NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1455

STATE OF LOUISIANA

VERSUS

DALLAS J. STADEN

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 02-10-0403, Section I
Honorable Anthony J. Marabella, Jr., Judge Presiding

Hillar C. Moore, III **District Attorney** **Allison Miller Rutzen** **Assistant District Attorney** **Baton Rouge, LA**	**Attorneys for Appellee** **State of Louisiana**
Bruce G. Whittaker **Louisiana Appellate Project** **New Orleans, LA**	**Attorney for** **Defendant-Appellant** **Dallas J. Staden**
Dallas J. Staden **Cottonport, LA**	**Defendant-Appellant** **In Proper Person**

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered May 3, 2012

PARRO, J.

The defendant, Dallas J. Staden, was charged by bill of information with attempted first degree murder (count one) and armed robbery (count two), violations of LSA-R.S. 14:27, LSA-R.S. 14:30, and LSA-R.S. 14:64, respectively. The defendant entered a plea of not guilty. The defendant waived his right to a trial by jury, and after a bench trial, he was found not guilty as to count one and guilty as charged as to count two. The state filed a habitual offender bill of information, and after a hearing, the defendant was adjudicated a second felony offender. The defendant was sentenced to forty-nine and one-half years of imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence.

The defendant now appeals, assigning error in a counseled brief to the waiver of the right to a jury trial and to a standby counsel appointment. The defendant also requests a review of the record pursuant to LSA-C.Cr.P. art. 920(2). In a pro se brief, the defendant assigns error to the sufficiency of the evidence, the trial court's denial of his motion for a speedy trial, ineffective assistance of counsel, and the second felony habitual offender adjudication. The defendant's pro se brief also presents further argument in support of the counseled assignments of error. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On December 1, 2009, at approximately 8:45 a.m., the defendant entered Alby's Market & Deli (Alby's) on North Sherwood Forest Boulevard in Baton Rouge, approached the check-cashing station, and began questioning a store employee, Sam Tran (one of the victims), about a power of attorney form and his need to cash someone else's check. Within seconds of the defendant's entry and as he continued to question Tran, the defendant's brother, Jeffrey Staden, entered the store and pointed a

gun to Tran's face while a third perpetrator held another store employee, Thanh Nguyen (another victim), at gunpoint.[1]

Jeffrey Staden tossed a bag to the defendant, and the defendant retrieved and placed pre-made zip ties around Tran's and Nguyen's wrists and placed a white plastic bag over Tran's head. Jeffrey Staden jumped over the counter and hit Tran in the head with the gun when Tran failed to comply with his command to get on the floor. Tran, who was dizzy and bleeding, fell to the floor as a result of the blow to the head. The perpetrators took cash from the store's cash registers, but also wanted money from the safe. After Tran informed Jeffrey Staden that he could not open the safe due to its time-lock system, he shot Tran in the right leg. As Jeffrey Staden and another perpetrator exited the store, the defendant dragged Nguyen toward Tran. Nguyen loosened the straps on his wrists and grabbed a gun that was located behind the store counter to pursue the perpetrators. The defendant untied Tran, apologized to him, shouted warnings to the other perpetrators that Nguyen had a gun, and then fled from the store.

COUNSELED ASSIGNMENT OF ERROR NUMBER ONE

In counseled assignment of error number one, the defendant argues that the trial court erred in proceeding without obtaining a knowing and intelligent waiver of his right to a trial by jury. The defendant specifically contends that the trial court failed to fully explore whether, in fact, the waiver was knowing and intelligent and failed to properly document the waiver. The defendant argues that during the jury trial waiver colloquy, the trial judge did not thoroughly inform him of his rights or the consequences of a waiver. The defendant further contends that the trial judge failed to explain the significance of the critical dynamics of jury deliberation and of the need for ten of the twelve to concur, with each juror having to consider whether his guilt had been proved beyond a reasonable doubt and being empowered to find him not guilty even if the

[1] At least one other perpetrator was present in the store and actively participated in the robbery along with the defendant and his brother, Jeffrey Staden. The bill of information lists the defendant, his brother, and a third perpetrator, Jermain Franklin, the defendant's cousin. The defendant's motion to sever was granted, and this appeal relates only to the defendant's trial.

evidence convinced them otherwise.

