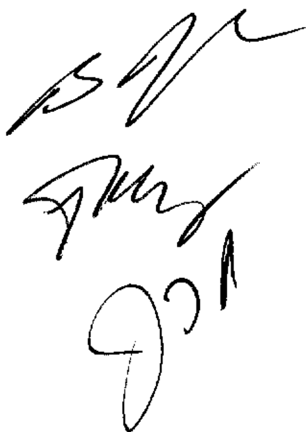
NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 KA 2184



STATE OF LOUISIANA

VERSUS

LARRY MITCHELL

Judgment Rendered: May 7, 2010 .

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On Appeal from the
22nd Judicial District Court,
in and for the Parish of St. Tammany
State of Louisiana
District Court No. 451323

The Honorable Peter J. Garcia, Judge Presiding

* * * * *

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Appearing Pro Se

* * * * *

BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

CARTER, C.J.

The defendant, Larry Mitchell, was charged by bill of information with one count of armed robbery, a violation of La. R.S. 14:64. The defendant entered a plea of not guilty and proceeded to trial before a jury. A unanimous jury determined the defendant was guilty as charged. The trial court sentenced the defendant to a term of twenty years at hard labor without benefit of probation, parole, or suspension of sentence.

The State subsequently instituted habitual offender proceedings against the defendant. Following a hearing, the trial court adjudicated the defendant a fourth felony habitual offender. The trial court vacated the original sentence and imposed a sentence of forty-five years at hard labor.

The defendant appeals, citing the following counseled assignments of error:

> 1. The district court erred in denying the motion to continue trial.
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> 2. The district court erred in adjudicating the defendant as a multiple offender.
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> 3. The verdict is contrary to the law and evidence.
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> 4. The district court erred in the denial of the motion for new trial.
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> 5. The district court erred in the denial of the motion for mistrial.
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> 6. The district court erred in denying the motion for post-verdict judgment of acquittal.

The defendant also filed a pro se brief in which he cited the following error:

> 7. The evidence is insufficient to prove guilt of armed robbery.

For the reasons that follow, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

FACTS

On May 11, 2008, Jonathan Johnson and Keoka Geary were both working at the Kangaroo convenience store on Voter's Road in Slidell. At approximately 7:00 p.m., Geary briefly left her register to get a drink. Johnson became aware that there were two men in the stock room. Because the stock room was off-limits to customers, Johnson walked over to determine why the men were there. When he reached the stock room, Johnson observed two men (one later identified as the defendant), each filling a trash bag with cartons of cigarettes. Johnson asked the men what they were doing, but they merely looked up and continued placing the cartons into the bags. Several seconds later, the two men walked outside the store as Johnson followed them.

The defendant and the other man walked outside the store toward a black Infiniti that was backed into a space in front of the store. Johnson, who was now outside the store, grabbed the bag that the defendant carried over his shoulder. The defendant turned and raised his shirt, revealing a pistol tucked into his pants. Johnson then backed away, noted the license plate number of the vehicle the men entered, and returned inside to report the incident to the police. Johnson admitted when he called 911, he failed to indicate one of the men was armed. At trial, Johnson explained the sight of the pistol had made him fearful and "shook." Johnson reported the license plate number to the police as OME661.

During the ensuing investigation by the Slidell Police Department, the license number was traced to a black Infiniti registered to Penny Hicks. Hicks was contacted at her residence in New Orleans, and the vehicle towed, while a search warrant was obtained. During this investigation, the defendant was developed as a suspect. Although the vehicle was searched pursuant to a warrant, no significant evidence was recovered.

Photographic lineups were prepared, including a photograph of the defendant. These lineups were separately shown to Johnson and Geary, and both identified the defendant as the man who participated in the robbery and raised his shirt to reveal a pistol. The defendant was subsequently arrested and charged with armed robbery. His accomplice was never identified. At trial, both Johnson and Geary identified the defendant in court as the perpetrator of this offense.

The defendant did not testify.

DENIAL OF MOTION TO CONTINUE TRIAL

In his first counseled assignment of error, the defendant argues the trial court erred in denying his motion to continue the trial. Specifically, the defendant contends that his trial counsel, Robert Stamps, replaced prior counsel, Lionel Burns, on April 29, 2009. The trial court then reassigned the matter to be tried on May 18, 2009. Stamps filed two motions to continue the trial, which were both denied by the trial court.

In support of this assignment of error, the defendant argues that Stamps only had thirteen working days (from April 29-May 18) to prepare for the instant armed robbery trial, during which time period Stamps also was preparing for a vehicular homicide case in another court. The defendant

asserts Stamps was forced to prepare for the armed robbery case in such a short time span "from scratch." The defendant further contends that pretrial discovery was not completed until May 4, and there were several motions to suppress filed but never heard prior to trial.

