STATE OF LOUISIANA	*	**NO. 2017-KA-0469**
VERSUS	*	
		COURT OF APPEAL
SAMUEL J. BARKER, JR	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 525-837, SECTION "I"
Honorable Karen K. Herman, Judge
* * * * * *

Judge Daniel L. Dysart
* * * * * *

(Court composed of Judge Edwin A. Lombard, Judge Daniel L. Dysart, Judge Paula A. Brown)

LOMBARD, J., CONCURS IN THE RESULT

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AFFIRMED

MAY 30, 2018

Defendant, Samuel Barker, was charged on several felony counts and two misdemeanor counts arising out of a series of incidents which occurred in June, 2015. Following a simultaneous jury trial (on felony charges) and bench trial (on misdemeanor charges), Samuel Barker was found guilty on all but one of those counts (and guilty of a lesser included offense on one charge). After he was sentenced, Mr. Barker was then found to be a multiple offender and re-sentenced. Mr. Barker has appealed his conviction and sentences. In addition to his counseled appellate brief, Mr. Barker has filed several *pro se* briefs of his own.

As discussed more fully herein, we find that Mr. Barker was properly convicted on all counts and we affirm his convictions and sentences.

FACTS AND PROCEDURAL HISTORY

On August 7, 2015, Samuel Barker was charged by bill of information with nine counts:

- Count 1: simple burglary of a structure ("3207 Dublin Street, belonging to Golean's Reception Hall"; hereafter referred to as "Golean's") occurring on June 15, 2015;

- Count 2: possession of burglary tools ("a screwdriver and/or a claw type hammer and/or channel lock pliers and/or needle nose pliers") occurring on June 14, 2015;

- Count 3: simple criminal damage to property (a television and/or D.J. equipment and/or a wall belonging to Golean's), where the damage amounted to more than $500.00 and less than $50,000.00 occurring on June 14, 2015;

- Count 4: simple burglary of a shed (located at 1116 Napoleon Avenue) occurring on June 9, 2015;

- Count 5: theft of a computer valued at $750.00 or more but less than $1500.00 (belonging to Yolanda Parker) with the intent to permanently deprive Yolanda Parker of it occurring on June 9, 2015;

- Count 6: theft of a computer valued at $750.00 or more but less than $1500.00 (belonging to Notre Dame Seminary) with the intent to permanently deprive Notre Dame Seminary of it occurring on June 13, 2015;

- Count 7: simple criminal damage to property (a table belonging to Notre Dame Seminary) with damage amounting to less than $500.00 occurring on June 13, 2015;

- Count 8: attempted simple burglary of an inhabited dwelling (located at 8203 Oleander Street) occurring on June 14, 2015;

- Count 9: attempted simple burglary of an inhabited dwelling (located at 8201 Oleander Street) occurring on June 14, 2015.

At his arraignment on August 12, 2015, Mr. Barker entered a plea of not guilty as to all charges. Between the date of the arraignment and Mr. Barker's trial, Mr. Barker filed no less than sixty-five *pro se* written notices, statements, pleadings and motions.[1]

[1] These include, but are certainly not limited to, motions: to dismiss the public defender assigned to him; to sever the charges against him; to suppress the evidence and statements; to recuse the court; for habeas corpus; to dismiss the prosecution; to object to court-ordered psychiatric evaluation; for change of venue; to quash the prosecution; for production of documents and information; and for expedited bond reduction hearing.

The record further reflects that, on April 14, 2016, Mr. Barker notified the court (Section "C") that he filed a civil lawsuit naming the judge and his appointed counsel as defendants, alleging his rights had been violated due to the admissions of the Orleans Public Defenders in section 'K' that they could not provide constitutional representation due to their high volume of cases. He

A trial on all counts took place on November 6, 2016. On November 9, 2016, the jury returned verdicts of guilty on all charges except count 8 (attempted simple burglary of an inhabited dwelling), for which the jury found Mr. Barker guilty of the lesser included offense of criminal trespass, a violation of La. R.S. 14:63. The following day, the court found Mr. Barker guilty of possession of burglars' tools, and not guilty of simple criminal damage to a table.

Mr. Barker's counsel then filed a Motion for Post Judgment Verdict of Acquittal or in the Alternative a New Trial.[2] The motion was denied after a hearing on January 6, 2017. On the same day, Mr. Barker was sentenced to twelve years imprisonment at hard labor on counts 1 and 4; six months at Orleans Parish Prison on counts 2 and 8; two years imprisonment at hard labor on count 3; ten years imprisonment at hard labor on counts 5 and 6; and six years imprisonment at hard labor on count 9. He objected to both the sentences and the sentencing procedure. At the sentencing hearing, the State noticed its intent to file a multiple offender bill.

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also filed motions to dismiss his public defender and to recuse the court; both motions were granted the same day.

Mr. Barker's case was then transferred to section "I" on April 20, 2016, and on May 24, 2016, the court appointed outside conflict counsel. Mr. Barker subsequently added his conflict counsel and Judge Herman to his civil lawsuit and moved the court to dismiss appointed counsel and to recuse Judge Herman; both motions were denied.

While the record contains copies of several *pro se* applications for supervisory writs with this Court, the only writ actually filed by Mr. Barker in this Court pertained to the trial court's denial of his motion to dismiss his counsel and to recuse the court. The writ application was denied by this Court on October 26, 2016. *State v. Barker*, 16-1066 (La. App. 4 Cir. 10/26/16), *unpub*.

[2] Mr. Barker, too, filed several pleadings post trial, including: Post Trial Motion and Request for Review of Judicial Process with Contradictory Hearing and Request for Declaratory Opinions on Same From All Judges; Request for Pre-Sentence Report; Request for Judgment Denying and Finding Motion Moving For Mistrial as Meritless and Notice of Intent to Appeal with Request for Stay; Additional Reasons for Mistrial and Objection to Preserve Appeal; Supplement to Motion for Judgment of Acquittal and Motion for Mistrial; Motion for Judgment of Acquittal; Motion Moving for Mistrial.

A multiple bill offender hearing was held on July 13, 2017, after which Mr. Barker was adjudicated a fourth felony offender. The court then sentenced Mr. Barker as a fourth felony offender to life imprisonment at hard labor with no benefit of parole, probation, or suspended sentence on both counts of simple burglary (counts 1 and 4), and to twenty years imprisonment at hard labor with no benefit of parole, probation, or suspended sentence on the remaining felony counts of simple criminal damage to property, attempted simple burglary of an inhabited dwelling, and both counts of theft (Counts 3, 5, 6, and 9).

ERRORS PATENT

As is our practice, we have reviewed the record for errors patent,[3] and have detected several patent errors.

First, La. C.Cr.P. art 873 requires that, for a felony conviction where a motion for new trial has been filed, "sentence shall not be imposed until at least twenty-four hours after the motion is overruled," unless a defendant "expressly waives a delay . . . or pleads guilty," in which case, the "sentence may be imposed immediately."

The record of this matter reflects that the court failed to observe the twenty-four hour delay between the denial of a motion for a new trial and sentencing, as required in La. C.Cr.P. 873. On the morning of the sentencing hearing, Mr. Barker's counsel filed a motion for a judgment of acquittal or in the alternative a new trial. The trial court heard argument on the motions and denied both. It then proceeded to sentence Mr. Barker.

[3] *See State v. Hawkins*, 16-0458, p. 13 (La. App. 4 Cir. 5/17/17), 219 So.3d 1133, 1144.

Our jurisprudence indicates that a defendant is not prejudiced by a court's failure to observe the delay in connection with the original sentencing when a defendant is subsequently adjudicated as a multiple offender. *State v. Everidge*, 02-0309, p. 6 (La. App. 4 Cir. 12/11/02), 834 So.2d 1197, 1201; *State v. Carter*, 07-196, p. 13 n.3 (La. App. 5 Cir. 12/27/07), 976 So.2d 196, 204. In such a case, the failure to observe the twenty-four hour period is deemed harmless error. *Id*. Accordingly, in this case, because Mr. Barker was subsequently adjudicated as a multiple offender, we find that Mr. Barker was not prejudiced by the trial court's failure to wait twenty-found hours before sentencing him and further find that the error is harmless.

Second, we note that the trial court's initial sentence on the two counts of theft where the value exceeds $750 but is less than $5,000 was twice the length allowed by statute. La. R.S. 14:67 (B)(3) provides that when the "taking amounts to a value of one thousand dollars or more, but less than a value of five thousand dollars, the offender shall be imprisoned with or without hard labor, for not more than five years, or fined not more than three thousand dollars, or both." The trial court, here, sentenced Mr. Barker to ten years at hard labor for these counts. It appears that the trial court mistakenly sentenced Mr. Barker under subpart (B)(2) of La. R.S. 14:67 which provides a maximum sentence of ten years imprisonment with or without hard labor, where the value of the taking exceeds $5,000.

While there was clearly error on the trial court's part as to this sentence, we find no reversible error. Because the trial court subsequently imposed the minimum habitual offender sentence as allowed by law on those counts, there is no prejudice to Mr. Barker and we find the error to be harmless.

Third, there is no indication in the minute entry or the transcript of the multiple offender proceeding that the district court vacated the original sentences before imposing sentence pursuant to the multiple offender statute. While some cases have held that the failure to vacate the original sentence warrants the setting aside of the multiple offender sentence and a remand for resentencing,[4] more recent cases have held that "where it is clear that the district court intended to replace the original sentence with the multiple offender sentence, any failure of the district court to vacate the original sentence before imposing the multiple offender sentence does not affect a defendant's substantial rights." *State v. Wilson*, 02-0776, pp. 4-5 (La. App. 4 Cir. 1/22/03), 839 So.2d 206, 210, citing *State v. Norwood*, 01-0432, p. 4-5, (La. App. 4 Cir. 8/29/01), 802 So.2d 721, 724-725, interpreting *State v. Mayer*, 99-3124 (La.3/31/00), 760 So.2d 309, 816 and citing *State v. Jackson*, 00-0717 (La. App. 1 Cir. 2/16/01), 814 So.2d 6. In *Wilson*, this Court noted:

> . . . [T]he transcript herein suggest[s] that the district court intended for the original two-year sentence to be replaced by the habitual felony offender sentence of life imprisonment; as evidenced by this colloquy:
>
> > The Court: Based on the submissions by the State the Court at this time is going to find that under Louisiana Revised Statute 15:529.1 that the defendant, Charles Wilson, is a fourth felony offender, and with two of the predicate offenses being possession with intent to distribute cocaine. Ms. Renfroe, are you now ready for sentencing?
> >
> > Ms. Renfroe: Yes, your Honor.
> >
> > The Court: Since this is a fourth felony ..., at this time Mr. Wilson I am going to sentence you to life imprisonment without benefit of parole, probation or suspension of sentence for the remainder of

[4] *See State v. Moffett*, 572 So.2d 705 (La. App. 4 Cir.1990).

> your natural life. I'm sorry to have done that but the statute mandates that.

Id., 02-0776, pp. 5-6, 839 So.2d at 210. The Court then held that the "failure of the district court to vacate Wilson's original sentence was an oversight, and the district court intended for the multiple offender sentence to replace the original sentence." *Id*., 02-0776, p. 7, 839 So.2d at 210. The Court likewise, noting that the defendant "did not object to this oversight at the multiple bill hearing and does not argue the point on appeal," concluded that "any failure of the district court to vacate Wilson's original sentence before imposing the multiple offender sentence did not affect his substantial rights." *Id*., 02-0776, p. 6, 839 So.2d at 210-11.

In the instant case, the record at Mr. Barker's original sentencing hearing indicates that the court intended to vacate his initial sentence and replace it with the multiple offender sentences, as evidenced by the court's response to his inquiry regarding sentencing guidelines: "I'm going to clarify [Mr. Barker's] sentence at the time of multiple bill hearing. This is just a preliminary sentence, prior to review of multiple bill. This is not the final sentence to be imposed in this section of court."

Accordingly, we do not find that Mr. Barker's substantial rights have been violated either by the initial illegal sentence on the counts of theft, or by the court's failure to formally vacate the initial sentences. To the contrary, the record reflects that the trial court intended to vacate all of the previous sentences and impose the multiple bill enhancements on all of the convictions.

We now turn to Mr. Barker's assignments of error.[5]

[5] We address both Mr. Barker's counseled assignments of error and those in his *pro se* briefs, although assignment of errors 8-19 address arguments raised solely by Mr. Barker *pro se*, which had not been not raised in his counseled brief.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, Mr. Barker maintains that the evidence presented at trial was insufficient to support convictions for three counts: count 5 (theft of Yolanda Parker's computer), count 6 (theft of a computer from Notre Dame Seminary) and count 9 (attempted simple burglary of an inhabited dwelling located at 8201 Oleander Street). His argument centers on his contention that (a) no one testified who could place Mr. Barker in Ms. Parker's "office or in possession of Ms. Parker's computer;" (b) no one testified that Mr. Barker was seen in the vicinity of the area where the computer was taken at Notre Dame; and (c) no one testified to having seen Mr. Barker attempting to gain entry into the property on Oleander Street.

This Court reiterated the applicable standard of review for sufficiency of the evidence challenges in *State v. Rapp*, 14-0633, pp. 5-6 (La. App. 4 Cir. 2/18/15), 161 So.3d 103, 108, quoting *State v. Marcantel*, 00-1629, p. 8 (La. 4/3/02), 815 So.2d 50, 55:

> The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. *See* LSA- C.Cr.P. art. 821; *State v. Hampton*, 98-0331, p. 13 (La.4/23/99), 750 So.2d 867, 880, *cert. denied*, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999). Pursuant to *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the standard of review is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. Louisiana Revised Statute 15:438 provides that the fact finder, when analyzing circumstantial evidence, must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. *State v. Mitchell*, 99-3342, p. 7 (La.10/17/00), 772 So.2d 78, 83.

