NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2016-KA-0230**
VERSUS	*	
		COURT OF APPEAL
MYRON LEE TURNER	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 2014-02794 C\W 2015-03199, DIVISION "B"
Honorable Michael D. Clement,
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome, Judge Rosemary Ledet)
BELSOME, J., CONCURS IN PART AND DISSENTS IN PART WITH REASONS

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AFFIRMED IN PART; VACATED IN PART; REMANDED

OCTOBER 19, 2016

In a jury trial, for violation of five counts[1] of distribution of cocaine under La. R.S. 40:967(B)(1), the State presented evidence to establish that defendant, Myron Lee Turner, sold cocaine on various days in May, June, and July 2014. The jury unanimously convicted Mr. Turner on all four counts, and the State filed a Multiple Bill of Information charging him as a third felony offender.[2] Mr. Turner was sentenced to a term of imprisonment for forty years on each count under the habitual offender statute, La. R.S. 15:529.1.

On appeal, counsel for Mr. Turner assigns the following assignments of error: (1) that the evidence is insufficient to support the convictions; and (2) the trial court erred by denying the defense's challenge for cause. Mr. Turner also filed a *pro se* brief and assigned the following two errors: (1) that he was denied effective assistance of counsel; and (2) that the sentence is excessive.

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[1] Prior to trial on October 13, 2015, the State amended the bill of information, dismissing count 2 and renumbering the remaining counts 1 through 4.

[2] Initially, the State charged Mr. Turner as a quadruple felony offender; however, on December 16, 2015, the State amended the multiple bill, and charged him a third felony offender.

For the reasons discussed herein, the jury's conviction of Mr. Turner is affirmed. However, although a trial judge's past representation of a party[3] is not listed as a mandatory or discretionary ground for recusal in La. C.C.P. arts. 151 or 152, we find the sentencing transcript demonstrates the appearance of bias on the part of the trial judge in this matter. As such, we vacate Mr. Turner's sentence and remand this matter to the trial court in order to hold a recusal hearing to determine if recusal of the presiding judge is proper.

PROCEDURAL HISTORY

Mr. Turner was charged by bill of information on October 27, 2014, with five counts of distribution of cocaine, violations of La. R.S. 40:967(B)(1), relative to sales occurring in May, June and July 2014. On December 8, 2014, Mr. Turner pled not guilty to all charges. Prior to trial on October 13, 2015, the State amended the bill of information, dismissing count 2 and renumbering the remaining counts 1 through 4.

At the close of trial on October 14, 2015, the jury unanimously convicted Mr. Turner on all counts, and the State filed a Multiple Bill of Information charging Mr. Turner as a quadruple felony offender. On November 2, 2015, Mr. Turner filed a Motion to Quash the multiple bill, which the trial court denied. On November 6, 2015, the trial court denied Mr. Turner's Motions for New Trial and Post-Verdict Judgment of Acquittal.

On December 16, 2015, the trial court sentenced Mr. Turner to twenty-five years on each of the four convictions, sentences to run concurrently with one another but consecutively to a ten year sentence Mr. Turner was already serving.

[3] It is worth noting that the trial judge informed all parties of his prior representation of Mr. Turner prior to trial and hearings.

Also on that date, the State amended the multiple bill, charging Mr. Turner as a third rather than quadruple offender. Following a hearing on the multiple bill, the court adjudged Mr. Turner a third felony offender, vacated Mr. Turner's original sentences and re-sentenced him pursuant to La. R.S. 15:529.1 to forty years on each count, sentences to be served consecutively with any other sentence.

On December 19, 2015, the court denied Mr. Turner's Motion to Reconsider Sentence but granted the Motion for Appeal.

FACTS

Plaquemines Parish Sheriff's Office Agent Christopher Johnson assigned to the DEA Task Force in New Orleans structured and implemented controlled drug buys in the spring and summer of 2014 in which Mr. Turner was the seller of crack cocaine. Those sales occurred in Plaquemines Parish with the assistance of an informant, who was not paid but rather cooperated in the buys in exchange for judicial consideration of her sentence; i.e. "working off a charge." In this case, the informant, Ms. Sandra Batholomew, was a self-admitted, known drug user, who was arrested in September of 2014 for drug distribution in April 2014.

