery, the victim's cell phone was taken and that two calls were made from that cell phone. He further testified that based on the cell phone records, he traced the addresses to which those calls were placed and that he went to those addresses. He interviewed Mr. Fisher and other persons at those addresses, but he was unsuccessful in discovering the caller's identity. He returned to the station, ran the names of all the persons he interviewed, and discovered that Mr. Fisher had an outstanding warrant for an unrelated matter. He then returned to that address and arrested Mr. Fisher. Through further investigation, he learned that Mr. Fisher had obtained the stolen cell phone from "Pookie," who lived across the courtyard from him. Through still further investigation, he learned that Pookie's real name was Oscar Singleton, an alias Mr. Tate used. Detectives Walls, Osborne, and Bell took a taped statement from Mr. Fisher. They also showed Mr. Fisher a single photograph of Mr. Tate, and he identified him. Finally, Detective Walls was questioned about the testimony at trial that another cell phone was taken in connection with another armed robbery, and asked if he had any knowledge of Ms. Heltz's cell phone. He replied that he had no knowledge of a cell phone taken from Ms. Heltz.

ERRORS PATENT

A review of the record reveals three errors patent. First, the record indicates that the trial court initially sentenced Mr. Tate on the same date that it denied his motion for new trial, April 24, 2003. A twenty-four hour delay is mandated between the denial of a motion for new trial and sentencing, unless the defendant expressly waives the delay or pleads guilty. La. C.Cr.P. art. 873. No waiver of the delay, either express or implied, appears in the record. However, any error was harmless because Mr. Tate has not alleged any error with regard to his initial sentence. *State v. Gibson*, 2003-0647, pp. 5-6 (La. App. 4 Cir. 2/4/04), 867 So. 2d 793, 797.

A review of the multiple offender transcript reveals a second error patent. The multiple bill filed by the State neither specified which counts of armed robbery it pertained to, nor stated if it pertained to all three counts for which Mr. Tate had been convicted. When the trial court sentenced Mr. Tate as a second offender, the court stated that it was vacating “its previous sentence of ten years” and sentencing “the defendant to 49 and a half years.” The trial court did not specify on which count or counts it was resentencing Mr. Tate. The minute entry is also silent as to which count or counts the resentencing applied.

Moreover, counts one and two, the robberies of Ms. Gallagher and

Ms. Vogt, arose out of the same criminal episode, *i.e.*, the July 13th robbery. Multiple convictions obtained on the same date and arising from the same criminal episode are to be treated as a single conviction for purposes of the habitual offender law in sentencing. *State v. Ward*, 94-0490 (La. App. 4 Cir. 2/29/96), 670 So. 2d 562, (citing *State ex rel. Porter v. Butler*, 573 So. 2d 1106 (La. 1991)); *State v. Hawthorne*, 2000-1258 (La. App. 4 Cir. 11/8/00), 772 So. 2d 924. Therefore, the trial court could not enhance all three of the counts for which Mr. Tate was convicted, although the court could enhance count four, the August 2nd robbery of Ms. Aguilard, in addition to one of the counts involving the July 13th robbery of Ms. Gallagher and Ms. Vogt. Because the record does not indicate which counts were enhanced and because only two of the three counts could be enhanced, the multiple offender sentence must be vacated, and this matter must be remanded for resentencing.

The third error patent pertains to the motion for appeal. A written motion was filed and granted by the trial court on April 10, 2003, before the sentencing on April 24, 2003, in violation of La. C.Cr.P. arts. 912(C)(1) and 914(B)(1), and thus the motion was granted prematurely. Although a defendant can take an appeal only from a conviction and sentence, this court has held that an appeal taken prior to sentencing will not be dismissed

“because ‘[d]ismissing the appeal would simply result in a delay of the appellate process and hinder defendant’s right to appeal.’” *State v. Thompson*, 98-0988 (La. App. 4 Cir. 1/26/00) 752 So. 2d 293, 295, (quoting *State v. Martin*, 483 So. 2d 1223, 1225 (La. App. 4 Cir. 1986)). Thus, this error is harmless.