Our jurisprudence also indicates that "[i]n the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion." *State v. Williams*, 11-0414 p. 18 (La. App. 4 Cir. 2/29/12); 85 So.3d 759, 771. Moreover, "[u]nder the *Jackson* standard, the rational credibility determinations of the trier of fact are not to be second guessed by a reviewing court" because "a factfinder's credibility determination is entitled to great weight and should not be disturbed unless it is contrary to the evidence." *Id.*

With these principles in mind, we turn to the three convictions for which Mr. Barker, in his counseled brief, claims there was insufficient evidence to support his convictions.

Counts 5 and 6

The crime of theft is defined by La. R.S. 14:67 (A) as follows:

> Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

The following essential elements must be proven by the State: "(1) that the defendant misappropriated or took by means of fraudulent conduct, practices, or representations; (2) a thing of value; (3) that belonged to another; and (4) that the defendant had the intent to deprive the owner permanently of that which was misappropriated or taken." *State v. Biddy*, 13-0356, p. 12 (La. App. 4 Cir. 11/20/13), 129 So. 3d 768, 776-77. (citation omitted).

Theft of Ms. Parker's computer

Yolanda Parker, an administrative assistant and substitute teacher at Watson Memorial Teaching Ministries, whose duties included the welcoming of visitors to the ministry, testified regarding the theft of her computer on June 9, 2015. According to Ms. Parker, the day of the theft was a Tuesday, a day on which the ministry regularly hosted a bible study at 6:30 p.m. While preparations were taking place for the bible study and a meal following it, Ms. Parker saw an unfamiliar man and she invited him into her office (where her laptop computer, valued at between $800 and $900, was located). She asked him if he needed anything to which he replied that he needed food and money. Ms. Parker advised him that the ministry did not have any money, but she invited him to stay for bible study and the meal.

Feeling that this man had an "end game" and that he "looked like he was trying to get something," she escorted him out of her office and offered him a seat. In such a situation, "[w]hen [she] know[s] that somebody is playing games, [she would] get one of the elders of the church to come in." She then left for a short period (between five and fifteen minutes) and when she returned, both the man and her laptop computer were gone. The following day, Ms. Parker contacted the New Orleans Police Department. In a recorded 911 call which was played for the jury, Ms. Parker reported that her computer had been stolen and she gave a description of the man who had come to the ministry the previous day, who she suspected had stolen her computer. A detective came to the ministry and showed her a picture which she positively identified as the man who had been in her office on June 9.

While Ms. Parker testified that she did not actually see the man take her computer, she confirmed "that he was gone and [her] laptop was gone and he was

near the vicinity of [her] property" during the time frame her computer disappeared. She likewise testified that she believed the man had taken her computer because "he wasn't in there for the right reasons," she suspected he was "looking to scam" and because she knew all of the fifteen to twenty regular attendees of the bible study. Moreover, as Ms. Parker was investigating her missing laptop, she learned that the man had approached the ministry earlier that day through the back door of the school's kitchen seeking food and "looking to take something else," which aroused her suspicions.

Tiffany Watson, a director at Watson Ministries, also testified about the events of June 9, 2015. That day, while she was taking out the trash from the kitchen, a man approached her and asked her for money. She advised him that she did not have any, but invited him to return that evening for bible study. The man left, and thirty minutes later, he returned and asked if he had left his wallet. He then asked if he could look around, and Ms. Watson advised that he could not and she did not allow him into the ministry.

Ms. Watson next saw the man later that evening around the time of the bible study. At that time, Mr. Barker was in the hallway, approximately six or seven feet from Ms. Parker's office. Later that evening, she learned that Ms. Parker's computer was missing when Ms. Parker asked if she had moved it. Both she and Ms. Parker searched for the computer but never located it. Ms. Watson concluded that the computer had to have been taken by the man she had seen twice that day after she checked to see that he had not gone to the bible study. She she testified that "he was really the only person that I figured would take it because we've never had those issues before." She indicated:

> I made an assumption that he took it based on, first of all, that morning coming back saying he left his wallet, that kind of triggered something, and then later when I saw him kind of perusing in the hall, and then did not see him after that 30 seconds or less of seeing him again, and then within minutes or so Yolanda's laptop is missing. We have been there over 20 years and we are pretty sure that – I mean stuff just doesn't come up missing.[6]

Ms. Watson later spoke to a police officer who showed her a picture and she identified that person as the man who she had seen that day.

Mr. Barker contends that, because the State presented neither fingerprint evidence nor eyewitness testimony of the theft, the State failed to prove his identity as the thief, asserting that anyone else in the building could have stolen the computer. We find no merit to this argument. When "circumstantial evidence forms the basis of a conviction, such evidence must consist of 'proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience.'" *State v. Castro*, 16-0284, p. 7 (La. App. 4 Cir. 12/14/16), 206 So.3d 1059, 1064, quoting *State v. Shapiro*, 431 So.2d 372, 378 (La. 1982).

Here, the computer was never recovered or located after it was discovered missing, and neither Ms. Parker nor Ms. Watson had moved, taken, or knew the location of the computer. On this basis, reasonable jurors could have found that the computer had been taken, without Ms. Parker's consent, by someone without authority to possess it, who had the intent to deprive Ms. Parker of her computer permanently.

[6] Ms. Watson, feeling responsible for the loss of Ms. Parker's computer (she testified that she "had let the guy in, got water, got familiar with him, I guess, invited him back, and then her property ended up missing"), replaced the computer at a cost of $800.

We further find that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved that it was Mr. Barker who had taken the computer.

Both Ms. Watson and Ms. Parker identified Mr. Barker as the man they had encountered at Watson Ministries from the photograph shown to them by a police officer.[7] Although neither witness had the opportunity to identify Mr. Barker during trial due to his earlier demand to exit the courtroom, the jurors viewed the same photograph the witnesses had seen and clearly made their own identification of him, as the jurors had seen Mr. Barker during voir dire and opening statement.[8]

According to both Ms. Parker and Ms. Watson, Mr. Barker was the only person that evening who neither knew, and who could not be accounted for immediately following the theft. According to Ms. Watson's testimony, she had seen Mr. Barker alone in the hallway near Ms. Parker's office just before the bible study class began and within minutes of the theft. Similarly, Mr. Barker had been inside Ms. Parker's office and Ms. Parker left him alone while she went to find a church elder. Upon her return shortly thereafter, neither her computer nor Mr.

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[7] As will be discussed *infra*, the photograph shown to both Ms. Parker and Ms. Watson was obtained by New Orleans Police Department ("NOPD") Detective Michael DiMarco, who investigated a "string of thefts and burglaries" in June, 2015. The photograph was a still shot of Mr. Barker which was taken from some surveillance video dated June 9, 2015 of property located at 1116 Napoleon Avenue (Count 4). We note that the surveillance video, itself, was shown to the jury.

[8] The record reflects that Mr. Barker voluntarily absented himself from the trial. At the close of opening statements, Mr. Barker moved for a mistrial, which the trial court indicated was a violation of an in-chambers hearing at which Mr. Barker "acknowledged he understood" that, in order for him to act as "hybrid counsel" on his own behalf, he had "to remain within the confines of what he is legally entitled to do . . ., that is, argue on his behalf as to the law and the evidence and facts and testimony that will be elicited during this case." The trial court then noted Mr. Barker had "forfeited [his] ability to proceed as hybrid counsel" and he would thereafter be represented by his trial counsel. After some discussion, Mr. Barker chose to remove himself from the courtroom. The trial court offered to allow him "to continue to listen to the proceedings against [him] in [the] law clerk's office, where there is a PA system, in the presence of a deputy and the law clerk so [he could] continue to at least hear what is happening in [the] proceedings." However, Mr. Barker declined this offer.

Barker could be located. On this basis, the State presented sufficient evidence to support the jury's finding that Mr. Barker was the person who stole Ms. Parker's computer. It is clear that the jury rejected as unreasonable Mr. Barker's hypothesis that someone else had stolen the computer.

We also note that the jury watched the surveillance video of the property located at 1116 Napoleon Avenue (see footnote 6), which showed Mr. Barker taking a piece of equipment from that residence, and also heard testimony about the theft of another computer from a religious establishment (discussed, *infra*), after Mr. Barker obtained entry under false pretenses and after having his request for money denied. While this other crimes evidence may not have been admissible to demonstrate Mr. Barker's bad character, it reasonably indicates Mr. Barker's identity as the perpetrator, his plan to gain entry onto private property, and his intent to commit a theft thereon. (La. C.E. art. 404 B(1)).[9]

Thus, viewing the evidence in the light most favorable to the prosecution, we find the direct and circumstantial evidence adduced at trial to be sufficient for the jury's finding Mr. Barker guilty of the theft of Ms. Parker's computer.

Theft of the computer from Notre Dame Seminary

Like his argument with respect to the theft of Ms. Parker's computer, Mr. Barker contends that, because the State presented neither fingerprint evidence nor eyewitness testimony of the theft, the State failed to prove his identity as the thief, asserting that anyone else in the building could have stolen the computer. We disagree. After reviewing the entirety of the record, as we found in *Castro*, 16-

[9] La. C.E. art. 404 (B)(1) provides, in pertinent part that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of

0284, p. 7, 206 So.3d at 1064, here, the State presented "proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience." (internal quotation omitted).

The testimony adduced at trial reflects that on June 13, 2015, Jennifer Prather, a Notre Dame Seminary student, observed a man ringing the doorbell of the seminary while she was on her lunch break.[10] She opened the door and the man advised that he was there to meet with Father (James) Warner. She advised the man that Father Warner was not present, to which the man responded that he was fifteen minutes early and that he would call Father Warner. She then left the man alone in the lobby as she had a class to attend. When shown video surveillance of the seminary during her testimony, Ms. Prather confirmed that it depicted the events of June 13, 2015 as well as the man she indicated had come to meet with Father Warner.

Father Warner, who is the Director and President of the Notre Dame Seminary, testified that, on the morning of June 13, 2015, he was at a wedding. Upon his return from the wedding, he observed that a sealed door had been knocked over, the sheetrock wall had been "pushed in" between the mailroom and his secretary's office, and file cabinets and papers had been knocked down. There was debris on the floor and his secretary's office was disheveled.

The following Monday, it was discovered that a computer from one of the classrooms had been stolen; it had been chained to a table and it had been "cut and

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motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ."

[10] June 13, 2015 was a Saturday. According to Ms. Prather, who was pursuing a master's degree in theological studies, Notre Dame Seminary offers classes on Saturdays for working students.

removed."[11] Father Warner testified that the table to which the computer had been chained was located in the classroom nearest to his office.

Father Warner determined that the theft of the computer occurred between the time that he had left in the morning and his return to the seminary that afternoon, or a "six-, seven-hour window." When he returned to the seminary, no one was present, as classes had already ended (there had only been the Saturday morning class). Father Warner testified that he had been at the seminary before he attended the wedding and nothing had been damaged. Importantly, he was not expecting any visitors to the seminary that day.

Father Warner and the director of the facility looked at surveillance video from that day, which was shown to the jury, and noted the man about whom Ms. Prather had testified. Father Warner was well familiar with the man, having encountered him on several occasions. According to Father Warner, in about mid-May, the man "kept coming during business hours to the front door" and "asking for assistance." A receptionist regularly advised him that the seminary did not provide assistance but that there were places where he could receive some assistance. The man "was becoming very persistent, agitated." The receptionist pointed him out to Father Warner, who observed the man from a window.

A few days before June 13, 2015, Father Warner and another priest were at a nearby restaurant, when the same man approached him, advised that his car was around the corner, that he was stranded and asking for money. Father Warner, having "seen him already on occasion," told the man that he was aware that he "come to the seminary many times before" and had "been around." He then

[11] The State introduced the computer sales receipt showing the cost was $1,235.88 at the time it was purchased.

advised the man that he had "been instructed to where assistance can be given and there is no reason for [him] to come back to the seminary."

Father Warner was certain that the man who approached him was the same man depicted in the surveillance video.

NOPD Detective Sam Jennings testified that he was dispatched to investigate a possible theft at Notre Dame Seminary. He spoke with Father Warner, who advised him that an older, white, male had come to the seminary on several occasions seeking money but Father Warner had refused and asked the man not to return.

According to Det. Jennings, "[a]fter he had been barred from the property," he returned on June 13, 2015. He spoke with a female student, claiming he was there to see Father Warner and the student allowed him into the building. The man then entered a restroom and forced open a door which led to the secretary's office. From there, he entered a classroom from which a computer had been stolen, as evidenced by a "cut cable" which had previously secured the computer to the table. Det. Jennings testified that he viewed surveillance footage taken from the Seminary which showed Mr. Barker arriving at 12:39 pm and leaving at 1:13 pm..

As this evidence establishes, Mr. Barker was seen on the surveillance video attempting to gain entry into the seminary on Saturday, June 13, 2015. Father Warner testified that he learned that the computer was missing on Monday, two days later and that the cord which secured the computer to the classroom table had been cut and the computer had not been recovered. Clearly, a rational juror could have concluded the computer had been stolen. We further find that, based on the totality of the circumstances, a rational juror could find Mr. Barker guilty of the theft of the computer from the seminary.