A defendant may waive his right to a jury trial and elect to be tried by the judge. LSA-C.Cr.P. art. 780(A). Generally, the waiver is entered at arraignment. See LSA-C.Cr.P. art. 780 (A) and (B). A waiver of trial by jury is valid only if the defendant acted voluntarily and knowingly. See **State v. Kahey**, 436 So.2d 475, 486 (La. 1983). A waiver of this right is never presumed. **State v. Brooks**, 01-1138 (La. App. 1st Cir. 3/28/02), 814 So.2d 72, 76, writ denied, 02-1215 (La. 11/22/02), 829 So.2d 1037. However, no special form is required for a defendant to waive his right to a jury trial. **State v. Coleman**, 09-1388 (La. App. 1st Cir. 2/12/10), 35 So.3d 1096, 1098, writ denied, 10-0894 (La. 4/29/11), 62 So.3d 103.

The record herein reflects that on June 30, 2010, at the preliminary examination hearing, the defendant appeared in proper person and indicated his desire to waive a jury trial in this matter. The defendant specifically stated, "I wanted to waive my right to a jury trial if you were the judge that was going to be presiding." The defendant further stated that he did not want to go through the venire process. The trial judge informed the defendant that he would be presiding over the trial, but further stated that he wanted to appoint an attorney for the defendant, noting that there was substantial evidence of the defendant's guilt. After the defendant indicated that he did not have confidence in an attorney, the trial judge asked, "You have confidence in me? You're going to waive a jury and put your life in my hands?" The defendant explained that he wanted to do so because the judge knew the law.

On September 8, 2010, the trial judge had a colloquy with the defendant regarding his request to waive his right to a jury trial. The trial judge stated, in part, "Instead of twelve people deciding whether or not you are guilty you are going to give all of that up to me to make the decision as to whether or not I believe you are guilty or not. . . . You are leaving it in one persons [sic] hands instead of twelve peoples [sic] hands." In adamantly explaining his desire to place the case in the hands of the judge, the defendant indicated that the jury would not have the experience that the trial judge had, stating, ". . . they don't do it everyday." The defendant added, ". . . they would

think the same thing that I would think if I seen someone kind of shaky or, you know, but they don't know my life is on the line . . . I just don't want to take a chance on 12 people."

Based on our review of the record, we find that the trial judge adequately explained the difference between a bench trial and a jury trial in basic terminology. In response, the defendant indicated that he had more confidence in the judge than a jury and clearly expressed his desire to waive his right to a jury trial. We conclude that the record supports a finding that the defendant knowingly and intelligently waived his right to be tried by a jury and elected to be tried by the trial judge. Counseled assignment of error number one lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

In the second counseled assignment of error, the defendant argues that the trial court's insistence in imposing standby counsel improperly impinged upon his right to self-representation. The defendant notes that, while he presented an opening and closing argument and questioned witnesses, the standby counsel was actively engaged in the case, questioned the defendant on direct examination, and interjected himself at numerous times throughout the course of the trial. The defendant also notes that he directly, clearly, and repeatedly expressed his desire to represent himself. In his pro se brief, the defendant supplements the counseled argument by contending that, despite the standby counsel's claim that he would not handle any witnesses, the standby counsel's approach and interference in cross-examination thwarted the defendant's attempt to elicit favorable testimony from Nguyen. The defendant contends that the standby counsel became upset with Nguyen and began questioning him in rapid-fire style, causing Nguyen to become defensive and withhold the substance of a past conversation with the defendant that would have "shed a completely new light on the entire case." Although he acknowledges that he asked the court to activate standby counsel "to spare the already impatient court and courtroom of my narrative," the defendant contends that he did not invite or agree to any participation. The defendant

argues that the participation of the standby counsel was impulsive and eroded his right to self-representation.