DISCUSSION

On appeal, Mr. Tate asserts two counseled and four *pro se* assignments of error. For ease of discussion, we have grouped his assignments into three categories; to wit: (i) identification errors, (ii) miscellaneous violations, and (iii) habitual offender adjudication error. We separately address each category.

(i) identification errors

In his first counseled assignment of error, Mr. Tate contends that the evidence presented was insufficient to sustain the convictions given the probability of misidentification by the three victims. In addressing sufficiency of the evidence claims, the constitutional standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979), applies. Under that standard, all evidence, both direct and circumstantial, must be sufficient to satisfy a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Tumblin*, 2002-1643, pp. 4-5 (La. App.

4 Cir. 9/17/03), 857 So. 2d 1045, 1048-49. The testimony of a single witness, if credible, may establish the elements of a crime beyond a reasonable doubt. *See State v. Hill*, 99-1750, p. 8, n.8 (La. 5/16/00), 761 So. 2d 516, 522; *State v. Allen*, 94-1895, p. 7 (La. App. 4 Cir. 9/15/95), 661 So. 2d 1078, 1084.

Armed robbery is defined as “the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.” La. R.S. 14:64. Encompassed in proving the elements of an offense is the requirement of proving the defendant’s identity as the perpetrator. *State v. Billard*, 2003-319, p. 5 (La. App. 5 Cir. 7/29/03), 852 So. 2d 1069, 1072, *writ denied*, 2003-2437 (La. 2/6/04), 865 So. 2d 739. When the key issue a defendant disputes is identity, the State is required to negate any reasonable probability of misidentification. *State v. Smith*, 430 So.2d 31, 45 (La.1983).

On the identity issue, the State produced the testimony of the three victims and the two investigating officers. Both officers (Detectives Walls and Bell) testified that they compiled a photographic line-up in which they included Mr. Tate’s photograph and that the victims positively identified Mr. Tate as the person who robbed them. All three victims identified the

photographic line-up they reviewed and signed, selecting Mr. Tate as the person who robbed them. All three victims personally identified Mr. Tate in court and stated that they were positive of their identification.

In support of his claim that the State failed to establish identification, Mr. Tate contends that the police were led to him solely due to Mr. Fisher's post-arrest statement that he obtained a stolen cell phone from a person named "Pookie," which is Mr. Tate's alias. He emphasizes the lack of any physical evidence linking him to any of the robberies. He further emphasizes that, although all four victims identified him in photographic line-ups, one of the victims, Ms. Heltz, later recanted her earlier identification.

Mr. Tate's most persuasive argument is that Ms. Heltz positively identified him in a photographic line-up as the person who robbed her, yet after viewing Mr. Mitchell's photograph on the day of trial was no longer positive. However, Ms. Heltz's August 3rd robbery was not tried. The three victims of the other robberies that were tried maintained their identifications of Mr. Tate, even after viewing Mr. Mitchell in person in open court, as well as viewing his photograph. Moreover, Ms. Vogt testified that there were distinct differences between Mr. Mitchell's photograph and Mr. Tate's, including the eyebrows, eyes, and the shape of the entire head; she described

their heads as differently shaped.

Mr. Tate further claims that the victims' identifications were unreliable given the contradictions in the victims' physical descriptions of him. He notes that the victims' descriptions ranged from Ms. Aguilard's statement that her robber was six-feet tall, 140 pounds, and between seventeen and twenty-one years old, to Ms. Vogt's and Ms. Gallagher's statements that their robber was five feet, eight inches tall and 135 pounds.

At trial, the following testimony regarding the robber's physical characteristics was given. Detective Walls testified that Ms. Vogt described her robber as a black male, dark complexion, twenty-five to thirty years old, five foot seven to five foot nine, and thin built. Ms. Vogt similarly testified that she used the following characteristics to identify her robber; to wit: black male, five foot seven or eight, not very big or stocky, and between twenty-five to thirty years old. Ms. Gallagher acknowledged that she gave a prior description of her robber as a black male in his mid-twenties, five foot seven, and 135 pounds.

