NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0934

STATE OF LOUISIANA

VERSUS

DERRICK MOORE

Judgment rendered: June 8, 2007

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On Appeal from the 19th Judicial District Court
Parish of East Baton Parish, State of Louisiana
Case Number 09-04-0289; Sec: III
The Honorable Michael R. Erwin, Judge Presiding

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BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

DOWNING, J.

The defendant, Derrick Moore, was charged by bill of information with twelve counts of armed robbery (counts I through VI and counts VIII through XIII) and one count of attempted armed robbery (count VII), violations of La. R.S. 14:64 and La. R.S. 14:27. The defendant refused to enter a plea, and the trial court entered a plea of not guilty on his behalf. The trial court denied the defendant's motion to quash. After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for new trial.

The trial court sentenced the defendant to ninety-nine (99) years imprisonment at hard labor as to counts I through VI, and VIII through XIII; and forty-nine and one-half (49½) years imprisonment at hard labor as to count VII. The trial court ordered that count II is to run concurrently to count I; count III is to run consecutively to counts I and II; count IV is to run concurrently to count III and consecutively to counts I and II; counts V through IX, count XI, and count XIII are to run consecutively to all other counts; count X is to run concurrently to count IX but consecutively to all other counts; and count XII is to run concurrently with count XI but consecutively to all other counts. The trial court also ordered the defendant to pay court costs. The trial court later amended the sentences to order that they be served without the benefit of probation, parole, or suspension of sentence. The trial court denied defendant's motion to reconsider sentence.

The defendant appeals, raising the following assignments of error:

1. The trial court erred in failing to quash the indictment in this case as it was brought in violation of the defendant's speedy-trial rights.

2. The trial court erred in failing to suppress the defendant's confession, given after a ***Miranda*** waiver, as the confession was coerced and involuntary.

3. The trial court erred in admitting two in-court identifications of the defendant, as the identifications did not possess the inherent quality of reliability.

4. The trial court erred in failing to reconsider the defendant's sentences in terms of excessiveness.

Subsequent to the defendant's appeal, the State filed a "motion to remand for correction of record or, alternatively, motion to strike defendant's [second] assignment of error." This Court referred the State's motion to the merits of the appeal and the arguments raised therein will be addressed herein. For the following reasons, we deny the State's motion and affirm the convictions and sentences.

STATEMENT OF FACTS

On several dates between October 12, 1998 and October 6, 2000, male subjects robbed, at gunpoint, several employees of various businesses located in Baton Rouge, Louisiana, (including Jumbo Sports, Hibernia National Bank, Chili's Restaurant, Martin's Grocery, Bank of West Baton Rouge, Piggly Wiggly grocery store, Liberty Bank, and Marcello's Wine Market).[1] During the same time period, two males attempted to rob an employee of an Albertson's grocery store in Baton Rouge, Louisiana. The subjects masked their faces during most of the offenses. Regarding each of the separate incidents, victims described one of the perpetrators as stocky and another as taller and thinner.[2] Several victims, despite any disguises used, were able to describe the perpetrators as African-American.

During the robbery at Jumbo Sports, occurring on or near October 12, 1998, several thousand dollars and several semi-automatic handguns were taken. During the robbery at Hibernia National Bank, occurring on or near

[1] Victims and/or witnesses of most of the robberies testified that there were two male perpetrators.

[2] Victims' and/or witnesses' physical descriptions of the perpetrators indicated that the defendant was the shorter, heavier perpetrator.

July 12, 1999, fifteen thousand dollars was taken The robbery at a Chili's Restaurant took place on or near August 28, 1999. Approximately six hundred to eight hundred dollars was taken during that robbery.

The robbery at Martin's Grocery took place on or near September 1, 1999. During that robbery, an undetermined amount of cash, a gun, and a vehicle were stolen. A store employee, Bang Le, positively identified the defendant during the trial as one of the perpetrators of the robbery at Martin's Grocery. Le stated that the defendant's face was not concealed during the robbery. Le testified that the defendant laughed, brandished a gun, and poured gasoline on Le. The defendant also brandished a cigarette lighter and threatened to ignite Le if he did not give him the money. Le's wallet, containing approximately two hundred dollars, was also taken. Store employee Phung Phan stated that the subjects did not have their faces covered during this robbery. They took Phan's vehicle, described as a van, after the robbery. While Phan was unable to make an in-court identification, he testified that the individuals photographed in suspect rap sheets S-223 (the defendant) and S-224 were the perpetrators of the robbery.

The attempted armed robbery of an employee of an Albertson's grocery store occurred on or near September 26, 1999. During this incident, the "short heavy" perpetrator began striking Nathan Teaford (the store employee) in the face when he failed to follow instructions to open the store's office. Teaford did not fully cooperate, and the perpetrators ultimately left the store without taking anything of value. A bag containing a gun and cell phone was discovered near the scene. The gun had previously been reported stolen, and the cell phone was purchased by the defendant.