The trial court has great discretion in deciding whether to grant a continuance, and its ruling will not be overturned absent an abuse of discretion. La. Code Crim. P. art. 712; **State v. Champion**, 412 So.2d 1048, 1050-1051 (La. 1982). Even when an abuse of discretion is shown, typically a conviction will not be reversed based on denial of a continuance absent a showing of specific prejudice. **State v. Castleberry**, 98-1388 (La. 4/13/99), 758 So.2d 749, 756, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999).

The defendant argues the requirement for specific prejudice will be disregarded when the time allowed counsel to prepare is so minimal that the fairness of the proceedings is questionable. However, we note that in the case law cited by the defendant, the courts have held that the reasonableness of the trial court's discretion turns on the circumstances of the particular case.

In examining the jurisprudence cited by the defendant, in **State v. Winston**, 327 So.2d 380, 383-384 (La. 1976), the supreme court held three days was not enough time to prepare an adequate defense where, prior to the attorney's appointment, eight months had elapsed since the offense occurred. Defense counsel repeatedly informed the trial court that he was unprepared. **Winston**, 327 So.2d at 383. The supreme court recognized that counsel should have been afforded more time to search for witnesses. **Id**.

Other cases cited by the defendant involved circumstances wherein defense counsel had never spoken with the defendant and learned on the date of trial of their representation. See e.g. **State v. Knight**, 611 So.2d 1381, 1383 (La. 1993) (counsel appointed on first day of trial); **State v. Simpson**, 403 So.2d 1214, 1216 (La. 1981) (counsel made aware of appointment on the first day of trial); and **State v. Commodore**, 2000-0076 (La. App. 4 Cir. 11/21/00), 774 So.2d 318, 320-321, writ denied, 2000-3485 (La. 11/2/01), 800 So.2d 869 (counsel and defendant had never spoken). In **State v. Laugand**, 99-1124, 99-1327 (La. 3/17/00), 759 So.2d 34 (*per curiam*), defense counsel was appointed a month prior to trial. On the first day of trial, defense counsel sought a continuance explaining that he had just completed another, unrelated, trial the day before the defendant's trial was scheduled to commence. **Laugand**, 759 So.2d at 36. Concluding the trial court should have granted the continuance, the supreme court observed that counsel's lack of preparation was evident from the record; the trial court had to intervene to help counsel from pursuing matters directly adverse to the defendant. **Laugand**, 759 So.2d at 36.

However, in **State v. Malinda**, 95-292 (La. App. 5 Cir. 10/31/95), 663 So.2d 882, 886, the Fifth Circuit held the time afforded defense counsel to prepare for an obscenity trial was not so minimal as to undermine the fairness of the proceedings. Defense counsel had actively represented the defendant for two months prior to trial, and although he indicated he was surprised when the State filed another bill of information charging the defendant with a third or subsequent obscenity offense, he never stated he was unprepared for trial. **Malinda**, 663 So.2d at 886. Further the court

noted that the defendant failed to show any specific prejudice resulting from the denial of the motion for continuance. **Malinda**, 663 So.2d at 886.

We find the circumstances of the present case distinguishable from the case law cited by the defendant. The defendant's initial contention that his thirteen-day period to prepare this case "from scratch" undermined the fairness of the proceedings is not supported by the record. First, although the instant offense is a serious crime with a maximum penalty of ninety-nine years, the State's case was presented through the testimony of two eyewitnesses and the investigating police officer. The defendant does not complain that the short time period deprived him of locating alibi or other witnesses for his defense. Moreover, the defendant's claim that he was preparing "from scratch" is contradicted by the record. Stamps was counsel of record until November 6, 2008, when Lionel Burns enrolled as counsel. There is no indication in the record that Stamps withdrew. Prior to the enrollment of Burns, on August 12, 2008, Stamps was provided open-file discovery and attached documentary material by the State.

Next, Stamps requested further discovery in the form of fingerprint evidence and juvenile records of a State witness, which were determined to be unavailable because there was no such evidence. Stamps ultimately agreed that there was no new discovery than what had been produced previously to him. Although defense counsel argued the fact that the time period for advising the use of an alibi witness had expired, the trial court stated an alibi witness would be allowed.[1]

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[1] No alibi witnesses were presented at trial.

