NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0412

STATE OF LOUISIANA

VERSUS

CHUCK LOUIS JARRELL

Judgment Rendered: September 19, 2007

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Case No. 02-CR2-83980

The Honorable Peter J. Garcia, Judge Presiding

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Defendant/Appellant
In Proper Person

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BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.

GAIDRY, J.

The defendant, Chuck Louis Jarrell, was charged by bill of information with indecent behavior with a juvenile, a violation of La. R.S. 14:81. The defendant entered a plea of not guilty. The defendant later withdrew his plea and entered a plea of guilty as charged. On the date set for sentencing, the guilty plea was also withdrawn. The trial court denied the defendant's motion to recuse the judge. The defendant filed an application for supervisory writs with this court wherein he alleged that the trial court erred in denying his motion to recuse and that he was not represented by counsel at the original recusal hearing. Finding that the defendant's attorney should have been notified and given an opportunity to be present at the hearing, this court granted the writ, vacated the ruling of the trial court, and remanded the case for further proceedings. *State ex rel. Jarrell v. State*, 2003-1052 (La. App. 1st Cir. 8/11/03) (unpublished). The defendant was appointed counsel and a second recusal hearing was held. The trial court denied the defendant's motion again. The defendant again filed a writ to this court and the writ was denied. *State ex rel. Jarrell v. State*, 2004-1087 (La. App. 1st Cir. 7/12/04) (unpublished). The defendant's application for supervisory relief from the Louisiana Supreme Court was also denied. *State ex rel. Jarrell v. State*, 2004-1846 (La. 10/29/04), 885 So.2d 581. The trial court denied several other pretrial motions, including a motion to suppress confession and motions to suppress evidence.[1]

After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post verdict judgment of

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[1] A counseled motion to suppress evidence was filed on April 24, 2002 and a pro se motion to suppress evidence was filed on May 8, 2003. The record also contains a motion to suppress evidence by subsequent defense counsel (who represented the defendant at the hearing on the motion to suppress). Each motion argues that evidence was obtained by an unconstitutional search and seizure.

acquittal, motion in arrest of judgment, and motion for new trial. The defendant was sentenced to seven years imprisonment at hard labor. The defendant was adjudicated a second-felony habitual offender. The defendant was later sentenced to ten years imprisonment at hard labor. The trial court ordered that the first two years of said sentence be served without probation, parole, or suspension of sentence. The defendant raises the following counseled assignments of error:

1. The trial court erred by not suppressing the evidence of the defendant's arrest because there was no search warrant or an arrest warrant to enter the residence where the defendant was found and the State failed to prove that the verbal consent to search was freely and voluntarily given by the owner of the residence.

2. The trial court erred by not granting the defendant's motion to suppress evidence of the defendant's prior conviction under La. Code Crim. P. art. 412.2.

3. The trial court erred by not granting the defendant's motion to suppress evidence of the video confession.

4. The trial court erred by not granting the defendant's motion for mistrial based on the State's failure to produce a written statement by the victim and the consent form for the DNA sample taken from the defendant.

5. The trial court erred by not conducting a presentence investigation prior to sentencing the defendant.

6. The defendant's conviction was in violation of his Sixth Amendment right to confrontation of all witnesses against him.

7. The trial court erred by imposing an excessive and harsh sentence upon the defendant.

The defendant raises the following pro se assignments of error in his supplemental brief:

8. The trial court erred by not allowing the defendant the right to compulsory process.

9. The trial court erred by not prosecuting the defendant in the time limit prescribed by law.

10. The trial court erred by not allowing the defendant to represent himself.

11. The trial court erred by placing the defendant in jeopardy twice for the same set of circumstances using the same evidence.

12. The trial court erred by not allowing or imposing excessive bail prior to trial.

13. The trial court erred by sentencing the defendant to the maximum sentence because the defendant showed no remorse.

14. The trial court erred by not allowing the defendant the right to choose a jury trial or judge trial.

15. The trial court erred by allowing sealed information to be used by the jury.

16. The trial court erred by allowing a tainted and/or broken chain of evidence to be used at the trial.

17. The trial court erred by allowing illegal identification of the defendant.

18. The trial court erred by allowing the prosecution of the defendant through a defective, invalid, defaced bill of information.

19. The trial court erred by allowing the defendant's public defender to continue throughout the proceedings to ineffectively assist the defendant.

For the following reasons, we affirm the conviction and habitual-offender adjudication, but vacate the enhanced sentence and remand for resentencing.

STATEMENT OF FACTS

On or about July 22, 2001, H.A. (the victim)[2] and a male friend (identified by the victim as Adam) went to a park in Bogalusa, Louisiana to play basketball. While there, the two had contact with the defendant. Ultimately, H.A., Adam, and the defendant simultaneously rode away from the park on the defendant's four-wheeler motor-bicycle. They rode to a

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[2] We reference this victim only by her initials. <u>See</u> La. R.S. 46:1844 W.

grassy area known as "lover's lane." The defendant allowed Adam to drive the motor-bicycle in the area as he and the victim conversed. According to the victim, the defendant asked to see her "stuff," which she also described as her private part. At that point, the victim stated that she wanted to go home. During their ride back to the park, Adam drove the motor-bicycle, the victim sat in the middle, and the defendant sat directly behind the victim. According to the victim, the defendant unzipped his pants and she felt "that stuff on [her] back." Before they made it back to the park, Adam's mother drove by and instructed Adam and the victim to come with her. The victim reported the defendant's actions to Adam's mother. Adam's mother took the victim to the Washington Parish Sheriff's Office. The victim's clothing was collected and sent to the Louisiana State Police Crime Laboratory for testing. A specimen that was taken from a stained area on the back of the victim's shirt contained spermatozoa. The DNA profile from the spermatozoa matched the DNA profile of a blood sample drawn from the defendant.

ASSIGNMENT OF ERROR NUMBER ONE (COUNSELED)

In the first assignment of error, the defendant challenges the trial court's ruling on his motion to suppress evidence. The defendant notes that the State did not produce a consent form to prove that the officers had consent to enter the home in which the defendant was located at the time of his arrest and the homeowner was not called to testify. Thus, the defendant argues that there was no determination that the owner of the home voluntarily consented to the entrance. The defendant notes that only Detective Chris Hickman (of the Washington Parish Sheriff's Office) testified as to the consent by the homeowner. The defendant also notes that Sergeant Quinzell Spikes (of the Washington Parish Sheriff's Office and one

of the arresting officers) could not recall whether they discovered the defendant's outstanding arrest warrants before or after the defendant was taken into custody. Further, Sergeant Spikes did not hear any discussion regarding consent. Finally, the defendant notes that there was no testimony that the owner was informed of his right to refuse to allow the search. The defendant argues that a failure to so inform the owner may have affected the voluntariness of the consent. The defendant, presumably, concludes that any fruits of his arrest (including his confession) should have been suppressed.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. Generally, a search warrant must also be obtained to enter the house of a third party to search for the subject of an arrest warrant. *Steagald v. United States*, 451 U.S. 204, 213-216, 101 S.Ct. 1642, 1648-1650, 68 L.Ed.2d 38 (1981); *State v. Wolfe*, 398 So.2d 1117, 1119-1120 (La. 1981). A search conducted without a warrant is presumably unreasonable unless justified by one of the specifically established exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Farber*, 446 So.2d 1376, 1378 (La. App. 1st Cir.), writ denied, 449 So.2d 1356 (La. 1984). A valid consent search is a well-recognized exception to the warrant requirement, but the State has the burden of proving that the consent was valid in that it was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797 (1968); *State v. Smith*, 433 So.2d 688, 693 (La. 1983); *Wolfe*, 398 So.2d at 1120. Consent is valid when it is freely and voluntarily given by a person who possesses common authority or other sufficient relationship to the premises or effects sought to be inspected.