The robbery at the Bank of West Baton Rouge (located inside of a Winn Dixie grocery store) occurred on or near September 29, 1999. Over

forty thousand dollars was estimated as the amount stolen during this robbery. During the August 2, 2000 robbery at a Piggly Wiggly grocery store, over ten thousand dollars was taken. One of the witnesses, Thomas Snead, testified that three African-American males participated in the robbery at a Piggly Wiggly. One of the robbers took Snead's wallet. Snead estimated that it contained three hundred dollars.

The robberies at Liberty Bank and Marcello's Wine Market (located adjacent to one another) took place on October 6, 2000. The robbery at Marcello's Wine Market took place at approximately 7:50 p.m., and at least six hundred dollars and a small handgun were taken from the safe and cash register. Barry Barnes, the victim, testified that his wallet with between two and three hundred dollars was taken. Barnes the store manager resided in the back of the store. After Barnes opened the store's safe, the perpetrators tied him up as he laid face down they placed a blanket and a chair over him. After the police arrived and untied Barnes, he assessed the store and noted that his gas treatment (also described by Barnes as carburetor cleaner) had been dispersed over his bed in the back of the store.

The robbery at Liberty Bank took place on October 6, 2000, at approximately 8:10 a.m. While one of the perpetrators was armed with a gun, the other had lighter fluid and a lighter and threatened to burn the victims if they did not cooperate. The perpetrators took seventy-six thousand dollars from the bank vault, a victim's gun (belonging to John Holland, the bank security officer at the time), and a victim's vehicle (belonging to Mel Renfro, deceased at the time of the trial). Victims of the Marcello Wine Market and Liberty Bank robberies recalled hearing the perpetrators speak with a third person via a communication device.

MOTION TO REMAND FOR CORRECTION OF RECORD OR, ALTERNATIVELY, MOTION TO STRIKE DEFENDANT'S ASSIGNMENT OF ERROR

In the above-named motion, the State notes that while the defendant's second assignment of error deals with the trial court's denial of his motion to suppress his confession, the appellate record (at the time of its lodging) was devoid of any transcripts relating to the hearings and rulings on the motion to suppress at issue in the assignment. The State cites La. Code Crim. P. art. 914.1A and Rule VII, §6 of the Uniform Rules – Courts of Appeal and submits that the instant record should be remanded for completion. In the alternative, the State urges this court to strike or refuse to consider assignment of error number two.

At the outset, we note that in designating Rule VII, §6 of the Uniform Rules as a rule of the Courts of Appeal, the State is confusing the Uniform Rules of the Courts of Appeal with the Supreme Court Rules. Rule VII, §6 of the Supreme Court does require a suitable reference to the transcript, including the page number, which contains the basis for the alleged error and states that the court "may" disregard that argument if it is not included. The correct reference is to Uniform Rules – Courts of Appeal, Rule 2-12.4, which provides, in pertinent part, as follows:

> The brief of the appellant or relator shall set forth the jurisdiction of the court, a concise statement of the case, the action of the trial court thereon, a specification or assignment of alleged errors relied upon, the issues presented for review, an argument confined strictly to the issues of the case, free from unnecessary repetition, giving accurate citations of the pages of the record and the authorities cited, and a short conclusion stating the precise relief sought.

Thus, the pertinent issue is whether the defendant's brief gives accurate citations of the pages of the record sufficient to allow review of the issues presented in the assignment of error at issue. The defendant gives

citations of pages of a hearing transcript that was not included in the record. The defendant also gives citations of pages of the trial transcript that was included in the record. The bill of information in this appeal was filed on September 14, 2004. The defendant's argument for the assignment of error at issue refers to a hearing that took place on October 24, 2002. Thus, the defendant's motion to suppress was filed under a different charging instrument. It is incumbent upon the defendant to establish a link between the two cases and to have the record properly designated. Nonetheless, if the need for the hearing transcript referenced by defendant becomes apparent, this court can order the transcript even without the appropriate request.

As detailed above, the charges arose from incidents that took place between October 1998 and October 2000. In his argument for assignment of error number one (regarding the trial court's denial of the defendant's motion to quash the indictment), the defendant notes that the initial charging instrument (an indictment) for the crimes at issue in the instant appeal was filed on January 10, 2001. The defendant further notes that the same facts used as bases for the bill of information herein were used as bases for charges in the prior indictment. The defendant's notes are not significantly inconsistent with the State's summation in its "answer and opposition to motion to quash indictment." Therein, the State notes that the instant bill of information reduces the number of charges and corrects the "particulars of the offenses including the names of victims." The State further notes that the original instrument charged the robberies of businesses (as opposed to the respective business individuals) and listed incorrect dates of offenses and victims' names. The original indictment was amended to cure some deficiencies on April 24, 2003.