Both the Louisiana and United States Constitutions guarantee a criminal defendant's right to the assistance of counsel. Nevertheless, a defendant may elect to represent himself if the choice is "knowingly and intelligently" made and the assertion of the right is "clear and unequivocal." U.S. Const. amend. VI; LSA-Const. art. I, § 13; **Faretta v. California**, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); **State v. Brown**, 03-0897 (La. 4/12/05), 907 So.2d 1, 21-22, cert. denied, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006). However, a trial court may appoint a standby counsel to assist a pro se defendant in his defense. **McKaskle v. Wiggins**, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

In **McKaskle**, the United States Supreme Court confirmed the right of a criminal defendant to represent himself or herself pro se, while allowing the trial court to appoint standby counsel "to explain and enforce basic rules of courtroom protocol." **McKaskle**, 465 U.S. at 184, 104 S.Ct. at 954. The court further found that standby counsel may participate in the trial as long as his or her participation does not "seriously [undermine the defendant's] appearance before the jury in the status of one representing himself." **McKaskle**, 465 U.S. at 187, 104 S.Ct. at 955-56. "In determining whether a defendant's [right to present his defense pro se has] been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." **McKaskle**, 465 U.S. at 177, 104 S.Ct. at 950. The pro se defendant must be allowed to control the organization and content of his own defense, make motions, argue points of law, question witnesses, and address the court at appropriate points in the trial. **McKaskle**, 465 U.S. at 174, 104 S.Ct. at 949.

In this case, the defendant invoked his right to self-representation at the arraignment. The defendant did not object when the trial court appointed standby counsel at the preliminary examination proceeding. As noted by the defendant, he presented his own opening and closing arguments and cross-examined state witnesses, questioned his own witnesses, made motions, argued points of law, and freely

addressed the court when required to do so. There is no indication that the standby counsel deviated from the line of defense set out by the defendant. The record reveals that standby counsel was an asset to the defendant. The defendant has failed to show he was prejudiced by having been appointed a standby counsel to assist him. Thus, there was no interference with the defendant's right to pro se representation in this case. Counseled assignment of error number two lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER THREE

In the final counseled assignment of error, the defendant urges this court to conduct a review of the record pursuant to LSA-C.Cr.P. art. 920. In his pro se brief, the defendant supplements this request by noting a potential conflict of interest with the public defender's office that was never explained to him. The defendant also asks this court to obtain the trial audio from the lower court and alleges that comments made by the trial judge at the time of the verdict, regarding the sufficiency of the evidence, were not transcribed.[2]

We routinely review the record on appeal in accordance with LSA-C.Cr.P. art. 920(2), even if there is no request for a review. However, the review is limited to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. The defendant's pro se requests for review exceed the scope of review for error pursuant to LSA-C.Cr.P. art. 920(2). After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277. Counseled assignment of error number three lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In pro se assignment of error number one, the defendant argues that the evidence was insufficient to prove the elements of armed robbery. The defendant

[2] As will be discussed later, the defendant also raised this issue in pro se assignment of error number one.

notes that, although the word "principal" was not included in the commitment, bill of information, or jury instructions, according to the judge's statements at the time of the verdict, he determined that the defendant was a principal in the offense. In that regard, the defendant argues that the intent element was not proven, that he operated under fear, and that the evidence does not support a finding that he had a guilty mind, such that he was a principal to armed robbery. The defendant also argues that the trial judge's decision was irrational, unreasonable, and unfairly based on non-evidence, lies, and his personal feelings. The defendant contends that this case entailed guilt by association. The defendant further argues that the trial judge failed to give proper weight to trial testimony and made poor credibility determinations.

In further support of his sufficiency argument, the defendant contends that the record is devoid of comments made by the trial judge, which were not transcribed. The defendant asks that this court obtain the audio recording of the proceeding. While the defendant has not assigned this issue as error, at the outset, we note that only material omissions from the transcript of the trial proceedings bearing on the merits of an appeal will require reversal. Conversely, inconsequential omissions or slight inaccuracies do not require reversal, and a defendant is not entitled to relief because of an incomplete record, absent a showing of prejudice based on the missing portions of the transcripts. **State v. Frank**, 99-0553 (La. 1/17/01), 803 So.2d 1, 19-20. Based on the defendant's allegations, he has failed to show that there are any material omissions or that he was prejudiced based on any omissions. We will now address the defendant's challenge of the sufficiency of the evidence.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560

(1979); see also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). When circumstantial evidence is used to prove the commission of an offense, LSA-R.S. 15:438 requires that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. See **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732. This is not a separate test to be applied when circumstantial evidence forms the basis of a conviction; all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Ortiz**, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, cert. denied, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998).