Agent Johnson explained the audio and video technology employed by law enforcement to document each of the controlled buys. A camera is placed in the informant's car, facing out of the driver's side window at a fixed vantage point. Next, the informant is given money to purchase the narcotics. The money the informant receives is photographed, for investigative purposes, prior to being given to the informant. The investigation continues through several purchases over a period of time before an arrest is made.

Johnson explained the procedure of a typical buy from start to finish. An agent meets with the informant and lays out the plan for the buy. The agent

searches the informant and his/her vehicle to eliminate the possibility the informant was in possession of drugs prior to making the controlled buy. The informant then would make a telephone call, which is recorded, to arrange the buy. The agent tenders the money for the buy and activates the video/audio equipment to record the transaction. After the informant has made the buy, which the agent witnesses from a distance, he follows the informant to a designated area, where the informant and his/her vehicle is again searched to be sure the informant has surrendered to the agent the entire amount of the narcotics received by the informant in the controlled buy. In this case, Johnson was close enough to see Mr. Turner approach the informant's vehicle, but he did not actually see the hand-to-hand transaction. Johnson witnessed the informant engage in four separate transactions with Mr. Turner over the course of three months in 2014. After each of those transactions, the informant gave Johnson crack cocaine she received from Mr. Turner. The contraband from the buys was placed in evidence bags; tagged with the item nos. 04846 (May 13, 2014); 06238 (June 17, 2014); 06353 (June 20, 2014); 06771 (July 1, 2014); sealed; and placed in the evidence box at the narcotics office for chemical analysis. The evidence in this case tested positive for cocaine, a Schedule II narcotic. After Johnson processed the evidence, he viewed the audio/video recording of each transaction to insure the recording technology operated properly.

Upon receipt of the lab test results, Johnson obtained and executed a warrant for Mr. Turner's arrest.

Plaquemines Parish Sheriff's Office Agent Jennifer Daigle assisted Agent Johnson in the investigation of Mr. Turner. Daigle corroborated Johnson's testimony concerning the logistics of setting up the controlled buys through the

informant. She added that she performed the search of the female informant prior to and after the narcotics purchases were made from Mr. Turner.

The State called Sandra Bartholomew, the informant who made the controlled narcotics buys from Mr. Turner. Ms. Bartholomew testified she had drug convictions and other legal problems, which led her to agree to act as a confidential informant for the Plaquemines Parish Narcotics Office. She referred to her service as "working off" her charge, i.e., she would make a certain number of controlled buys in exchange for a reduction or dismissal of the charges pending against her. Ms. Bartholomew set up controlled drug buys from Mr. Turner and agreed to testify in this case against Mr. Turner. She knew Mr. Turner from the community and by his nickname "Face." She arranged four buys of cocaine from Mr. Turner at $100.00 per buy. The witness made the buys in May, June and July 2014. She would call Mr. Turner, establish the price and meet Mr. Turner in the same location for each of the buys. Agents Johnson and Daigle supplied Ms. Bartholomew with money to make all of the purchases. Prior to and after making each of the buys, the agents would search her and her vehicle. As Ms. Bartholomew drove to and from the purchase and at the time she made each purchase, she was under constant surveillance by the agents. After the buy was completed, she would hand over the narcotics to the agents.

The prosecutor played the video/audio recordings of each of the buys (State's Exhibit Nos. 5, 6, 7 and 8) while Ms. Bartholomew narrated the action seen on the videos. She identified the location of the buys (Mr. Turner's mother's trailer), her image and Mr. Turner's image as well as the hand to hand exchange of narcotics and money.

Under cross-examination, Ms. Bartholomew recalled she made controlled narcotics buys in five unrelated cases. In return for making those purchases, she was allowed to keep a small amount of crack in payment for her services. She denied, however, receiving narcotics or money in exchange for arranging buys from Mr. Turner in this case.