On October 5, 2004, the trial court ordered that the file for the prior case be consolidated into the file for the instant case. Based upon that order, the description of the two charging instruments at issue given by the defendant and the State, and the arguments raised by defendant in the assignment of error at issue (assignment of error number two), we found that there is an apparent connection between the two cases such that defendant is entitled to a review of the merits of the complaint in assignment of error number two. As the need for the transcript referenced by defendant became apparent, this court ordered the instant record on appeal supplemented with the record for the linked case. Based on the foregoing conclusions, the State's "motion to remand for correction of record or, alternatively, motion to strike defendant's assignment of error" is hereby denied.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant avers that the trial court erred in denying his motion to quash. The defendant notes that the indictment charging the crimes at issue was filed on January 10, 2001. The defendant further notes that the bill of information giving rise to the instant case was filed on September 14, 2004. According to the defendant, the time period from May 24, 2001, until November 29, 2001 (from the date defense attorney Paula Cobb filed pretrial motions until the date she withdrew as defense counsel), cannot be counted in a speedy-trial assessment. The defendant similarly notes that the time periods from August 9, 2002 to October 24, 2002, and from September 2, 2003 to December 7, 2004, during which pretrial motions were pending, cannot be counted. The defendant deduces that while the trial took place in May 2005, he should have been tried by January 2005. The defendant also notes that he was incarcerated during the four years from the date the original charging instrument was

filed until the commencement of trial. The defendant concludes that the convictions and sentences were obtained in violation of his constitutional right to a speedy trial.

The general limit imposed by the legislature on the discretion of the State under La. Code Crim. P. art. 691 to dismiss a prosecution without the consent of the court is that the dismissal of the original charge is "not for the purpose of avoiding the time limitation for commencement of trial established by Article 578." La. Code Crim. P. art. 576. La. Code Crim. P. art. 578(2), provides that trial of non-capital felonies must be held within two years from the date of the institution of the prosecution. "Institution of prosecution" includes the finding of an indictment, or, as in this case, the filing of a bill of information, or affidavit, which is designed to serve as the basis of a trial. La. Code Crim. P. art. 934(7); **State v. Cotton**, 01-1781, p. 4 (La. App. 1 Cir. 5/10/02), 818 So.2d 968, 971. A motion to quash is the proper vehicle to assert that the time limitation for the commencement of trial has expired. La. Code Crim. P. art. 532(7). Upon expiration of this time limitation, the court shall, on motion of the defendant, dismiss the indictment and there shall be no further prosecution against the defendant for that criminal conduct. La. Code Crim. P. art. 581. 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, 697-698 (La. App. 1 Cir. 1983).

La. Code Crim. P. art. 579 states:

> A. The period of limitation established by Article 578 shall be interrupted if:
>
> (1) The defendant at any time, with the purpose to avoid detection, apprehension, or prosecution, flees from the state, is outside the state, or is absent from his usual place of abode within the state; or
>
> (2) The defendant cannot be tried because of insanity or because his presence for trial cannot be obtained by legal process, or for any other cause beyond the control of the state; or
>
> (3) The defendant fails to appear at any proceeding pursuant to actual notice, proof of which appears of record.
>
> B. The periods of limitation established by Article 578 shall commence to run anew from the date the cause of interruption no longer exists.

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**, 02-0792, p. 6 (La. 2/14/03), 838 So.2d 778, 782 (per curiam).

Under the federal and state constitutions, every person is guaranteed the right to a speedy trial. U.S. Const. amend. VI; La. Const. art. I, § 16; **State ex rel. Miller v. Craft**, 337 So.2d 1191, 1193 (La. 1976); **State v. Wilson**, 95-0613, p. 3 (La. App. 1 Cir. 4/4/96), 672 So.2d 716, 718. The

right to a speedy trial attaches from the time defendant becomes an accused by arrest or actual restraint or by formal bill of information or indictment. **State v. Bodley**, 394 So.2d 584, 594 (La. 1981). In determining whether or not this constitutional right has been violated, no fixed time period is determinative. **Wilson**, 95-0613 at p. 3, 672 So.2d at 718. The constitutional right to a speedy trial is imposed upon the states by the Due Process Clause of the Fourteenth Amendment. **Klopfer v. North Carolina**, 386 U.S. 213, 222-223, 87 S.Ct. 988, 993, 18 L.Ed.2d 1 (1967); **State v. Batiste**, 05-1571, pp. 6-7 (La. 10/1227/06), 939 So.2d 1245, 1250.

The underlying purpose of this constitutional right is to protect a defendant's interest in preventing pretrial incarceration, limiting possible impairment of his defense, and minimizing his anxiety and concern. **Barker v. Wingo**, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972). The Supreme Court has set forth the following four factors for courts to consider in determining whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's assertion of his right to speedy trial; and (4) the prejudice to the accused resulting from the delay. **Barker**, 407 U.S. at 531-532, 92 S.Ct. at 2192-93; *see also* **State v. Reaves**, 376 So.2d 136, 138 (La. 1979) (adopting **Barker** factors).