As the evidence at trial established, Mr. Barker had come to the seminary on multiple occasions prior to June 13, 2015, seeking assistance. On each occasion, a receptionist informed Mr. Barker that the seminary did not provide assistance and advised him that there were other places he could seek assistance. A couple of days before June 13, 2015, Mr. Barker confronted Father Barker and asked for money. Father Warner refused his request, advised him that he had seen him at the seminary and asked him not to come to the seminary again. Nevertheless, Mr. Barker returned to the seminary, asked Ms. Prather for Father Warner, suggesting by his comment (that he was "fifteen minutes early") that he had a scheduled meeting with Father Warner. As Father Warner indicated, he was at a wedding on the morning of June 13, 2015 and had no scheduled appointments that day. On this basis, a reasonable juror could have found that Mr. Barker, having repeatedly been refused financial assistance from the seminary, used a subterfuge to gain access to the seminary.

While it was not until two days later, Monday, June 15, 2015, that it was discovered that the computer was missing, Father Warner found that the wall had been pushed in, file cabinets overturned and his secretary's office disheveled on the afternoon of June 13, 2015. Any rational juror could conclude from these facts that the theft of the computer had occurred on June 13, 2015. Likewise, a rational juror could easily have concluded that a stranger to the seminary forced open the sealed door, causing the damage to the wall, and "ransacked" the secretary's office in search of money or something of value, and continued to the room next door and stole the computer.

Considering the record as a whole, it is clear that the jury found Mr. Barker guilty of theft based on the circumstantial evidence presented and the similarity of

the thefts at the Watson Memorial Teaching Ministries and Notre Dame Seminary: neither building was open to the general public, Mr. Barker had visited each building prior to the disappearances of the computers asking for money and using a ruse to gain entry (or in the case of Ms. Parker's computer, attempted to use a ruse – that he had misplaced his wallet – to gain entry into the building), and computers went missing after Mr. Barker's otherwise unauthorized presence.

As we found with respect to the theft of Ms. Parker's computer, the circumstantial evidence in this case consists of "'proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience.'" *Castro*, 16-0284, p. 7 (La. App. 4 Cir. 12/14/16), 206 So.3d at 1064. Furthermore, under La. C.E. art. 401 and our jurisprudence, even if the charges had not been joined, the other crimes evidence would have been admissible in each case and the jury could have formed the same inference of guilt based on the similarity of the two thefts. As the Louisiana Supreme Court indicated in *State v. Rose*, 06-0402, p. 13 (La. 2/22/07), 949 So.2d 1236, 1243, "the State may introduce evidence of other crimes, wrongs or acts if it establishes an independent and relevant reason such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In *Rose*, the Supreme Court found that "t[t]he similar nature of [two] crimes clearly demonstrates an identifiable, concrete, relevant pattern of behavior of the defendant that is so distinctively similar that one may logically infer that the same person committed both crimes. *Id*, 06-0402, p. 16, 949 So.2d at 1245.

In *State v. Taylor*, 01-1638 pp. 10-16 (La. 1/14/03) 838 So.2d 729, 741-745, quoting *State v. Colomb*, 98-2813 p. 3 (La. 10/1/99) 747 So.2d 1074, 1076, the

court held admissible evidence of all crimes the defendant allegedly committed in a spree lasting seven days and traversing several states observing that:

> integral act (*res gestae*) evidence in Louisiana incorporates a rule of narrative completeness without which the state's case would lose its 'narrative momentum and cohesiveness, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.'"

The court continued,

> "under the rule of narrative completeness incorporated into the *res gestae* doctrine 'the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.'"

Id., quoting *Old Chief v. United States*, 519 U.S. 172, 188, 117 S.Ct. 644, 654 (1997).

In the instant case, under the current record and viewing the evidence in the light most favorable to the prosecution, a rational juror could have reasonably concluded that Mr. Barker was guilty of theft of the computer from Notre Dame Seminary.

Count 9

Attempted simple burglary of an inhabited dwelling located at 8201 Oleander Street

The crime of simple burglary of an inhabited dwelling is defined by La. R.S. 14:62.2 as follows:

> Simple burglary of an inhabited home is the unauthorized entry of any inhabited dwelling, house, apartment, or other structure used in whole or in part as a home or place of abode by a person or persons with the intent to

> commit a felony or any theft therein, other than as set forth in R.S. 14:60.[12]

Under La. R.S. 14:27, an attempted crime is defined as:

> Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

The testimony regarding count 9 was elicited primarily from two witnesses, although a recording from a 911 emergency call was played for the jury as well. The first witness to testify was Martin Mitchell who lives at 8203 Oleander St., a duplex. Mr. Mitchell lives in the upstairs unit and his tenant, David Dean, lives in the downstairs unit, 8201 Oleander St.[13] On June 14, 2015, Mr. Mitchell "happen[ed] to just look out the window" and he saw an elderly white haired Caucasian man within the gate of the yard that enclosed the property. Feeling that the man was trespassing, Mr. Mitchell went out the back door to "see what [was] going on." He could then see that the man was inside the screen door, in front of the door to the property. When he asked the man what he was doing, the man mumbled something and left.

Mr. Mitchell's tenant then came to the door, and they noticed that "there were indentations in his door, and in the doorknob, right, like someone was trying to jimmy it." He saw the man across the street where a "meeting hall" is located and he asked the man "what is going on?" His wife then called 911.

[12] La. R.S. 14:60 concerns aggravated burglary and requires a dangerous weapon or a battery.
[13] The tenant's name is actually David Howard, who testified immediately after Mr. Mitchell.

At that point in the trial, the 911 recording was played for the jury.[14] In that call, Jewel Pichon reported an attempted break-in at her neighbor's house and identified the perpetrator as wearing an aqua-blue shirt and khaki pants, and carrying a black suitcase. She stated that the suspect knocked on her door following the attempted break-in at her neighbor's house. She watched the suspect leave her property and enter into the alleyway of 3201 Dublin St. through the back gate. She also stated that the suspect had used a screwdriver in an attempt to "jimmy the locks," and had left it behind at the neighbor's residence.

Within ten or fifteen minutes of the 911 call, the police arrived at the property and Mr. Mitchell and his tenant sent him across the street where they had last seen the man, who was then arrested. The man was brought back for Mr. Mitchell who identified him as the man he had seen on his property. Photographs of the door which had been taken on that day were shown to Mr. Mitchell at trial and he agreed that the damage to the doorknob depicted in the photos was "in the same location as where [he] observed [Mr. Barker]."

Mr. Howard was next to testify. He indicated that he left his home to get something to eat and saw a gentleman "leaning up against the reception hall" (Golean's) across the street. When he returned, he spoke with Mr. Mitchell, who told him that there had been a man knocking on the doors to the property and Mr. Mitchell's wife "had him go downstairs to remove the guy from the premises." Later that afternoon, he saw the same man having been arrested at the reception hall. Mr. Howard confirmed that the property was surrounded by a metal fence and two gates; to get to his front door, one must first open a screen door.

[14] The recording of the 911 call had previously been authenticated by Officer Nicole Jones, the custodian of records for incident recall reports for the NOPD.

According to Mr. Howard, Mr. Mitchell advised him that the man who had been at the door had "had taken off before he could run him off the property." He then examined the front doorknob and felt something sharp on his thumb; he testified that "someone had tried to knock the doorknob off of [his] front door." Mr. Howard was shown photographs of the doorknob. He confirmed that the doorknob was in fact, the doorknob to his home and the damage to it had not been present the last time he had used the door. Mr. Howard did not know Mr. Barker and had never seen him before. He stated that he had not invited Mr. Barker onto his property or inside his residence

In Mr. Barker's counseled brief, there is an assertion that "David Howard did not testify at the trial." It then states that "Martin Mitchell, his landlord and neighbor, told the jury that Mr. Howard said the marks on his doorknob were recent." The limited argument, thus, was that the conviction was based on "uncorroborated hearsay." A counseled reply brief was then filed,[15] which corrected this fact and then made the argument that "[t]he testimony of Mr. Howard and Mr. Mitchell is conflicting as to where Mr. Howard was when Mr. Mitchell confronted Mr. Barker." Mr. Barker then argued that "should Mr. Howard have been in the house as Mr. Mitchell testified, it would mean that he had entered his home without ever noticing that the door had been damaged, indicating the damage could have been done at some earlier time and also not noticed."

[15] The counseled reply brief was filed after Mr. Barker filed a *pro se* brief (entitled "Appellant's Amendment to Appellant Counsel's Original Brief[,] Alternative Clarification [of] Original Brief Errors & Omissions;" hereafter referred to as "Amendment") and raised the issue of the error in the counseled brief. Mr. Barker argues that Mr. Howard testified that he spoke to his neighbor after he returned home from dining, which he asserts contradicts Mr. Mitchell's testimony that Mr. Howard had come out of his door after Mr. Mitchell thwarted the intruder's attempts. Mr. Barker argues that Mr. Mitchell's testimony is therefore unreliable and should be discounted entirely.

We do not view the testimony of Mr. Mitchell and that of Mr. Howard to be so conflicting as to be unreliable. First, while Mr. Howard did not testify that he saw Mr. Mitchell outside in the yard when he returned home, he was not asked this question directly; rather, he simply stated that his conversation with Mr. Mitchell about the attempted burglary occurred at some point after he returned from his meal. Second and more importantly,

> [c]onflicting statements as to factual matters is a question of weight of the evidence, not sufficiency. *State v. Jones*, 537 So.2d 1244 (La. App. 4 Cir.1989). Such a determination rests solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witness. *Id*. A trier of fact's determination as to the credibility of a witness is a question of fact entitled to great weight, and its determination will not be disturbed unless it is clearly contrary to the evidence. *State v. Vessell*, 450 So.2d 938 (La. 1984).

State v. Wells, 10-1338, p. 5 (La. App. 4 Cir. 3/30/11), 64 So.3d 303, 306. "The testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction." *Id*.

In this case, the jury heard Mr. Mitchell testify that he witnessed Mr. Barker enter the screen door of his neighbor's home. After the man "took off" when Mr. Mitchell confronted him, it was discovered that someone had tried to "jimmy" the doorknob of the front door. The jury also heard Mr. Howard testify that the doorknob had not been damaged when he last used it. Likewise, the jury viewed pictures of the damage to Mr. Howard's door hardware and learned that Mr. Barker possessed a hammer, pliers, and several screwdrivers when he was searched

incident to arrest.[16] Additionally, the jury heard evidence that implicated Mr. Barker in several other burglaries and thefts.

Based on the totality of the evidence at trial, and having viewed the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the Mr. Barker guilty of the crime of attempted simply burglary of an inhabited dwelling.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, Mr. Barker's counseled brief argues that the trial court erred in denying his motion to sever the offenses. He contends that the crimes charged led the jury to infer a criminal disposition, evidenced by its verdicts of guilty on charges for which Mr. Barker maintains the State otherwise presented insufficient evidence.[17]

Under La.C.Cr.P. art. 493:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting

[16] During the course of trial, NOPD Officer Walter Fuquay, who had been dispatched to the Oleander St. property to investigate a suspicious male subject tampering with doorknobs, testified that he and other officers arrested Mr. Barker. During a search incident to the arrest, the officers discovered several screwdrivers and pliers, and a search of Mr. Barker's backpack revealed several more screwdrivers, a hammer, needle-nose pliers, electronic cords, a computer mouse, a green T-Shirt, and several computer software discs.

[17] Mr. Barker's Amendment makes the unsupported assertion that the court denied his motion to sever out of spite and with vindictive intent as retribution for naming the court in a civil lawsuit he filed. We note that Mr. Barker's motion to sever filed in pre-trial posture claimed only that the bill of information improperly joined misdemeanor charges with felony charges. At trial, the indictment, as read by the court, included only seven charges, omitting the two misdemeanors. Later in the trial, during a break between witnesses and out of the presence of the jury, the court acknowledged the two misdemeanor charges separately (possession of burglary tools, and simple criminal damage to property inside Notre Dame Seminary) and indicated that it would hold a judge trial contemporaneously with the jury trial. Additionally, the court minutes reflect only seven charges in the "violations" section. Accordingly, although it is not reflected in the indictment contained in the record, it appears the two misdemeanor charges were indeed severed from the felonies for statutory purposes, and the trials combined for expediency and efficacy.

> parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

The joinder of offenses is subject to the provisions of La. C.Cr.P. art. 495.1, as well, which provides:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires.

State v. Nix, 2007-1431, pp. 11-12 (La. App. 4 Cir. 6/18/08), 987 So.2d 855, 862, quoting the Supreme Court in *State v. Deruise*, 98-0541, p. 7 (La. 4/3/01), 802 So.2d 1224, 1232, indicated:

> A motion to sever is addressed to the sound discretion of the trial court, and the court's ruling should not be disturbed on appeal absent a showing of an abuse of discretion. *[State v.] Brooks*, 541 So.2d [801] at 804 [(La. 1989)] (citing *State v. Williams*, 418 So.2d 562, 564 (La.1982)). In ruling on such a motion, the trial court must weigh the possibility of prejudice to the defendant against the important considerations of economical and expedient use of judicial resources. In determining whether joinder will be prejudicial, the court should consider the following: (1) whether the jury would be confused by the various counts; (2) whether the jury would be able to segregate the various charges and evidence; (3) whether the defendant would be confounded in presenting his various defenses; (4) whether the crimes charged would be used by the jury to infer a criminal disposition; and (5) whether, especially considering the nature of the charges, the charging of several crimes would make the jury hostile. *Id*. (quoting *State v. Washington*, 386 So.2d 1368, 1371 (La.1980)). However, the fact that evidence of one of the charges would not be admissible under *State v. Prieur*, 277 So.2d 126 (La.1973), in a separate trial on the joined offense, does not per se prevent the joinder and single trial of both crimes, if the joinder is otherwise permissible. *State v. Davis*, 92-1623, p. 9 (La. 5/23/94), 637 So.2d 1012, 1019 (citing *State v. Celestine*, 452 So.2d 676 (1984)). Finally, there is no prejudicial effect from joinder of two offenses when the evidence of each is relatively simple and distinct, so that the jury can easily keep the evidence of

> each offense separate in its deliberations. *Brooks*, 541 So.2d at 805.