Detective Bell testified that Ms. Aguilard described her robber as a young, black male, thin built, five seven to five nine, brown complexion, and as having a short Afro. He acknowledged that the initial report, which he did not prepare, stated that she described her robber as a black male,

between seventeen and twenty-one years old, six foot, 140 pounds. Ms. Aguilard testified that she was upset immediately after the incident when she gave that description of her robber. She also described her robber as wearing a white t-shirt and black shorts.

Although Ms. Aguilard did describe Mr. Tate as being six feet, which is taller than the description provided by Ms. Vogt and Ms. Gallagher, she was questioned on this discrepancy at trial. After viewing Mr. Tate at trial, she conceded that he was not six feet tall. She explained that in her earlier description she had guessed that he was at six feet tall; she admitted that she had not been sure of his height. Considering that Ms. Aguilard was seated in her vehicle when Mr. Tate confronted her, but the other two victims were standing in the street, it is reasonable to conclude that Ms. Aguilard thought the defendant was taller than he actually is. We thus find no marked difference in the victims' descriptions of Mr. Tate.

Mr. Tate further contends that the victims' identifications were unreliable in that they failed to notice (or to recall noticing) his tattoo and gold tooth. He emphasizes that it was dark when Ms. Vogt and Ms. Gallagher were robbed, rendering them unable to get a good look at their robber's physical characteristics. Conversely, he emphasizes that it was daylight when Ms. Aguilard was robbed, yet she still did not notice (or

recall) her robber having a tattoo or a gold tooth. Mr. Tate is accurate that none of the victims told the investigating officers or testified at trial that their robber had a gold tooth or tattoo. Nonetheless, all three victims immediately and positively identified Mr. Tate from the photographic lineup and at trial as their robber.

The trier of fact in this case, the trial judge, had the opportunity to view Mr. Tate's physical appearance, particularly his tattoo and gold tooth, which the defense argued the victims should have seen. The trial judge also had the opportunity to view Mr. Tate's appearance with regard to the victims' descriptions of his age, height, and weight, and to consider all of those factors in light of the victims' positive testimony that he was the person who robbed them. Similarly, since Mr. Mitchell was presented in open court to the victims, the trial judge was able to gauge whether there was a possibility of misidentification. Apparently, the trial judge resolved any conflicts in the State's favor. Considering that the trial judge found the victims' identifications to be credible, while being fully aware that Ms. Heltz was unable to maintain a positive identification, we find the State met its burden of proof of negating a reasonable probability of misidentification. We thus find this assignment of error unpersuasive.

In a similar vein, Mr. Tate's third *pro se* assignments of error is that

the police employed suggestive line-up procedures in obtaining identifications from the victims and that those identifications should have been excluded. Like the prior argument, this argument challenges the reliability of the victims' identifications, repeating the same arguments addressed and rejected above. Again, Mr. Tate argues the lack of reliability of the identification testimony, citing: (i) the lack of visibility at the time of the July 13th robbery of Ms. Vogt and Ms. Gallagher, due to the darkness of the night; (ii) the lack of attention at the time of the incident, given the victims' failure to notice his tattoo and prominent gold tooth, especially the failure of Ms. Aguilard to notice these features given her robbery occurred during the day time; (iii) the discrepancies in the victims' descriptions of him; and (iv) the fact that Ms. Heltz changed her mind about her positive identification of Mr. Tate after viewing Mr. Mitchell's photograph. As to the line-ups, he argues that they were suggestive in that Mr. Mitchell's photograph was not included in the array. He further argues that the line-ups were suggestive in that the officers included a photograph of a suspect with a cross tattoo between his eyes, despite that none of the victims referred to their robber as having a tattoo. He argues that photo "noticeably excluded itself from the other photos."

A defendant seeking to exclude a photographic identification must

prove two factors: 1) that the identification was unduly suggestive and 2) that there was a substantial likelihood of irreparable misidentification. *State v. Lagarde*, 2003-0606, p. 15 (La. App. 4 Cir. 12/10/03), 861 So. 2d 871, 881 (citing *State v. Buchanan*, 463 So. 2d 660, 661 (La. App. 4 Cir. 1985)). A photographic line-up is unduly suggestive if the photographs depict the defendant so singularly that the witness' attention is unduly focused on him. *Id.* However, no exact, detailed criteria exist defining what is a legitimate photographic line-up; each case must be decided based on its own facts. *State v. Savoy*, 501 So. 2d 819, 821 (La. App. 4th Cir. 1986).