The specific circumstances of a case will determine the weight to be ascribed to the length of and reason for the delay because "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." **Reaves**, 376 So.2d at 138 (quoting **Barker**, 407 U.S. at 531, 92 S.Ct. at 2192).

A court's resolution of motions to quash in cases where the district attorney entered a nolle prosequi and later reinstituted charges should be

decided on a case-by-case basis. **Batiste**, 2005-1571 at p. 5, 939 So.2d at 1249. In the instant case, the defendant is charged with non-capital felonies, thus requiring commencement of trial within two years from the date of the institution of the prosecution. More than four years elapsed from the filing date of the original charging instrument (January 10, 2001) to the date of the trial (May 23, 2005). Thus, the State had the burden of showing an interruption or suspension of the prescriptive period. The running of the period of limitation established by Article 578 was suspended when the defendant filed his initial motion to suppress on May 24, 2001, until the July 31, 2003 final ruling by the trial court thereon. On September 2, 2003 (less than one year after the ruling on the first motion to suppress and, thus prior to the expiration of the prescriptive period), the defendant filed another motion to suppress. The State reinstituted charges on September 14, 2004, prior to the trial court's ruling on the second motion to suppress. The trial court denied the second motion to suppress on December 7, 2004. The trial commenced (on May 23, 2005) less than one year after the ruling (on May 23, 2005) on that motion to suppress. Thus, the statutory time limitations set forth in Article 578 did not expire prior to the commencement of trial. Clearly, the reinstitution of the prosecution was not for the purpose of avoiding the time limitation for commencement of trial established by Article 578. Nonetheless, the defendant argues that his constitutional right to a speedy trial was violated. Thus, we will assess the delay in light of the **Barker** factors.

As noted, over four years elapsed between the filing of the original charging instrument and the commencement of trial. The reasons for the delay cannot be placed solely upon the State. The defendant filed four motions to suppress (three counseled and one *pro se*). The separate motions

were filed on May 24, 2001, November 28, 2001, August 9, 2002 (based on the same grounds as the May 24, 2001 motion but by a new defense counsel), and May 13, 2005. Further, on October 26, 2001, the defendant filed a motion to continue the hearing on the motion to suppress pending at the time. On November 8, 2001, the defendant filed a motion to continue status conference. On November 26, 2001, the defendant's attorney filed a motion to withdraw as counsel of record. On March 19, 2002, the defendant filed a *pro se* motion for change of venue. The defendant filed several additional pretrial motions. The record does not reveal an intentional delay on the State's part for the purpose of gaining a tactical advantage.

The defendant did not assert his right to a speedy trial until he raised the issue in his April 26, 2005 motion to quash the bill of information after the charges were reinstituted.[3] Finally, the last factor to be considered is whether the delay prejudiced the defendant. The defendant notes that he was incarcerated during the delay in the commencement of trial.

It is evident that, after reviewing the **Barker** factors, the State's action did not deny the defendant his right to a speedy trial or otherwise cause specific prejudice to his defense. Much of the delay in the commencement of trial can be attributed to the defendant's pretrial motions and withdrawal of defense counsel. Secondly, the defendant's delay in asserting his right to a speedy trial weighs against him. Finally, the defendant does not suggest that his defense was ever impaired by the delays of his prosecution.

Under the specific facts presented by this case, we conclude the trial court did not abuse its discretion in denying this motion to quash the bill of information. The State did not violate any of the time constraints imposed

[3] A prior motion to quash the indictment was filed by the defendant on September 2, 2003. However, the defendant did not assert his speedy-trial rights in that motion.

by statutory law and the defendant's constitutional right to a speedy trial was not violated. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant argues that the trial court erred in denying his motion to suppress his confession. The defendant argues that he waived his *Miranda* rights involuntarily as he was under duress when subjected to an overnight session of police interrogation. The defendant specifically argues that he was coerced into confessing to protect his girlfriend, Melba Parker, from being prosecuted on drug-related charges and involvement in the instant offenses. The defendant contends that he accepted responsibility for marijuana that was found during the search of the residence inhabited by himself and Parker. According to the defendant, Assistant District Attorney Aaron Brooks discussed making a deal with him to protect Parker. The defendant asserts that he therefore listed all of the robberies in which he participated. The defendant notes that there was no evidence that Parker engaged in criminal conduct. The defendant contends that threats regarding the potential prosecution of Parker were used to coerce him to waive his *Miranda* rights and confess.

It is well settled that 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* rights. **Miranda v. Arizona**, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966); **State v. Plain**, 99-1112, p. 5 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 342.

