NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1119

STATE OF LOUISIANA

VERSUS

GHAZIR G. LACAYO

Judgment Rendered: February 11, 2011

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 415424

The Honorable William J. Crain, Judge Presiding

* * * * * * * *

Walter P. Reed **District Attorney** **Kathryn Landry** **Special Appeals Counsel** **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellee** **State of Louisiana**
Lieu T. Vo Clark **Slidell, Louisiana**	**Counsel for Defendant/Appellant** **Ghazir G. Lacayo**
Ghazir G. Lacayo **Kinder, Louisiana**	**Defendant/Appellant** **In Proper Person**

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The defendant, Ghazir G. Lacayo, was charged by bill of information with aggravated criminal damage to property, a violation of La. R.S. 14:55. He pled not guilty and, following a jury trial, was found guilty as charged.[1] The State subsequently filed a multiple offender bill. At the habitual offender hearing, the defendant was adjudicated a second-felony habitual offender and sentenced to thirty years imprisonment at hard labor. The defendant filed *pro se* motions to reconsider sentence, which were denied. The defendant now appeals, designating four counseled assignments of error and three *pro se* assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On the night of June 21, 2006, Stephanie Lacayo drove to Daiquiris & Company on Gause Boulevard in Slidell. Stephanie had recently separated from her husband, the defendant. In April of 2006, Stephanie obtained a protective order against the defendant, ordering the defendant, among other things, not to contact, abuse, harass, follow, or threaten her. Stephanie had custody of their ten-year-old son.

Stephanie drove her Volvo into a parking spot at the daiquiri shop. The defendant followed her into the parking lot in a new F-250 Ford pickup truck pulling a small trailer. From her rearview mirror, she saw the truck approaching her from behind. Not positive it was the defendant, but fearing it might be, Stephanie put her car in reverse, preparing to back out. Without

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[1] The defendant filed a timely pro se post verdict judgment of acquittal, which was not ruled on by the trial court. However, such failure to rule on this motion did not "inherently prejudice" the defendant. See *State v. Price*, 2005-2514, pp. 21-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, no action by this court is required. Furthermore, in the second assignment of error, we find no merit in the defendant's sufficiency of evidence argument.

warning, the defendant smashed his truck into the back of the Volvo. Her windows (not windshields) shattered on impact and her car passed over the narrow median it was parked at and spun until Stephanie faced the opposite direction from her original parking-spot position. Because the median had a concrete curb, the tires on the Volvo were flattened. The defendant veered off several feet to the right and crashed into the side of a storage unit behind the daiquiri shop.

Stephanie testified at trial that she could not open the driver-side door. She crawled toward the passenger door and opened it. Before she could get both feet on the ground, the defendant dove through the driver-side window and grabbed her ankle. Stephanie fell to the ground. She kicked free from the defendant and got up to run. The defendant grabbed her hair and tackled her to the ground. Stephanie screamed for help. As she lay on her stomach, the defendant repeatedly struck her in the head. A crowd soon gathered, and the defendant was pulled off of Stephanie.

Theresa Sanders witnessed the collision and the aftermath. Theresa knew neither Stephanie nor the defendant. She testified at trial that she saw Stephanie pull her Volvo into a parking spot. As Stephanie's car sat still, the defendant drove his truck into the back of her car while moving very fast. The truck veered off into a storage unit, and the Volvo spun 180 degrees. The defendant exited his truck, screaming, and ran to the car. Theresa testified that defendant had to go around the car, but was not sure whether he went over the hood of the car before pulling Stephanie out of the passenger side by her hair. As Stephanie lay on the ground, the defendant stood over her and punched her in her face and body repeatedly. Stephanie screamed for help. At least two people pulled the defendant off of Stephanie and held him until the police came.