The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

Louisiana Revised Statute 14:64(A) provides that "[a]rmed 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." The parties to crimes are classified as principals and accessories after the fact. LSA-R.S. 14:23. Principals are all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. LSA-R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. See **State v. Pierre**, 631 So.2d 427, 428 (La. 1994) (per curiam). There is absolutely no requirement that an indictment explicitly denominate the accused as a "principal." That the accused is charged for the offense

itself, and not charged as an accessory after the fact, irrefutably evidences that he is charged as a principal. **State v. Peterson**, 290 So.2d 307, 308 (La. 1974).

Considering that the state may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another, the defendant need not have actually performed the taking to be found guilty of a robbery. **State v. Smith**, 513 So.2d 438, 444-45 (La. App. 2nd Cir. 1987). Further, a defendant convicted as a principal need not have personally held a weapon to be found guilty of armed robbery. **State v. Dominick**, 354 So.2d 1316, 1320 (La. 1978). One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime, depending upon the mental element proved at trial. **State v. Holmes**, 388 So.2d 722, 726 (La. 1980). Armed robbery is a general intent crime. 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. **State v. Payne**, 540 So.2d 520, 523-24 (La. App. 1st Cir.), writ denied, 546 So.2d 169 (La. 1989).

The defendant does not dispute the fact that he was present during the armed robbery, but challenges the evidence to establish the nature of his involvement. Tran testified that he knew the defendant very well at the time of the incident. Before the other perpetrators approached, the defendant was asking nonsensical questions about a power of attorney issue and distracted Tran. According to Tran, after the defendant's brother (with whom Tran was not as familiar) started yelling at Tran and ordering Tran to get on the floor, the defendant exclaimed, "I'm just a customer, don't – I mean, don't hurt me . . . ." The defendant repeatedly made similar statements regarding his status and asking not to be harmed. After the defendant's brother struck Tran with the gun, the defendant asked him why he hit Tran and subsequently asked his brother why he shot Tran. However, the defendant warned the other perpetrators when Nguyen retrieved a gun. When the defendant cross-examined Tran, it was clarified that the defendant put the straps around Tran's wrist on the defendant's own accord, but the defendant's brother instructed the defendant to put the bag over Tran's head, and he complied. Tran testified that he did not initially think the defendant was involved until

he found out that the gunman who shot him was the defendant's brother and until he recapped the incident, then realizing it had been a plan.

Nguyen testified that after he retrieved the gun that was kept behind the store counter, he pursued the perpetrators and tried to shoot at them, but the gun jammed. Nguyen was ultimately able to fire the weapon twice as he stood in the doorway and observed the defendant flee the scene in a red Mazda. Detective Brian Higginbotham of the Baton Rouge City Police Department testified that, after the incident, the police searched the defendant's residence and recovered black zip ties like the ones used to bind the victims' wrists.

The police also conducted a recorded interview of the defendant after his arrest. The defendant stated that he was twenty-four years old and was an unemployed college student at the time of the interview, with overdue financial obligations for a probation condition or fine for an unrelated offense. According to the defendant, an acquaintance was paying his living expenses while he was attending school. The defendant indicated that he went to the store on the date in question to talk to Tran about cashing a check that belonged to a friend. As he was at the counter, a "guy" approached with a gun and commanded the defendant to assist with the robbery. The defendant was very reluctant to admit that his brother, Jeffrey Staden, was the gunman who approached the counter, but ultimately did so approximately thirty-one minutes into the interview. The defendant stated that he believed four individuals were involved in the robbery, but that his brother was the only one he could identify. According to the defendant, his brother had discussed his desire to rob the store on several occasions, but the defendant warned him against it. The defendant also admitted that he and his brother had a fight the Sunday night before the robbery, because he refused to go along with his brother's plans. He stated that his brother wanted him to wear a mask and enter the store with other masked assailants and that his brother also wanted to use his apartment to facilitate the robbery. He stated that he refused to participate or let his brother use the apartment, but his sister, Jayda Staden, gave him permission to do so. The defendant went to the store early on the day in question because he

thought that his brother and the other assailants would be committing the robbery at night. The defendant ultimately admitted that he arrived at the store in a white Ford Explorer driven by his cousin Franklin and departed in the same vehicle after the robbery. The defendant claimed that it was an unexpected coincidence that his brother committed the robbery while the defendant was in the store and that he "had nothing to do with this."