We note, too, that a "defendant bears a heavy burden of proving prejudicial joinder of offenses, and he must make a clear showing of prejudice." *State v. Ennis*, 11-0976, p. 11 (La. App. 4 Cir. 7/5/12), 97 So.3d 575, 582.

This Court stated in *State v. Carter*, 99-2234, pp. 34-35 (La. App. 4 Cir. 1/24/01), 779 So.2d 125, 145 that "severance is not required if the facts of each offense are not complex, and there is little likelihood that the jury will be confused by the evidence of more than one crime." Additionally, "the trial judge can mitigate any prejudice from joinder of offenses by providing clear instructions to the jury." *State v. Labuzan*, 480 So.2d 420 422 (La. App. 4 Cir. 1985).

In *Ennis*, this Court found no abuse of the trial court's discretion in the joinder of separate charges of simple burglary and attempted simple burglary of an inhabited dwelling, each of which called for different witnesses. The Court noted that "the evidence of the two offenses was relatively simple and distinct," that there was "no evidence suggesting that appellant was "confounded" in presenting a defense, that is, that he wished to testify on one count but not on the other, and was effectively prevented by the joinder from testifying at all," "[n]or . . . anything in the record to suggest that the state joined the offenses to show appellant's criminal propensity or that the jury became hostile because of the joinder." *Id*., pp. 10-11, 97 So.3d at 582.

Similarly, in *State v. Sam*, 99-0300, p. 15 (La. App. 4 Cir. 4/19/00), 761 So.2d 72, 81-82, this Court held that joinder of armed robbery and two counts of first-degree robbery was not prejudicial where the facts of each offense were not confusing and could be easily distinguished by the jury; the offenses were similar

in nature, triable by the same mode of trial, and occurred within a five-day period; the victims presented separate and concise testimony concerning the robberies; and the testifying police officers distinguished each offense.

In the instant case, the crimes charged are all related to burglaries and thefts and were committed in the same area of town over the course of four days. The State presented witnesses orderly and succinctly such that the evidence flowed in a linear timeline from one crime scene to the next, allowing the jury to maintain a separation of the charges and evaluate the evidence accordingly. Additionally, during closing argument, the State walked the jury through the evidence as applicable to each element of each charged offense related to each separate crime scene. The trial court also provided the jury with instructions to consider "each count and the evidence pertaining to it" separately.

Moreover, as we have already discussed, notwithstanding a lack of eyewitness or surveillance evidence presented on the charge of theft of the computer from Notre Dame Seminary, even at a trial on that charge alone, the "other crimes" evidence that Mr. Barker committed a theft of the computer from Weston Ministries would have been admissible under La. C.E. 404(B)(1) to show intent, preparation, identity, and modus operandi.

Based on the record before us, we do not find that Mr. Barker met the heavy burden of proving prejudicial joinder of offenses or a clear showing of prejudice.

We further note that, in balancing the possible prejudice to Mr. Barker from the joinder of his charges at a single trial against the economical and expedient use of judicial resources, joinder of the charges was warranted. The record indicates that Mr. Barker filed a litany of what appear to be repetitive, dilatory, and baseless

pre-trial motions,[18] including a motion for mistrial which he made during his *pro se* opening remarks to the jury by discussing information the court expressly warned him not to discuss under penalty of contempt of court.[19] Mr. Barker also filed a civil lawsuit naming every judge but one in the Orleans Parish Criminal District court and every defense counselor appointed to him throughout the judicial process, and attempted (unsuccessfully) to argue that a "conflict of interest" constituted grounds for a mistrial, to quash the indictment, and for recusal of the court. Clearly, Mr. Barker intended to thwart "important considerations of economical and expedient use of judicial resources." *Deruise*, 98-0541, p. 7, 802 So.2d at 1232.

We find no merit to this assignment of error.

As an aside, Mr. Barker was convicted of three other felonies as well, for which no sufficiency of the evidence claims were raised. We note them, however, as they further support the joinder of the counts against Mr. Barker (for one of which there was direct evidence in the form of video surveillance) and because they are relevant to the issue of joinder and other issues raised in this appeal.

First, Mr. Barker was convicted on Count 1 of the burglary of Golean's, which took place on June 14, 2015, and of criminal damage to property. The evidence supporting this conviction which was adduced at trial includes the testimony of Mr. Howard and Mr. Mitchell, who both saw Mr. Barker at the reception hall, shortly after he left their property on Oleander Street, and the

[18] The sheer volume of pre-trial motions Mr. Barker filed precludes them from an exhaustive listing. *See* footnote 1.

[19] *See* footnote 7. We also note that Mr. Barker filed a post-trial motion requesting that every judge employed at the Criminal District Court review the entire procedural process of his trial from the time of his arrest and submit an opinion as to its constitutionality.

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testimony of NOPD Officer Walter Fuquay. Officer Fuquay testified that, after being dispatched to investigate a suspicious man tampering with doorknobs and in the alley near Golean's, he discovered a hole in the rear wall of the building that appeared to have been "kicked in." Officer Fuquay, accompanied by several other officers, located Mr. Barker inside the building hiding in a rear storage room, apprehended him and placed him in handcuffs. It was during a search of Mr. Barker that multiple tools and other items, including "homeless assistance information from the Archdiocese of New Orleans," were discovered in his possession.[20]

Officer Fuquay described several photographs taken from the scene which depicted the tools recovered from Mr. Barker, his backpack, a deadbolt door lock which appeared damaged, likely by pliers, the interior of the building in which a large television had been dismounted from the wall and set on the floor, a television remote control and electrical cord, which Officer Fuquay stated he also discovered on Mr. Barker, and an interior view of a storage area with the large hole in the wall which Fuquay suspected was created by Mr. Barker to gain access into the building.

Officer Fuquay testified that the residents from the duplex on Oleander Street identified Mr. Barker as the perpetrator of their criminal complaints.

David Warren, the owner of Golean's, testified that he arrived at the business after the police notified him of the break-in. He observed Mr. Barker after his arrest but stated that he had never seen him before and Mr. Barker did not have permission to be on the premises. Mr. Warren further testified that he had been at the reception hall the day before and the rear wall had not been damaged. Mr.

[20] *See* footnote 15.

Warren also confirmed that the remote control and power cord found in Mr. Barker's possession had belonged with the television as well. Mr. Warren also testified that he observed damage to the deadbolt lock on the front door, which had not been present the day before, and which he believed was caused by an attempt to remove it with a hammer and screwdriver.

Second, Mr. Barker was convicted on Count 4 of simple burglary of a shed (located at 1116 Napoleon Avenue). The evidence supporting this conviction included the testimony of Ariana Heintzen, who indicated that, on June 9, 2015, she arrived home at 1116 Napoleon Avenue, a duplex, to find her garage open and items missing. She testified that when she had left her residence, the garage door was closed, but when she returned nearly two hours later, she noticed the garage was open, which was unusual, and the neighbor's bicycle was outside, which was also unusual, as it was generally stored in the back of the garage and out of direct sight. Ms. Heintzen testified that her neighbor indicated to her that she had been at work all day and had not moved her bicycle from its usual location. Ms. Heintzen also contacted her boyfriend, with whom she resided at that residence via "Facetime" and, through the cell phone video camera, he was able to see that his air compressor was missing from its usual storage location in the garage.

The surveillance video (of the front porch of the residence) was played in open court. The video depicts a Fed Ex deliveryman placing a large blue "chow" box on the front porch, ringing the doorbell, and leaving the premises. Several minutes later, Mr. Barker is seen, carrying a large backpack and riding a bike down the sidewalk. As he rides down the sidewalk, he looks up onto the porch of each house he passes before stopping at Ms. Heintzen's residence. He parks his bicycle in the driveway of the residence with only the rear tire visible in the camera frame.

He then walks onto the porch and knocks on the front door; he then leaves the porch and walks down the driveway toward the rear of the house. Around five minutes later, the bicycle is moved out of the camera frame toward the rear of the driveway. Within minutes, Mr. Barker is seen riding his bicycle back up the driveway toward the street and a large dark object with bright yellow spirally-wound cords is mounted directly behind the bicycle seat.

Ms. Heintzen testified at trial that the video did not depict any other person entering or exiting her property during that time period. She also stated that she did not know the person in the video and had never seen him before.

Michael Shlansky, Ms. Heintzen's husband, corroborated Ms. Heintzen's testimony and identified his air compressor as the dark item with the yellow cords mounted to Mr. Barker's bicycle as he rode away on the surveillance footage. He testified that he did not know the man in the video and had not given him permission to take his air compressor, which was never returned.

ASSIGNMENT OF ERROR NUMBER 3

In his third assignment of error, Mr. Barker contends that the trial court erred in "curtailing Mr. Barker's voir dire examination of the jury." In his counseled brief, Mr. Barker maintains that the trial court "denied him the ability to present any viable defense to the charges against him." Mr. Barker's asserted defense was "the failure of the judiciary to afford him counsel to both consult with him and investigate the case for over a year."

During voir dire, Mr. Barker's trial counsel posed questions of the jury first. Mr. Barker was then allowed to continue questioning the jury in his *pro se* capacity. He began by identifying himself as a veteran and attempting to explain his presence in New Orleans. The court warned him that he needed to ask

questions. He then asked jurors if any of them had seen court-related television shows, stating: "Despite what the judge says, [prosecutors] do have to put on a case and prove that case, but the only way that you are going to be able to understand that, whether you can arrive at the truth or not, is whether the defense can effectively challenge those things." The trial judge replied that the jury would be instructed on the law by the court and reiterated the burden of proof.

Next, Mr. Barker asked the jurors if any of them was aware of his civil lawsuit against the judge and his counsel regarding the violation of his constitutional rights, then asked if anyone could find him guilty if it appeared that the State obstructed his ability to put on a defense. Mr. Barker then asked if the jury would be able to tell the court it needed "more information" to render a verdict after it retired to deliberate, and, as his "final question," he asked if the jury would be comfortable refusing to render a verdict. The trial judge again explained the law to the jury, stating that, instead of refusing to render a verdict, it should find Mr. Barker not guilty if it determined the State did not present sufficient evidence to prove him guilty.

At that point, Mr. Barker asked "one last question:" "if [anybody] were to find out that from the day of my arrest until today, the start of trial, 514 days, would you have a problem finding out that I never once seen (sic) a lawyer to talk to me about the case or have anybody investigate my case, except for yesterday somebody came up and asked me what size - - " The judge interrupted Mr. Barker, stating: "All right. I'm shutting this down right now. Thank you. That is not a question you need to respond to." In chambers following the first jury panel, the

trial judge instructed Mr. Barker on the legal scope of voir dire, admonishing him to confine his questions therein or face removal of his *pro se* "co-counsel" status.[21]

Based on these events, Mr. Barker contends that he was denied the ability to fully conduct voir dire. We disagree.

As the Louisiana Supreme Court recently explained in *State v. Coleman*, 14-0402, p. 40 (La. 2/26/16), 188 So.3d 174, 205:

> As a general matter, an accused in a criminal case is constitutionally entitled to a full and complete voir dire examination. La. Const. art. I, § 17. However, the scope of counsel's examination rests within the sound discretion of the trial judge and voir dire rulings will not be disturbed on appeal absent a clear abuse of that discretion. La. C.Cr.P. art. 786; *State v. Tilley*, 99-0569 (La. 7/6/00), 767 So.2d 6, 19. Further, the right to a full voir dire does not afford the defendant unlimited inquiry into possible prejudices of prospective jurors, including their opinions on evidence, or its weight, hypothetical questions, or questions of law that call for any prejudgment of supposed facts in the case. *State v. Ball*, 00-2277 (La.1/25/02), 824 So.2d 1089, 1110. A party interviewing a prospective juror may not ask a question or pose a hypothetical which would demand a commitment or prejudgment from the juror or which would pry into the juror's opinions about issues to be resolved in the case. *Ball*, 824 So.2d at 1110; *Tilley*, 767 So.2d at 19. "It is not proper for counsel to interrogate prospective jurors concerning their reaction to evidence which might be received at trial." *Ball*, 824 So.2d at 1110.

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[21] The trial court advised Mr. Barker as follows:

> ". . . you are proceeding as hybrid counsel. I am now admonishing you that no questions can be asked and no discussion can be made with this pool as to anything that took place post arrest, which means you are limited to asking questions surrounding the law under which you have been charged and certain hypotheticals surrounding the facts and circumstances under the allegations for which you have been arrested, but anything that took place after your arrest and incarceration are not relevant to this case and you will be limited from asking any questions. If you ask another question your hybrid — your opportunity to be hybrid counsel is gone."

"[T]he accused's right to exercise his challenges intelligently may not be curtailed by the exclusion of non-repetitious voir dire questions which reasonably explore the juror's potential prejudices, predispositions or misunderstandings relevant to the central issues of the case." *State v. Harris*, 01-2730, p. 34 (La. 1/19/05), 892 So.2d 1238, 1261. (citation omitted).