United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *State v. Bodley*, 394 So.2d 584, 588 (La. 1981). An oral consent to search is sufficient; a written consent is not required. *State v. Ossey*, 446 So.2d 280, 287 n. 6 (La.), cert. denied, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984); *State v. Parfait*, 96-1814, p. 13 (La. App. 1st Cir. 5/9/97), 693 So.2d 1232, 1240, writ denied, 97-1347 (La. 10/31/97), 703 So.2d 20. Furthermore, informing a suspect of his right to refuse consent to a search is not required. Instead, the lack of such a warning is only one factor in determining the voluntary nature of consent to a search. *State v. Overton*, 596 So.2d 1344, 1353 (La. App. 1st Cir.), writ denied, 599 So.2d 315 (La. 1992). Voluntariness is a question of fact to be determined by the trial court under the facts and circumstances of each case. The trial court's factual findings during a hearing to suppress evidence are entitled to great weight and should not be disturbed unless they are clearly erroneous. *State v. Casey*, 99-0023, p. 6 (La. 1/26/00), 775 So.2d 1022, 1029, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000); see also *State v. Brumfield*, 2005-2500, p. 5 (La. App. 1st Cir. 9/20/06), 944 So.2d 588, 593.

As he has been adversely affected by the search of the home, the defendant has standing under Article I, § 5 of the Louisiana Constitution to assert the owner's loss of privacy rights. See *State v. Gant*, 93-2895, p. 3 (La. 5/20/94), 637 So.2d 396, 397 (per curiam). According to testimony presented at the motion to suppress evidence hearing, the defendant was arrested on January 31, 2002. Detective Hickman, Sergeant Spikes (who was a trainee at the time of the offense), and Deputy Ben Godwin went to Kenny Adams's residence after receiving information regarding the whereabouts of a suspect in an unrelated case. When they arrived at Adams's residence, Detective Hickman saw what he recognized as the

defendant's truck. Outstanding warrants for the defendant's arrest were posted at the Sheriff's Office. Adams met the officers outside and Hickman questioned him regarding the whereabouts of the other subject. Adams stated that the subject's whereabouts were unknown. When Detective Hickman asked about the defendant, Adams stated that the defendant was in the back of the home. Sergeant Spikes went to the rear of the home. According to Detective Hickman's testimony, Adams gave him permission to enter the home. Deputy Godwin did not testify.

In *State v. Shy*, 373 So.2d 145, 148 (La. 1979), the Louisiana Supreme Court held that the State satisfied its burden of proving the defendant gave valid consent to the police to search his luggage with the uncontroverted testimony of a police officer, who was the State's sole witness at the suppression hearing. See also *State v. Cambre*, 2004-1317, pp. 13-15 (La. App. 5th Cir. 4/26/05), 902 So.2d 473, 482-83, writ denied 2005-1325 (La. 1/9/06), 918 So.2d 1039. Herein, we find no error in the trial court's reliance on the uncontroverted testimony of Detective Hickman and the finding that Adams freely and voluntarily consented to the search of his home.

It also appears from a review of the record[3] that a warrantless search of the home was justified on the basis of the exigent circumstances presented by the risk of escape. During the hearing on the motion to suppress the confession, Detective Tom Anderson of the Washington Parish Sheriff's Office testified that the warrant for the defendant's arrest regarding the instant offense was issued on November 5, 2001. According to Detective Anderson, the defendant was pursued on several occasions through family members who were asked to tell the defendant that the police were looking for him. During the first police encounter with the defendant, prior to his

[3] When reviewing a trial court's ruling on a motion to suppress, the entire record may be considered. ***State v. Martin***, 595 So.2d 592, 596 (La. 1992).

January 31, 2002 arrest, the defendant fled and eluded capture. Warrantless entries into a person's home, though per se unreasonable, may be justified where sufficient exigent circumstances exist. Examples of exigent circumstances have been found to be: escape of the defendant, avoidance of a possible violent confrontation that could cause injury to the officers and the public, and the destruction of evidence. *Farber*, 446 So.2d at 1379-80. Thus, the record supports a finding that another exception to the warrant requirement, exigent circumstances, existed in this instance. Based on the foregoing reasons, we find that the trial court did not abuse its discretion in denying the motion to suppress evidence.

ASSIGNMENT OF ERROR NUMBER TWO (COUNSELED)

In his second assignment of error, the defendant argues that evidence of his prior conviction for forcible rape should not have been admitted under La. Code of Evid. art. 412.2. The defendant contends that the allowance of the evidence was prejudicial and a violation of the ex post facto laws of this State. The defendant notes that his prior conviction of forcible rape occurred in 1988, prior to the effective date of Article 412.2. The defendant further notes that the date of the instant offense is July 22, 2001, also prior to the effective date of the code article.

During the trial, Officer Curtis Hodge of the Louisiana Department of Probation and Parole (the defendant's parole officer at the time of the instant offense) testified and informed the jury of the defendant's prior conviction for forcible rape. In accordance with Article 412.2 (in pertinent part), when an accused is charged with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior may be admissible and may be

considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403. When the instant offense was committed, La. Code Evid. art. 404B governed the admissibility of evidence regarding other crimes, wrongs, or acts. In 2001, the legislature enacted Article 412.2 which became effective on August 15, 2001. Thus, Article 412.2 was in effect at the time of the trial, but not at the time of the instant offense.

Article I, § 10 of the United States Constitution and La. Const. art. I, § 23 prohibit ex post facto application of the criminal law by the State. *State v. Everett*, 2000-2998, p. 13 (La. 5/14/02), 816 So.2d 1272, 1280. The United States Supreme Court has identified four categories of law that violate the ex post facto prohibition: 1) any law that makes an action criminal that was innocent when done and before the passing of the law, 2) any law that aggravates a crime or makes it greater than it was when committed, 3) any law that changes the punishment and inflicts greater punishment than the law provided when the crime was committed, and 4) any law that alters the legal rules of evidence and requires less or different testimony in order to obtain a conviction than was required at the time the offense was committed. *Rogers v. Tennessee*, 532 U.S. 451, 456, 121 S.Ct. 1693, 1697, 149 L.Ed.2d 697 (2001).

In *State ex rel. Olivieri v. State*, 2000-0172, pp. 15-16 (La. 2/21/01), 779 So.2d 735, 744, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001), the Louisiana Supreme Court held that in determining whether there has been an ex post facto violation, the analysis should focus on whether the new law redefines criminal conduct or increases the penalty by which it is punished, and not whether the defendant has simply been disadvantaged.

The Louisiana Supreme Court has not decided whether the retroactive application of Article 412.2 is a violation of the ex post facto clause. In footnote two of *State v. Morgan*, 2002-3196 (La. 1/21/04), 863 So.2d 520 (per curiam), the Supreme Court noted that the retroactive applicability of Article 412.2 "remains an open question." *Morgan*, 2002-3196 at p. 2 n. 2, 863 So.2d at 522-23. The Third Circuit has held that its retroactive application does not constitute an ex post facto violation. *State v. Willis*, 2005-218, p. 22 (La. App. 3d Cir. 11/2/05), 915 So.2d 365, 383, writ denied, 2006-0186 (La. 6/23/06), 930 So.2d 973, cert. denied, ___ U.S. ___, 127 S.Ct. 668, 166 L.Ed.2d 514 (2006). The Third Circuit found that Article 412.2 did not alter the amount of proof required in the defendant's case as it merely pertains to the type of evidence which may be introduced. Citing *Willis*, the Fifth Circuit ruled similarly in *State v. Greene*, 2006-667, p. 8 (La. App. 5th Cir. 1/30/07), 951 So.2d 1226, 1232. Prior to the enactment of Article 412.2, the type of evidence at issue was admissible if it fell within an exception under La. Code Evid. art. 404B. Article 412.2 removed that restriction. *Willis*, 2005-218 at p. 22, 915 So.2d at 383.

At the outset, we note that the fact that the past sexual act occurred prior to the effective date of Article 412.2 is inconsequential. We further hold that the ex post facto laws would not prohibit the application of Article 412.2 to the present case. Article 412.2 expanded the type of evidence which may be introduced in the prosecution of certain sex offenses without altering the quantum of evidence required for a conviction. The article does not redefine criminal conduct or increase the penalty by which it is punished. Thus, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE (COUNSELED)

In his third assignment of error, the defendant raises additional arguments (along with reiterating the argument raised in assignment of error number one) as to why the trial court erred by not suppressing the videotaped confession. The defendant adds that the State failed to prove that the confession was freely and voluntarily given or that the defendant was made aware that he was being videotaped. The defendant further argues that it is unclear from the record whether the State produced the signed waiver of rights form.

For a confession or inculpatory statement to be admissible into evidence, the State must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements or promises. La. R.S. 15:451. Additionally, the State must show that an accused who makes a statement or confession during custodial interrogation was first advised of his *Miranda*[4] rights. *State v. King*, 563 So.2d 449, 453 (La. App. 1st Cir.), writ denied, 567 So.2d 610 (La. 1990). The admissibility of a confession is in the first instance a question for the trial court. Its conclusions on the credibility and weight of testimony relating to the voluntariness of the confession for the purpose of admissibility will not be overturned on appeal unless they are not supported by the evidence. *State v. Daughtery*, 563 So.2d 1171, 1177 (La. App. 1st Cir.), writ denied, 569 So.2d 980 (La. 1990). Whether or not a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. *State v. Benoit*, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the

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

circumstances in deciding whether a statement or confession is admissible. *State v. Hernandez*, 432 So.2d 350, 352 (La. App. 1st Cir. 1983).

Detective Anderson interviewed the defendant after his arrest. Detective Anderson informed the defendant of his *Miranda* rights by reading them out loud from a waiver of rights form. According to Detective Anderson, the defendant stated that he wanted to speak to the detective off the record. The detective informed the defendant that they could not speak off the record, adding, "Anything I do is on the record." Detective Anderson passed the defendant the waiver of rights form and activated the video camera. According to the detective, while he did not specifically say to the defendant that he was being recorded, the video camera was positioned on the table. Detective Anderson testified that he did not threaten the defendant or make any promises or inducements. At the beginning of the videotape, the defendant appears to study a form for several minutes before passing it and a pen to Detective Anderson. During the interview, the defendant appeared calm, cooperative, and lucid. The defendant admitted to riding with the victim and Adam on his four-wheeler motor-bicycle. According to the defendant, the defendant was sweating when he was on the motor-bicycle because they played basketball before riding on the motor-bicycle. When asked if that may have been what the victim felt, the defendant stated that this was the only possible explanation. The defendant stated that the victim and Adam informed him that they were eighteen years old. The defendant denied any inappropriate behavior. At the end of the interview, the defendant confirmed that his signature was on the form. During the trial, the State introduced a copy of the waiver of rights form. Detective Anderson testified that the whereabouts of the original form could not be

determined. The defendant did not object to the admission of the copy at the time of the trial and does not challenge such admission on appeal.

We find that the evidence presented at the hearing on the motion to suppress defendant's confession supported the trial court's conclusions on the credibility and weight of the testimony relating to the voluntary nature of the defendant's statement. To the extent that the defendant re-raises any issue as to the legality of the arrest, we have found the consent to search proper in addressing assignment of error number one. Based on the foregoing conclusions, we find that there was no abuse of discretion in the trial court's denial of the defendant's motion to suppress the videotaped confession herein. The third assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR (COUNSELED)

In the fourth assignment of error, the defendant argues that the trial court erred by not granting the defendant's motion for mistrial based on the State's failure to produce a written statement of the victim and the consent form for the DNA sample taken from the defendant. As noted by the defendant, the victim testified that she gave a written statement to the police. He contends that, while the State provided open-file discovery, this statement was never produced by the State and may have contained information that could have been used to impeach the victim. Finally, the defendant contends that he did not voluntarily submit to the DNA sample and the State failed to produce the consent form.

Louisiana Code of Criminal Procedure article 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. However, a mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any

reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. *State v. Berry*, 95-1610, p. 7 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

During the victim's testimony, she stated as follows regarding events that took place after she arrived at the sheriff's office to make the initial complaint: "They had took my clothes from me and he had made me wrote [sic] a statement." The defense asked for production of the statement. During a bench conference, the prosecutor stated that he had never seen a written statement by the victim. The trial court suggested further questioning by the defense to determine who wrote the statement. The victim stated that someone else wrote the statement. The victim could not remember who wrote the statement. She specifically remembered someone writing her oral statement.

Lt. Ellis Norsworthy of the Washington Parish Sheriff's Office completed the initial report for the instant offense and collected the victim's clothing. According to Lt. Norsworthy's testimony, he did not have the victim give a written statement. The lieutenant stated that he took "scratch notes" while interviewing the victim. He used the notes to make an offense report.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). Favorable evidence includes both exculpatory evidence and evidence impeaching the testimony of a witness when the

reliability or credibility of that witness may be determinative of defendant's guilt or innocence, or when it may have a direct bearing on the sentencing determination of the jury. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (citing *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566; *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381.

After the State rested its case-in-chief, the defendant moved, pursuant to *Brady v. Maryland* for any exculpatory material, specifically designating a statement given by the victim on the evening of July 22, 2001. The State reiterated that open-file discovery was provided. The State further indicated that Detective Anderson searched the Sheriff's Office files for such a statement and could not find one. The trial court noted Lt. Norsworthy's testimony regarding the notes that he took during the victim's initial statement. The trial court also noted that the victim acknowledged that she did not personally write a statement. The trial court concluded that the record does not clearly establish the existence of a written statement by the

victim. The trial court ruled that the defendant's motion had been satisfied by the State providing open-file discovery.

At the outset we note that the defendant did not move for a mistrial on this basis. At any rate, we agree with the trial court's assessment of the record. The victim was sixteen years of age at the time of her complaint and nineteen years of age at the time of the trial. There is no indication in the record that the victim had any other encounters with the police. Based upon the victim's lack of experience and the gist of the testimony presented by the victim and Lt. Norsworthy, it is likely that the victim was referring to the notes written by Lt. Norsworthy in taking the victim's complaint.

We now turn to the issues raised regarding the defendant's DNA sample. Officer Hodge was present during a prior meeting at the Sheriff's Office to obtain the defendant's consent to a blood sample and witnessed the blood sample being drawn from the defendant at the St. Tammany Parish Medical Center. According to Officer Hodge's trial testimony, the defendant voluntarily gave the blood sample. Officer Hodge believed a consent form was executed but he was not present for such execution. According to Officer Hodge, he was standing just outside of the room and the door was open. Based upon the State's failure to produce a consent form, the defense objected to the admission of the blood sample. Officer Hodge did not know the whereabouts of a consent form. Officer Hodge did not witness any duress or coercion placed upon the defendant. The trial court overruled the defendant's objection. Upon further questioning, Officer Hodge testified that the defendant was cordial in providing the blood sample.

Medical testing procedures have been held to constitute a search of the person. *State v. Carthan*, 377 So.2d 308, 311 (La. 1979). A search

conducted with a subject's consent (including a search involving the taking of a blood sample) is a specifically established exception to both the warrant and probable cause requirements. When the State seeks to rely upon consent to justify a warrantless search, it must demonstrate the consent was given freely and voluntarily without coercion. Generally, the test for consent is whether the defendant acted voluntarily without coercion. See *State v. Clark*, 446 So.2d 293, 297 (La. 1984) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). The voluntariness of a subject's consent to search is a question of fact to be determined by the trial court under the facts and circumstances surrounding each case, and the trial court's determinations as to the credibility of the witnesses are to be accorded great weight on appeal. *State v. Wilson*, 467 So.2d 503, 518 (La.), cert. denied, 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 246 (1985). See also *State v. Fontenot*, 383 So.2d 365, 368 (La. 1980); *State v. Davis*, 94-2332, p. 4 (La. App. 1st Cir. 12/15/95), 666 So.2d 400, 403, writ denied, 96-0127 (La. 4/19/96), 671 So.2d 925.

Before resting, the defendant moved for the production of the consent form regarding the DNA sample. The prosecutor argued that the defendant should have filed a motion to suppress the DNA sample before the trial. The prosecutor further noted that the record is unclear as to the existence of such a consent form and that no such form could be located in the Sheriff's Office records. The State further noted that Officer Hodge, as the defendant's parole officer, had the right to demand a blood sample from the defendant. After the State's argument, the defense moved for a mistrial. The trial court denied the motion for mistrial. The trial court noted that the issue may have been waived by the defendant's failure to file a pretrial motion and further

noted that the trial testimony indicated that the defendant consented to the DNA sample.

We find that the trial court did not abuse its discretion in denying the defendant's motion for mistrial. Uncontroverted testimony indicated that the defendant consented to the DNA sample. The defendant is not arguing, nor does the record establish, that he was coerced in any way. We cannot say that the defendant suffered such substantial prejudice that he was deprived of any reasonable probability of a fair trial. Based on the foregoing reasons, we find that this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE (COUNSELED)

In the fifth assignment of error, the defendant argues that the trial court erred by not conducting a presentence investigation (PSI) prior to sentencing the defendant as a habitual offender. The defendant contends that the trial court abused its discretion in not ordering the PSI requested by the defendant at the time of the original sentencing.

As noted by the defendant, there is no mandate under our law that the trial court order a PSI. *State v. Wimberly*, 618 So.2d 908, 914 (La. App. 1st Cir.), writ denied, 624 So.2d 1229 (La. 1993). Such an investigation is an aid to the court and not a right of the accused. The trial court's failure to order a PSI will not be reversed absent an abuse of discretion. *Wimberly*, 618 So.2d at 914. Herein, as noted by the trial court in denying the defendant's request, the trial court was fully aware of the defendant's background. A PSI was ordered and reviewed by the trial court after the defendant entered his later-withdrawn guilty plea to the instant offense. We find no abuse of discretion in the trial court's denial of a second PSI as requested on the date of sentencing. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER SIX (COUNSELED)

In the sixth assignment of error, the defendant argues that his conviction was obtained in violation of his Sixth Amendment right to confrontation of all witnesses against him. The defendant specifically contends that he was unable to confront two essential witnesses, the guardian of the alleged victim and the young male present at the time of the offense.[5]

At the outset, we note that the defendant did not object or raise any arguments at trial as to this alleged constitutional violation. In order to preserve an issue for appellate review, a party must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for the objection. La. Code Crim. P. art. 841. The purpose behind the contemporaneous objection rule is to put the trial judge on notice of an alleged irregularity so that he may cure the problem, and to prevent the defendant from gambling on a favorable verdict, then resorting to appeal on errors that might easily have been corrected by an objection. Since the defendant did not lodge any objections regarding the absence of the individuals at issue or to any testimony on the ground that it violated the confrontation clause of the United States or Louisiana Constitutions, he is precluded from raising the issue on appeal. Moreover, the Confrontation Clause of the Sixth Amendment safeguards the defendant's rights to confront his accusers and to subject their testimony to rigorous testing in an adversary proceeding before the trier of fact. *State v. Kennedy*, 2005-1981, p. 12 (La. 5/22/07), ___ So.2d ___, ___, 2007 WL 1471652. No statements or

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[5] The victim referred to the young male who was present at the time of the offense as "Adam," her close friend. The defendant refers to the first adult individual to have contact with the victim after the offense as "Ms. Holland" and the victim's "guardian." The victim referred to this individual as Adam's mom.

testimony of the individuals in question were presented to the jury. Nor was there any evidence to suggest that they were the defendant's accusers.[6] Thus, we find no merit in this assignment of error.

ASSIGNMENT OF ERROR NUMBER SEVEN (COUNSELED) AND ASSIGNMENT OF ERROR NUMBER THIRTEEN (PRO SE)

In the seventh and final counseled assignment of error, the defendant argues that the trial court erred in imposing an excessive, harsh sentence. In pro se assignment of error number thirteen, the defendant argues that the trial court erred in sentencing the defendant to the maximum sentence without complying with sentencing guidelines.

At the outset, we note that while the trial court imposed the maximum sentence at the original sentencing, the defendant was resentenced upon his habitual-offender adjudication and a maximum sentence was not imposed. When the trial court sentenced the defendant as a habitual offender, it failed to vacate the original sentence for the instant offense, the conviction used as the basis for the sentencing enhancement. The language of the habitual-offender statute requires the sentencing court, when imposing a habitual-offender sentence, to vacate any sentence already imposed in the case. However, when faced in previous criminal appeals with the failure of a trial court to vacate the original sentence, this court has simply vacated the original sentence to conform to the requirements of the habitual-offender statute and has found it unnecessary to vacate the habitual offender sentence or remand for resentencing. Accordingly, we vacate the original seven-year hard-labor sentence to conform to the requirements of La. R.S. 15:529.1D(3). It is not necessary to vacate the habitual-offender sentence

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[6] As noted by the State in its appellate brief, the record evidences an agreement between the State and the defense attorney to not call the Cangelosi boy (presumably Adam) to avoid a potential conflict of interest with the Public Defender's Office. The substance of the potential conflict of interest was not fully developed in the record.

imposed, or to remand for resentencing on this basis. See *State v. Jackson*, 2000-0717, pp. 3-6 (La. App. 1st Cir. 2/16/01), 814 So.2d 6, 9-11 (en banc), writ denied, 2001-0673 (La. 3/15/02), 811 So.2d 895.

The record in this case does not show that defendant filed a new motion to reconsider upon resentencing in accordance with La. Code Crim. P. art. 881.1. *State v. Smith*, 2003-1153, pp. 7-8 (La. App. 1st Cir. 4/7/04), 879 So.2d 179, 183-84 (en banc). He did object to his enhanced sentence as "unduly harsh" at the time it was imposed. Therefore, the defendant is only entitled to a review for constitutional excessiveness on this basis. *State v. Handley*, 96-0631, pp. 13-14 (La. App. 1st Cir. 12/20/96), 686 So.2d 149, 158, writ denied, 97-0189 (La. 6/13/97), 695 So.2d 986.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. The Louisiana Supreme Court in *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979), held that a sentence that is within the statutory limits may still be excessive. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. *State v. Hurst*, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. *Hurst*, 99-2868 at pp. 10-11, 797 So.2d at 83.

In *State v. Dorthey*, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the

punishment mandated by the Habitual-Offender Law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in *Dorthey* was made only after, and in light of, express recognition by the court that the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. *Dorthey*, 623 So.2d at 1278.

As a second-felony offender, the defendant was subject, under La. R.S. 15:529.1A(1)(a), to a minimum of three and one-half years imprisonment and a maximum of fourteen years imprisonment. See La. R.S. 14:81C (prior to its 2006 amendment). The defendant was sentenced to ten years imprisonment at hard labor. As noted, the defendant's previous conviction was for a crime of violence, forcible rape. La. R.S. 14:42.1; La. R.S. 14:2(13)(j) (prior to its 2006 amendment). Based on the record before us, we do not find that the trial court abused its discretion in imposing an enhanced sentence of ten years imprisonment at hard labor. Considering the facts of the offense, the sentence is not shocking or grossly disproportionate to the defendant's behavior. Counseled assignment of error number seven and pro se assignment of error number thirteen are without merit.[7]

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[7] A sentencing error will be discussed in the review for error section herein.

ASSIGNMENT OF ERROR NUMBER EIGHT (PRO SE)

In the eighth assignment of error, the defendant argues that the trial court erred in not allowing him compulsory process. The defendant contends that on several occasions he attempted to have witnesses subpoenaed for trial. The defendant specifically names the victim's guardian, the individual who was present at the time of the offense, and the owner of the home wherein his arrest took place. The defendant argues that the victim's guardian and the individual who was present at the offense may have testified that the defendant was innocent.

A defendant's right to compulsory process for obtaining witnesses on his behalf is embodied in both the federal and state constitutions and in the statutory law of this State. See U.S. Const. amend. VI; La. Const. art. I, § 16. The court shall issue subpoenas for the compulsory attendance of witnesses at hearings or trials when requested to do so by the State or the defendant. La. Code Crim. P. art. 731. The right of a defendant to compulsory process includes the right to demand subpoenas for witnesses and the right to have them served. *State v. Latin*, 412 So.2d 1357, 1361 (La. 1982). However, a defendant's inability to obtain service of requested subpoenas will not be grounds for reversal of his conviction or new trial in each and every case. In order for the defendant to show prejudicial error, he must demonstrate the testimony the witness might give which would be favorable to the defense and which would indicate the possibility of a different result if the witness were to testify. See *State v. Green*, 448 So.2d 782, 787 (La. App. 2d Cir. 1984).

At trial, the defendant could have made an oral motion for continuance prior to the selection and seating of the jury, motioned for a recess in order to locate his witness, or preserved his claim in some other

timely fashion. Instead, the defendant failed to make a timely complaint about the absence of the potential witnesses. Thus, the defendant waived his right. The defendant's claim that he was denied the right of compulsory process, which he raised for the first time on appeal, was not properly preserved for appellate review. La. Code Crim. P. art. 841. Further, it has been held that an accused cannot claim that he was denied the right to compulsory process for obtaining witnesses where the defense did not seek to subpoena these witnesses. *State v. Ball*, 32,498, p. 6 (La. App. 2nd Cir. 12/15/99), 748 So.2d 1249, 1253, writ denied, 2000-0506 (La. 10/6/00), 770 So.2d 364. See also *Beach v. Blackburn*, 631 F.2d 1168, 1171 (5th Cir. 1980). Here, the record does not reflect subpoenas for the potential witnesses at issue. Also, there has been no showing as to what testimony the witnesses might give which would be favorable to the defendant and which would indicate the possibility of a different result if the witnesses were to testify. We find no prejudicial error related to the absence of the potential witnesses at issue. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER NINE (PRO SE)

In the ninth assignment of error, the defendant argues that the State failed to institute prosecution within "the two (2) year" (sic) time limitation. The defendant notes that the offense occurred on July 22, 2001, and that he was arrested on January 31, 2002. The defendant also notes that the trial occurred in late 2005. The defendant concludes that the conviction and sentence should be vacated and the indictment dismissed or quashed.

Initially, we note that it is unclear whether the defendant is raising an argument as to the State's failure to timely institute prosecution or as to the State's failure to timely commence trial, or both. Nonetheless, it appears that the defendant has failed to properly preserve either complaint for review.

First, the defendant did not file an oral or written motion on the basis of untimely prosecution. Moreover, the time limits for the institution of prosecution had not expired. As noted by the defendant, the instant offense was committed on July 22, 2001. Prosecution was instituted by the filing of a bill of information on March 6, 2002. See La. Code Crim. P. art. 382. The State had four years within which to institute prosecution. See La. Code Crim. P. art. 572A(2); La. R.S. 14:81. The instant bill of information was filed within one year after the commission of the offense.

Second, the defendant made an oral motion to quash in open court based on untimely commencement of trial. Statements made at the time of the oral motion seemingly indicate, though not directly, that a written motion was being filed at the time. However, the record does not contain such a written motion. Pursuant to La. Code Crim. P. art. 536, a motion to quash shall be in writing, signed by the defendant or his attorney, and filed in open court or in the office of the clerk of court. Further, it shall specify distinctly the grounds on which it is based. Since an oral motion to quash does not comply with the provisions of Article 536, it cannot be considered. *State v. Howell*, 525 So.2d 283, 284 (La. App. 1st Cir. 1988). Thus, the defendant may have waived any right he may have had to complain about lack of compliance with the time limitations imposed by La. Code Crim. P. art. 578(2). See La. Code Crim. P. art. 581; *State v. James*, 394 So.2d 1197, 1199 n. 1 (La. 1981). In any event, the time limit for commencement of trial had not expired by the date of the trial.

Louisiana Code of Criminal Procedure article 578(2) provides that trial of non-capital felonies must be held within two years from the date of the institution of the prosecution. When a defendant has brought an apparently meritorious motion to quash based on prescription, the State

bears a heavy burden to demonstrate either an interruption or a suspension of time such that prescription will not have tolled. *State v. Rome*, 93-1221 (La. 1/14/94), 630 So.2d 1284, 1286; *State v. Guidry*, 395 So.2d 764, 765 (La. 1981); *State v. Haney*, 442 So.2d 696, 697-98 (La. App. 1st Cir. 1983). La. Code Crim. P. art. 580, concerning the suspension of the time limitation, states that when a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by Article 578 shall be suspended until the ruling of the court thereon; but in no case shall the State have less than one year after the ruling to commence the trial. The prescriptive period is merely suspended until the trial court rules on the filing of preliminary pleas; the relevant period is not counted, and the running of the time limit resumes when the court rules on the motions. A preliminary plea is any pleading or motion filed by the defense that has the effect of delaying trial, including properly filed motions to quash, motions to suppress, or motions for a continuance, as well as applications for discovery and bills of particulars. *State v. Brooks*, 2002-0792, p. 6 (La. 2/14/03), 838 So.2d 778, 782 (per curiam).

As stated herein, prosecution was instituted on March 6, 2002, by the filing of the bill of information. Thereafter the defendant filed several pretrial motions including a motion for bill of particulars and discovery and inspection, motions to suppress, a motion for a *Prieur* hearing, and a motion for preliminary examination. On October 23, 2002, the defendant withdrew pending motions and pled guilty as charged. On December 3, 2002, the trial court allowed the defendant to withdraw his guilty plea due to an apparent misunderstanding regarding the sentence to be imposed. On February 6, 2003, still within the two-year time limit for commencement of trial, the defendant filed a motion to recuse the judge. A recusal hearing took place

on May 6, 2003, and the trial court denied the motion to recuse. On May 8, 2003, the defendant filed notice of intent to seek writs of certiorari and review, a motion to suppress evidence, a motion for preliminary examination, and a motion for discovery. On August 11, 2003, this court granted the defendant's writ application, vacated the trial court's ruling on the motion to recuse, and remanded for further proceedings on the motion to recuse. On remand, a second recusal hearing was held on October 30, 2003, and the trial court again denied the motion. This court denied writs on July 12, 2004, and the Louisiana Supreme Court denied writs on October 29, 2004. The hearing on the motion to suppress evidence commenced on the date of the trial, and was denied in the midst of the trial. Thus, the statutory time limitation set forth in La. Code Crim. P. art. 578(2) did not expire prior to the commencement of trial. Based on the foregoing reasons, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TEN (PRO SE)

In the tenth assignment of error, the defendant argues that the trial court erred in not allowing him to represent himself. Citing the Louisiana Code of Criminal Procedure, the defendant notes that an arrestee has the right to the appointment of counsel. The defendant further notes, however, that there is no statutory mandate that an accused be represented by counsel. The defendant contends that had the trial court allowed him to act on his own behalf, he would have subpoenaed witnesses. The defendant contends that he was held in contempt and ordered to serve sixty days in parish jail when he attempted to exercise his right of compulsory process. The defendant further claims that the trial court ordered the minute clerk not to record the defendant's statements.

We note that the defendant has not provided any record references for the arguments raised in this assignment. Pursuant to Uniform Rules – Courts of Appeal, Rule 2-12.4, in pertinent part, the brief of the appellant shall set forth an argument confined strictly to the issues of the case, giving accurate citations of the pages of the record and the authorities cited. According to the pertinent minute entry, the trial court found the defendant in contempt of court on October 24, 2005, one day prior to the trial (during a hearing on the motion to suppress confession). The minute entry further reflects the imposition of sixty days imprisonment in parish jail. We presume that the defendant's arguments raised herein are in reference to this portion of the record.

According to the October 24, 2005 suppression-hearing transcript, the State presented the testimony of one witness. The trial court recessed the proceedings to allow the defendant and his attorney, Mr. Stamps, to discuss the possibility of the defendant testifying. The defense attorney indicated that he had no witnesses. The defendant stated he had witnesses regarding his arrest. The trial court advised the defendant to raise his hand and take the stand if he wished to testify. The defendant requested his attorney's advice and ultimately stated, "The tape speaks for itself. There wasn't nothing there but manipulation." At that point the trial court (in pertinent part) stated: "Any more conversation between Mr. Stamps and Mr. Jarrell is not on the record." The trial court denied the defendant's motion to suppress confession.

An accused has the right to choose between the right to counsel, guaranteed in the state and federal constitutions, and the right to self-representation. However, the choice to represent oneself must be clear and unequivocal. Requests which vacillate between self-representation and

representation by counsel are equivocal. Whether a defendant has knowingly, intelligently, and unequivocally asserted the right to self-representation must be determined on a case-by-case basis, considering the facts and circumstances of each. *State v. Leger*, 2005-0011, p. 53 (La. 7/10/06), 936 So.2d 108, 147-48, cert. denied, ___ U.S. ___, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007).

The defendant failed to show, nor do we find any clear and unequivocal assertion or a mere attempt to assert, his right to self-representation. Moreover, the defendant did not raise this issue below, thus, it has not been properly preserved for appellate review. La. Code Crim. P. art. 841. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER ELEVEN (PRO SE)

In the eleventh assignment of error, the defendant argues that the trial court was without jurisdiction as the case was barred by double jeopardy. The defendant notes his prior plea agreement. The defendant argues that it is judicially incorrect for him to be prosecuted after he entered a guilty plea to the instant offense. The defendant concludes that his right against double jeopardy was violated in this regard.

The Fifth Amendment to the United States Constitution provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Protection against double jeopardy is divided into three basic guarantees: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishment for the same offense. *State v. Smith*, 95-0061, p. 3 (La. 7/2/96), 676 So.2d 1068, 1069. Similar protections are offered by Article I, § 15 of the Louisiana Constitution and La. Code Crim. P. art. 591. According to La. Code Crim.

P. art. 592, jeopardy attaches when a valid sentence is imposed upon a defendant who pleads guilty.

The trial court may permit a guilty plea to be withdrawn any time before sentence. La. Code Crim. P. art. 559A. In the instant case, the trial court allowed the defendant to withdraw his guilty plea prior to sentencing. Thus, jeopardy had not attached before the subsequent trial. The defendant's subsequent trial and sentence for indecent behavior with a juvenile do not violate the prohibitions against double jeopardy. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWELVE (PRO SE)

In the twelfth assignment of error, the defendant argues that the trial court erred by not allowing the defendant bail. The defendant contends that he was denied bail for forty-six months, in violation of his constitutional right to bail.

Bail is the security given by a person to assure his appearance before the proper court whenever required. La. Code Crim. P. art. 311. The trial court is empowered on its own motion, for good cause, to increase or reduce the amount of bail. La. Code Crim. P. art. 342. When a defendant is aggrieved by any bail ruling, the appropriate remedy lies in an application for supervisory review at that time. La. Code Crim. P. art. 343; *State v. McCloud*, 357 So.2d 1132, 1134 (La. 1978). On June 26, 2003, the defendant filed a pro se application with this court to seek review of the trial court's denial of his Motion for Bail Reduction and Motion and Order for Constructive Contempt and Appeal From Judgment and the application was denied. *State ex rel. Jarrell v. State*, 2003-1326 (La. App. 1st Cir. 9/8/03) (unpublished). Thus, the defendant has invoked supervisory review on this issue. The subject of the trial court's ruling at issue in this assignment was

rendered moot by the subsequent trial, conviction, and sentence. *State v. Bradford*, 298 So.2d 781, 788 (La. 1974). Thus, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FOURTEEN (PRO SE)

In the fourteenth assignment of error, the defendant simply states that the trial court erred by not openly advising him of his right to a jury trial or a bench trial. As previously noted, the defendant was tried by a jury.

At the outset, we note that the defendant has not alleged, nor do we find, any prejudice in this regard. Thus, the matter is not a ground for reversal of the defendant's conviction. La. Code Crim. P. art. 921. Moreover, the record reflects that the defendant was well aware of his rights in this regard. During the recusal hearing, the defendant personally stated (in pertinent part) as follows: "If I choose to have a judge trial -- which I haven't made that decision yet … ." Also, the defendant's attempts to have the trial judge recused coincide with a choice to be tried by a jury of his peers. Thus, we find no merit in this assignment of error.

ASSIGNMENT OF ERROR NUMBER FIFTEEN (PRO SE)

In the fifteenth assignment of error, the defendant contends that the trial court erred by allowing sealed information to be used in the trial to help the jury make their decision. The defendant notes that he entered a guilty plea, which was later withdrawn, and the trial court ordered a PSI. During the PSI, the defendant wrote a confession seeking mercy and a lesser sentence.[8] The defendant notes that the trial court ordered the PSI to be placed under seal. According to the defendant, his trial attorney advised him that the written confession would be used by the State and shown to the jury if the defendant testified.

[8] The argument for this assignment of error contains unrelated, incoherent statements that have not been repeated herein.

As noted by the State in response to this assignment of error, neither the written confession, nor any other portion of the PSI, was introduced at the trial. The videotaped confession was the only statement by the defendant that was admitted and the propriety of that admission has been addressed herein. We find no basis for this argument, thus the assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER SIXTEEN (PRO SE)

In the sixteenth assignment of error, the defendant argues that the trial court erred by admitting evidence for which the chain of custody was not established. The defendant specifically contends that an uncertified technician cross-referenced a DNA sample already on file for the defendant with an unrelated matter. The defendant further contends that the technician contacted the Sheriff's Office and advised them to collect a blood sample from the defendant to conceal the illegal cross-referencing. The defendant further argues that the State did not establish the origin of the garments that were allegedly sent to the laboratory.[9]

In order to introduce demonstrative evidence at trial, it must be identified either visually by testimony that the object at issue is the one related to the case or, alternatively, by establishing a continuous chain of custody. *State v. Martin*, 607 So.2d 775, 779 (La. App. 1st Cir. 1992). Julia Naylor, a forensic serologist accepted as an expert in forensic DNA analysis without objection, analyzed the evidence in question. A contemporaneous objection to the chain of custody of the evidence in question, the DNA sample, and the victim's clothing was not raised below. The defendant objected to the admission of the DNA sample solely on the basis of the

[9] The argument for this assignment of error also contains unrelated, incoherent statements that have not been repeated herein.

State's failure to produce a consent form. The defendant objected to the admission of the victim's clothing as "previously raised pretrial." However, the pretrial motions to suppress evidence pertained to the legality of the search of the residence in which the defendant was located and the defendant's arrest. The motions did not contain arguments as to chain of custody and the evidence in question was not a fruit of the arrest. Thus, it appears that the issues raised in this assignment were not properly preserved for appellate review. La. Code Evid. art. 103A(1); La. Code Crim. P. art. 841.

Nonetheless, we find that the State presented sufficient testimony to establish visual identification and/or the chain of custody of the evidence at issue. The victim testified that her clothing was collected at the police station. The victim specifically identified the items in S-1 as the shirt and skirt that she wore at the time of the offense and released to the police on that same date. Lt. Norsworthy collected the clothing from the victim at 8:00 p.m. on the date of the offense and turned the evidence over to Detective David Pittman at 10:30 p.m. The evidence custodian (who was the custodian at the time of the trial but not at the time of the offense) examined the evidence and determined that it was sealed, turned over to the evidence custodian and taken to the Louisiana State Police Crime Lab. Officer Hodge was present when the blood sample was drawn from the defendant. He placed the sample in an evidence envelope from the Washington Parish Sheriff's Office and placed the evidence in a locked drawer at the hospital. A sheriff's deputy picked up the evidence. Officer Hodge identified the contents of S-5 as the vial that he placed in the evidence envelope on the date it was drawn. Julia Naylor identified the contents of S-1 and S-5 as the evidence that she received and tested at the

lab. The defense did not object to the chain of evidence and visual identification testimony of the evidence at issue. Based on the foregoing, we find no merit in this assignment of error.

ASSIGNMENT OF ERROR NUMBER SEVENTEEN (PRO SE)

In the seventeenth assignment of error, the defendant argues that the trial court erred in admitting the victim's in-court identification of the defendant. The defendant contends that the victim was unable to identify the defendant on the date of the offense, but did so four years later during the trial. The defendant further contends that the in-court identification may have been the result of debriefing of the victim by the State and the fact that the defendant was sitting at the defense table in non-formal attire.

A defendant who fails to file a motion to suppress identification, and who fails to object at trial to the admission of the identification testimony, waives the right to assert the error on appeal. Herein, the defendant withdrew his motion to suppress identification. In doing so, the defense attorney stated that the motion was technically moot, as the evidence would reflect that the victim did not identify the defendant before the trial from a line-up. No objection was lodged when the victim identified the defendant in court. Thus, the defendant has waived his right to assert this issue on appeal. Nonetheless, we find no merit in the defendant's argument that the victim's in-court identification was unreliable.

A pretrial identification is not a prerequisite to an in-court identification. *State v. Williams*, 2001-1398, p. 4 (La. App. 1st Cir. 3/28/02), 815 So.2d 378, 381, writ denied, 2002-1466 (La. 5/9/03), 843 So.2d 388. The absence of a pretrial identification goes to the weight of the witness's testimony, not to its admissibility. *State v. King*, 604 So.2d 661, 669 (La. App. 1st Cir. 1992). Several factors are considered in evaluating the

reliability of an identification: (1) the opportunity of the witness to view the criminal at the scene of the crime; (2) the witness's degree of attention; (3) the accuracy of his or her prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). In order to suppress an identification, the defendant must show that the procedure was suggestive and that there was a substantial likelihood of misidentification by the eyewitness. Thus, even if the identification procedure is suggestive, an identification will be permissible if there is not a very substantial likelihood of irreparable misidentification. *State v. Johnson*, 2000-0680, pp. 7-8 (La. App. 1st Cir. 12/22/00), 775 So.2d 670, 677, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066; *King*, 604 So.2d at 669. The opportunity to cross-examine a witness about his in-court identification of the defendant as the perpetrator of a crime will ordinarily cure any suggestiveness of such an identification. *Williams*, 2001-1398 at p. 5, 815 So.2d at 381.

In *State v. Johnson*, 343 So.2d 155, 160-61 (La. 1977), the Louisiana Supreme Court found a similar in-court identification was not unduly suggestive. The *Johnson* court reasoned that the mere fact that the defendant was conspicuously seated at the defense table at trial at the time the witness identified him did not suggest that he was guilty of the crime, only that he was charged with its commission. The court further found that counsel's right to cross-examine the witness was sufficient to remedy any suggestiveness inherent in the in-court identification process.

A review of the victim's testimony does not show that there was a substantial likelihood of misidentification. During cross-examination, the defense attorney questioned the victim concerning her opportunity to view

the perpetrator at the crime scene. Any suggestiveness in the in-court identification was cured by the opportunity to cross-examine the witness. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER EIGHTEEN (PRO SE)

In the eighteenth assignment of error, the defendant argues that the trial court erred in allowing the institution of prosecution with a "defective, invalid, defaced" bill of information. The defendant notes that the bill of information did not specifically state whether the offense was committed upon or in the presence of the victim.

At the outset, we note that the defendant did not move to quash the bill of information nor lodge an objection thereto. A defendant may not complain of technical insufficiency in an indictment or bill of information for the first time after conviction, when the defendant is fairly informed of the charge against him and there is no prejudice caused by the defect. *State v. Comeaux*, 408 So.2d 1099, 1106 (La. 1981); *State v. McLean*, 525 So.2d 1251, 1252 n. 1 (La. App. 1st Cir.), writ denied, 532 So.2d 130 (La. 1988); see La. Code Crim. P. art. 487. Under our constitution, a person accused of a crime has a right to be fully informed of the nature of the accusation against him. La. Const. art. I, § 13.

The bill of information, in pertinent part, states that the defendant violated La. R.S. 14:81 (indecent behavior with a juvenile) "by committing a lewd and lascivious act upon a juvenile or in the presence of, one H.A., under the age of 17 by the defendant, with the intent of arousing or gratifying the sexual desires of either person, the defendant being over the age of 17 years." An indictment which charges indecent behavior with juveniles in the alternative language of the statute does not adequately inform an accused of the nature and cause of the accusations against him.

See *State v. Edwards*, 283 So.2d 231, 233 (La. 1973). However, the constitutional mandate that a defendant be informed of the nature and cause against him does not require that he may only be so informed by indictment or information. By virtue of open-file discovery, the defendant was aware of all the evidence the State had at its disposal in this prosecution.

Considering the record before us, including the facts and circumstances of the instant case, we find that the defendant had full knowledge of the nature and cause of the charge against him and of the nature and extent of the evidence the State had with which to prove its allegations. Moreover, there has been no showing of prejudice. La. Code Crim. P. art. 921. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER NINETEEN (PRO SE)

In the nineteenth and final assignment of error, the defendant argues that the trial court erred in allowing his trial attorney to ineffectively assist him. The defendant contends that he never filed an application to have a public defender. The defendant further contends that his trial attorney covered up violations of the trial judge. The defendant argues that his trial attorney failed to list vital errors in his application for supervisory review of the denial of his motion to recuse. The defendant concludes that if his attorney had raised error as to the two different minute keepers who "transcribed the minutes differently," the matter would have been remanded for re-allotment.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court than by appeal. This is because post-conviction relief creates the opportunity for a full evidentiary hearing under La. Code Crim. P. art.

930.[10] *State v. Lockhart*, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. However, when the record is sufficient, this court may resolve this issue on direct appeal in the interest of judicial economy. *State v. Ratcliff*, 416 So.2d 528, 530 (La. 1982). Effective counsel has been defined to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." *United States v. Frugé*, 495 F.2d 557, 558 (5th Cir. 1974) (per curiam) (citing *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974)); see also *United States v. Johnson*, 615 F.2d 1125, 1127 (5th Cir. 1980) (per curiam). In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court established a two-part test for review of a convicted defendant's claim that his counsel's assistance was so defective as to require reversal of a conviction. First, the defendant must show that counsel's performance is deficient. Second, the defendant must show that this deficient performance prejudiced the defense. A failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

The defendant has raised arguments as to his counsel's performance regarding his motion to recuse. Thus, the defendant must show that but for his counsel's deficient performance, the ruling on the motion to recuse would have been changed, either in the district court or on appeal. The only specific deficiency alleged regards defense counsel's failure to list as error for supervisory review the use of two different minute clerks who

[10] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924 et seq., in order to receive such a hearing.

transcribed the minutes differently. The defendant has not specified which portion of the record was transcribed differently and has not stated how any discrepancy in transcription was consequential. The arguments raised by the defendant do not substantiate a claim of deficient performance or prejudice. Thus, this assignment of error lacks merit.

REVIEW FOR ERROR

As mandated by La. Code Crim. P. art. 920(2), a review for error has been made of the record in this case, and a sentencing error has been discovered. The trial court sentenced the defendant under La. R.S. 15:529.1A(1)(a) to ten years imprisonment at hard labor with the first two years of said sentence to be served without the benefit of probation, parole, or suspension of sentence. However, parole eligibility is prohibited neither by La. R.S. 15:529.1A(1)(a) nor for the crime of indecent behavior with juveniles. See La. R.S. 14:81C (prior to its 2006 amendment). Thus, the denial of parole eligibility on the defendant's habitual-offender sentence is unlawful. We note that neither the defendant nor the State has raised this issue on appeal. However, in accordance with the provisions of La. Code Crim. P. art. 882A, we amend the sentence to delete the provision without benefit of parole. This matter is remanded to the trial court with instructions to correct the minutes and commitment order, if necessary, to reflect this amendment to the sentence. *State v. Templet*, 2005-2623, p. 17 (La. App. 1st Cir. 8/16/06), 943 So.2d 412, 422, writ denied, 2006-2203 (La. 4/20/07), 954 So.2d 158.

For the foregoing reasons, the defendant's conviction and habitual-offender adjudication are affirmed. The sentence is amended, and as amended, affirmed, and the case is remanded to the trial court with instructions.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED, AND AS AMENDED, AFFIRMED; REMANDED WITH INSTRUCTIONS.