During the trial, the defendant testified that, before the incident in question, his brother asked to borrow money from him and he initially refused to provide a loan to him, but later told his brother that he would try to give him some money. The defendant subsequently told his brother that he did not have any cash, but that he did have a check that he was supposed to cash for a friend who was incarcerated. The defendant further testified that he never actually planned to cash the check, but only wanted to pretend to attempt to do so to appease his brother. Franklin gave the defendant a ride to Alby's, and his brother arrived in a maroon vehicle. The defendant entered the store and as he was talking to Tran, his brother pulled out a gun. The defendant was initially in disbelief. The defendant recalled that his brother had previously contemplated robbing the store and verbalized the notion to the defendant during an argument over money, and everything just sort of "hit" the defendant as to what was going on.

The defendant further testified that after his brother started yelling and acting strangely, he grabbed the black ties and put them loosely around Nguyen's wrists. The defendant was hoping Nguyen would remove the straps and shoot one of the gunmen. However, the defendant admitted to warning the others when Nguyen retrieved a gun. The defendant fled from the scene because he assumed the police would not believe that he was not willingly involved. The defendant admitted to repeatedly lying to the police during the recorded interview. For example, the defendant initially lied about arriving at the store with Franklin and was repeatedly asked if he placed the bag over Tran's head and he denied doing so. The defendant contended at the trial that he only put the bag on Tran's head because the other perpetrators told him to do so. During

cross-examination, the defendant confirmed that before the date in question, he knew his brother wanted to rob the store but claimed that he did not know his brother was actually going to do so. The defendant testified that he knew his brother entered the store behind him but thought that he was coming in to purchase cigarettes. Video footage of the exterior of the store recorded the day of the robbery shows that before the defendant and his brother entered the store, a white SUV drove past the store, and came back up the nearby block as it was approached by a maroon or red car. The defendant exited the white SUV as his brother exited the maroon or red car, and they walked to the store from the intersection.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 721 So.2d at 932. An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact 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.

We note that a finding of purposeful misrepresentation, as in the case of material misrepresentation of facts by the defendant, or flight following an offense reasonably raises the inference of a "guilty mind." Lying has been recognized as indicative of an awareness of wrongdoing. **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984). The facts in this case established acts of both flight and material misrepresentation by the defendant. After the crime, instead of waiting for the police and informing them that he had been forced to participate in an armed robbery against his will, the

defendant fled from the scene. As noted, the defendant also lied about his conduct during the robbery and made several inconsistent statements. The record clearly supports a finding that the defendant aided and abetted the other perpetrators.

Based on our review of the evidence, we conclude that the trial judge reasonably rejected the defendant's hypothesis of innocence, namely, that he did not have the requisite mental state to be convicted for the armed robbery. See **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trier of fact. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). After a thorough review of the record, we conclude that the evidence supports the trial court's judgment of conviction. We are convinced that, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of armed robbery. Pro se assignment of error number one is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In the second pro se assignment of error, the defendant contends that the trial court erred in denying his motion for speedy trial. As to the length of the delay, the defendant notes that he was incarcerated for 341 days while awaiting trial. The defendant argues that the trial court should have been aware of the fact that this case would depend heavily on eyewitness testimony. The defendant argues that the trial court assumed the role of the state in finding "just cause" for the delay and that its actions were "contemptuous." The defendant notes that there was no contradictory hearing and the motion was not mentioned. The defendant contends that when his trial date was moved from November 29 to November 18 and again to November 8 for pretrial matters, the trial court failed to consider the procedure for use of the prison's law library. The defendant further contends that perhaps this is the reason his subpoenas were not served. The defendant further asks this court to review the

transcripts for the September 8 and October 19, 2010 proceedings in this regard. The defendant notes that he asserted his speedy trial rights at every appearance and ultimately filed an application for supervisory writs with this court in that regard. The defendant argues that his incarceration was oppressive. The defendant notes that he was the breadwinner in his family, and that he was forced to neglect educational, family, and personal opportunities and responsibilities. Thus, the defendant argues that he had several causes for anxiety and concern. The defendant also contends that his defense was impaired due to witness unavailability and faded memory and noted that his decision to represent himself was based on his desire to "move things along."