Finally, there is no merit to the contention that there were outstanding motions to suppress (seeking to suppress derivative evidence) that were not heard prior to trial. This argument surrounds a statement made by the defendant's wife, Penny Hicks, who was interviewed by the police. The State explained that during the testimony of Detective Sean McClain, the prosecutor purposely did not ask about the substance of the Hicks interview. Moreover, the prosecutor reminded the trial court that Hicks had asserted the marital privilege in refusing to testify at trial outside the presence of the jury. Accordingly, no evidence was presented that would have been the subject of this particular motion to suppress evidence.

Considering that trial counsel had twenty days to prepare the defense in this matter and was able to cross-examine the State's eyewitnesses to the crime, as well as considering the lack of any indication that the denial of a continuance caused any specific prejudice to the defendant, we cannot say this ruling was an abuse of discretion.

This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In the defendant's counseled assignments of error three, four, and six, and his sole pro se assignment of error, he challenges the sufficiency of the evidence used to support his conviction. In his counseled assignments of error, the defendant points to the fact no stolen property was recovered, no firearm was recovered, no second suspect was ever identified, and the only evidence supporting the contention that the defendant was armed was the testimony of Johnson, which is contradicted by what Johnson told the 911 operator.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the legislature in enacting La. Code Crim. P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. **State v. Brown,** 2003-0897 (La. 4/12/05), 907 So.2d 1, 18, cert. denied, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006).

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing the weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **Richardson**, 459 So.2d at 38. Thus, the fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence supporting the verdict insufficient. **State v. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460.

In accordance with La. R.S. 14:64A, armed robbery is the taking of anything of value belonging to another from the person of another, or that is

in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon. Armed robbery is a general intent crime. **State v. Payne**, 540 So.2d 520, 523 (La. App. 1st Cir.), writ denied, 546 So.2d 169 (La. 1989). In general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts that have been declared criminal. **Payne**, 540 So.2d at 523-524.

The defendant's argument that the 911 tape contradicts Johnson's testimony that the defendant was armed is erroneous. At trial, Johnson acknowledged that he failed to tell the 911 dispatcher that the defendant was armed, explaining that he was "shook" by the entire episode. Such failure to provide every detail does not equate to Johnson stating that the defendant was not, in fact, armed at the time of the robbery. Both Johnson and Geary testified they saw a pistol tucked into the defendant's pants, which the defendant revealed when Johnson attempted to stop him by grabbing the trash bag. The testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988).

Viewing the evidence in the light most favorable to the prosecution, both Johnson and Geary identified the defendant as the individual who left the store with a trash bag filled with cartons of cigarettes for which he did not pay. Both eyewitnesses saw the defendant reveal his possession of a pistol when Johnson attempted to stop him from leaving the store premises. The fact that the defendant's accomplice was never apprehended has no bearing on the jury's determination of the defendant's guilt. Further, the jury was aware that the vehicle in which the defendant left the store was

searched several days following the incident and that none of the stolen cigarettes or the weapon possessed by the defendant were recovered. However, recovery of the merchandise and weapon are not required in proving the defendant committed the instant armed robbery.

In his pro se brief, the defendant argues that the facts at trial merely show a theft was committed and that the display of a gun in the perpetrator's waistband after the theft occurred fails to change the theft to an armed robbery. We disagree. The fact that the defendant revealed his possession of a weapon tucked into his pants was in direct response to Johnson's attempt to stop the robbery. Clearly, the jury determined the defendant revealed the weapon to further the robbery and his successful escape. See **State v. Meyers**, 620 So.2d 1160, 1163 (La. 1993). Thus, the jury's verdict that the defendant committed an armed robbery was rationally based on the evidence presented.

The evidence is sufficient to support the conviction of armed robbery. These assignments of error are without merit.

HABITUAL OFFENDER ADJUDICATION

Through his second assignment of error, the defendant argues the trial court erred in adjudicating him as a fourth-felony habitual offender. Specifically, the defendant contends the State failed to carry its requisite burden of proof with regard to the defendant's identity as the perpetrator of the three previous crimes, and the State failed to show the defendant properly waived his rights. In support of this argument, the defendant contends that the evidence used by the State was uncertified and therefore incompetent.

The State filed a multiple offender bill alleging the defendant committed the following predicate offenses:

> 1. A November 26, 2002, guilty plea in docket number 429-570 of Orleans Parish, to the offense of theft of goods over $100.00 (La. R.S. 14:67.10).
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> 2. An October 30, 1992, guilty plea in docket number 357-428 of Orleans Parish, to the offense of possession of cocaine (La. R.S. 40:967).
>
> 3. A December 18, 1991, guilty plea in docket number 353-387 of Orleans Parish, to the offense of felony theft (La. R.S. 14:67).