In the instant case, it is evident that Mr. Barker was attempting to testify to the jury during the voir dire. He attempted to provide information, including his biography and his presence in New Orleans. He also attempted to undermine the court's instructions when he stated, "Despite what the judge says…" followed by misleading or inaccurate statements concerning the jury's options to request additional evidence during deliberations and to refuse to return a verdict. These "questions" do not appear to be for the purpose of exposing potential juror bias, but instead, to confuse the jury regarding its duty, the law, and the burden of proof, and to refer to evidence that he either did not plan to introduce or which would not have been admissible at trial. The areas of inquiry do not appear to be permissible within the scope of voir dire.

Given our deference to the sound discretion of the trial court, we find no error in the trial court's "curtailing" of Mr. Barker's voir dire as, according to the transcripts, Mr. Barker stated the last question he asked was his "final question," and the jury had been permitted to answer every question until that point. Further, the jury had already been instructed several times by the court as to its duty and the burden of proof, which the jurors indicated they understood. Additionally, Mr. Barker has failed to assert any prejudice he sustained in establishing challenges for cause or peremptory challenges for any juror caused by the court's prohibition of

his final question regarding the jury's theoretical considerations of his allegations of incompetent counsel.

Accordingly this assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 4

Next, Mr. Barker asserts that he was denied the right to present a defense of his choice, arguing (1) that his counsel was ineffective in failing to investigate the case and failing to present evidence during the defense's case-in-chief; and (2) that the court terminated his status as "co-counsel" after curtailing his opening remarks to the jury.[22]

At the outset, it must be noted that Mr. Barker, in all of his *pro se* motions to the trial court and his *pro se* briefs to this court, has failed to assert any facts or evidence he was precluded from presenting, nor has he proffered or alleged any defenses to the charges in general. Other than suggesting in his "Amendment"[23] that video surveillance may show him at McDonald's "all day every day" and that he had "several witnesses to disprove the state's claims on all counts charged,"[24] he points to nothing specific which he (or his counsel) was prohibited from presenting to the jury. Moreover, Mr. Barker could have testified to this information himself during his case-in-chief had he so chosen.

During the course of trial and near the end of the State's case-in-chief, the court asked Mr. Barker in private whether he wished to testify on his own behalf and he responded, "Well, no. The only thing that I want to testify to is that I'm not

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[22] *See* footnote 8.
[23] *See* footnote 14.
[24] We note that, considering Mr. Barker was caught on surveillance video committing burglary at Ms. Heintzen's residence, and is shown on police body camera footage from Officer Fuquay, depicting Mr. Barker and the items found in his possession at Golean's Reception Hall, this claim is disingenuous.

getting a defense in a corrupt court system." The court confirmed his choice not to testify and again he replied, "Yes, that is right. I don't want anything to do with your corrupt trial." The judge then informed defense counsel that she had spoken with Mr. Barker and that he did not wish to testify. If Mr. Barker had other facts or evidence that he believes exculpated him, his failure to present such evidence cannot for the basis of his claim that he was denied the right to present a defense.

Regarding the claim that defense counsel was ineffective for failing to investigate Mr. Barker's case, the record indicates that (1) two law clerks for the Orleans Public Defender's Office visited Mr. Barker to attempt to garner information which could assist in his defense, which he claims, without support, were not, in fact, investigated [25]; and (2) in defense counsel's Motion to Withdraw as Counsel of Record, Ms. Harrell asserted that "there has been a significant lack of an attorney-client relationship from the beginning of the undersigned's appointment. Attempts to build an attorney-client relationship with [Mr. Barker] have been thwarted and refused." The motion also asserted that Mr. Barker declined assistance of counsel from the inception of counsel's appointment, refusing representation from any attorney appointed, employed or otherwise compensated by the OPD. Counsel also asserted that Mr. Barker threatened her with civil litigation and attempted to interfere with her attorney-client relationships with other persons incarcerated with Mr. Barker.[26]

> Generally, ineffective-assistance-of-counsel claims are more properly raised in an application for post-conviction relief where the district court can conduct a full

[25] According to defendant's *pro se* notice of intent to call witnesses, he lists (a) unknown employees of Holly Grove Farmer's Market; (b) unknown residents of "Boy's Home" on Carrollton and Olive; (c) Father Jim from Notre Dame Seminary; and (4) a homeless man named Mark Hale "who stayed near [Goleans Reception Hall]."

[26] The record reflects that Mr. Barker also filed motions to dismiss every counselor appointed to him.

> evidentiary hearing on the matter, if one is warranted. *See State v. Leger*, 05-0011, p. 44 (La. 7/10/06), 936 So.2d 108, 142; *see also State v. Small*, 13-1334, p. 13 (La. App. 4 Cir. 8/27/14), 147 So.3d 1274, 1283. Nevertheless, where the record contains evidence sufficient to decide the issue, and it is raised on appeal by an assignment of error, courts may consider the issue in the interest of judicial economy. *See Leger*, 05-0011, p. 44, 936 So.2d at 142.

State v. Paulson, 15-0454, p. 9 (La. App. 4 Cir. 9/30/15), 177 So.3d 360, 367.

In this case, Mr. Barker's claims that his counsel was ineffective in failing to investigate his case are indeterminable from the evidence contained in the record. His claims that he never received a visit from an attorney is contradicted by his admission that two law clerks visited him in an attempt to gather evidence. It is also evident from his counsel's own filings that Mr. Barker refused assistance of counsel at every juncture in this judicial proceeding.

We note that defense counsel advised the jurors during opening statement that they should return "mostly not guilty" verdicts except for "possibly criminal trespass for Dublin"; she explained to the jury that she was "being honest" with them. *See State v. Hoffman*, 98-3118, pp. 39-40 (La. 4/11/00), 768 So.2d 542, 578-79 (conceding the defendant's involvement may constitute a defense strategy to establish candor with the jury in the hopes of gaining credibility, where the Court noted that it does "'not sit to second-guess strategic and tactical choices made by trial counsel.'"). We note though, that Mr. Barker, too, made an inherent admission of guilt when he stated to the jury in his *pro se* opening statement: "I'm not going to deny that. I was caught inside of the building that they were talking about."

We are aware of the recent United State Supreme Court decision of *McCoy v. La.*, 584 U. S. ____, ___ S. Ct. ____, 2018 WL 2186174 at * 4 (2018) which

considered whether the defense counsel's admission of guilt over a defendant's objection was unconstitutional.[27] The Supreme Court, noting that the defendant opposed his counsel's "assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court" and "vociferously insisted on his innocence and adamantly objected to any admission of guilt" held:

> . . . that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right "to have the Assistance of Counsel for his defence," the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

Id. at *3. The *McCoy* Court also remarked that, when "a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest." *Id*. at *7.

As we have already noted, "ineffective assistance of counsel claims are usually addressed in post-conviction proceedings, rather than on direct appeal . . . [which] allows the trial court to conduct a full evidentiary hearing, if one is warranted. " *State v. Leger*, 05-0011, p. 44 (La. 7/10/06), 936 So.2d 108, 142

Here, the record does not sufficiently demonstrate whether the issue of implying Mr. Barker's guilt on the one charge against him for which the "mostly

[27] In *McCoy*, the defendant's counsel made a tactical decision to admit the defendant's guilt of the three murders, and "urged mercy in view of [his] 'serious mental and emotional issues.'"

not guilty" comment was made (criminal trespass, the lesser included offense for which the jury found Mr. Barker guilty) was considered by Mr. Barker.

Without more information on defense counsel's investigation into Mr. Barker's case, or lack thereof, or the issue of an implied concession of guilt on Mr. Barker's part, a claim of ineffective assistance of counsel in the instant case is not ripe for a full analysis on direct appeal.

Mr. Barker's additional assertion, that he was denied presentation of his defense when his status as co-counsel was revoked during opening statement to the jury is also without merit.

> In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Supreme Court recognized a defendant's Sixth Amendment right to conduct his own defense by making a knowing and voluntary waiver of his right to counsel and thereby asserting his right to represent himself. Assertion of that right "must also be clear and unequivocal." *State v. Bell*, 09-0199, p.17 (La. 11/30/10), 53 So.3d at 448 (citing *State v. Hegwood*, 345 So.2d 1179, 1181-82 (La. 1977)) . . . . However, while *Faretta* permits the appointment of standby counsel to help "ensure the defendant's compliance with basic rules of courtroom protocol and procedure," *McKaskle v. Wiggins*, 465 U.S. 168, 183, 104 S.Ct. 944, 954, 79 L.Ed.2d 122 (1984), it does not require a trial judge to permit "hybrid" representation in which both counsel and a defendant participate actively as co-counsel in the conduct of trial. *Wiggins*, 465 U.S. at 183, 104 S.Ct. at 953 …As a general rule, one to which this Court has long subscribed, an indigent defendant "'has a right to counsel as well as the opposite right to represent himself, [but] he has no constitutional right to be both represented and representative.' " *State v. Brown*, 03-0897, p. 29 (La. 4/12/05), 907 So.2d 1, 22 (quoting *State v. Bodley*, 394 So.2d 584, 593 (La.1981)); *see also Bell*, 09-0199 at 17, n. 14, 53 So.3d at 448 … Warren R. Lafave, *Criminal Procedure*, § 11.5(g), p. 768 (3rd ed. 2008)("[T]wo [ ] concerns [other than administrative difficulties] probably play a more significant role in reaching the initial conclusion that hybrid representation can constitutionally be left to judicial discretion. Those concerns relate to the impact of

> hybrid representation on the role of counsel and to the typical use of hybrid representation to permit the defendant, in effect, to make an unsworn statement to the jury.").

State v. Mathieu, 10-2421, pp. 6-7 (La. 7/1/11), 68 So.3d 1015, 1018-19

In the instant case, during *voir dire*, the court admonished Mr. Barker in chambers not to discuss his allegations of inadequate representation or his civil lawsuit against the judge and defense counsel. However, when delivering his *pro se* opening statement to the jury, Mr. Barker began testifying as to his innocence, alleging that charges against him in a different section of court had been "thrown out" because the State was "pinning cases on him to clear the books," then attempted to file a motion for a mistrial during his remarks, claiming he had never been visited by an attorney in 516 days of incarceration. The court informed Mr. Barker that the motion for a mistrial should be made outside the presence of the jury and again admonished him to stay within the scope of their earlier discussion in chambers during *voir dire*. The court then warned Mr. Barker that if he refused to comply with the court's rulings, he would no longer be allowed to represent himself as co-counsel. In response, Mr. Barker demanded to be removed from the courtroom for the duration of the trial and declined the court's offer to listen to the trial through the PA system in the clerk's office.[28]

It is apparent that Mr. Barker was attempting to utilize his hybrid status as co-counsel to present unsworn statements to the jury in contravention to law and procedure. Because Mr. Barker disregarded the court's earlier rulings, the only party responsible for the revocation of his co-counsel status was Mr. Barker, himself. Additionally, Mr. Barker's refusal to assist his appointed counsel in

[28] *See* footnote 8.

providing his defense can only be seen as a deliberate attempt to manufacture a claim of ineffective assistance of counsel or a claim of denial of his right to representation.

Accordingly, we find this assignment of error to be without merit.

ASSIGNMENT OF ERROR NUMBER 5

In his counseled brief, Mr. Barker contends that he "was denied the right to present the defense of his choice, not only because his right to effective counsel had been denied for a substantial period of time due to funding issues, but also because of the trial judge's removal of his status as co-counsel when he attempted to present his defense to the jury." Mr. Barker, in his *pro se* capacity added to this assignment of error that he was denied a fair trial due to the contentious relationship he had with his counsel and the court; he asserts that the contentious nature of these relationships was due to the conflict of interest resulting from his civil lawsuit against them. In support of these claims, Mr. Barker cites La. C.Cr.P. art 772, which provides:

> The judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.

In interpreting this article, this Court stated in *State v. Camper*, 08-0314, p. 9 (La. App. 4 Cir. 10/1/08), 996 So.2d 571, 578:

> [t]his no-judge-comment rule is designed to safeguard the role of the jury as the sole judge of the facts on the issue of guilt or innocence. *State v. Hodgeson*, 305 So.2d 421, 430 (La. 1974). Thus, if the effect of a comment is to permit a reasonable inference that it expresses or implies the judge's opinion as to the defendan''s innocence or guilt, this constitutes a violation of the defendant's statutory right to no-comment and thus requires reversal. *State v. Green*, 231 La. 1058, 93 So.2d 657, 659 (1957).

> To constitute reversible error, however, the effect of the improper comment must be such as to have influenced the jury and contributed to the verdict. *State v. Johnson*, 438 So.2d 1091, 1102 (La.1983).

In this case, Mr. Barker was removed as his own co-counsel after he unsuccessfully and improperly moved for a mistrial after opening statements.[29] The trial court responded by advising Mr. Barker that he had violated an in-chambers hearing at which he acknowledged that he understood his role in acting as "hybrid counsel" and that he had to "remain within the confines" of the law by arguing only the law and facts and testimony to be proven at trial. By this violation, the trial court found that he had forfeited his right to act as co-counsel. We find no error on the trial court's part.

Under La. C.Cr.P. art. 770, a mistrial is warranted if, in the presence of the jury, the court, the state, or a court official prejudicially refers to (1) race, religion, color, or national origin; (2) inadmissible other crimes evidence; or (3) the failure of defendant to testify. However, if the remark does not fall under the scope of art 770, and on motion of defendant, "the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial." La. C.Cr.P. art. 771. "Mistrial is a drastic remedy which should only be declared upon a clear showing of prejudice by the defendant. The mere possibility of prejudice is insufficient to warrant a mistrial." *State v. Coleman*, 12-1408, p. 12 (La. App. 4 Cir. 1/8/14,), 133 So.3d 9, 20 citing *State v. Leonard*, 05-1382, p. 11 (La. 6/16/06), 932 So.2d 660, 667.