We have reviewed the photographs used in the three photographic line-ups prepared by Detectives Walls and Bell. All three line-ups used an array of the same six color photographs, albeit each was arranged in a different order. The photographs depict the head and upper chest of African-American males of similar skin tone and complexion, similar age, similar light mustache, and similar short hairstyle. Although, as Mr. Tate points out, one suspect has an apparent cross tattoo between his eyes, it is barely noticeable. Indeed, it is unclear if the cross is actually a tattoo or a scar. Defense counsel explored this point in cross-examining Detective Walls. Although Detective Walls acknowledged that the suspect had a cross tattoo between his eyes, he denied that this made that suspect easy to discount from

the line-up. We agree.

We further note that the jurisprudence has rejected claims of suggestive line-up based on the fact that the defendant was singled out because he was the only suspect pictured in the line-up that had a tattoo. *Buchanan*, 463 So. 2d at 662; *State v. James*, 431 So. 2d 1075 (La. App. 2d Cir. 1983). Mr. Tate's claim is even weaker in that he does not claim he was singled out, but rather he claims that another one of the suspects pictured was singled out and noticeably excluded because the suspect had a cross tattoo between his eyes.

Nor do we find there to be a substantial likelihood of misidentification. The standard of review for identification procedures is fairness, and the linchpin in determining the admissibility of identification testimony is reliability. In determining the reliability of identification testimony, the jurisprudence has applied the following five-factor test enunciated in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977): (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. *Lagarde*, 2003-0606 at pp. 15-16, 861 So. 2d at 881

(citing *State v. Jones*, 2002-1171 (La. App. 4 Cir. 6/26/02), 822 So.2d 205).

Applying those factors, the three victims in this case had ample opportunity to view Mr. Tate during their respective robberies. Detective Walls testified that the victims of the July 13th robbery indicated to him that they got a good enough look at the robber to identify him. Detectives Walls and Bell also testified that the victims immediately selected Mr. Tate's photograph from the line-up as the man who robbed them and that the victims were certain of their identifications. All three victims also positively identified Mr. Tate at trial as the person who robbed them. Despite Mr. Tate's argument regarding inconsistencies in their descriptions of their robber, the victims' overall descriptions were neither markedly different nor inaccurate. Finally, the length of time between the July 13th robberies and the photographic identifications by Ms. Vogt and Ms. Gallagher was about a week (both dated July 20, 2002); and the length of time between the August 2nd robbery and the photographic identification by Ms. Aguilard was about two weeks (dated August 14, 2002). For these reasons, we find the five-factor test was satisfied. We thus find Mr. Tate's argument regarding the suggestive photographic line-ups unpersuasive.

(ii) *miscellaneous violations*

Mr. Tate's other three *pro se* assignments of error are all premised on

the State's failure to introduce at trial, and to provide him with pre-trial, the store videotape of Ms. Aguilard's robbery and Mr. Fisher's tape-recorded statement. He argues these two things are significant because the State relied on them to link him to the robberies, yet failed to introduce them at trial. As a result, he alleges three miscellaneous violations: (a) *Brady* violations, (b) ineffective assistance of counsel, and (c) confrontation violation.

(a) *Brady* violations

Mr. Tate's second *pro se* assignment of error is that the State withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed. 2d 215 (1963). The Supreme Court has explained that a true *Brady* violation has three components; namely: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 1948, 144 L.Ed. 2d 286 (1999).

In this case, the alleged *Brady* material was the Spur station videotape and Mr. Fisher's tape-recorded statement, which were both mentioned by the State's witnesses at trial, but neither of which was introduced into evidence.

We understand Mr. Tate's argument to be that because this evidence was not introduced, it must have been favorable to the defense. It follows, he contends, that a *Brady* violation resulted from the State's failure to disclose this evidence to him. We disagree.