Dillon Sanders, Theresa's husband, also testified at trial. Dillon did not know Stephanie, nor did he know the defendant. He observed the defendant drive fast past him and hit Stephanie's car, causing the car to spin around. Dillon did not see brake lights illuminate on the truck before it struck the car. In fact, Dillon heard the engine "rev up" as it approached Stephanie's car. Dillon stated that the defendant did not try to stop. As Stephanie tried to climb out of her car, the defendant pulled her out of the passenger side, got on top of her, and began striking her in the head and face. The defendant was yelling and cursing, and Stephanie was screaming for help. A man who had come out of the back of the daiquiri shop pulled the defendant off of Stephanie.

The defendant did not testify at trial.

COUNSELED ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in allowing other crimes evidence at trial. Specifically, the defendant contends that the probative value of the protective order against him, which was admitted at trial, was outweighed by its prejudicial effect.

Prior to trial, the State filed a motion for a 404(B)(1) hearing to determine the admissibility of evidence. Particularly, the State sought to be allowed to introduce at trial evidence of a protective order Stephanie had obtained against the defendant about two months prior to the incident in the instant matter. According to the motion, the protective order prohibited the defendant from using any force or physical violence against Stephanie, from following or stalking her, and it granted her exclusive use of the Volvo.

At a pretrial hearing, the State argued the protective order proved motive, identity, and intent. The defendant violated the protective order by

crashing into Stephanie's vehicle and physically attacking her. In ruling the protective order was admissible, the trial court stated in pertinent part:

> Generally speaking, other crimes, wrongs or acts are inadmissible to show that the defendant acted in conformity therewith at the time of the incident.
>
> However, . . . this type of evidence may be admissible for other purposes; such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident[.] . . .
>
> * * * * *
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> I find that that evidence, that the probative value of that evidence substantially outweighs the prejudicial effect. I find that it has probative value as to intent, absence of mistake, or accident or other elements of that provision.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. *State v. Lockett*, 99-0917, p. 3 (La. App. 1st Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So.2d 115.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

The defendant contends that the trial court's analysis under La. Code Evid. art. 404(B)(1) was erroneous because the protective order, itself, does not allege any specific acts or conduct. Further, according to the defendant,

the protective order is not relevant as to whether he is guilty of aggravated criminal damage to property, but serves only to suggest he has the character of a dangerous person from whom Stephanie had to seek a court order for protection. We do not agree.

We note initially that, while the protective order is not, itself, necessarily "other crimes" evidence, such a legal document is indicative of wrongs or acts perpetrated by the person against whom the order is issued. As such, the trial court properly analyzed the protective order under La. Code Evid. art. 404(B). Further, the protective order was relevant because the general intent of the defendant was at issue in this case. The defendant's theory of the case was that he did not intentionally strike Stephanie's car with his truck. According to the defendant, while he was in the parking lot driving toward Stephanie, their vehicles inadvertently collided because, without warning, Stephanie began backing up her car. Evidence of the protective order in light of this defense was relevant to show the defendant's intent, and, in particular, absence of mistake or accident.

The trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. See *State v. Galliano*, 2002-2849, pp. 3-4 (La. 1/10/03), 839 So.2d 932, 934 (per curiam). We find no abuse of discretion in the trial court's ruling. The evidence of the protective order had independent relevance to the issues of intent, and absence of mistake or accident, and any prejudicial effect was outweighed by the probative value of such evidence.[2] See *State v. Scales*, 93-2003, pp.

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[2] Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. Code Evid. art. 403.

4-5 (La. 5/22/95), 655 So.2d 1326, 1330-31, cert. denied, 516 U.S. 1050, 116 S.Ct. 716, 133 L.Ed.2d 670 (1996).

We find, further, that even had the protective order been found to be inadmissible, the admission of such evidence would have been harmless error. See La. Code Crim. P. art. 921. The erroneous admission of other crimes evidence is a trial error subject to harmless-error analysis on appeal. *State v. Johnson*, 94-1379, p. 17 (La. 11/27/95), 664 So.2d 94, 102. The test for determining whether an error is harmless is whether the verdict actually rendered "was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *Johnson*, 94-1379 at p. 14, 664 So.2d at 100.