Here, the court's comments to Mr. Barker during his *pro se* opening statement cannot be construed as an opinion on his guilt or innocence, nor on the

[29] *See* footnote 8.

facts of the case, as no evidence had been presented at that time. Nor does Mr. Barker make any showing that those comments fall within the scope of La. C.Cr.P. art. 770. The court informed Mr. Barker that motions for a mistrial must be made outside the presence of the jury and reminded him of the court's earlier ruling regarding the scope of his comments to the jury.

We note that Mr. Barker posed the question during voir dire whether any of the jurors had "heard about a lawsuit that [he] filed which charges the Judge with violating my constitutional rights within this very trial over the public defender crisis?" Any perceived prejudice of the jury by the alleged conflict of interest caused by Mr. Barker's civil lawsuit against his counsel and the court is attributable solely to Mr. Barker; it could not have been the result of any conduct by the court, Mr. Barker's counsel, the State, or any court official or witness. It is evident that Mr. Barker attempted to improperly influence the jury by alleging that his counsel refused to provide assistance and discussing events that happened in a different section of court on charges that were not before the jury in the instant case. In this regard, the trial court's comments may fairly be characterized as an attempt to maintain control of the courtroom and the trial, while attempting to prevent Mr. Barker from manufacturing a mistrial.

Additionally, on its own accord, the court admonished the jury to disregard any impression of guilt or innocence the court may or may not have indicated at any point during trial. Other than mere suggestion, Mr. Barker has not made a clear showing of prejudice attributable to improper conduct by the court or the State, and any possible prejudice was mitigated by the court when it admonished the jury.

With respect to Mr. Barker's claim that he was denied the right to present the defense of his choice, "because his right to effective counsel had been denied

for a substantial period of time due to funding issues," other than making a generalized statement that "[i]n the decision to not accept cases, the Orleans Public Defenders noted that the inability to adequately investigate and defend cases were core causes." There is no specific allegation that, in this case in particular, funding issues had any effect on Mr. Barker's ability to defend the charges against him. Moreover, as we have previously discussed, claims of ineffective assistance of counsel are more properly raised in an application for post-conviction relief, at which time, the trial court can conduct a full evidentiary hearing on the matter, if one is warranted.

We find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER 6

Mr. Barker maintains that the State failed to prove beyond a reasonable doubt that he was a habitual offender, arguing that the fingerprints presented at the multiple bill hearing were "not specifically related to any conviction" and the photographs the State submitted were "illegible." He argues that the plea forms containing his date of birth and social security number are insufficient to establish his identity.

At the hearing, the State submitted fingerprints that Officer George Jackson, a fingerprint expert, stated had come from a certified transcript of records from the Missouri Department of Corrections of Mr. Barker's release from custody on probation. The certified transcript of records listed five offenses for which Mr. Barker was convicted in Missouri, including second degree robbery (the conviction associated with the fingerprints), second degree burglary for which he was sentenced on August 13, 2007, and attempted second degree robbery for which he was also sentenced on August 13, 2007. In addition to Mr. Barker's birthdate and

social security number, the conviction packet also lists a number of identifiable scars and tattoos.

"To obtain a multiple offender conviction, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony." *State v. Daniels*, 00-0850, p.4 (La. App. 4 Cir. 11/8/00), 773 So.2d 229, 231 quoting *State v. Henry*, 96-1280 (La. App. 4 Cir. 3/11/98), 709 So.2d 322, 326. "[T]he prosecution is not required to use a specific type of evidence to carry its burden at a habitual offender hearing; rather, "prior convictions may be proved by any competent evidence." *State v. Ross*, 15-1113, p. 9 (La. App. 4 Cir. 12/21/16), 207 So.3d 511, 517, *writ denied*, 17-0118 (La. 9/22/17), 227 So. 3d 823, *writ denied*, 17-0394 (La. 9/22/17), 227 So. 3d 826, and *writ denied*, 17-0537 (La. 9/22/17), 227 So.3d 827, quoting *State v. White*, 13-1525, p. 2 (La. 11/8/13), 130 So.3d 298, 300.

Previous decisions by this Court have found that the matching of a defendant's fingerprints to fingerprints on an arrest register, and the linking of that arrest register to other documents evidencing a conviction, suffices to establish that the defendant is the same person previously convicted. *State v. Robertson*, 05-1214, pp. 4-5 (La. App. 4 Cir. 2/1/06), 925 So.2d 615, 618. *See also State v. Francois*, 02-2056 (La. App. 4 Cir. 9/14/04), 884 So.2d 658; *State v. Wolfe*, 99-0389 (La. App. 4 Cir. 4/19/00), 761 So.2d 596; *State v. Hawthorne*, 580 So.2d 1131 (La. App. 4 Cir.1991).

In *State v. Henry*, the prosecution was unable to find the arrest register for one of the defendant's prior convictions. This Court held that it was sufficient for the prosecution to produce a certified copy of the prior conviction bearing the same

Bureau of Identification Number, physical description, birth date, and social security number of the defendant.

In this case, the State's evidence consisting of a certified transcript of records from the Missouri Department of Corrections which includes a certified fingerprint card positively matched with Mr. Barker's fingerprints, and which contains corresponding and corroborating identifying information as that found in the arrest register of the previous convictions for which Mr. Barker was being charged as a multiple offender, was sufficient for the court to conclude Mr. Barker was the same person convicted for the previous offenses. In this case, the corroborating information consisted of the same DOC number, name, physical description, birthdate and social security number, which the Court has found to be sufficient proof. See also, *State v. Vincent*, 10-0764, p. 13 (La. App. 4 Cir. 1/19/11), 56 So.3d 408, 416 (the "unique folder number, date of birth, and social security number were sufficient to establish that Vincent was the same defendant . . . . Based upon the totality of the evidence submitted, the state proved that the defendant was the same Earl Vincent"); *State v. Lindsey*, 99-3256, p. 7 n.3 (La. 10/17/00), 770 So.2d 339, 345 (where the state introduced the defendant's bill of information packet, which contained docket masters, plea forms, and minute entries, all of which contained the same defendant's birth date, social security number, and Bureau of Identification number, the state "sufficiently proved that the defendant was the person who committed the previous offenses").

We find that this assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 7

Mr. Barker contends that that the multiple offender proceeding was untimely. He argues that, although the State noticed its intent to file a multiple

offender bill at sentencing, it did not actually file the bill until the day of the hearing. Mr. Barker relies on *State v. Muhammad*, 03-2991, p. 14 (La. 5/25/04), 875 So.2d 45, 55 for the principle that, although there is no set time frame within which to file a multiple offender bill, it must be filed within a reasonable time after the State learns a defendant has prior felony convictions.

Under the Habitual Offender Law, La. R.S. 15:529.1:

> If, at any time, either after conviction or sentence, it shall appear that a person convicted of a felony has previously been convicted of a felony under the laws of this state, or has been convicted under the laws of any other state, or of the United States, or of any foreign government or country, of a crime, which, if committed in this state would be a felony, the district attorney of the parish in which subsequent conviction was had may file an information accusing the person of a previous conviction.

La. R.S. 15:529.1 D(1)(a).

The issue of when a multiple offender proceeding is to be instituted is not a novel issue. In line with *Muhammed*, this Court has held that "habitual offender proceedings must occur within 'a reasonable time' after the filing of the bill of information." *Ross*, 15-1113, p. 13, 207 So.3d at 519. The *Ross* Court found no unreasonable delay when four months elapsed between the filing of the multiple bill and the habitual offender proceeding, noting the cases of "*[State v.] Toney*, 02-0992, p. 7, 842 So.2d [1083,] at 1087 (seventeen-month delay not unreasonable); [and] *State v. Grimes*, 01-0576, pp. 15–16 (La. App. 4 Cir. 5/2/01), 786 So.2d 876, 885 (sixteen-month delay not prejudicial)."

In *State v. Buckley*, 11-0369 (La. App. 4 Cir. 12/27/11), 88 So.3d 482, 487, this Court held that a two-year delay between the State's notice of a multiple offender proceeding and the date of the hearing was not unreasonable and did not

rise to the level of depriving the defendant a fair hearing, considering the State's assertion that it had not yet received records of the prior convictions and that the hearing had been continued multiple times on both state and defense motions. The court also noted that the State had notified defendant at his original sentencing that it intended to file a multiple offender bill.

In the instant case, the State noticed its intent to file the multiple offender bill at Mr. Barker's original sentencing hearing on January 6, 2017, and requested additional time to compile the certified conviction packet. The court set the multiple bill hearing for February 24, 2017. The record reflects that the hearing was reset for April, 4, 2017; it was then continued on the State's motion, continued again on Mr. Barker's motion, and finally held on July 13, 2017. Thus, the multiple offender hearing took place approximately six months after the State provided Mr. Barker notice of a multiple offender bill. We do not find that this delay was prejudicial to Mr. Barker or objectively unreasonable.

Additionally, Mr. Barker did not assert his right to a speedy trial at any time during the proceedings. In fact, at the outset of the multiple offender hearing, counsel for Mr. Barker requested "an extension of time before this hearing." Mr. Barker has not shown that he was prejudiced by the six-month delay between the State's notice and the hearing date.

We find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER 8[30]

Mr. Barker maintains that he was deprived of effective assistance of counsel, and argues he should not have been forced to accept court-appointed counsel.

[30] The remaining assignments of error in this opinion relate to those errors specifically raised by Mr. Barker, alone, in his *pro se* briefs.

This claim appears to be based on the inadequate funding of the Orleans Public Defender's Office in 2015 and the subsequent statements by several public defenders in section 'K' that they did not believe they could provide effective representation to their clients at the time due to their high case load. Mr. Barker's assertions that he was personally deprived of effective assistance of counsel appear to be contradicted by the record, including several motions his appointed, conflict counsel filed indicating that Mr. Barker persistently refused her assistance. Nevertheless, as we have discussed herein, this claim is more properly asserted in an application for post-conviction relief.

As concerns Mr. Barker's objection to "court-forced" counsel, he states in his brief:

> After the case was re-allotted to section I, and despite section I judge knowing of the OPD conflict and conflict in appointing OPD, when appellant declined to represent himself at prompting of judge the judge forced the OPD appointment, and, as Exhibit-1 and its exhibit-A annexed thereto demonstrates (sic) – all judges were sent this notice informing them that in the OPD crisis, the OPD were reaching out to find pro bono counsel in such crisis/conflicts…a remedy the judge responded to by saying, "We're not going to do all of that!" And, with the section I judge's persistence in unethically forcing the OPD appointment…[defendant named the section I judge in his civil lawsuit]…and moved for a change of venue.[31]

The record also contains a letter sent by Mr. Barker's appointed trial counsel which states:

> Now, I know you indicated you wanted a "pro bono" attorney, but to ask an attorney to handle your case for free requires you to take that task upon yourself. The benefits of utilizing OPD funds for transcripts and proceedings, potential expert witnesses if appropriate, are not available to a private attorney who volunteers for

[31] Mr. Barker's assertions are mere argument; he provides no citations for any of these claims and allegations in his brief.

> your case to handle it pro bono. Paying costs in addition to working for free to represent someone is a lot to ask an attorney to do. However, if you have asked another attorney to do (sic) represent you in this case and they have agreed to, please advise the Court of such.

It is clear that Mr. Barker took the opportunity to argue that the inadequate funding of the Orleans Parish Public Defender's Office in 2015 and the resultant inability of the public defenders to provide effective representation required the appointment of private, pro bono counsel. Mr. Barker then proceeded to create a conflict with every court-appointed attorney (by naming them in his lawsuit) until he received private pro bono counsel. We cannot and do not sanction such tactical maneuvers. The Louisiana Supreme Court has indicated:

> An indigent defendant does not have the right to have a particular attorney appointed to represent him. An indigent's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice, if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice.

State v. Leger, 05-0011, p. 43 (La.7/10/06), 936 So.2d 108, 142. See also, *State v. LeBlanc*, 10-1484, p. 25 (La. App. 4 Cir. 9/30/11), 76 So.3d 572, 588; *State v. Griffin*, 01-1137, pp. 8-9 (La. App. 4 Cir. 7/25/01), 793 So.2d 415, 420.

Furthermore,

> In *Faretta [v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975)],, the United States Supreme Court recognized that a trial court may not force a lawyer upon a defendant when the defendant insists he wants to conduct his own defense and voluntarily and intelligently elects to proceed without counsel. However, he must ask clearly and unequivocally to proceed pro se and he must also make his request in a timely manner. *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541.

State v. Campbell, 06-0286, p. 63 (La. 5/21/08), 983 So. 2d 810, 851-52

In the instant case, Mr. Barker was appointed four attorneys prior to trial, and each time, he named the attorney in his civil lawsuit, then moved for his or her dismissal under a claim of conflict of interest. Mr. Barker also named each Criminal District Court judge before whom he appeared in his civil lawsuit, then moved for their recusals under the same claim. By his own admission, Mr. Barker indicated he would not be satisfied until he was appointed private counsel, an appointment to which he is not legally entitled.

We further note that Mr. Barker could have relieved the court's obligation to appoint an attorney by voluntarily, intelligently, and unequivocally electing to proceed *pro se*, however, as noted above, he "declined to represent himself." The record contains no indication that Mr. Barker made any efforts to obtain private counsel. Rather, because Mr. Barker was indigent, the court was obliged to appoint counsel for him. Mr. Barker was not entitled to the appointment of an attorney of his choice. We likewise note that the trial court was more than accommodating to Mr. Barker by dismissing and re-appointing counsel for him on three separate occasions.