First, as to Mr. Fisher's statement, Mr. Tate failed to establish that the State suppressed this evidence. Indeed, the transcript of the January 17, 2003, motion hearing at which Detective Walls referred to Mr. Fisher's tape-recorded statement reflects that defense counsel responded by immediately requesting the State be ordered to provide him with a copy of that statement if it implicated his client. Mr. Tate failed to establish that the State did not comply with this request.

Second, as to the store videotape, Mr. Tate failed to establish it was exculpatory. Indeed, he argues that it could be either inculpatory or exculpatory because it showed who was present at the scene of the crime. This videotape was only mentioned at trial in Detective Bell's testimony. Detective Bell testified that he confiscated the store videotape on the day of the robbery, that he "spent most of the evening" working with the video, that they "tried to enhance the video, which [they] did," and that "you can make out the whole robbery as it occurred." He further testified, in response to defense counsel's questions on cross-examination, that based on viewing the

videotape he was able to determine that the young boy Ms. Aguilard described as being on a bicycle next to Mr. Tate was not involved in the crime; rather he was “[j]ust a kid on a bicycle hanging around the store.” Defense counsel made no objection at trial to Detective Bell’s references to the videotape. Regardless, Detective Bell’s testimony regarding the videotape merely confirmed Ms. Aguilard’s testimony that she spotted Mr. Tate and the young boy on the bicycle when she arrived at the station and that she did not think anything of this. Moreover, we find it significant that Detective Bell had to spend time enhancing the video in order to make out what occurred; this perhaps explains the State’s failure to introduce the videotape into evidence. Finally, we note that Mr. Tate asserted the same argument regarding the State’s failure to admit the videotape into evidence in his motion for new trial, which the trial court denied. We thus find this claim unpersuasive.

(b) ineffective assistance of counsel

Mr. Tate’s first *pro se* assignment of error is ineffective assistance of counsel. The gist of Mr. Tate’s ineffective assistance of counsel claim is that his trial counsel failed to object to Detective Wall’s testimony regarding the hearsay content of Mr. Fisher’s taped statement. Particularly, he argues that Mr. Fisher’s statement pointing Mr. Tate out as the person who gave

him the victim's cell phone is hearsay and that his attorney's failure to object to this testimony was ineffective assistance of counsel. He also argues that his counsel failed to conduct meaningful discovery and thus seemed to be unaware of this evidence.

The general rule is that "the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted." *State v. Jones*, 2002-2433, p. 3, (La. App. 4 Cir. 6/18/03), 850 So.2d 782, 785. An exception is recognized when the record contains sufficient evidence to rule on the merits of the claim. In the latter context, the interests of judicial economy justify consideration of the claim on appeal. *Id.* (citing *State v. Seiss*, 428 So.2d 444 (La.1983); *State v. Ratcliff*, 416 So.2d 528 (La.1982); *State v. Garland*, 482 So.2d 133 (La.App. 4th Cir.1986); *State v. Landry*, 499 So.2d 1320 (La.App. 4th Cir.1986)). This case, as Mr. Tate contends, falls within the exception.

The well-settled standard for analyzing assistance of counsel claims is the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Simply stated, that test requires the defendant establish that (1) counsel's performance was deficient, and (2) that the deficiency prejudiced him. The defendant must make both showings to

prove that counsel was so ineffective as to warrant reversal. *State v. Sparrow*, 612 So. 2d 191, 199 (La. App. 4th Cir. 1992).

The record reflects that, contrary to Mr. Tate's contention, his trial attorney did object to Detective Walls' testimony regarding Mr. Fisher's hearsay statement. After the trial court sustained that objection, Detective Walls testified to the actions he took in investigating this matter. He testified that he learned through investigation that "Pookie" was the person who had given Mr. Fisher the cell phone. Continuing, Detective Walls explained that, through further investigation, he learned that Pookie lived across the courtyard from Mr. Fisher and that Pookie's real name was Oscar Singleton, an alias Mr. Tate used.

Insofar as Mr. Tate suggests his attorney was unaware of Mr. Fisher's taped statement, as discussed above, this suggestion is belied by the transcript of the motion hearing at which defense counsel expressly requested the State be ordered to provide him with a copy of Mr. Fisher's statement if it exculpated his client. Neither that statement nor hearsay testimony regarding its content was introduced into evidence at trial. For these reasons, we find Mr. Tate's ineffective assistance of counsel claim unpersuasive.