In the instant matter, we find the defendant could not have been prejudiced by evidence of the protective order against him. The defendant struck Stephanie's car hard enough to spin it around 180 degrees and to cause the car's windows to shatter. Three eyewitnesses, including the victim herself, testified at trial that following the collision, the defendant ran toward Stephanie, grabbed her, and struck her repeatedly as she lay on the ground. Moreover, the defendant's attack desisted only because he was pulled off Stephanie by bystanders. Accordingly, the State's evidence clearly established the defendant's guilt. As such, the guilty verdict rendered would surely have been unattributable to any evidence of a protective order, and any error in allowing such evidence of other crimes, wrongs, or acts to be presented to the jury would have been harmless. See *Sullivan*, 508 U.S. at 279, 113 S.Ct. at 2081.

This assignment of error is without merit.

COUNSELED ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the evidence was insufficient to support the conviction. Specifically, the defendant contends the State failed to prove that he intentionally collided with Stephanie's car.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found 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 La. Code Crim. P. art. 821(B); *State v. Ordodi*, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; *State v. Mussall*, 523 So.2d 1305, 1308-09 (La. 1988). The *Jackson* standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See *State v. Patorno*, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

The defendant asserts that the trial testimony of the eyewitnesses was "replete with inconsistencies," especially when compared to Stephanie's testimony. For example, both Theresa and Dillon testified Stephanie's car was parked when it was hit, while Stephanie testified that she was backing up when hit. The defendant asserts that the evidence does not exclude the reasonable hypothesis of innocence that he accidentally drove into Stephanie's car as she was unexpectedly backing out of her parking spot.

Louisiana Revised Statutes provides in pertinent part:

> Aggravated criminal damage to property is the intentional damaging of any structure, watercraft, or movable, wherein it is foreseeable that human life might be endangered, by any means other than fire or explosion.

The crime of aggravated criminal damage to property requires proof of general criminal intent. See *State v. Brumfield*, 329 So.2d 181, 189-90 (La. 1976). General criminal intent is present when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2). See *State v. Jackson*, 42,960, p. 9 (La. App. 2d Cir. 2/13/08), 976 So.2d 279, 284. In a general intent crime, the criminal intent necessary to sustain a conviction is shown by the very doing of the act which has been declared criminal. *State v. Holmes*, 388 So.2d 722, 727 (La. 1980).

The testimony at trial established that Stephanie pulled her car into the daiquiri shop parking spot. When she observed the defendant heading toward her in his truck, she put her car in reverse. The defendant then ran into the back of her car. While the defendant's speed at the moment of the collision was not established at trial, the impact was forceful enough to spin Stephanie's car 180 degrees and to shatter the windows. The impact also forced her car over a curb, which flattened her tires. The testimony and photographic evidence indicated the defendant lost control of his truck and ran into a storage shed. Stephanie's driver-side door was stuck, so she attempted to exit her car through the passenger-side door. Within moments, the defendant had reached through the driver-side window and grabbed Stephanie's ankle. Stephanie fell to the ground. As she lay on the ground, the defendant, while shouting, positioned himself over her and repeatedly

punched her in the head, while screaming. At least one man from the daiquiri shop pulled the defendant away from Stephanie, who was terrified and crying. As the crowd kept the defendant away from Stephanie, the defendant continued to shout and curse at Stephanie.

The jury heard all of the testimony and viewed all of the evidence presented to it at trial and, notwithstanding any alleged inconsistencies, the jury found the defendant guilty. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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 factfinder's determination of guilt. *State v. Taylor*, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. *State v. Mitchell*, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. *State v. Quinn*, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. *State v. Moten*, 510 So.2d 55, 61 (La. App. 1st Cir. 1987), writ denied, 514 So.2d 126 (La. 1987). Immediately after running into Stephanie's car, the defendant, instead of helping her or

inquiring about her well-being, grabbed her and repeatedly punched her. As such, the inference was very strong that the defendant's collision into Stephanie's car was intentional. In finding the defendant guilty, it is clear the jury rejected the defense's theory of accident. Given the physical damage to Stephanie's car and the aftermath of the collision wherein the defendant attacked Stephanie, the jury's guilty verdict reflected the reasonable conclusion that the defendant followed Stephanie into the parking lot and, fully cognizant that human life might be endangered, intentionally damaged her vehicle by colliding into it with his truck.