ASSIGNMENT OF ERROR NUMBER 9

Next, Mr. Barker maintains that his naming of a "peer of the court" in his civil lawsuit created a conflict of interest which required the court to recuse itself. He further asserts that once the judge in section 'C' recused himself, every judge in the courthouse should have recused himself or herself, thereby forcing a change of venue.

La. C.Cr.P. art. 671 provides, in pertinent part:

> A. In a criminal case a judge of any court, trial or appellate, shall be recused when he:

> (1) Is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial;
>
> (6) Would be unable, for any other reason, to conduct a fair and impartial trial.

We note, at the outset that a "trial judge is presumed to be impartial." *State v. Parker*, 96-1852, p. 15 (La. App. 4 Cir. 6/18/97), 696 So.2d 599, 607. *See also*, *State v. Stewart*, 10-389, p. 8 (La. App. 5 Cir. 5/10/11), 65 So.3d 771, 776 (a "trial judge is presumed to be impartial, and the burden is on the party seeking to recuse a judge to prove otherwise."). "For a defendant to be entitled to the recusation of a trial judge on the grounds of bias or prejudice such must be of a substantial nature based on more than conclusory allegations." *Parker*, 96-1852, p. 15, 696 So.2d at 607. Thus, the party desiring to recuse the trial judge must set forth factual allegations in support of the motion to rebut the presumption of impartiality. *State v. Walton*, 469 So.2d 1204, 1205 (La. App. 4 Cir.1985). Improper remarks or the appearance of impropriety during the proceedings are not cause for recusal unless supported by evidence in the record of actual bias. *In re Succession of Manheim*, 03-0282, p. 8 (La. App. 4 Cir. 10/15/03), 859 So.2d 836, 840.

In this matter, Mr. Barker named the judge in a civil lawsuit based on the appointment of counsel Mr. Barker did not want to accept. Mr. Barker has pointed to nothing else in the record to overcome the presumption of impartiality. He asserts that his claimed assignments of error (e.g. the trial court failed to rule on several motions, the court erred in curtailing his voir dire, etc.) established sufficient bias such that recusal was warranted;[32] however, as discussed herein,

[32] Mr. Barker asserts that the judge should have recused herself because his lawsuit against her created a conflict of interest. He uses the alleged assignments of error as evidence of the judge's bias such that recusal was warranted. Yet, elsewhere in his brief, he asserts that the trial court

those assignments of error are meritless and necessarily, he has not shown bias or prejudice of a substantial nature. Nor do we find that the trial court acted partially when it did not rule in Mr. Barker's favor. We note, too, that in a per curiam to this Court in response to Mr. Barker's writ application seeking review of this very issue,[33] the district court stated,

> When the defendant attempted the same ploy that had been successful in section C, his motion to recuse this court and his motion for yet another defense attorney were denied. In denying these requests, this Court concluded that the defendant had not stated a genuine cause of action against either of the sections of court to which his case had been randomly allotted, not had he a plausible basis for demanding new counsel. Instead, it was and is the opinion of this court that the defendant is seeking to delay the prosecution of this matter—it has been more than a year since the filing of the bill of information and pretrial motions have not yet been hears—and is using these spurious complaints and pleadings to that end.

When this Court denied Mr. Barker's writ application, it clearly found no merit to his complaint at the time. In his brief in this appeal, Mr. Barker made assertions similar to those made in his writ application. We do not find, as we did not find with respect to the writ application, that the trial court erred in denying Mr. Barker's motion for recusal or new venue.

We find that this assignment or error is without merit.

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judge intentionally committed the complained-of "errors" as retribution for naming her in his civil lawsuit. Summarily, Mr. Barker's *pro se* supplemental brief, taken as a whole, appears to corroborate the notion that he attempted to fabricate a conflict of interest by suing the judge and his attorney, and then attempted to use that spurious conflict of interest to avoid prosecution (evidenced by his motion to halt prosecution and motions to quash); to avoid conviction (evidenced by his attempts to influence the jury, his motions for recusal, mistrial, etc.); and to avoid incarceration (evidenced by his allegations of bias, revenge, and sabotage-caused by the conflict of interest- as the basis for nearly all of his assignments of error). The record also indicates indicate that Mr. Barker sabotaged his own defense to bolster his claim that his rights were violated as a victim of the OPD funding "crisis." (Mr. Barker filed a pro se motion to dismiss his initial public defender on 8/25/15, just eleven days after he was appointed, claiming the OPD funding crisis precluded his effective representation).

[33] *See* footnote 1.

ASSIGNMENT OF ERROR NUMBER 10

Mr. Barker maintains that the court erred in failing to conduct hearings on or provide rulings on several of his *pro se* motions: "a pre-trial habeas corpus, a motion to halt prosecution on public defender crisis, [and a] motion to compel OPD to investigate all counts on all cases." He concedes in his brief that the court is not required to entertain *pro se* motions when a defendant is represented by counsel, but argues, without any support whatsoever, that that rule should not apply when, as here, a defendant has been granted "co-counsel" status.

It is well-settled that "motions pending at the commencement of trial are waived when the defendant proceeds to trial without raising as an issue the fact that the motions were not ruled upon." *State v. Holmes*, 06-2988, p. 80 (La. 12/2/08), 5 So.3d 42, 94. Thus, while the trial court may have been aware, as Mr. Barker contends, that there may have been outstanding motions before trial transcripts reflect that, at some point during trial, the court conducted a review of the record and discovered only one outstanding motion for discovery, based on defense counsel's inquiry after several witnesses had already testified. Although the handwritten, *pro se* motions Mr. Barker listed appear in the record, Mr. Barker aptly points out that he enjoyed co-counsel status (maintained through opening statements), and therefore had the capacity to raise this issue with the trial court on his own prior to the commencement of the trial. Consequently, we find that any motions which had not yet been addressed were waived once trial began. See La. C.Cr.P. art. 841.

We find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER 11

Mr. Barker again asserts that the trial court erred in stating its opinion on the facts of the case during voir dire and in the opening statements. This assignment of error has been adequately addressed in assignments of error four and five.

ASSIGNMENT OF ERROR NUMBER 12

In his next assignment of error, Mr. Barker contends that the trial court erred when it admitted identification evidence because the single-photograph identification procedure employed was unduly suggestive and rendered the identifications unreliable. The transcripts in the instant case reveal that the state introduced its exhibits nine and ten (the still photos of Mr. Barker taken from the surveillance footage, signed by Ms. Parker and Ms. Watson) during trial and examined Ms. Parker, Ms. Watson, and Detective DiMarco regarding the "identification procedure" conducted in this case without objection. However, because Mr. Barker made the same claim and argument at the hearing on the motions to suppress as he does in this appeal, and under La. C.Cr.P. 84(B), the issue appears to have been sufficiently preserved.[34]

Our jurisprudence reflects:

> A defendant attempting to suppress an identification must prove both that the identification itself was suggestive and that there was a likelihood of misidentification as a result of the identification procedure. *State v. Prudholm*, 446 So.2d 729, 738 (La. 1984). An identification procedure is unduly suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. *State v. Robinson*, 386 So.2d 1374, 1377 (La.

[34] La. C.C.Pr. art. 841 (B) states that "[t]he requirement of an objection shall not apply to the court's ruling on any written motion." While a new basis for an objection may not be urged for the first time on appeal . . . and the rule encompasses a new basis for suppressing evidence urged for the first time on appeal as a reason for overturning a trial court's denial of a motion to suppress," *State v. Butler*, 2012-2359, p. 5 (La. 5/17/13), 117 So.3d 87, 89, here, Mr. Barker filed a pre-trial motion to suppress in which he urged the same arguments raised here.

> 1980). For this reason, identifications arising from single-photograph displays may be viewed in general with suspicion. *Simmons v. United States*, 390 U.S. 377, 383, 88 S.Ct. 967, 970-971, 19 L.Ed.2d 1247 (1968*); State v. Martin*, 595 So.2d 592, 595 (La.1992). The central question, however, is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). Thus, despite the existence of a suggestive pre-trial identification, an in-court identification is permissible if, under all the circumstances, there does not exist "a very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977) (quoting *Simmons*, 390 U.S. at 384, 88 S.Ct. at 971).
>
> If an identification procedure is suggestive, courts must look, under the totality of the circumstances, to several factors in evaluating the likelihood of misidentification. *Neil v. Biggers*, 409 U.S. at 199, 93 S.Ct. at 382; *Martin*, 595 So.2d at 595. These factors include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200, 93 S.Ct. at 382; *Braithwaite*, 432 U.S. at 114, 97 S.Ct. at 2253; *Martin*, 595 So.2d at 595.

State v. Sparks, 88-0017, pp. 52-53 (La. 5/11/11), 68 So.3d 435, 477.

In the instant case, while both Ms. Parker and Ms. Watson identified Mr. Barker from a single photograph, after analyzing the totality of the circumstances, there is very little likelihood of misidentification. First, both witnesses had ample opportunity to view Mr. Barker. Ms. Watson had spoken to him earlier in the day when he approached asking for money, and immediately recognized him as the same man when she saw him later in the hallway near Ms. Parker's office. Ms. Parker greeted Mr. Barker when he entered the building and had a conversation with him inside her office. Second, both women testified that they viewed Mr.

Barker with extreme suspicion at the time they encountered him and believed his motives were dishonest. We find it reasonable that both women would have paid close attention to Mr. Barker with their suspicions raised and would have observed him more carefully.

Third, Mr. Barker fits Ms. Parker's description of the perpetrator on the 911 phone call as an unshaven, Caucasian male, in his late forties or early fifties, with an arm tattoo. Ms. Watson also testified that perpetrator had a backpack, which Mr. Barker is seen carrying in both the surveillance and the police body camera footage. Fourth, Ms. Parker and Ms. Watson both testified that they were able to identify Mr. Barker from the picture they were shown, and both identified him again from the same photos during their testimony.

Officer DiMarco also testified that he had only seen Mr. Barker on the surveillance footage and in the still photos, but immediately recognized Mr. Barker once he arrived at Goleans' reception hall where he was arrested. All three witnesses, therefore, positively identified Mr. Barker as the same man in the still photos.

Finally, Ms. Parker signed the photo from which she identified Mr. Barker and dated it June 17, 2015, one week after she realized Mr. Barker had stolen her laptop. In *Biggers*, the court found that, although a seven-month lapse between the crime and the identification procedure weighed negatively in the totality of the circumstances, it did not preclude a reliable identification in that case. Similarly, the court in *Sparks* found that a two-and-a-half-year lapse between the crime and photographic confrontation was not fatal to an otherwise reliable single-photo identification procedure. Here, we find that a seven or eight day lapse does not render the identification of Mr. Barker unreliable.

Moreover, there is additional evidence which reduced the likelihood of misidentification in this case. Ms. Watson testified that when Mr. Barker approached Weston Ministry earlier in the day, he told her he was from Biloxi, and was down on his luck and needed money. Father Warner testified that when Mr. Barker approached him outside the restaurant, he claimed his car had broken down leaving him stranded and in need of money. Also, on Officer Fuquay's body camera video, Mr. Barker stated that he was from Biloxi, but became stranded in New Orleans. Mr. Barker also told potential jurors during voir dire that he was from Biloxi but his car had broken down here in New Orleans, and during his *pro se* opening statement at trial, he stated that he was from Biloxi, but was stranded in New Orleans after his car broke down. Finally, in Mr. Barker's Amendment," he asserts that the facts show "a man from out of town, his vehicle disabled and the man trying to find a place out of the elements like many other down and out persons in the city."

Not only did Ms. Parker provide a fair description of Mr. Barker to police prior to viewing the picture, Ms. Watson stated the perpetrator carried a backpack and had told her the same story that Mr. Barker had apparently related to nearly every trial witness with whom he interacted, including the jury and this Court. Accordingly, we do not perceive a "substantial likelihood of irreparable misidentification" by the two witnesses who identified Mr. Barker as the perpetrator from the single-photo identification procedure.

Mr. Barker's claim that the surveillance footage and the still photo taken therefrom were "illegible" is unconvincing. The jury had the opportunity to view the surveillance footage and the still photos, and to observe Mr. Barker in the court room prior to his exit. As the finders of fact, the jurors were entitled to make their

own determinations. Our review of the surveillance footage and still photos submitted as evidence belies Mr. Barker's assertion that they were "illegible."

We are also unconvinced by Mr. Barker's contention that he was never identified as having been on Mr. Mitchell's property. Mr. Mitchell specifically testified that he saw Mr. Barker, approached him, and spoke to him before Mr. Barker walked away. Additionally, Mr. Barker was shown on police body camera footage at the reception hall directly across the street from Mr. Mitchell's property and Mr. Mitchell is seen on that same footage identifying Mr. Barker in person as the same individual he observed on his property moments before.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 13

Mr. Barker next argues that the "[o]riginal sentence was excessive being maximum terms on all counts . . . ." This assignment or error regarding Mr. Barker's original sentencing is moot, as he was subsequently found to be a multiple offender and the court was bound by the mandatory sentencing statute. On the charges which the court had discretion in sentencing, it imposed the minimum mandatory sentences, as noted in the errors patent section of this opinion.

ASSIGNMENT OF ERROR NUMBER 14

As his fourteenth assignment of error, Mr. Barker maintains that the trial "[j]udge erred [in] overstepping jurisdiction to reclassify non-violent crimes to [the] status of violent for multiple bill proceeding." He asserts that one of his predicate offenses forming the base of his multiple offender adjudication was not considered a crime of violence under Missouri law, where he was convicted, and the trial court thus erred in interpreting it as a crime of violence under Louisiana law.