If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that the defendant was represented by counsel when the pleas were taken. **State v. Shelton**, 621 So.2d 769, 779 (La. 1993). If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. **Shelton**, 621 So.2d at 779. If the defendant is able to do this, then the burden shifts to the State. **Id**. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one that reflects a colloquy between the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. **Shelton**, 621 So.2d at 779-780. If the State introduces anything less than a perfect transcript, for example, a guilty plea form, a minute entry, an imperfect transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and the State to determine whether the State has met its burden of proving that the defendant's prior

guilty plea was informed and voluntary and made with an articulated waiver of the three **Boykin** rights. **Shelton**, 621 So.2d at 780. The purpose of the rule of **Shelton** is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity attaches to promote the interests of finality. See **State v. Deville**, 2004-1401 (La. 7/2/04), 879 So.2d 689, 691 (*per curiam*).

The defendant argues the penitentiary pack (pen pack) introduced by the State should not have been admissible because only the cover sheet was certified. In examining the pen pack, we note the affidavit from the custodian of records, attached to the front of the document, clearly references the "attached documents" as true copies of the defendant's records with the Louisiana Department of Public Safety and Corrections.

Other circuits have held that the custodian's certification on the cover of pen pack attachments is sufficient and that each page need not be individually certified. See La. R.S. 15:529.1F; La. Code Evid. arts. 902(2)(b), 904; **State v. Ayche**, 2007-753 (La. App. 5 Cir. 3/11/08), 978 So.2d 1143, 1151-1153, writs denied, 2008-2291 (La. 1/30/09), 999 So.2d 752, 2008-1115 (La. 2/13/09), 999 So.2d 1140; **State v. White**, 28,095 (La. App. 2 Cir. 5/8/96), 674 So.2d 1018, 1029, writs denied, 96-1459 (La. 11/15/96), 682 So.2d 760, 98-0282 (La. 6/26/98), 719 So.2d 1048. Thus, we find the pen pack evidence introduced by the State was properly admitted.

The pen pack included a minute entry dated November 26, 2002, indicating the defendant, who was represented by counsel, entered a guilty plea in docket number 429-570 to the offense of theft. The pen pack also contained a minute entry dated October 30, 1992, indicating the defendant, who was represented by counsel, entered a guilty plea in docket number 357-428 to the offense of possession of cocaine. The State also introduced a certified copy of a minute entry dated December 18, 1991, indicating the defendant, who was represented by counsel, entered a guilty plea in docket number 353-387 to the offense of felony theft.[2]

The defendant also contends that the State failed to prove his identity with regard to these three prior convictions. We disagree. The State presented the testimony of Tommy Morse, who was accepted by the trial court as an expert in fingerprint examination and identification. Morse testified that he took the defendant's fingerprints on the morning of the habitual offender hearing. Morse testified that the defendant identified himself as Larry Mitchell, date of birth July 18, 1971, and social security number 438-XX-XXXX. Morse also obtained a print card from the AFIS database for a Moya Jackson, a/k/a Charles Mitchell, with a date of birth of July 18, 1972, and a social security number of 438-XX-XXXX.

Morse testified he could not positively match the prints he took from the defendant that morning to the prints contained on the bill of information in docket number 429-570, due to the quality of the prints, but the AFIS print card that matched the date of arrest for that docket number and another

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[2] According to each minute entry associated with these prior convictions, the defendant was advised of his rights prior to entering his guilty plea.

print card contained in the pen pack both matched the prints taken the morning of the hearing.

Likewise, in docket number 357-428, the bill of information in the pen pack did not contain fingerprints; however, Morse was able to match the prints on the arrest register associated with this conviction to the prints he took from the defendant that morning. In docket number 353-387, because of the poor quality of the prints on the bill of information, Morse used the prints on the arrest register associated with this conviction and was able to determine these prints matched the prints he took of the defendant prior to the hearing.

Based on the foregoing, we find the State sustained its initial burden of proof in that the defendant had three prior convictions and was represented by counsel at the time the pleas were taken. Thus, it became the defendant's burden to produce some affirmative evidence indicative of an infringement of rights or procedural irregularity in the taking of these pleas. The defendant put forth no such evidence; thus, we find the trial court properly adjudicated the defendant as a fourth felony habitual offender.

This assignment of error is without merit.

DENIAL OF MOTION FOR MISTRIAL

In his fifth counseled assignment of error, the defendant contends the trial court erred in denying his motion for mistrial. However, the defendant's brief fails to include any argument or reference to this assignment of error. Accordingly, under Uniform Rules, Courts of Appeal Rule 2-12.4, this assignment of error is considered abandoned.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.