At trial, the State and the defense stipulated that Exhibits 1 through 4 were criminal lab reports confirming that the contraband in this case tested positive for cocaine; Exhibits 5, 6, 7 and 8 were video/audio recordings of the controlled buys in this case; and Exhibits 9, 10, 11 and 12 were the individual pieces of crack cocaine purchased via the controlled buys.

ERRORS PATENT

A review for errors patent on the face of the record reveals one as to sentencing. Specifically, Mr. Turner was sentenced pursuant to La. R.S. 15:529.1 as a third felony offender to forty years on each count but the trial court failed to articulate that the first two years of Mr. Turner's sentences be restricted as to the benefits of parole, probation and suspension of sentence. However, because this court is vacating Mr. Turner's sentence, and remanding for the trial court to hold a recusal hearing, we find this issue moot.

ASSIGNMENT OF ERROR NUMBER 1

In the first assignment of error, Mr. Turner argues the evidence is insufficient to support his conviction. He argues that no rational jury could have found him guilty of distributing cocaine based upon the testimony of Sandra Bartholomew, an admitted drug user, who set up the controlled buys in exchange for a reduction or dismissal of drug charges pending against her.

The standard of appellate review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This standard does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the fact finder. *State v. Pigford,* 05-0477, p. 6 (La. 2/22/06), 922 So.2d 517, 521. The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith,* 94-3116 (La.10/16/95), 661 So.2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Fields*, 08-1223, p.6 (La. App. 4 Cir. 4/15/09), 10 So. 3d 350, 354. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. *Id.*

The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Mr. Turner was guilty of every essential element of the crime. *State v. Sutton,* 436 So.2d 471 (La.1983).

In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. *State v. Higgins,* 03-1980, p. 6 (La. 4/1/05), 898 So.2d 1219, 1226. Appellate courts should not disturb a fact

finder's credibility decision unless it is clearly contrary to the evidence. *State v. Huckabay,* 00-1082, p. 33 (La. App. 4 Cir. 2/6/02), 809 So.2d 1093, 1111.

Mr. Turner was convicted of possession with intent to distribute cocaine. To sustain its burden of proof, the State was required to show that Mr. Turner possessed the cocaine, and that he had the intent to distribute it. See *State v. Simmons*, 10-1508, 4-5, (La. App. 4 Cir. 5/18/11), 67 So. 3d 525, 528.

Agent Christopher Johnson assigned to the DEA Task Force in New Orleans testified that he structured and carried out four controlled drug buys in which Mr. Turner was the seller of crack cocaine. Johnson said those buys were set up in Plaquemines Parish with the assistance of confidential informant, Sandra Bartholomew. Johnson recalled that audio and video technology employed by law enforcement documented each of the controlled buys. He explained that a camera was placed in the informant's car and placed facing out of the driver's side window at a fixed vantage point. Further, he said Ms. Bartholomew was given $100.00 to make each of the cocaine purchases. After Ms. Bartholomew made each buy, which Johnson witnessed from a distance, he met Ms. Bartholomew at a designated area and retrieved the narcotics from her.

Agent Johnson's trial testimony was corroborated by Ms. Bartholomew, who verified she set up four controlled drug buys at $100.00 a piece from Mr. Turner and agreed to testify in this case. She stated she knew Mr. Turner from the community and made the buys in May, June and July 2014. She confirmed she called Mr. Turner prior to each of the buys, established the purchase price and met Mr. Turner in the same location for each of the buys. As she drove to and from the purchase and at the time she made each purchase, she was under constant surveillance by the agents. After the buy was complete, she surrendered the

narcotics to the agents. Ms. Bartholomew narrated the action seen on the video/audio recordings of the four buys. She identified the location of the buys, her image and Mr. Turner's image, as well as the hand to hand exchange of narcotics and money between her and Mr. Turner. Moreover, she identified Mr. Turner at trial as the person from whom she made the four controlled buys.