(c) *confrontation violation*

Mr. Tate's fourth *pro se* assignment of error is that the trial court's erroneous admission of hearsay testimony at trial deprived him of the right to confront and cross-examine his accusers. He maintains that the State's failure to call Mr. Fisher as a witness and its reliance instead on Detective Walls' testimony regarding Mr. Fisher's hearsay, tape-recorded statement violated his due process right to confront his accuser.

Hearsay evidence is excluded because the value of the statement rests on the credibility of the out-of-court asserter who is not subject to cross-examination and other safeguards of reliability. *State v. Everidge*, 96-2665 (La.12/2/97), 702 So.2d 680, 685. Addressing the relationship between hearsay evidence and the confrontation clause, the Court in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L. Ed.2d 489 (1970), listed the following three reasons for excluding hearsay evidence; to wit: (1) to insure that the witness will make his assertions under oath, thus impressing him with the seriousness of the matter and subjecting untrue statements to a penalty for perjury; (2) to force the witness to submit to cross-examination, characterized as the "greatest legal engine ever invented for the discovery of truth;" and (3) to permit the jury which decides the defendant's fate to observe the demeanor of the witness in making his statements, thus aiding the jury in assessing the witness' credibility. *Green*, 399 U.S. at 158, 90 S.Ct.

at 1935.

In this case, however, Mr. Fisher's hearsay, tape-recorded statement was neither introduced into evidence, nor relied on by the State as the sole basis for establishing its case against Mr. Tate. Indeed, as discussed above, the trial court sustained defense counsel's hearsay objection to Detective Walls' testimony as to what Mr. Fisher told the officers after he was arrested regarding the cell phone. Regardless, the State's case against Mr. Tate was supported by the testimony at trial of the three victims who positively identified Mr. Tate as the person who robbed them. This argument is thus unpersuasive.

(iii) habitual offender adjudication violation

In his second counseled assignment of error, which was raised by supplemental brief, Mr. Tate contends, as his counsel did at the habitual offender hearing, that the State failed to meet its burden of proving that the requisite ten-year period under La. R.S. 15:529.1(C) had not elapsed. La.

R.S. 15:529.1(C) provides:

This Section shall not be applicable in cases where more than ten years have elapsed since the expiration of the maximum sentence or sentences of the previous conviction or convictions, or adjudication or adjudications of delinquency, and the time of the commission of the last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said ten-year periods.

In order for a prior conviction to be used as a basis for a habitual offender adjudication, this statute requires that less than ten years have passed from the expiration of the previous sentence and the commission of the subsequent offense. The date of actual discharge from the Department of Corrections determines the expiration of the previous sentence. *State v. Lorio*, 94-2591, p. 4 (La. App. 4 Cir. 9/28/95), 662 So. 2d 128, 130.

Although the State generally has the burden of proving that the ten-year period has not expired, the State need not prove the actual discharge date when less than ten years have elapsed between convictions. *State v. Tucker*, 95-0030, p. 11 (La. App. 4 Cir. 9/18/96), 682 So. 2d 261, 266.

Applying these principles to the instant case, Mr. Tate committed the instant offenses on July 13, 2002, and August 2, 2002. Mr. Tate pled guilty to the previous offense (armed robbery) in case number 322-317, Section "H", Orleans Parish Criminal District Court on March 2, 1988. He was sentenced to serve five years at hard labor without the benefit of probation, parole, or suspension of sentence. Thus the latest date on which Mr. Tate theoretically could have been still serving the previous sentence was March 2, 1993. It follows then that assuming Mr. Tate did not receive any type of early discharge or was not given credit for time served, the ten-year period did not elapse. However, if he was given credit for time served or received

an early release, the ten-year period possibly did elapse. Given that possibility, the State had the burden of proving that the ten-year period did not elapse.