At his multiple bill sentencing, Mr. Barker made this very argument to the court. In response, the trial judge correctly explained that under La. R.S. 15:529.1, if an out-of-state, prior offense would be considered a felony were it committed in Louisiana, it may be considered in adjudicating a defendant as a multiple offender.[35] According to La. R.S. 15:529.1(A)(4)(b), the offenses are then evaluated under La. R.S. 14:2(B) to determine if they are considered crimes of violence. (La. R.S. 15:529.1 (A)(4)). Thus, whether the out-of-state offense was defined as a crime of violence in the state in which it occurred is irrelevant. In a Louisiana multiple offender proceeding, Louisiana law is applied to make that determination.

La. R.S. 15:529.1 (A)(4)(b) provides, in pertinent part:

> If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(B)… or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

"Louisiana law and not the law of the foreign jurisdiction determines the seriousness of the defendant's prior felony convictions." *State v. Thomas*, 99-1985, pp. 2-3 (La. App. 4 Cir. 1/5/00), 751 So.2d 979, 980, citing *State v. Carouthers*, 618 So.2d 880 (La. 1993). Furthermore, as this Court explained in *State v. Dawson*, 99-2489, p. 3 (La. App. 4 Cir. 2/2/00), 752 So. 2d 332, 333, citing *Carouthers*, "the multiple bill statute allows Louisiana's courts to enhance the

[35] That statute provides, in pertinent part, that "[a]ny person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, *if committed in this state would be a felony*, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows . . . ." La. R.S. 15:529.1 (A) (emphasis added).

defendant's sentence on the basis of convictions from another state or under federal law when the convictions would otherwise be classified as felonies if they were committed in this state."

In *Carouthers*, the Court found that although one of the defendant's predicate out-of-state offenses did constitute a felony under Louisiana law, the corresponding Louisiana law did not provide a punishment of twelve years or more and therefore the predicate felony could not form the basis of the mandatory life sentence provision for a third felony offender. In so finding, the court stated,

> When it added subsection A(2)(b) to the multiple offender law in 1977, the legislature provided no clear indication that it had departed from the general rule of Section A using Louisiana law to determine the seriousness of the defendant's prior convictions according to the nature of the conduct charged.

Id., 618 So.2d at 882.

La. R.S. 15:529.1(A)(4)(B), under which Mr. Barker was sentenced as a fourth felony offender in the instant case, corresponds to the provision for third felony offenders as stated in *Carouthers*. Therefore the trial court in the instant case properly applied Louisiana law in determining that two of Mr. Barker's out-of-state predicate offenses, if committed in Louisiana, would have been simple robbery and attempted simple robbery, both considered crimes of violence under La. R.S. 14:2 (B)(23).[36]

[36] La. R.S. 14:2 (B)(23) provides:

> In this Code, "crime of violence" means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon. The following enumerated offenses

This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 15

Mr. Barker next contends that trial the court admitted "known altered fingerprint evidence" to prove his identification in the multiple offender proceeding. Mr. Barker bases this claim on what he concedes is an incomplete hearing transcript which does not contain either cross-examination or re-direct examination of the fingerprint expert. During the state's direct examination of Officer George Jackson, a fingerprint expert, it admitted a fingerprint card as State Exhibit 2. When handed the fingerprint card, Officer Jackson stated, "This is not the actual one that I compared on because I don't see my handwritten notes, but this is – I don't know who has that copy."

The instant record, however, contains the complete Multiple Offender Hearing transcripts which indicate that the state did, in fact, introduce the actual fingerprint card used by Officer Jackson to make the comparison as indicated by the following colloquy:

> STATE: Is that the same photocopy I handed you?
>
> WITNESS: Yes, sir. This is the one I used to do my comparison with earlier in court today.
>
> STATE: Are your notations located on that?
>
> WITNESS: Yes. Those are my initials and today's date, yes, sir.

> and attempts to commit any of them are included as "crimes of violence":
>
> * * *
>
> (23) Simple robbery.

It is, therefore, clear from the record that the State also introduced the actual card used to make the comparison, as Officer Jackson's testimony indicates.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 16

In his next assignment of error, Mr. Barker asserts that the court erred in sentencing him under the multiple offender statute that was in effect at the time the fourth felony was committed, and instead, should have sentenced him under the statute which would become effective on November 1, 2017, over two years after the offense occurred and four months after his multiple offender adjudication. He argues that the cleansing period in the most recent version of the statute is only five years instead of the ten year cleansing period in the version of the statute under which he was sentenced, and that his multiple offender status should reflect accordingly. We disagree.

It is well-settled that a "defendant should be sentenced in accord with the version of La. R.S. 15:529.1 in effect at the time of the commission of the charged offense." *State v. Parker*, 03-0924, p. 16 (La. 4/14/04), 871 So.2d 317, 326. (*See also, State ex rel. Nicholas v. State*, 15-1060, p. 3, n. 3 (La. 4/22/16), 192 So.3d 729, 731 recognizing the well-settled rule that a "defendant's status as a habitual offender is…determined as of the date that he commits the charged crime."). In *Parker*, the Supreme Court discussed the public policy behind the issue of ameliorative changes in habitual offender law as asserted in *State v. Dreaux*, 205 La. 387, 17 So.2d 559 (1944):

> We went on to note that if we were to find a defendant's status as a second offender was fixed as of any date other than the commission of the offense, "it would be within the power of the district attorneys and the Attorney General, by delaying the filing of the charges and

> prosecution of the case, to fix the accused's status as a second offender at practically any time he desired." [*Dreaux*] at 392, 17 So.2d at 560. Thus, we also found public policy dictated that defendant's habitual offender status be fixed as of the date of the commission of the crime since this allows defendant's own act to establish his status rather than leaving the matter in the discretion of government attorneys.
>
> * * *
>
> Following *Dreaux*, this court has consistently held that habitual offender proceedings do not charge a separate crime but merely constitute ancillary sentencing proceedings such that the punishment for a new conviction is enhanced. *See State v. Dorthey*, 623 So.2d 1276, 1278-79 (La. 1993); *State v. Walker*, 416 So.2d 534, 536 (La. 1982); *State v. Williams*, 326 So.2d 815, 818 (La. 1976). Additionally, it is generally settled that the law in effect at the time of the commission of the offense is determinative of the penalty which is to be imposed upon the convicted accused. *See State v. Narcisse*, 426 So.2d 118, 130 (La. 1983). *State v. Wright*, 384 So.2d 399, 401 (La. 1980); *State v. Gros*, 205 La. 935, 938, 18 So.2d 507, 507 (1944), cert. denied, 326 U.S. 766, 66 S.Ct. 170, 90 L.Ed. 462 (1945). Finally, "[t]he mere fact that a statute may be subsequently amended, after the commission of the crime, so as to modify or lessen the possible penalty to be imposed, does not extinguish liability for the offense committed under the former statute." *Narcisse*, 426 So.2d at 130.

Parker, 03-0924, pp. 7-10, 871 So.2d at 321–22.

In the instant case, Mr. Barker committed the felonies underlying his habitual offender status in 2015 and was sentenced as a habitual offender under the law in effect at the time of the commission of the offenses.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 17

Mr. Barker asserts that the charges against him were required to be instituted by a grand jury indictment, not by bill of information, because he faced potential adjudication as a fourth felony offender, and a possible life sentence, upon

conviction of any of his felony charges. He further argues that the state was aware that he had prior felony convictions as early as his first appearance on June 15, 2015, and was therefore required by law to file the multiple offender bill at some point before it did so in this case. As we previously noted, a multiple bill may be filed *after c*onviction of the felony which would subject a defendant to multiple offender status. To require the State to file a multiple offender bill before it is known whether a defendant will be convicted of the underlying offense(s) is neither required by the law nor logical.

As to Mr. Barker's contention that his multiple offender status should have been presented to a grand jury, this argument has been repeatedly rejected by the courts. This Court, in *State v. Lomax*, 11-0591, pp. 7-8 (La. App. 4 Cir. 11/28/11), 81 So.3d 788, 793, addressed this issue as follows:

> As to the defendant's contention that he must have a grand jury indictment relative to his multiple offender status, the Louisiana Supreme Court in *State v. Alexander*, 325 So.2d 777, 778–779 (La. 1976) has made it clear that the constitutional requirement of a grand jury indictment in capital cases or cases punishable by life imprisonment does not apply to the institution of enhanced-penalty proceedings under La. R.S. 15:529.1. Id. The grand jury's function is to inquire into an offense and to indict for an offense if the evidence so indicates. *Id*. at 779. The Alexander court explained that "[t]he constitutional classification of felonies for initiation of prosecution is founded upon the general penalty applicable to the substantive crime charged ... not upon any enhanced penalty to which any particular individual might be subject because of his prior convictions ... [P]ost-conviction enhanced-penalty proceedings have no functional relationship to the innocence or guilt of the crime for which prosecution is initiated either by grand-jury indictment or by bill of information." *Id*.

Moreover,

> [T]he Louisiana Constitution of 1974 does not require that the District Attorney institute proceedings by a bill

> of indictment where the maximum penalty for the charge is less than life imprisonment. The constitution mandates that prosecution of felonies be initiated by indictment or information applies only to the substantive crime for which the accused is charged. La. Const.1974, art. I, § 15; La.C.Cr.P. art. 382. In *State v. Alexander*, 325 So.2d 777, 779 (La. 1976), quoting *State v. Jackson*, 298 So.2d 777 (La. 1974), the Court reasoned that the "(bill of) information [charging the defendant as a multiple offender] does not charge a crime but is merely the method of informing the sentencing court of the circumstances and requesting an enhancement of penalty." Thus, the enhanced penalty proceeding does not charge the defendant with a crime; consequently no indictment is necessary. *Id*. Moreover, the charging instrument is dependent upon the classification of the substantive crime charged, not the enhanced penalty to which an individual may be subject upon conviction. Id. In *State v. Tassin*, 08-0752, p. 9 (La. App. 3 Cir. 11/5/08), 998 So.2d 278, 285, *writ denied* 08-2909 (La. 9/18/09), 17 So.3d 385, the defendant asserted that the *State v. Alexander* needed to be reconsidered in light of *U.S. v. Booker*, 543 U.S. 220 [125 S.Ct. 738, 160 L.Ed.2d 621] (2005). The court reasoned that *Booker* was not applicable because it did not address a recidivism statute. Id. at 238 [125 S.Ct. 738]. Thus, the *Tassin* court concluded that *State v. Alexander* was still "good law."

State v. Landfair, 10-1693, p. 5 (La. App. 4 Cir. 7/20/11), 70 So.3d 1061, 1065 quoting *State v. Vincent*, 10-0764, pp. 9-10, 56 So.3d at 414-15.

In the instant case, the maximum sentence Mr. Barker faced upon conviction of any of his charges was twelve years for simple burglary. As such, the State was not required to charge him by grand jury indictment.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NUMBER 18

In this assignment of error, Mr. Barker contends that Louisiana's multiple offender sentencing statute constitutes double jeopardy, "despite current jurisprudence." He argues that receiving a longer sentence than what a statute provides, based on nothing more than having a previous felony conviction, means

that the enhancement must be additional "punishment" for either the previous conviction or the newest conviction, constituting double jeopardy either way. Like his argument with respect to the requirement of a grand jury indictment, this issue has been addressed and rejected:

> Both the Fifth Amendment to the United States Constitution and Art. 1, Section 15 of the Louisiana Constitution guarantee that no person shall be twice placed in jeopardy for the same offense. The purpose of these provisions is to protect a person from a second prosecution after he has already been acquitted or convicted of that offense and to protect an accused against multiple punishment for the same conduct. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969); *State v. Vaughn*, 431 So.2d 763, 767 (La.1983); *State v. Warner*, 94-2649, p. 4 (La. App. 4 Cir. 3/16/95), 653 So.2d 57, 59.
>
> It is well-settled that double jeopardy does not apply to multiple offender proceedings. *State v. Langendorfer*, 389 So.2d 1271, 1277 (La. 1980); *see also*, *State v. Picot*, 98-2194, p. 1 (La. App. 4 Cir. 11/10/98), 724 So.2d 236, 237; *State v. Davis*, 2002-0565, p. 16 (La. App. 4 Cir. 12/11/02), 834 So.2d 1170, 1180. The Habitual Offender Statute, La. R.S. 15:529.1, does not create a new or separate offense based on the commission of more than one felony but merely provides for imposition of an increased sentence for persons convicted of second and subsequent felonies. *State v. Hayes*, 412 So.2d 1323, 1325–1326 (La. 1982); *State v. Boatner*, 304 So.2d 661, 662 (La. 1974); *Picot*, 98-2194, p. 1, 724 So.2d at 238; *see also, State v. Dorthey*, 623 So.2d 1276, 1279 (La. 1993) (providing that Louisiana's Habitual Offender statute is simply an enhancement of punishment provision; it does not punish status and does not on its face impose cruel and unusual punishment).

State v. Holloway, 12-0926, p. 3 (La. App. 4 Cir. 7/3/13), 120 So.3d 795, 797.

Thus under our current jurisprudence, sentence enhancements under Louisiana's multiple offender statute do not constitute double jeopardy.

This assignment of error is meritless.

ASSIGNMENT OF ERROR NUMBER 19

In his last assignment of error, Mr. Barker argues that the multiple bill was untimely. He concedes, however, that this issue was addressed in his counseled original brief. He then asserts that additional arguments appear in his Amendment which he would like considered. We have reviewed all of the claims and arguments set forth in Mr. Barker's Amendment and find that they were all addressed in the first seven counseled assignments of error. Accordingly, they need not be reiterated here.

This assignment of error is moot.

CONCLUSION

For the foregoing reasons, we affirm Mr. Barker's convictions and sentences.

AFFIRMED