Additionally, Mr. Turner argues the videotapes of the second and third buys in this case cannot support his convictions. He notes that the camera's focus shifts from the driver's side window of Ms. Bartholomew's vehicle to the vehicle's steering column as she drives away from the purchase. The defense posits Ms. Bartholomew changed the focus of the camera to conceal her action of retrieving a rock of crack cocaine from somewhere in her vehicle in order to claim she received the contraband from Mr. Turner. Further, the defense contends the videos of the first and fourth buys are of no evidentiary value because neither captures the hand-to-hand transactions, the only evidence of which was based upon the incredible testimony of Ms. Batholomew, a self-admitted, self-serving, unreliable drug user. Even if the focus and images captured by the videos were as Mr. Turner claims, the videos were not the only evidence of Mr. Turner's guilt in this case. The jury, by its verdict of guilty, obviously accepted Agents Johnson, Daigle and Ms. Bartholomew's testimony that Mr. Turner sold cocaine to Ms. Bartholomew on four occasions.

The jury heard and reviewed all of the evidence. A review of the record as a whole demonstrates that the jury's determination was reasonable, and a rational trier of fact could have found the evidence, viewed in a light favorable to the prosecution, sufficient to prove the elements of possession with the intent to distribute cocaine. This assignment has no merit.

ASSIGNMENT OF ERROR NUMBER 2

By this assignment, Mr. Turner argues his constitutional rights were violated because his counsel was forced to exercise a peremptory challenge to remove a prospective juror Mr. Turner claims should have been removed for cause.

Louisiana Constitution article I, § 17 guarantees to a defendant the right to full *voir dire* examination of prospective jurors and the right to challenge jurors peremptorily. In trials of offenses necessarily punishable by imprisonment at hard labor, such as in the present case (distribution of cocaine), each defendant shall have twelve peremptory challenges, and the State shall have twelve for each defendant. Additionally, to ensure a fair and impartial trial, the State and defendant can challenge a juror for cause. The grounds for a challenge for cause are set out in La. C.Cr.P. art. 797, which provides in pertinent part:

> The state or the defendant may challenge a juror for cause on the ground that:
> ....
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence.

When a defendant uses all twelve of his peremptory challenges, as the defendant in this case did, a trial court's erroneous ruling on a defendant's challenge for cause that results in the deprivation of one of his peremptory challenges constitutes a substantial violation of his constitutional and statutory rights, requiring reversal of his conviction and sentence. Prejudice is presumed when a defendant's challenge for cause is erroneously denied, and he has exhausted all of his peremptory challenges. Accordingly, to establish reversible

error in the denial of one of his challenges for cause, a defendant must show: (1) that he exhausted all of his peremptory challenges; and (2) that the trial court erred in refusing to grant his challenge for cause. *State v. Dotson*, 15-0191, p.5 (La. App. 4 Cir. 2/17/16), 187 So. 3d 79, 82.

Determinations on excluding a prospective juror for cause are made on a case-by-case basis. *State v. Dotson,* 15-0191 at 5-6, 187 So. 3d at 81-82. Additionally, this Court recognizes that a trial court is vested with broad discretion in ruling on challenges for cause, and its ruling will only be reversed when a review of the *voir dire* as a whole reveals an abuse of discretion. *Id.*

During voir dire in the present case, the trial court gave the prospective jurors the names of the possible witnesses and asked them whether they recognized any of the names. Prospective juror No. 171, Mr. Bartol J. Taliancich, Jr. (Juror), answered that he knew Chris Johnson and Jennifer Daigle, the two narcotics officers who orchestrated the controlled buys which led to Mr. Turner's arrest. The following exchange ensued:

> Judge: Would your relationship or that you're acquainted with any of those people cause you to be fair and impartial to anyone in connection with this case?
>
> Juror: I'll be all right.
>
> Judge: Would you be able to weigh their testimony as any other person who came to testify - -
>
> Juror: [Nods head affirmatively].
>
> Judge: - - that is, as if you did not know them at all?
>
> Juror: Correct.
>
> Judge: You would not give their testimony any greater weight?
> Juror: No.