The admissibility of a confession is, in the first instance, a question for the trial court; its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the confession are accorded great weight and will not be overturned unless they are not supported by the evidence. Whether 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. The trial court must consider the totality of the circumstances in deciding whether or not a confession is admissible. **Plain**, 99-1112 at p. 6, 752 So.2d at 342; **State v. Guidry**, 93-1091, pp. 2-3, (La. App. 1 Cir. 4/8/94), 635 So.2d 731, 733-34.

Where the alleged threat concerns someone other than the defendant, fear that the police will inflict additional harm on another has been recognized as a substantial factor in determining the voluntary nature of the confession. **State v. Wilms**, 449 So.2d 442, 444 (La. 1984). In reviewing the correctness of a trial court's ruling on a motion to suppress a confession, we are not limited to the evidence introduced at the hearing on the motion but may consider all pertinent evidence adduced at trial. **State v. Brooks**, 92-3331, p. 10 (La. 1/17/95), 648 So.2d 366, 372.

The defendant was arrested on December 7, 2000, near 6:00 p.m., and transported to the Baton Rouge City Police Station. Detective Tillman Cox and Detective William Poe advised the defendant of his *Miranda* rights and a waiver of rights form was executed.[4] During the motion to suppress hearing (commencing on September 25, 2002), Detective Cox and former Detective Poe testified that the defendant seemed to have a normal level of intelligence and seemed to understand his rights. Both officers further

[4] Poe was a special agent of the Federal Bureau of Investigation at the time of the hearing and a Louisiana State Police trooper at the time of the trial. He was a Louisiana State Police detective at the time of the defendant's arrest. (Supp. R. 301, R. 1180).

testified that the defendant was friendly and relaxed. Detective Cox left when Sergeant Bart Thompson arrived (about thirty minutes after the officers placed the defendant in the interview room). Detective Cox did not witness any coercion, threats, intimidation, or ill treatment directed toward the defendant. Former Detective Poe and Sergeant Thompson also testified that the defendant was never coerced, intimidated, or threatened.

After Detective Cox left, Detective Poe and Sergeant Thompson spoke outside of the defendant's presence to discuss their strategy for interviewing the defendant. The officers decided to show the defendant some of the evidence that was collected regarding the various robberies. According to the officers, the defendant was lackadaisical during the interview and bragged about his involvement in various offenses.

At some point, the officers advised the defendant that a large sum of money and a substantial amount of marijuana was found at his residence and that Melba Parker was in custody.[5] The defendant expressed his concern for Parker. He adamantly informed the officers that the marijuana did not belong to Parker and she was not responsible for any of the robberies. The defendant expressed his desire to take full responsibility and to have Parker released. The officers informed the defendant that they could not make the decision regarding Parker's potential prosecution. The officers informed the defendant that they did not have the authority to decide whether Parker would be charged and that the prosecutor would make that decision. The defendant stated that he wanted the officers to contact the district attorney. The defendant expressed his desire to give a full confession if the district attorney assured him that Parker would not be prosecuted. The officers

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[5] Former Detective Poe testified that the defendant asked about his wife while Sergeant Thompson could not remember who initiated the information regarding Parker's whereabouts.

agreed to contact Aaron Brooks, the prosecutor assigned to the armed robberies in question. Brooks agreed to come speak to the defendant.

Brooks arrived at the station at approximately 11:30 p.m., and the officers began explaining the situation to him. Brooks noted that they had a good case against the defendant but they did not know who any of the accomplices were. When Brooks spoke to the defendant, the defendant requested immunity for Parker. Brooks was initially hesitant to come to any agreement with the defendant. Brooks noted that the defendant was initially reluctant to do so but ultimately agreed to write a statement ("proffer") as to what his confession would entail.[6] After the defendant executed the proffer, Brooks executed a written statement as follows:

> Re: Melba Parker, I will agree to a probated sentence to Melba Parker if she is truthful; she did not enter a crime scene; she did not wait in a getaway car; she did not ever carry a weapon. She will not be arrested for these armed robberies, accessory after the fact to these armed robberies or the marijuana or the money, ever – Aaron Brooks.

After the agreement, the defendant gave an audio and videotaped confession. The defendant's confession began at approximately 1:20 a.m.

The motion to suppress hearing continued on October 24, 2002, with the testimony of Melba Parker and Sergeant Thompson. Parker testified that upon her December 7, 2000 arrest (near 7:00 p.m.), she was taken to the station and handcuffed to the side of a wall. Parker further testified that she waited for approximately two hours without any police questioning or comments. At some point, the officers instructed Parker to briefly glance into the doorway of the room the defendant was located in to allow him to see her. Sometime after 11:00 p.m., Brooks informed Parker that she could

[6] According to Brooks' testimony, he suggested that the defendant label the proffer "plea bargain," noting that the document would not be admissible. During the trial, the document was filed into the record as S-196 and S-225 (original and copy), and pertinent portions of it were read to the jury without objection.

go home after the defendant, "do what he gotta do." Sometime after 2:00 a.m. (presumably after the defendant completed his statement), the defendant was allowed to briefly speak to Parker. According to Parker, the officers interrogated her following this brief encounter with the defendant. Parker estimated that she was finally allowed to leave around 4:00 a.m. The defendant did not wish to testify at the hearing.