The State may satisfy its burden of proof on this issue either by complying with La. R.S. 15:529.1(F), which provides for *prima facie* evidence that the period between convictions had not elapsed in the form of a "pen pack," or by presenting other competent evidence. *See State v. Bernard*, 366 So. 2d 1294, 1296 (La. 1978). In this case, the State submitted several pieces of evidence at the multiple offender hearing, including the following documents from case number 322-317: (i) the bill of information, (ii) guilty plea form, (iii) the screening action form, (iv) the docket master, and (v) the arrest register. The State also submitted a computer printout it obtained from the Department of Corrections, entitled "DPS&C CORRECTIONS SERVICES CAJUN II DOCKET RECORD DETAIL INQUIRY" (the "Cajun II computer printout"). The latter, one-page computer printout, however, was not certified in accord with La. R.S. 15:529.1 (the "pen pack" provision) or any other evidentiary article pertaining to authentication of extrinsic evidence. Nor did the State provide any testimony from the person who generated that computer printout.

Overruling defense counsel's objection to the introduction the Cajun

II computer printout on the grounds that it was neither certified nor authenticated, the trial court stated that it was a matter of public record. Although we find merit to Mr. Tate's argument that the trial court erred in overruling that objection and allowing the State to introduce the Cajun II computer printout, we nonetheless find the trial court correctly concluded that the State met its burden of proof of establishing the ten-year period had not elapsed by introducing other competent evidence. Stated otherwise, we find the State met its burden by introducing documentation that allows us to perform the type of calculations sanctioned in a trio of prior decisions by this court; to wit: *State v. Martello*, 98-2066, pp. 15-17 (La.App. 4 Cir. 11/17/99), 748 So. 2d 1192, 1202-03; *State v. Lorio*, 94-2591 (La. App. 4 Cir. 9/28/95), 662 So. 2d 128; *State v. Falgout*, 575 So.2d 456 (La.App. 4th Cir.1991). Particularly, that trio of cases stands for the proposition that when sufficient documentation is produced regarding a defendant's sentence and release date, albeit not of the defendant's actual discharge date, the court may calculate the discharge date by taking into account possible early discharge for good time or for other reasons. *Cf State v. Young*, 2003-1690, pp. 3-6 (La. App. 4 Cir. 12/10/03), 863 So. 2d 658, 660-62 (presenting converse situation in which State produced no evidence).

Performing that calculation in this case is possible because the docket

master from case number 322-317, which the State introduced and which was certified, reflects that Mr. Tate was originally on bond. On November 2, 1987, the trial court ordered him remanded. Each entry thereafter reflects that he was remanded to jail. Thus, these entries indicate that Mr. Tate was incarcerated from November 2, 1987, until when his previous sentence commenced on March 2, 1988, giving him four months of credit for time served. His five-year sentence was without parole eligibility. Thus, unless he was released on good time without supervision, his previous sentence would not have expired before November 2, 1992, less than ten years from the commission of the instant offenses, which occurred on July 13, 2002, and August 2, 2002. However, at the time of Mr. Tate's previous 1987 conviction, La. R.S. 15:571.5 provided that when a prisoner was released because of good time which diminished the sentence, "he shall be released as if released on parole" and "shall be supervised in the same manner and to the same extent as if he were released on parole. The supervision shall be for the remainder of the original full term of sentence."

Given these circumstances, we find the State met its burden of proof under La. R.S. 15:529.1(C) of establishing that less than ten years elapsed from the date of the previous conviction to the date of the instant offenses. By submitting the certified copy of the docket master, which reflects the

amount of time served prior to the commencement of the previous sentence, and the minute entry, which reflects that Mr. Tate's five year sentence was without parole, the State made a *prima facie* showing that Mr. Tate would not have been released from the supervision of the Department of Corrections before November 2, 1992, which is after the expiration of the ten-year period (*i.e.* after July 13, 1992). Furthermore, in contrast to the defendant in *Young*, Mr. Tate made no attempt to establish that he was released without supervision before the expiration of that ten-year period (*i.e.* before July 13, 1992). Accordingly, the trial court did not err in adjudicating Mr. Tate a second offender.

DECREE

For the forgoing reasons, we affirm Mr. Tate' convictions, vacate his multiple offender sentence, and remand for resentencing.

**CONVICTION AFFIRMED, SENTENCE VACATED,
AND REMANDED FOR RESENTENCING**