After a thorough review of the record, we find that the evidence supports the jury's verdict. 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 aggravated criminal damage to property. See *State v. Calloway*, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

COUNSELED ASSIGNMENTS OF ERROR NOS. 3 and 4

In his third and fourth assignments of error, the defendant argues, respectively, that the trial court erred in denying his motion to reconsider sentence and that his sentence is constitutionally excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence falls within statutory limits, it may be excessive. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless

infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *State v. Andrews*, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. *State v. Holts*, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code of Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. *State v. Brown*, 2002-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. Code Crim. P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. Code Crim. P. art. 894.1. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. *State v. Jones*, 398 So.2d 1049, 1051-52 (La. 1981).

In the instant matter, the defendant was sentenced to the maximum sentence of thirty years at hard labor. See La. R.S. 14:55 & 15:529.1(A)(1)(a). As a general rule, maximum or near maximum sentences are to be reserved for the worst offenders and the worst offenses. *State v.*

James, 2002-2079, p. 17 (La. App. 1st Cir. 5/9/03), 849 So.2d 574, 586. Also, maximum sentences permitted under a statute may be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. *State v. Hilton*, 99-1239, p. 16 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. The defendant contends the trial court failed to consider any mitigating circumstances.

At sentencing, the trial court stated in pertinent part:

> I will tell you, having listened to the trial, that the evidence to that effect in my opinion was overwhelming. I believe that the jury correctly found in this case that Mr. Lacayo had violated that act by ramming his truck into the vehicle in which [sic] Ms. Lacayo occupied and doing it in such a manner as it was foreseeable that her life was in danger. . . .
>
> It is also unfortunate that Mr. Lacayo has not, in my opinion, shown the slightest remorse for the actions on that day in committing the crime that he committed. Rather, he expresses to the Court that he forgives Ms. Lacayo for what she had done to him.
>
> I have listened to both Ms. Lacayo and Mr. Lacayo in this courtroom. I have read the victim impact statement that Ms. Lacayo filed into the record in this proceeding. That statement I found to be quite impressive and, quite frankly, quite disturbing in its description of the abuse and the violence that Ms. Lacayo has lived under since she has been involved with Mr. Lacayo.
>
> Ms. Lacayo has expressed a fear that if Mr. Lacayo were released that her life would be in danger. I believe Ms. Lacayo's fear is real. And, quite frankly, I, too, have serious, serious concerns about Mr. Lacayo's ability to follow the rules of our civil society and have much doubt that -- or let me rephrase that -- I have little doubt, quite frankly, that if not -- that if real [sic] released any time soon, that Mr. Lacayo would commit further acts of violence, not only as a threat to Ms. Lacayo but possibly to others.
>
> I have reviewed the provisions of article 894.1 which guides the Court in imposing a sentence and I will mention a few. First of all, I believe that Mr. Lacayo's offense or conduct manifested a deliberate cruelty to Ms. Lacayo.
>
> * * * * *
>
> I also believe that there is an undue risk that if any portion of a sentence in this matter were suspended that Mr. Lacayo would commit another crime. I believe that Mr. Lacayo is in need of correctional treatment in a custodial environment that will best be provided by commitment to an institution.

> He is a two-time violent offender. He tormented and terrorized the victim in this case.
>
> The Court believes that he is a continued threat to those people that he was involved with, specifically Ms. Lacayo and their son, and possibly to others.
>
> Presentence investigation report in this matter recommended that a maximum sentence is imposed. I have considered this case at great length, Mr. Lacayo. I have tried to work through in my mind whether or not and to what extent releasing you back into our community, what risk that would present.
>
> And I am convinced based on the nature of the act involved, based on the nature of the prior violent act that you were convicted of, and, quite frankly, based on the stubborn refusal to try to conform to the rules even of the court, that returning you to our community would present a serious and grave risk to our community.

The trial court adequately considered the factors set forth in Article 894.1. Considering the trial court's careful review of the circumstances, the presentence investigation report, the defendant's previous aggravated battery conviction, and the nature of the instant crime, we find no abuse of discretion by the trial court. The trial court provided ample justification for the imposition of the maximum sentence allowed by law and found, in particular, that the defendant posed a serious and grave risk to the public safety because of his violent behavior and refusal to conform to rules. See *State v. Mickey*, 604 So.2d 675, 679 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). See also *Hilton*, 99-1239 at pp. 16-17, 764 So.2d at 1037-38; *State v. Herrin*, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. The trial court, therefore, did not err in denying the motion to reconsider sentence.

These assignments of error are without merit.

***PRO SE* ASSIGNMENT OF ERROR NO. 1**

In his first *pro se* assignment of error, the defendant raises several disparate issues regarding the denial of "his constitutional rights to due process and equal protection of the law" during the course of his pretrial motion hearings and first and second trials.

Throughout his *pro se* brief, the defendant argues his rights were violated because he was denied a preliminary examination in both his first trial and second trial. Prior to the defendant's first trial, defense counsel waived the preliminary examination because the State had provided open-file discovery. Prior to his second trial, the defendant filed a *pro se* motion for a preliminary examination, which was denied by the trial court because the defendant's case had already been tried. The defendant claims the trial judge deprived him of his right to a preliminary examination hearing before his second trial. The primary function of a preliminary examination is to ensure that probable cause exists to hold the accused in custody. *State v. Foster*, 510 So.2d 717, 723 (La. App. 1st Cir. 1987). A conviction shall be reversed only if a ruling of the trial court affects a substantial right of the accused. La. Code Crim. P. art. 921. *State v. Burns*, 602 So.2d 191, 193 (La. App. 3d 1992). The defendant has made no showing of any prejudice as a result of no preliminary examination being conducted. Thus, even if the defendant had been improperly deprived of a preliminary examination hearing, the issue of denial became moot upon his conviction where the defendant had failed to show any prejudice. *State v. Wright*, 564 So.2d 1269, 1272 (La. App. 4th Cir. 1989) (per curiam) (on rehearing). See *State v. Washington*, 363 So.2d 509, 510 (La. 1978); *State v. Daniels*, 25,833, p. 3 (La. App. 2d Cir. 3/30/94), 634 So.2d 962, 964. This argument has no merit.

The defendant asserts in his *pro se* brief that had he been granted a preliminary examination, the evidence adduced at the hearing would have established he did not have the intent to commit the charged offense. The defendant then argues throughout his brief why the evidence was insufficient for a conviction. We have addressed already the sufficiency of the evidence in the second counseled assignment of error and found the evidence clearly supported the jury's guilty verdict.

Because of misconduct by the defendant, the trial court granted a mistrial at the beginning of the defendant's first trial during voir dire on January 9, 2008. The defendant's second trial began on May 18, 2009. The defendant argues in his *pro se* brief that, because more than one year passed between trials, the State was "time-barred" from any further prosecution against him. This argument has no merit.

La. Code Crim. P. art. 582 provides:

> When a defendant obtains a new trial or there is a mistrial, the state must commence the second trial within one year from the date the new trial is granted, or the mistrial is ordered, or within the period established by Article 578, whichever is longer.

Except as otherwise provided, no trial shall be commenced in felony cases after two years from the date of institution of the prosecution. La. Code Crim. P. art. 578(A)(2). Prosecution was instituted when the bill of information was filed, which was on July 18, 2006. Two years from that date would be July 18, 2008. Since the mistrial was ordered on January 9, 2008, the longer period under Article 582 would be one year from that date, or January 9, 2009. However, the commencement of the second trial on May 18, 2009, was still timely because of the exception found in La. Code Crim. P. art. 580, which provides:

> 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 defendant filed *pro se* motions to quash the indictment on December 2, 2008, and December 4, 2008. The minutes indicate the trial court denied a *pro se* motion to quash on May 15, 2009. Thus, pursuant to Article 580, the State had until May 15, 2010 to commence a new trial.

We note as well that it was the defendant, himself, who caused the delay between his first and second trial. Several months after his mistrial, the defendant filed a *pro se* motion to recuse the trial judge. That motion was denied in July 2008. The defendant then appealed this ruling. The defendant received a letter dated November 24, 2008, from the 22nd JDC Clerk of Court, which stated:

> Please be advised you have lodged an appeal with the First Circuit which puts a stay on all proceedings within the District Court pending ruling. Your Motion for Severance and Motion for a Change of Venue will not be set for hearing until a ruling is received from the First Circuit.

This court reviewed the defendant's appeal and determined that a ruling on a motion to recuse is not a final ruling and, as such, is not an appealable ruling. This court handed down its ruling, which dismissed the defendant's appeal, on January 20, 2009, which was already one year past the mistrial date of January 9, 2008. See *State v. Lacayo*, 2008-2485 (La. App. 1st Cir. 1/20/09) (unpublished).

Prior to his second trial, the defendant filed a *pro se* motion to recuse Judge Raymond Childress. At a hearing on the matter, Judge Elaine DiMiceli denied the defendant's motion. In his *pro se* brief, the defendant argues that "the 'transcript' of this motion has been 'injured' beyond recognition, which impairs his ability to [] prepare a suitable supplemental

'Pro-Se' Appeal Brief for appellate review." We have reviewed the recusal hearing transcript and find it accurate and complete. The record does not support the defendant's claims regarding this issue. Similarly, the defendant contends that there has been injury to public records. For example, he claims that the transcript of certain pages of testimony has "been 'altered' to cover-up 'unlawful' or illegal courtroom activity, and has 'impaired' the INTEGRITY of the 'object' (Transcript) for further use in any potential prosecution against 'corrupted' trial court officials for malfeasance in office." The defendant further maintains that the court reporter misspelled a word in one of the defendant's motions "for the sole purpose of producing a [sic] portraying an []uneducated iliterate [sic] person lacking educational skills." The record does not support these claims, which are unsubstantiated and completely without merit.

The defendant also argues that the lunacy hearing was tainted because the hearing was conducted in the defendant's absence. The minutes in the record indicated the defendant was present at the April 16, 2007, hearing:

> The defendant being present in open Court attended by his Counsel, MARION B. FARMER, and this matter being on assignment for a Lunacy Hearing. Both the State and Defense stipulated to Dr. John W. Thompson, Jr. and Dr. Alicia Pelligrin [sic] reports and that both Doctors' [sic] are experts in the field of forensic pathology and the matter submitted to the Court; whereupon Court finds that defendant does have the mental capacity and is competent to proceed with trial.

This argument has no merit.

The defendant makes varied accusations in his brief against the trial judge, Judge William Crain, the prosecutor, and his defense counsel, Frank DeSalvo. According to the defendant, Judge Crain committed perjury when he stated in open court that the defendant would receive a fair trial and that he would conduct a fair trial. Also, Judge Crain did not protect the

defendant's right to compulsory process because he permitted Mr. DeSalvo to join forces with the State by adopting the State's witness list, which did not include key defense witnesses, all for the purpose of gaining a "prosecutorial tactical advantage over his defense." The defendant continues in his brief that it ishis contention that:

> the trial officials (i.e., Judge, Trial Prosecutor and Defense Counsel) have acted in "concert" to deprive him of his right to compulsory process by "doctoring" the record with testimony to "circumvent" that right, that is, by painting a picture to show that appellant was afforded an opportunity to compel the attendance of witnesses when, in truth, he was DENIED that right by the inactions of the trial officials.

According to the defendant, the State's witnesses were coached and "non-credible" because they were nowhere in sight when the accident occurred.

The credibility of witnesses is a sufficiency of the evidence issue, which has already been addressed. Furthermore, all of the other accusations by the defendant are completely unsubstantiated. There is nothing whatsoever in the record to suggest witnesses were coached, that the record was doctored, or that there was any conspiracy among the trial judge, prosecutor, and defense counsel. These unsupported allegations are meritless.

The defendant also asserts that *Brady* material was withheld at his second trial. According to the defendant, photographs of his hands and body taken at the parish jail, and withheld by the prosecutor, were evidence favorable to him. The defendant maintains that these photographs would have shown that the victim was untruthful regarding any injuries sustained as a result of his actions. We note initially that we do not have photographs as described by the defendant to review. The defendant has made no initial showing that the State had any such photographs in its possession.

Moreover, we do not see how pictures of the defendant's hands or body would have had any bearing on the guilty verdict. It seems the defendant is suggesting that these photographs would show hands and a body that are not injured or marked up, which would indicate that any injuries sustained by the victim could not have been caused by him, lest his hands would have shown signs of trauma from battering the victim. However, the defendant was tried for and convicted of aggravated criminal damage to property. Notwithstanding the overwhelming evidence of the beating sustained by the victim at the hands of the defendant, any injuries suffered by the victim did not constitute an element of the charged offense. The crime of aggravated criminal damage to property was complete when the defendant ran his truck into the victim's vehicle. Accordingly, we fail to see how photographs, assuming they existed, of the defendant's hands or body, could have been considered favorable evidence to the defense for a charge of aggravated criminal damage to property. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The defendant's argument regarding *Brady* material is meritless.

The defendant also argues that both defense counsel, Marion Farmer for his first trial, and Frank DeSalvo for his second trial, provided ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence

resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *State v. Morgan*, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So.2d 1035, 1038-39 (La. App. 1st Cir. 1985), writ denied, 476 So.2d 350 (La. 1985).

The defendant asserts that Mr. DeSalvo failed to appear in court during several "critical" stages of pretrial and posttrial proceedings. The first hearing listed by the defendant was the hearing on the motion to recuse Judge Childress, which was based on a *pro se* motion filed by the defendant. The defendant argued his motion *pro se*. Given that the defendant offered in argument nothing proper or substantive which would require recusal, even had Mr. DeSalvo's failure to appear at the hearing constituted deficient performance, we find the defendant has failed to show sufficient prejudice in arguing an issue only he felt had any merit. Moreover, there was no trial date set. The jury trial had been continued without date pending the outcome of the hearing on the motion for recusal.

The next hearing the defendant asserts Mr. DeSalvo did not attend was an August 6, 2009, "sentencing hearing." The hearing on August 6, 2009, was not a sentencing hearing, but rather a hearing for victim impact statements. It was a non-adversarial proceeding that did not require defense counsel's presence. Even if his presence were required, the failure of which would have constituted deficient performance, we find the defendant has failed to show how he was prejudiced by having to listen to victim impact statements without his counsel.

The next hearing the defendant asserts Mr. DeSalvo did not attend was an October 2009 motion hearing seeking to recuse "biased" Judge Crain. No hearing was held on this date, and the matter was reassigned for a later hearing date. The trial court informed the defendant it would appoint counsel if his attorney did not show up. Even if Mr. DeSalvo's presence were required, the failure of which would have constituted deficient performance, we find the defendant has failed to show how he was prejudiced by having his hearing postponed to a later date.

The final hearing the defendant asserts Mr. DeSalvo did not attend was a November 20, 2009, multiple offender adjudication hearing. The defendant was not adjudicated a multiple offender at this hearing, but was only arraigned. Because Mr. DeSalvo was not present, the trial court ordered that other counsel, Mr. John L. Lindner, II, stand in solely for the purpose of arraignment. The defendant was arraigned on the multiple offender bill of information and did not plead, but stood mute. Even if Mr. DeSalvo's failure to be present at the arraignment constituted deficient performance, we find the defendant has failed to show how he was prejudiced when he was represented by different counsel merely to enter a plea.

In sum, defense counsel's failure to attend some hearings, even if constituting deficient performance, did not prejudice the defendant. See *Robinson*, 471 So.2d at 1038-39. The defendant's claim of ineffective assistance of counsel regarding these hearings, therefore, must fall.

The defendant also asserts that Mr. DeSalvo was ineffective for failing to question the credibility of the "State's star witness." Apparently referring to witness Theresa Sanders, the defendant suggests she was lying when she testified that she had no difficulty seeing the events unfold before

her because they had street lamps that shone directly down into the parking lot. As already noted, this issue lends itself to a sufficiency of the evidence analysis, which has already been addressed. However, regarding the ineffective assistance of counsel issue, our review of the record reveals that Mr. DeSalvo did attack Theresa's credibility on cross-examination. For example, Mr. DeSalvo's questioning prompted Theresa to testify the victim was parked when the defendant hit her. However Stephanie Lacayo, the victim, testified she had put her car in reverse when the defendant hit her. Theresa also testified on cross-examination that she gave a statement to the police shortly after the incident that she saw the defendant go over the hood of the car before he grabbed Stephanie. However, on further questioning by Mr. DeSalvo, Theresa admitted that she was not sure if the defendant had gone over the hood or not. We find Mr. DeSalvo's cross-examination of Theresa was adequate and, accordingly, the defendant's claim is meritless.

Any other allegations of ineffective assistance of counsel raised in the defendant's *pro se* brief cannot be sufficiently investigated from an inspection of the record alone. For example, the defendant claims that both of his attorneys for his first and second trials have not operated as counsel guaranteed by the constitution in that the "pretrial motion hearing records are 'replete' with evidence of 'incompetent, deficient performances' on the part of BOTH defense attorneys, which has, once again 'seriously' affected a substantial right of appellant, requiring reversal of his conviction." Other than these bare allegations, the defendant provides no support in his brief of how the performance of his trial counsel was insufficient. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant

record, could these allegations be sufficiently investigated.[3] Accordingly, these allegations are not subject to appellate review. *State v. Albert*, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-64.

***PRO SE* ASSIGNMENTS OF ERROR NOS. 2 and 3**

In these *pro se* assignments of error, the defendant argues that his appellate counsel incorrectly interpreted and misapplied La. R.S. 15:529.1(A)(1)(a), and that his thirty-year sentence is illegal.

The defendant was adjudicated a second-felony habitual offender and sentenced to thirty years at hard labor under La. R.S. 15:529.1(A)(1)(a), which provides:

> If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction[.]

The defendant's first conviction was for aggravated battery, which carries a maximum sentence of ten years. See La. R.S. 14:34. The defendant asserts his maximum sentence exposure was twenty years because "twice the longest term prescribed for a first conviction," which was the conviction for aggravated battery, would be twenty years. The defendant misinterprets the "first conviction" language of La. R.S. 15:529.1(A)(1)(a). A plain reading of the statute indicates that the "first conviction" is referring to "the second felony." As such, the language refers to a first conviction of the instant offense (the second felony), which was aggravated criminal damage to property. A conviction for aggravated criminal damage to property carries a maximum sentence of fifteen years. See La. R.S. 14:55. Accordingly, pursuant to La. R.S. 15:529.1(A)(1)(a), the defendant faced a

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

maximum sentence of thirty years. The trial court, therefore, did not err in sentencing the defendant to thirty years. Further, any argument in these assignments of error that the thirty-year sentence is excessive has already been addressed in the third and fourth counseled assignments of error.

The defendant's *pro se* assignments of error are without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.