At the conclusion of the hearing, the trial court denied the motion to suppress. However, on July 31, 2003, the trial court vacated the prior ruling and re-opened the hearing to allow additional testimony by the defense (in the form of the defendant's testimony only) and the State's rebuttal thereto. Pertinent to the instant argument on appeal, the defendant testified that while he could not remember the specifics, he apparently asked the officers if he could help Parker get released. The following colloquy took place during the direct examination of the defendant:

> Q. Okay. After they showed you, or after you saw Melba's face in the interview room and you became convinced that she was there, do you recall that you asked or that they suggested to you or how that went, do you remember how that went?
>
> A. I can't really remember how that went. I know that's what it came to.
>
> Q. Okay. And when you say you know "that's what it came to", what did it come to?
>
> A. Well, it came to the point where Bart Thompson told me that they had no power to let Melba go, you know. I was just telling them, look, why don't you guys just let her go, you know, she's not involved. And they told me that that wasn't up to them, it was up to the district attorney because she was charged, you know, so once she's charged, they, you know, it's out of their hands.
>
> Q. What did you say in response to that, if not specifically or what do you recall your reaction was?
>
> A. It was probably get me the district attorney.

> Q. Did you understand that if you gave a full confession they would let Melba go?
>
> A. Well, that, that's, ended up being an agreement, yes, between Aaron Brooks and myself, yes.

The defendant further testified that his initial interaction with Brooks was brief and confrontational. According to the defendant, approximately fifteen minutes later, Brooks returned to the interview room and spoke to the defendant in a "less confrontational" manner. At that point, the defendant told Brooks that he wanted Parker to go home that night. Brooks told the defendant that they believed he was involved in various crimes and that he wanted the defendant to tell him who else was involved. The defendant also testified that the document executed by Brooks originally stated that Parker "would not be arrested tonight." According to the defendant, he told the prosecutor, "no deal, she won't be arrested *ever*." The prosecutor crossed out the word "tonight" and substituted the word "ever."

As a State rebuttal witness, Brooks confirmed that his first encounter with the defendant was confrontational. Brooks added, "[w]e had discussed how to handle Mr. Moore. And he didn't like Poe, so he needed somebody to hate more than Poe so I became it, so that Poe could become a good guy, which he would be willing to talk to."

After reviewing the videotape of the defendant's confession, the trial court denied the motion to suppress with reasons. The trial court noted that it appeared that the rapport between the defendant and the officers was cordial, friendly, and relaxed. The trial court concluded that there was no conspiracy on the part of the officers and that the defendant's motivating force was his desire to assist Parker. The trial court found no undue influence exerted by the law enforcement officers or the prosecutor.

In **Wilms**, defendant's pregnant wife, who was arrested along with the defendant, was struck in the stomach by an arresting officer prior to being taken to the police station. The Supreme Court found the defendant's statement voluntary despite allegations that the officer in charge of the defendant's interrogation made promises to the defendant that if he made an inculpatory statement, his wife would receive necessary medical attention and would be released. Prior to making his confession, the defendant and his wife discussed their options, including whether they wanted an attorney. The defendant knew his rights and waived them. The court further concluded that the defendant's feeling of psychological pressure before the confession could as well be equally attributed to his being apprehended for the first time on a felony charge and as a result of having exposed his wife and unborn child to risk. **Wilms**, 449 So.2d at 444-445. Also, in **State v. Horton**, 479 So.2d 528 (La. App. 1 Cir. 1985), the defendant argued that his statements were obtained by direct or implied promises that his wife, who was being held in jail on the charge of accessory after the fact, would be released only if he confessed. This court concluded that the confessions were freely and voluntarily made. We noted that while the defendant may have had a concern for his wife's well being, the impetus for his confessions was the fact that an accomplice was in the police headquarters and had implicated the defendant in the murder. **Horton**, 479 So.2d at 531.

In the instant case, the prosecutor clearly communicated to the defendant that Parker would be released based upon her innocence, evidenced by the defendant's full confession of culpability, attesting to her lack of involvement. While the defendant argues on appeal that he was threatened, the testimony presented during the hearings on the motion to

suppress the confession (including the defendant's testimony) and the trial clearly shows otherwise.

The defendant prompted, and remained in control of, the agreement with the prosecutor. We conclude that the agreement elicited by the defendant did not constitute illegal inducement sufficient to render the defendant's confession involuntary. Neither the officers nor the prosecutor, in any way, promised or led the defendant to believe that he would not be prosecuted and incarcerated for the crimes. Instead, the prosecutor merely agreed to release an innocent person.