The defendant filed a supervisory writ with this court requesting mandamus relief for the trial court's failure to act on his pro se motion for speedy trial under LSA-C.Cr.P. art. 701. The action on the writ was as follows:

> **WRIT GRANTED.** We have been advised by the district court that trial in this matter is set for November 15, 2010. Nevertheless, the district court is instructed to proceed toward disposition of relator's motion for speedy trial, filed on or about March 15, 2010, under the provisions in Louisiana Code of Criminal Procedure article 701(D), (E), and (F). See **State v. Miller**, 97-0761 (La. App. 3d Cir. 7/10/97), 699 So.2d 448; see also **State v. Thurman**, 574 So.2d 400, 402 (La. App. 1st Cir. 1990).

State v. Staden, 10-1544 (La. App. 1st Cir. 9/27/10) (unpublished). On October 6, 2010, the trial court denied the defendant's motion for speedy trial. The defendant did not seek review of that ruling with this court, and the trial took place on November 9, 2010. There is no indication that the defendant filed a motion to quash in the district court raising the issue of his constitutional right to a speedy trial.

Louisiana Code of Criminal Procedure article 701, which provides the statutory right to a speedy trial, merely authorizes pretrial relief. The remedy for a speedy trial violation under Article 701 is limited to release from incarceration without bail or release of the bail obligation for one not incarcerated. Once a defendant has been convicted, any allegation of a violation is moot. **State v. Odom**, 03-1772 (La. App. 1st Cir. 4/2/04), 878 So.2d 582, 593, writ denied, 04-1105 (La. 10/8/04), 883 So.2d 1026.

In addition to the limitations provided by Article 701, LSA-C.Cr.P. art. 578(A)(2) provides for a two-year time limitation from the date of institution of the prosecution

within which the trial of a defendant accused of a noncapital felony must be commenced. The defendant was initially charged on February 11, 2010, for an offense committed on December 1, 2009. An amended bill of information was filed on March 4, 2010, and as noted, the trial took place on November 9, 2010. Thus, to the extent that defendant's claim is based on Article 578(A)(2), it was properly denied by the trial court as the delay was even less than one year.

Besides these statutory provisions, the right to a speedy trial is guaranteed by both the federal (U.S. Const. amend. VI) and state (LSA-Const. art. I, § 16) constitutions, and the proper method for raising the claim of a denial of the constitutional right to a speedy trial is by a motion to quash. **State v. Gordon**, 04-0633 (La. App. 1st Cir. 10/29/04), 896 So.2d 1053, 1063, writ denied, 04-3144 (La. 4/1/05), 897 So.2d 600. There is no indication that the defendant filed a motion to quash. Therefore, the defendant failed to preserve for appeal his claim that the state violated his constitutional right to a speedy trial. See **Gordon**, 896 So.2d at 1063. Cf. **State v. Buckley**, 02-1288 (La. App. 3rd Cir. 3/5/03), 839 So.2d 1193, 1199-1200 (In that case, the Third Circuit Court of Appeal concluded that the defendant was precluded from raising a constitutional speedy trial issue, but reviewed the defendant's claim out of an abundance of caution. In this case, a review of the defendant's claim, out of an abundance of caution, reveals that the defendant's constitutional speedy trial rights were not violated.)

In **Barker v. Wingo**, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), the United States Supreme Court identified four factors to determine whether a particular defendant had been deprived of his right to a speedy trial, namely: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.

The Louisiana Supreme Court has explained:

> The first of the **Barker** factors, the length of the delay, is a threshold requirement for courts reviewing speedy trial claims. This factor serves as a "triggering mechanism." Unless the delay in a given case is "presumptively prejudicial," further inquiry into the other **Barker** factors is unnecessary. However, when a court finds that the delay was

"presumptively prejudicial," the court must then consider the other three factors. [Citations omitted.]

State v. Love, 00-3347 (La. 5/23/03), 847 So.2d 1198, 1210.