In another round of questions, the trial judge asked the jurors if any of them had friends or relatives employed by the District Attorney's Office, the Department of Corrections, State or City Police, the Sheriff's Office, or any other law enforcement agency. Mr. Taliancich responded:

> Juror: Yes. My father-in-law . . . , and my step-mother-in-law . . . [both] with the Plaquemines Parish Sheriff's Office and numerous friends with the Sheriff's Office, too - - too many [to] name.
>
> Judge: Okay. Sort of like you identified all the PPSO employees a moment ago. All right. The same question would apply: Would having those folks . . . have any impact on your ability to be fair and impartial?
>
> Juror: No, sir.

Further, the trial judge inquired:

> Judge: Can you evaluate the credibility of a law enforcement officer just as you would evaluate the credibility of any other witness? I suppose putting it a different way: Would you give law enforcement's testimony greater weight?
>
> Juror: I have to see what's going on.
>
> Judge: . . . you would weigh their testimony in light of the circumstances?
>
> Juror: Yes, sir.
>
> Judge: . . . you would listen to the testimony –
>
> Juror: Correct.
>
> Judge: **. . .** and if it sounds right, then you believe them –
>
> Juror: Yes, sir.
>
> Judge: . . . if it doesn't, you may not believe them?
>
> Juror: [Nods head].

Following the foregoing exchanges, the trial court denied Mr. Turner's challenge for cause of Mr. Taliancich.

On appeal in this case, Mr. Turner claims the trial court erred by simply accepting Mr. Taliancich's claim he could be fair and impartial, given his familiarity with the two narcotics agents who testified in this case and the number of his family members and friends employed by law enforcement. Generally, an individual who will unquestionably credit the testimony of law enforcement officers over that of defense witnesses is not competent to serve as a juror. *State v. Kang*, 02-2812, p.4 (La. 10/21/03), 859 So. 2d 649, 652, citing *State v. Allen,* 380 So.2d 28, 30 (La.1980). However, a mere relationship between a prospective juror and a law enforcement officer is not of itself grounds to strike the juror for cause. Additionally, a prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a trial judge's refusal to excuse him on the grounds of impartiality is not an abuse of discretion, if after further questioning the potential juror demonstrates a willingness and ability to decide the case impartially according to the law and evidence. *Kang,* 02-2812, p. 5, 859 So. 2d at 653. However, a challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied. *Id.*

The party seeking to exclude a juror for cause has the burden of demonstrating, through questioning, that the juror lacks impartiality. *State v. Nellum*, 13-0360, p.17-18 (La. App. 4 Cir. 2/12/14), 136 So. 3d 120, 131, citing *State v. Taylor,* 99-1311, p. 13 (La. 1/17/01), 781 So.2d 1205, 1218.

In *State v. Lee,* 93-2810 (La. 5/23/94), 637 So.2d 102, the Louisiana Supreme Court reiterated the broad discretion afforded trial courts' rulings on motions to strike jurors for cause because of their ability to get a first person impression of prospective jurors during *voir dire*. The *Lee* court characterized the jurisprudence as follows:

> We have repeatedly held that a trial judge is vested with broad discretion in ruling on challenges for cause, and only where it appears, upon review of the voir dire examination as a whole, that the judge's exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to the accused, will this Court reverse the ruling of a trial judge....

Lee, 93-2810 at p. 9, 637 So.2d at 108 (quoting *State v. Passman,* 345 So.2d 874, 880 (La.1977)).

> This standard is utilized since the trial court has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning. [*State v.*] *Anthony,* 98–0406 at p. 25, [(La.4/11/00),] 776 So.2d [376,] at 392. Such expressions and intonations are not readily apparent at the appellate level where a review is based on a cold record.

Lee, 93-2810 at p. 9, 637 So.2d at 108.

Mr. Turner in this case has failed to show any abuse of discretion under La. C.Cr.P. art. 797. The trial judge questioned Mr. Taliancich as to whether his acquaintance or relationship with the testifying narcotics agents in this case would cause him to be unfair or partial to anyone in connection with this case. The juror answered, "I'll be alright." Next, the judge asked Mr. Taliancich: "Would you be able to weigh their testimony as any other person who came to testify - - that is, as if you did not know them at all?" Mr. Taliancich nodded his head affirmatively. Finally, the judge questioned him: "You would not give their testimony any

greater weight?" Mr. Taliancich replied: "Correct." Moreover, when asked whether he had family members or friends employed by law enforcement, Mr. Taliancich responded that his father-in-law, step-mother-in-law, and many of his friends were employed by the Plaquemines Parish Sheriff's Office. The judge queried whether any of the aforementioned connections would impact in any way his ability to be fair and impartial. Mr. Taliancich responded "No."

In this case, the entirety of the *voir dire* transcript on this issue shows that Mr. Taliancich indicated he could be fair and impartial notwithstanding the fact he knew the narcotics agents who testified in this case and the number of his friends and family employed by the Plaquemines Parish Sheriff's Office.

Based upon Mr. Taliancich's responses that neither his acquaintance with Agents Johnson and Daigle, nor his friendship with, and familial ties to, other Plaquemines Parish law enforcement personnel would not affect his impartiality in this case, we do not find that the trial judge erred by denying Mr. Turner's challenge for cause to remove this prospective juror. This assignment is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 1

In the first of two *pro se* assignments, Mr. Turner contends he was denied effective assistance of counsel. He claims the Plaquemines Parish District Attorney had a "personal interest" in his case, and defense counsel was ineffective in failing to file a Motion to Recuse the Plaquemines Parish District Attorney's Office, which had counsel done so, the results of the proceedings would have been different.

To buttress his "personal interest" claim, Mr. Turner maintains:

> . . . [he] was prosecuted in docket numbers 13-0687, 13-4170 and 13-4174 in relation to possession of marijuana (2nd offense), resisting an officer (2 counts), possession with intent to distribute cocaine, and aggravated second degree battery. The district attorney's office offered [the defendant] a plea agreement, which in exchange for his pleas of guilty he would be sentenced to serve a total of ten (10) years at hard labor in relation of each of the three docket numbers. [The defendant] accepted the terms of the plea agreement, only to have the district attorney come back a little over one month after and file another bill of information, this time charging [the defendant] with four (4) counts of distribution of cocaine in regard to docket number 14-2794. Obviously, the district attorney had a score to settle with [the defendant] and he had a personal interest in the instant convictions.

Generally, a claim of ineffective assistance of counsel is "relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal." *State v. Mercadel,* 12-0685, p. 16 (La. App. 4 Cir. 7/24/13), 120 So.3d 872, 882.

The Louisiana Supreme Court has held that the two-part analysis of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), relative to ineffective assistance of counsel claims, applies to challenges to guilty pleas based upon ineffective assistance of counsel. *State v. Washington,* 491 So.2d 1337, 1338 (La.1986); *see also State v. West,* 09-2810, p. 1 (La.12/10/10), 50 So.3d 148, 149. Generally, to attain relief in an ineffective assistance of counsel claim, a Mr. Turner must show 1) that counsel's performance was deficient, and 2) that the deficiency prejudiced Mr. Turner. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. Counsel's performance is deficient when it can be shown that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed to Mr. Turner by the Sixth Amendment." *Id.* Counsel's deficient performance will have prejudiced Mr. Turner if he shows that the errors were so serious as to deprive him of a fair trial. *Id.* To carry his burden, Mr. Turner "must show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 697, 104 S.Ct. 2052. We do "'not sit to second-guess strategic and tactical choices made by trial counsel,'" *State v. Hoffman,* 98-3118, p. 40 (La. 4/11/00), 768 So.2d 542, 579 (quoting *State v. Myles,* 389 So.2d 12, 31 (La. 1979)), and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. We grant this deference because "the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Premo v. Moore,* 562 U.S. 115, 122, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052; *State v. Jenkins*, 2014-1148, p.8-9 (La. App. 4 Cir. 5/6/15), 172 So. 3d 27, 35-36

"It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland,* 466 U.S. at 693, 104 S.Ct. 2052. Claims "alleging a deficiency in attorney performance are subject to a general requirement that the [petitioner] affirmatively prove prejudice." *Id.* at 693, 104 S.Ct. 2052. See also *Williams v. Taylor,* 529 U.S. 362, 394, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("The petitioner bears the 'highly demanding' and

'heavy burden' in establishing actual prejudice."). "The [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. "[I]t is not the State's burden to disprove conjectured theories of prejudice." *Jenkins,* 14-1148, p. 9, 172 So.3d at 35-36.

Other than his self-serving conclusion "that the district attorney had a score to settle with [the defendant], and he had a personal interest in the instant convictions," Mr. Turner offers no proof of his claims of ineffective assistance of counsel, nor does the record support Mr. Turner's claim. The record indicates Mr. Turner plead guilty in the cases bearing docket numbers 13-0687 (possession of marijuana), 13-4170 (possession with intent to distribute cocaine, obstruction of justice and resisting an officer with force) and 13-4174 (second degree battery). Those cases, which involved crimes occurring on August 4, 2012, May 1, 2013 and October 23, 2012, respectively, were unrelated to the charges in this case, and the pleas were accepted by Mr. Turner with no considerations or restrictions on the State's right to prosecute the present charges. "[I]t is not the State's burden to disprove conjectured theories of prejudice." *Jenkins,* 14-1148, p. 9, 172 So.3d at 35-36. This *pro se* assignment has no merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 2

In his second *pro se* assignment of error, Mr. Turner acknowledges that his forty year sentence as a third felony offender is within statutory limits; however, he claims the sentence is constitutionally excessive under the facts of this case.

In this case, the record shows Mr. Turner was sentenced as a third felony offender based upon four convictions for distribution of cocaine, in violation of La.

R.S. 40:967(B)(4)(b). La. R.S. 15:529.1 A(3)(a) provides that if the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction. Therefore, as a third felony offender, Mr. Turner was exposed to a sentence of imprisonment at hard labor for not less than twenty nor more than sixty years, with the first two years of the sentence being without benefit of parole, probation or suspension of sentence. Mr. Turner herein received mid-range sentences of forty years.

At sentencing on the multiple bill, the trial judge observed Mr. Turner had five felony convictions prior to the four charges of distribution of cocaine in this case, and noted:

> . . . through the proceedings presented today . . . [the court] is aware and takes judicial notice of your – your prior convictions in this court, which have been evidenced in the multiple offender proceeding . . . and in considering my decision in that matter, notes that you have served prior bouts, stints in the Department of Corrections. It looks like the longest time was a seven year sentence . . . [t]wo years were without benefit of parole, probation, or suspension of sentence.
>
> Ironically, the sentences appear to get less serious with the later convictions. I'm not familiar with those. However. . . the record will reflect that I was counsel of record for you [on two of the convictions] . . . and thought that that was a serious sentence at the time and that it would send a strong message to you.
>
> With your subsequent convictions in the . . . other matters, upon recollection of - - of those cases that dated back to . . . 2000. . . and your current conviction and the conviction that occurred after the offenses that you're here for today, but before you were arrested, which

> included crime of violence, I reflect and think that the message wasn't made clear to you; that you are just determined to do what you are going to do in the street; and that you're not capable of rehabilitation, having served sentences in the Department of Corrections several times.
>
> . . . this Court is aware, any amount of time that I give you is ultimately going to be calculated by someone in the Department of Corrections. So, without having a better idea of what time you're actually going to serve so I can keep you off the street the Court has no other remedy except to sentence you to a harsh sentence.

As stated previously, although the trial judge informed all parties of his prior representation of Mr. Turner prior to trial and hearings, we find the trial judge's bias comments on record regarding his past knowledge and experiences with Mr. Turner create a possible conflict of interest that warrants a recusal in this matter. Thus, as stated previously, we vacate Mr. Turner's sentence and remand this matter to the trial court to hold a recusal hearing to determine whether the recusal of the presiding judge is warranted. For these reasons, we hereby affirm Mr. Turner's conviction, vacate his sentence, and remand the matter for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART; REMANDED