The trial court did not err in finding that the defendant freely and voluntarily confessed. The trial court was correct in denying the defendant's motion to suppress and admitting the defendant's confession into evidence at trial. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, the defendant argues that the trial court erred in admitting two in-court identifications of the defendant. The defendant contends that the identifications were not reliable and were the products of coaching by the prosecution. The defendant notes that the witnesses at issue, Bang Le and Phung Phan, did not participate in identification procedures with the police. The defendant notes discrepancies in the descriptions provided by the witnesses. The defendant further notes that Phan was shown pictures of the defendant when he met with the prosecution before the trial. Finally, the defendant notes that he was the only non-juror, black male in the courtroom without a uniform.

An identification procedure is suggestive if it unduly focuses a witness's attention on the suspect. **State v. Neslo**, 433 So.2d 73, 78 (La. 1983); **State v. Robinson**, 386 So.2d 1374, 1377 (La. 1980). Our

jurisprudence permits testimony of a prior identification to support the present in-court identification. Even in tainted pretrial identifications, our courts have rejected a *per se* exclusionary rule and have adopted the same reliability test used for in-court identification. In **Manson v. Brathwaite**, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court allowed evidence of a suggestive pretrial identification from a single photograph by an undercover police agent after determining that it was reliable. In that decision, the court concluded that, "reliability is the linchpin in determining the admissibility of identification testimony [.]" Reliability is to be determined by the totality of the circumstances. **Manson v. Brathwaite**, 432 U.S. at 113-114, 97 S.Ct. at 2252-2253.

Thus, a defendant attempting to suppress an identification must prove the identification was suggestive and that there was a substantial likelihood of misidentification by the eyewitness. Even should the identification be considered suggestive, that alone does not indicate a violation of the defendant's right to due process. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. **State v. Reed**, 97-0812, pp. 4-5 (La. App. 1 Cir. 4/8/98), 712 So.2d 572, 576. An in-court identification may be permissible if there is not a "very substantial likelihood of irreparable misidentification." **State v. Martin**, 595 So.2d 592, 595 (La. 1992). *See also* **State v. Jones**, 94-1098, p. 6 (La. App. 1 Cir. 6/23/95), 658 So.2d 307, 311. Single-photograph identifications should be viewed in general with suspicion. **Jones**, 94-1098 at p. 5, 658 So.2d at 311. *See* **Simmons v. U.S.**, 390 U.S. 377, 383, 88 S.Ct. 967, 970-71, 19 L.Ed.2d 1247 (1968).

If the identification procedure is determined to be suggestive, courts look to several factors to determine, from the totality of the circumstances, if

the identification presents a substantial likelihood of misidentification. 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 his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. **Martin**, 595 So.2d at 595 (citing **Neil v. Biggers**, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972)).

Against these factors is to be weighed the corrupting effect of the suggestive identification itself. **Martin**, 595 So.2d at 595. A trial court's determination of the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal in the absence of an abuse of discretion. **Reed**, 97-0812 at p. 5, 712 So.2d at 576.

In **State v. Brooks**, 294 So.2d 503, 504 (La. 1974), the Supreme Court stated that "[w]e know of no law nor do appellants cite any jurisprudence granting them the right to a lineup prior to an in-court identification." In **State v. Wright**, 316 So.2d 380, 382 (La. 1975), the supreme court stated that the "[d]efendant has no right to a pretrial line-up."

Bang Le, the victim in count six, was a cashier at Martin's Grocery at the time of the robbery. During his trial testimony, he described one of the perpetrators as, "maybe like a big man, not too big, middle." Le stated the perpetrator's face was not concealed and he had an opportunity to view the perpetrator's face and described the perpetrator's skin tone as medium black.

During the State's direct examination of Le, the defense attorney objected to the admission of an identification by Le, arguing (in pertinent part) that the pretrial identification procedure used by the district attorney was unduly suggestive. The trial court overruled the defendant's objection, noting that a full cross-examination on the issue would be allowed. On

redirect examination, Le identified the defendant as the described perpetrator. Le stated that he could not identify or describe the man who entered the store with the defendant, having stated, "because he go another way" (behind the meat department). Le did not participate in any pretrial identification procedure with the police. However, Le met with the district attorney one month before the trial and made a positive identification. At that time, Le was shown two photographs. As done in court, he was able to identify the perpetrator (the defendant) who poured gasoline on him and robbed him, but was unable to identify the second photograph as a depiction of the perpetrator who went to the meat department.

Phung Phan, the meat cutter at Martin's Grocery, met with the district attorney along with Le. Phan was able to describe both perpetrators during his trial testimony. He stated that he was able to clearly see both perpetrators, and their faces were exposed. He stated that a "tall and skinny" black male held a gun on him while a "short and fat" black male was with the cashier. During the meeting with the district attorney and during direct examination at the trial, Phan was able to identify photographs of the defendant and the other perpetrator (the one who held a gun on him). Phan was unable, however, to make an in-court identification of the defendant as one of the perpetrators. We note that witnesses testified during the trial that the defendant lost a substantial amount of weight by the time of the trial.