In this case, there was only a nine-month delay from the initial bill of information before the trial took place. Further, regarding the second **Barker** factor, the record shows the defendant filed a number of pro se pretrial motions in this case, including a motion to suppress evidence that was filed on June 16, 2010, and withdrawn on November 9, 2010, the day of the trial. Regarding the third **Barker** factor, the defendant filed his motion for speedy trial on March 15, 2010, about eight months before the trial took place. However, as noted, the defendant failed to file in the district court a motion to quash. Regarding the final **Barker** factor, the defendant does not sufficiently allege prejudice to his case. Considering the fact that the defendant admitted during his trial testimony to being present at the time of the robbery, consistent with the testimony of the other trial witnesses, the defendant's claims that he suffered witness unavailability or faded memory is unsubstantiated. Moreover, although incarceration is inherently prejudicial, it does not weigh heavily in a **Barker** analysis, which focuses upon prejudice to a defendant's case. Thus, applying the **Barker** analysis to the present case, we find no constitutional violation in this regard. Pro se assignment of error number two lacks merit.

PRO SE ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR

In the third pro se assignment of error, the defendant argues that he received ineffective assistance of counsel at the sentencing and habitual offender proceedings. The defendant specifically contends that his counsel failed to subject the prosecutor's case to meaningful adversarial testing, including the failure to object to the evidence or exhibits, resulting in a failure to preserve his challenge to the habitual offender adjudication raised in pro se assignment of error number four.

In the fourth pro se assignment of error, the defendant argues that the state failed to meet its burden at the habitual offender proceeding. The defendant specifically argues that the state failed to prove that the predicate guilty plea was knowingly and voluntarily entered, that he is the same individual previously convicted,

or that he was represented by counsel at the time of the predicate guilty plea. The defendant concludes that the record is insufficient to prove beyond a reasonable doubt that he is a second-felony habitual offender.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post-conviction relief, filed in the trial court where a full evidentiary hearing can be conducted.[3] **State v. Prudholm**, 446 So.2d 729, 737 (La. 1984). But an evidentiary hearing is not necessary where the record on appeal is sufficient to permit a determination of counsel's effectiveness at trial. **State v. Seiss**, 428 So.2d 444, 449 (La. 1983). Under such circumstances, it is in the interest of judicial economy to dispose of the issue on appeal. **State v. Calhoun**, 96-0786 (La. 5/20/97), 694 So.2d 909, 914.

Under **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced him. With regard to counsel's performance, the defendant must show that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. As to prejudice, the defendant must show that counsel's errors were so serious as to deprive him of a fair trial, i.e., a trial whose result is reliable. Thus, it must be shown to a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

If the defendant denies the allegations of the habitual offender 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. If the defendant is able to do this, then the burden of proving the constitutionality of the plea

[3] The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 et seq., to receive such a hearing.

shifts to the state. 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 779-80. 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 by 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.[4] **Shelton**, 621 So.2d at 780; **State v. Bickham**, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 889-90. The purpose of the rule of **Shelton** is to sharply demarcate 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**, 04-1401 (La. 7/2/04), 879 So.2d 689, 691 (per curiam).

The defendant in this case initially stated that he would stipulate to his status as a second felony habitual offender, but subsequently requested a hearing. The state introduced evidence to show that the defendant pled guilty to three counts of bank fraud (violations of LSA-R.S. 14:71.1) on April 27, 2007, in the 19th Judicial District Court in East Baton Rouge Parish (case number 03-06-0744). A careful review of the documentation introduced by the state in support of the use of the 2007 predicates to establish the defendant's habitual offender status convinces us that the state met its initial burden under **Shelton**. Specifically, the state introduced fingerprint evidence to

[4] Before accepting a guilty plea, **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), requires that a trial court ascertain that the defendant has voluntarily and knowingly waived: 1) his right against compulsory self-incrimination; 2) his right to trial by jury; and 3) his right to confront his accusers. **Boykin** only requires a defendant be informed of these three rights. **State v. Bickham**, 98-1839 (La. App. 1st Cir. 6/25/99) 739 So.2d 887, 890.

show that the defendant was the same person convicted in the cases at issue. The state proved the existence of the convictions at issue and that the defendant was represented by counsel by submitting the bill of information and minutes for the guilty plea convictions. Thereafter, the defendant failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. Accordingly, the state had no burden to prove the constitutionality of the predicates at issue by "perfect" transcript or otherwise. The defendant has failed to show any deficiency in performance or prejudice in this regard. Accordingly, pro se assignments of error numbers three and four lack merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.