Here, it appears that the single-photograph pretrial identifications by Le and Phan were not so suggestive as to create a substantial likelihood of misidentification. During the pretrial identification procedure and in court, Le only identified the perpetrator he had the opportunity to view, the defendant. Le's in-court identification of the defendant was made with certainty. Despite being shown a photograph purported to depict the other

perpetrator, Le repeatedly admitted that he was unable to sufficiently observe the other perpetrator and could not identify him. Despite the pretrial procedure, in court, Phan was completely unable to identify the defendant as the perpetrator. We also do not find the physical descriptions presented during the testimony of the witnesses to be significantly inconsistent. We further note that the defendant does not have a constitutional or a statutory right to have a pretrial identification line-up conducted. Finally, we note that the defendant fully confessed to the offense at issue. *See* La. Code Crim. P. art. 921. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In the final assignment of error, the defendant argues that the trial court erred in denying his motion to reconsider excessive sentences. The defendant contends that he was sentenced to a disproportionate amount of incarceration based upon the jury's verdicts. While noting several factors that the trial court considered, the defendant concludes that the sentences were based upon the whims of the sentencing judge.

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 although a sentence may be within statutory limits, a sentence 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.

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. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83. Maximum sentences may be imposed for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040, p. 4 (La. App. 1 Cir. 11/7/97), 703 So.2d 698, 701.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The judge is not required to list every aggravating or mitigating factor as long as the record shows ample considerations of the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir. 1990). The articulation of the factual basis for a sentence is the goal of Article 894.1, not to force a rigid or mechanical recitation of the factors. In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Mickey**, 604 So.2d 675, 678 (La. App. 1st Cir. 1992). Thus, even without full compliance with article 894.1, remand is unnecessary when the record clearly reflects an adequate basis for the sentence. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982); **State v. Milstead**, 95-1983, p. 8 (La. App. 1 Cir. 9/27/96), 681 So.2d 1274, 1279; **State v. Greer**, 572 So.2d 1166, 1171 (La. App. 1 Cir. 1990).

As to counts I and II, the defendant was exposed to a sentencing range of five years to ninety-nine years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. *See* La. R.S. 14:64B (prior to its amendment by 1999 La. Acts No. 932, §1). As to counts III through VI and VIII through XIII, the defendant was exposed to a sentencing range of ten years to ninety-nine years imprisonment at hard

labor without the benefit of parole, probation, or suspension of sentence. La. R.S. 14:64B. As to count VII, the defendant was exposed to a maximum sentence of forty-nine and one-half years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. La. R.S. 14:27D(3) and La. R.S. 14:64B. The trial court imposed the maximum term of imprisonment on each count.[7]

In sentencing the defendant, the trial court ordered and reviewed a presentence investigation report. The trial court noted that the defendant had one prior felony conviction for possession of marijuana (five pounds and four ounces). The trial court considered the defendant's social and employment history. The trial court referenced the requirements of Article 894.1. The trial court noted that the instant offenses are crimes of violence. Citing Article 894.1B(1) ("[t]he offender's conduct during the commission of the offense manifested deliberate cruelty to the victim"), the trial court noted that the defendant used a flammable liquid to threaten victims. Citing subsection five, the trial court noted that the defendant created a risk of death or great bodily harm to more than one person in entering these businesses armed with weapons. Citing subsection nine, the trial court noted the trauma and mental anguish suffered by the victims of the offenses. Citing subsection thirteen, the trial court further recalled evidence that the defendant played a lead role in the execution of several of the offenses. In finding no strong provocation for the commission of the offenses (citing subsection twenty-four), the trial court noted that the defendant was well-educated and had a good job at the time of the offenses. The trial court noted the repetitive nature of the defendant's criminal conduct. The trial

[7] As noted, some of the various counts were ordered to be served concurrently, while others were ordered to be served consecutively. The defendant does not assign, nor do we note, any error in this regard.

court also noted that the defendant did not respond affirmatively to a probation imposed on his prior felony conviction.

In light of the risk of harm to society and to the victims involved, the sentences imposed were neither grossly disproportionate to the severity of the crimes, nor so disproportionate as to shock our sense of justice. Based on our thorough review of the record and the trial court's stated reasons for the sentences imposed, we cannot conclude that the trial court abused its wide discretion. Considering the seriousness of the offenses and the multitude of such offenses committed by the defendant, the trial court did not err in imposing the maximum sentences in the instant case. Therefore, the trial court did not err in denying the defendant's motion to reconsider sentence. This assignment of error lacks merit.

DECREE

Accordingly, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED