NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1954

STATE OF LOUISIANA

VERSUS

JESSIE BELL, JR.

Judgment Rendered: June 10, 2011

* * * * * * * *

Appealed from the
17th Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Case No. 433,703

The Honorable Walter I. Lanier, III, Judge Presiding

* * * * * * * *

James D. Buddy Caldwell **Attorney General** **Camille A. Morvant, II** **District Attorney** **Lisa R. Pinho** **Assistant District Attorney** **Thibodaux, Louisiana**	**Counsel for Appellee** **State of Louisiana**
Ferdinand J. Kleppner **Metairie, Louisiana**	**Counsel for Defendant/Appellant** **Jessie Bell, Jr.**

* * * * * * * *

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

GAIDRY, J.

Defendant, Jessie Bell, Jr., was charged by bill of information with distribution of cocaine and possession of cocaine with intent to distribute, violations of La. R.S. 40:967A. He pled not guilty and, following a trial by jury, was found guilty as charged on both counts. Thereafter, the State filed a habitual offender bill of information seeking to enhance defendant's sentence pursuant to La. R.S. 15:529.1. After denying various post-trial motions, the trial court sentenced defendant on each count to thirty years at hard labor, with the first two years of the sentences to be without the benefit of parole, probation, or suspension of sentence, to be served concurrently. Subsequently, the trial court adjudicated defendant to be a fourth-felony habitual offender and sentenced him to life imprisonment without the benefit of parole, probation, or suspension of sentence under La. R.S. 15:529.1. Defendant has now appealed, designating eight assignments of error. For the following reasons, we affirm the convictions.[1]

ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to appoint counsel for defendant, an indigent.

2. The trial court erred in denying defendant's motion to suppress evidence seized during the warrantless search of defendant's rental vehicle.

3. The trial court erred in refusing to give a special jury charge requested by the defense to the effect that, if a jury believes a witness lied about an essential matter, the jury may disregard the entire testimony of that witness.

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[1] Defendant has separately appealed his habitual offender adjudication and sentences. That appeal was lodged with this Court on April 29, 2011, under docket number 2011-KA-0786.

4. The trial court erred in refusing to revise the jury verdict form to eliminate the overemphasis on the word "guilty."

5. The trial court erred in accepting "guilty" verdicts by a less than unanimous jury.

6. The trial court erred in denying defendant's post-trial discovery motion.

7. The trial court erred in denying defendant's motion in arrest of judgment, motion for post-judgment verdict of acquittal, and motion for new trial, and in applying the jury shield law to prohibit defendant from subpoenaing jurors to testify on the issue of jury contamination.

8. The trial court erred in adjudicating defendant to be a fourth-felony habitual offender and in imposing an excessive life sentence.[2]

FACTS

In July of 2006, Todd Sigrist volunteered to work with the Lafourche Parish Sheriff's Drug Task Force (LPSDTF) as a confidential informant. On July 18, 2006, Sigrist advised Sergeant John Champagne of the LPSDTF that he could arrange to buy cocaine from defendant. Accordingly, Sigrist and Champagne met that day and Sigrist telephoned defendant. Champagne was able to hear Sigrist's end of the recorded conversation, which ostensibly involved an order for seafood. However, Sigrist explained that "seafood" was a code word for cocaine that he and defendant had used on prior occasions.

Sigrist had spoken to defendant earlier in the day to place an order for two ounces of cocaine. At that time, defendant was driving to Golden Meadow from Baton Rouge, and indicated to Sigrist that he first needed to pick up a trailer from his friend, Doby Guidry. They arranged to meet at a

[2] In view of the separate appeal of defendant's habitual offender adjudication and sentences, we pretermit consideration in the instant appeal of this assignment of error.

remote location on Highway 308 where defendant intended to load some equipment located in a shed onto the trailer. Defendant indicated he would call Sigrist when he was ready to meet.

Champagne provided Sigrist with serialized task force money to make the purchase, together with an audio transmitter for Sigrist to wear during the transaction. It was agreed Sigrist would use the phrase "ice chest" as a signal that the drug purchase was complete and officers could move in for the arrest.

After Sigrist received a call from defendant indicating he was ready to meet, Sigrist proceeded to the meeting location under LPSDTF surveillance. The LPSDTF also had the Guidry residence under surveillance, and defendant was observed departing the residence for the meeting location in a pickup truck. Once Sigrist arrived at the meeting location, he helped defendant load the equipment onto the trailer. At one point, he and defendant walked to the rental truck[3] that defendant was driving and defendant retrieved approximately one ounce of crack cocaine from inside the interior of the truck. Defendant sold the cocaine to Sigrist, who gave him $960.00 of the LPSDTF serialized funds. Thereafter, Sigrist gave the signal indicating the transaction was complete, and the LPSDTF arrived on the scene and placed defendant under arrest.

The serialized funds were recovered during a search of defendant. The crack cocaine involved in the purchase was recovered from Sigrist. Additionally, during a search of the truck, the police found approximately 12.7 grams of crack cocaine underneath the dash under the vehicle's steering wheel. The cocaine was packaged in a plastic baggie that held ten smaller bags containing crack cocaine. The police also found a roll of cash inside

[3] It was established at trial that defendant began renting the truck from Enterprise Rent-A-Car on July 7, 2006.

the pocket of a pair of pants located inside the truck. Subsequently, defendant gave an oral statement to the police admitting he sold crack cocaine to Sigrist and several other individuals.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, defendant contends the trial court erred in refusing to appoint counsel to represent him in spite of his indigence. Specifically, defendant complains that, even though he had earlier stated to the trial court under questioning that he wished to represent himself, the trial court should have appointed counsel once defendant realized at the beginning of the hearing on his motion to suppress that he was incapable of representing himself.

A defendant's right to the assistance of counsel is guaranteed by both our state and federal constitutions. See U.S. Const. amends. VI & XIV; La. Const. art. I, §13; *State v. Brooks,* 452 So.2d 149, 155 (La. 1984) (on rehearing). Additionally, La. Code Crim. P. art. 511 provides for a defendant's right to counsel. The federal constitution also grants a defendant the right of self-representation. *Faretta v. California,* 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975); *State v. Kimble*, 2010-1559 (La. App. 1st Cir. 3/25/11), ____ So.3d ____ (2011 WL 1102802). Thus, a defendant is entitled to choose between the right to counsel and the right to self-representation. *State v. Bridgewater,* 2000–1529 (La. 1/15/02), 823 So.2d 877, 894, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003). If a defendant chooses to exercise his right to self-representation, he must knowingly and intelligently waive the right to counsel. *State v. Penson,* 630 So.2d 274, 277 (La. App. 1st Cir. 1993).

In deciding, based on the totality of the circumstances, whether a defendant understands the significance of a waiver of his right to counsel,

the trial court should inquire into the defendant's age, education, and mental condition. *State v. Bell*, 2009-0199 (La. 11/30/10), 53 So.3d 437, 448. Other factors relevant to this inquiry are the stage of the proceedings at which the waiver occurs and whether the defendant has prior experience with the criminal justice system. *State v. Robinson*, 2008-0820 (La. App. 1st Cir. 6/4/10), 42 So.3d 435, 437-38. Although a defendant need not have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that his choice is made with open eyes. *Robinson*, 42 So.3d at 437. Essentially, when a trial court is confronted with a defendant's unequivocal request to represent himself, the court need only determine if the accused is competent to waive counsel and is "voluntarily exercising his informed free will." *State v. Santos,* 99–1897 (La. 9/15/00), 770 So.2d 319, 321 (per curiam).

Furthermore, although a defendant has the right to counsel, as well as the right to self-representation, he has no constitutional right to be both represented and representative. *State v. Bodley,* 394 So.2d 584, 593 (La. 1981). While a trial court is not prohibited from allowing a hybrid form of representation where the defendant and counsel act as co-counsel, with each speaking for the defense at different phases, such arrangements present inherent difficulties. *Kimble*, ____ So.3d at ____ (2011 WL 1102802).

In the instant case, defendant initially was represented by retained counsel. However, the trial court subsequently appointed George J. Ledet, Jr., as indigent counsel for defendant. At a pretrial hearing on October 18, 2007, defense counsel stated for the record that he refused to file a motion to suppress as defendant requested because, based on his review of the case, he

believed no grounds existed for a motion to suppress. On that ground, defendant argued he had a conflict with his appointed counsel and requested that the trial court appoint new counsel to represent him. He further requested that his pro se motion to suppress be filed. The trial court refused to appoint new counsel, indicating Ledet was defendant's only option as appointed counsel, since he was the indigent defender assigned to the trial court's division. Defendant persisted in requesting new counsel, and stated he was unwilling to accept Ledet as his counsel, unless Ledet filed the proposed motion to suppress.

Faced with this impasse, the trial court advised defendant that he had the option of representing himself. Thereupon, an extensive colloquy between the trial court and defendant followed. Defendant indicated that, although he was uncertain that he could represent himself, he preferred to do so if the trial court refused to appoint different counsel to represent him. At one point, defendant indicated he would allow Ledet to represent him, if he could serve as co-counsel. The trial court rejected this proposal. Upon questioning defendant, the trial court ascertained that he was able to read and write, had an eighth-grade education, was not under the influence of drugs or alcohol, and had prior experience in the criminal justice system. Additionally, the trial court warned defendant on several occasions of the dangers of representing himself, and advised him that it was not a good idea, nor in his best interests to do so. Finally, despite the trial court's warnings, defendant chose to represent himself, since the trial court declined to appoint new counsel. The trial court granted defendant's request to represent himself and appointed Ledet as standby counsel. At that point, defendant was permitted to file the motion to suppress at issue.

Our review of the record indicates that defendant essentially wanted to be both represented and representative. As previously noted, defendant possessed no such right. *Bodley,* 394 So.2d at 593; *Kimble*, ____ So.3d at ____ (2011 WL 1102802). Hence, the trial court explained to defendant that his options were either to allow Ledet to continue as defense counsel, without defendant dictating what motions Ledet was to file, or to represent himself. Defendant was not satisfied with either of these options. Nevertheless, when confronted with the choice, defendant chose to waive his right to counsel and to represent himself, even though he was repeatedly warned of the dangers of self-representation. Thus, the record establishes that defendant clearly and unequivocally asserted his right to represent himself and did so knowingly and intelligently. The fact that defendant waived his right to counsel reluctantly, after the trial court refused to appoint new counsel, does not alter this fact.

Nevertheless, at the beginning of the motion hearing on March 11, 2008, defendant requested that the trial court appoint counsel to represent him on his motions to suppress.[4] The trial court explained to defendant that the only way it would re-appoint Ledet as defense counsel would be if defendant withdrew the motions to suppress, since Ledet previously had indicated he did not wish to pursue the motions. The trial court further stated it believed defendant's request for counsel was either a delay tactic or

[4] There actually were three motions to suppress filed. The first was filed by defendant's retained counsel before the trial court appointed an indigent defender to represent defendant. The motion sought to suppress all physical evidence and any oral statements or confessions on the grounds that they were not seized incident to a valid arrest or search and no probable cause existed for the warrantless search and seizure. Although the matter was set for hearing on several occasions, defense counsel never appeared in court to pursue the motion. The pro se motion to suppress filed by defendant on October 17, 2006, broadly encompassed the grounds asserted in the counseled motion to suppress. The second pro se motion filed by defendant on January 14, 2008, sought to suppress the audio recordings obtained through police surveillance on the grounds that the recordings were illegally obtained. The trial court opined that there was no real distinction between the motions, and treated them as one omnibus motion.

an attempt by defendant "to have his cake and eat it too." Defendant opted to proceed with the motions without counsel. The trial court indicated that although defendant would represent himself on the motions, the court would inquire at the end of the hearing whether defendant wished to be represented by counsel at trial. At the conclusion of the hearing, the trial court denied the motions to suppress. Thereafter, upon defendant's request, the trial court re-appointed Ledet as defense counsel.[5]

The record reveals no evidence of a material change of circumstances from the time of defendant's initial waiver of counsel and his renewed request for the appointment of new counsel at the motion hearing. Rather, it appears the renewed request was merely another attempt by defendant to force the trial court into appointing counsel other than Ledet to represent him on motions that Ledet had chosen in the exercise of his professional judgment not to pursue. However, when the trial court refused to be so manipulated, defendant opted to represent himself. Considering the circumstances, as well as the fact that the trial court had already concluded after a *Faretta* hearing that defendant knowingly and intelligently waived his right to counsel, we find no error in the trial court allowing defendant to represent himself at the motion hearing.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, defendant contends the trial court erred in denying his motion to suppress the evidence seized from his rental truck because there were no exigent circumstances justifying the warrantless search of the vehicle. Defendant also argues there was no information establishing the reliability of the confidential informant relied upon by the

[5] The record reflects that defendant actually was represented at trial by Bruce Harris.

LPSDTF in this case. He further complains that he had no opportunity to investigate the confidential informant, because his identity was not revealed to defendant until the day of the suppression hearing.[6]

Under the Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution, a search conducted without a warrant is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. *State v. Griffin,* 2007-0974 (La. App. 1st Cir. 2/8/08), 984 So.2d 97, 109. Moreover, when challenged by a motion to suppress, the state bears the burden of proving the admissibility of evidence seized without a warrant. La. Code Crim. P. art. 703D; *State v. Warren,* 2005-2248 (La. 2/22/07), 949 So.2d 1215, 1226. A trial court's ruling on a motion to suppress is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. *State v. Jones,* 2001-0908 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Consequently, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless such ruling is not supported by the evidence. *State v. Green,* 94-0887 (La. 5/22/95), 655 So.2d 272, 81. However, a trial court's legal findings are subject to a *de novo* standard of review. See *State v. Hunt,* 2009-1589 (La. 12/1/09), 25 So.3d 746, 751. Further, the entire record, not merely the evidence adduced at the motion to suppress, is reviewable by the appellate court in considering the correctness of a ruling on a pretrial motion to suppress. *State v. Francise,* 597 So.2d 28, 30 n.2 (La. App. 1st Cir.), writ denied, 604 So.2d 970 (La. 1992).

[6] With respect to this complaint, we note that, when the trial court informed defendant at the suppression hearing that he was entitled to learn the identity of the confidential informant at that time, defendant stated he already knew who the confidential information was.

In the instant case, although the challenged search was conducted without a warrant, the trial court agreed with the state's contention that the truck was properly searched incident to defendant's lawful arrest. The trial court concluded the search was reasonable because it was likely that the drugs sold to Sigrist during the transaction were procured from the vehicle.

A search incident to a lawful arrest is one of the well-established exceptions to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969); *Warren*, 949 So.2d 1226-27. Prior to *Arizona v. Gant,* ___ U.S. ___, 129 S.Ct. 1710, 1713, 173 L.Ed.2d 485 (2009), the law provided that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981) (footnotes omitted). In *Gant*, the Supreme Court redefined the permissible parameters of a search of a vehicle conducted pursuant to this exception to the warrant requirement by holding that the police were authorized "to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant,* 129 S.Ct. at 1719. However, the Supreme Court also recognized in *Gant* "that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Hence, the Supreme Court opined that in certain cases "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant,* 129 S.Ct. at 1719.

In the instant case, probable cause existed for defendant's arrest. The LPSDTF received information from Sigrist, who agreed to work undercover, that he could arrange to purchase cocaine from defendant. Sigrist made several telephone calls to defendant for this purpose. Sergeant Champagne was able to hear Sigrist's end of the conversation during one of these calls as Sigrist discussed purchasing drugs in a pre-arranged code he had with defendant. Sigrist agreed to wear an audio transmitter so that the LPSDTF could monitor and record his encounter with defendant. Additionally, Sigrist advised the LPSDTF that defendant would travel to the meeting location in a silver or gray Dodge pickup truck. The LPSDTF also was informed that defendant would be at the Guidry residence prior to going to the meeting location, and confirmed this fact by surveillance. Thereafter, defendant drove to the agreed-upon location in a silver Dodge pickup truck and met Sigrist, all of which was observed by the LPSDTF from a distance. After the LPSDTF received the audio signal indicating the transaction was complete, defendant was placed under arrest.

Probable cause to arrest exists when the facts and circumstances known to the arresting officer and of which he has reasonably trustworthy information are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. *State v. Wilson,* 467 So.2d 503, 515 (La. 1985), cert. denied, 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 246 (1985). Whether an informant's tip establishes probable cause to arrest must be considered under the totality of the circumstances. *Illinois v. Gates,* 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328 76 L.Ed.2d 527 (1983). Corroboration of details of an informant's tip by independent police investigation is a valuable factor in applying the totality of the circumstances analysis. *State v. Raheem,* 464 So.2d 293, 296 (La. 1985).

Prior to the undercover operation at issue, the LPSDTF had no information concerning Sigrist's reliability, because they had never worked with him before. Nevertheless, his total cooperation and willingness to participate in an undercover operation to be conducted under LPSDTF surveillance were indicative of some trustworthiness on his part. Further, his reliability was enhanced by the fact that Sergeant Champagne was able to monitor at least one of Sigrist's telephone calls to defendant. Additionally, the LPSDTF also corroborated the information Sigrist provided concerning the vehicle defendant would be driving and defendant's movements. Considering the totality of the circumstances, particularly Sigrist's cooperation and the LPSDTF'S independent corroboration of information he provided, we believe the LPSDTF had probable cause to arrest defendant for distribution of cocaine upon receiving the prearranged arrest signal from Sigrist.

Furthermore, the same circumstances provided probable cause for an immediate warrantless search of the truck incident to defendant's lawful arrest. See *Gant,* 129 S.Ct. at 1719. The trial court concluded it was reasonable for the LPSDTF to search the truck because it was likely under the circumstances that drugs were located in the vehicle driven by defendant to the meeting location. We find no abuse of discretion in this determination.

Additionally, we believe the search of the truck was justified pursuant to the automobile exception to the warrant requirement. Under the automobile exception, police may search a vehicle without obtaining a search warrant if the car is readily mobile and probable cause exists to believe it contains contraband or evidence of criminal activity. See *Pennsylvania v. Labron,* 518 U.S. 938, 940, 116 S.Ct. 2485, 2487, 135

L.Ed.2d 1031 (1996) (per curiam); *United States v. Ross,* 456 U.S. 798, 809, 102 S.Ct. 2157, 2164-65, 72 L.Ed.2d 572 (1982). In such cases, no special exigency is required beyond a showing of the mobility of the automobile. *Maryland v. Dyson,* 527 U.S. 465, 466, 119 S.Ct. 2013, 2014, 144 L.Ed.2d 442 (1999) (per curiam). Further, it has been held in applying the automobile exception that there is no constitutional distinction between seizing and holding a vehicle before presenting the probable cause issue to a magistrate and immediately searching the vehicle without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment and the Louisiana Constitution. *State v. Gordon,* 93-1923 (La. App. 1st Cir. 11/10/94), 646 So.2d 1005, 1010. Therefore, since probable cause existed in this case to believe contraband was located inside the truck, the LPSDTF were acting within the scope of the automobile exception when they searched it without a warrant. See *Gant,* 129 S.Ct. at 1721.

For the above reasons, the trial court did not err in denying the motion to suppress the evidence seized in the vehicular search.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, defendant argues the trial court erred in refusing to give a special jury charge orally requested by defense counsel to the effect that, if the jury believed a witness lied about an essential matter, it could disregard the entire testimony of that witness. He maintains that, since the charge was correct and did not require qualification, limitation or explanation, the trial court was obliged to give the charge, even though it was not in writing as required by La. Code Crim. P. art. 807. Defendant further argues the charge was pertinent because several credibility issues were raised regarding state witnesses.

Under La. Code Crim. P. art. 802(1), the trial court has a duty to charge the jury as to the applicable law. Additionally, La. Code Crim. P. art. 807 provides that:

> The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. Such charges may be received by the court in its discretion after argument has begun. The party submitting the charges shall furnish a copy of the charges to the other party when the charges are submitted to the court.
>
> A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

In the instant case, the trial court conducted a charge conference with both counsel. Thereafter, the trial court ordered a recess prior to the parties beginning closing arguments. When the proceedings resumed outside of the presence of the jury, the following colloquy occurred between defense counsel and the trial court:

> MR. HARRIS:
>
> Judge, it just dawned on me after we did the conference, there is no instruction concerning if they do not believe – if a witness – they believe that a witness lies to them that they can throw out –
>
> THE COURT:
>
> They can disregard it all?
>
> MR. HARRIS:
>
> Right. I need that added to the – to this.
> THE COURT:
>
> I wish you'd of [sic] done it before.

While acknowledging that the proposition was a correct statement of law, the trial court indicated that it did not have the verbiage for such a charge before it at that time. However, the trial court indicated it would give such a

charge if the parties could agree to the language to be utilized. The prosecutor objected, remarking that she was "not comfortable just formulating it. He's had an opportunity to include it, Judge." The trial court then proposed that it would give the following instruction: "in determining the weight to give to a witness's testimony, you can choose to believe all, part or none of that witness's testimony." Defense counsel indicated that language was not acceptable. At that point, the trial court called a recess in order to attempt locating the requested special charge.

When the proceedings resumed, the trial court indicated it was unable to locate the exact charge requested by defendant, but was prepared to give the following civil charge to the jury:

> In judging the credibility of the witness which you have heard you should have in mind the rule that a witness is presumed to speak the truth about the facts within his knowledge. This presumption, however, may be overcome by the contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that pertains to his motives. As I mentioned to you at the beginning of the trial, when you weigh the credibility of a witness you should consider the interest, if any, which he or she may have in the outcome of the case, the ability to know, remember and tell the facts to you, his or her manner of testifying as to sincerity and frankness and reasonableness and unreasonableness of the testimony in light of the other evidence. You do not have to accept all the testimony of a witness as being true or false. You may accept and believe those parts of the testimony that you consider logical and reasonable and reject those parts that seem improbable or unlikely.

When defense counsel indicated this charge also was unacceptable to the defense, the trial court stated that defense counsel had the ability to prepare the charge and should submit it to the court. Defense counsel responded, "I don't have it on me right now." In fact, the trial court had given both counsel a copy of its preliminary jury instructions at the end of the first day of the three-day trial. The court indicated it was doing so in

order to give counsel an opportunity to prepare for the charge conference to be held once the taking of evidence was concluded. On that basis, the trial court denied defense counsel's request for an opportunity to look for the charge on the grounds that it was too late, and noted "that's why we had our charge conference...." Moreover, the trial court indicated it believed the substance of the requested charge was covered by the jury charge the court had stated it was prepared to give, but which defense counsel had declined. Accordingly, the jury was returned to the courtroom and charged by the trial court. The jury instructions given included the following:

> As jurors, you alone determine the weight and credibility of the evidence. In evaluating the testimony of a witness, you may consider his or her ability and opportunity to observe and remember the matter about which he or she has testified, his or her manner while testifying, any reason he or she may have for testifying in favor of or against the State or the defendant, and the extent to which the testimony is supported or contradicted by the evidence.

Based on our review of the record, we find no error in the trial court's refusal to give the requested jury charge. Defense counsel failed to submit the requested charge to the trial court in writing or to furnish a copy to the opposing party, as required by La. Code Crim. P. art. 807.[7] See *State v. Weems*, 358 So.2d 285, 289 (La. 1978). Moreover, in response to defense counsel's request, the trial court offered to charge the jury that "in determining the weight to give to a witness's testimony, you can choose to believe all, part or none of that witness's testimony." This language was general and did not explicitly refer to a witness lying or being untruthful as defense counsel apparently wished. Nevertheless, we believe that when

[7] The writing requirement of La. Code Crim. P. art. 807 may be waived by the trial court. See *State v. Haddad*, 99-1272 (La. 2/29/00), 767 So.2d 682, 685. cert denied, 531 U.S. 1070, 121 S.Ct.757, 148 L.Ed.2d 660 (2001). In the instant case, when the trial court was unable to formulate language acceptable to defense counsel, the court requested that defense counsel submit the proposed special charge to the court, which counsel was unable to do. Under these circumstances, we do not believe the trial court waived the statutory requirement of a written request for a special jury charge.

combined with the actual charge given to the jury that it alone was to determine the weight and credibility of the evidence, the language would have sufficiently covered the essence of the charge requested by defendant by conveying to the jury that it was free to accept or reject a witness's testimony in its entirety based on its credibility determinations. However, defense counsel declined the trial court's offer to give this additional charge. We conclude that, having rejected the trial court's offer to give a proposed charge that covered the essence of the requested charge, defendant is not entitled to complain on appeal of the trial court's refusal to give the requested charge, especially when defendant failed to make a written submission of the requested special charge as required by La. Code Crim. P. art. 807.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In his fourth assignment of error, defendant asserts the trial court erred in denying his request to revise the verdict form. Defendant maintains that by over-emphasizing the word "guilty" the verdict form suggested to the jury that he should be found guilty of something.

The disputed verdict form provided as follows:

COUNT 1: DISTRIBUTION OF COCAINE

We, the members of the jury, find the defendant:

1. Guilty of Distribution of Cocaine
2. Guilty of Attempted Distribution of Cocaine
3. Guilty of Possession of Cocaine
4. Guilty of Attempted Possession of Cocaine
5. Not Guilty

COUNT 2: POSSESSION WITH INTENT TO DISTRIBUTE COCAINE

We, the members of the jury, find the defendant:

1. Guilty of Possession with Intent to Distribute Cocaine

2. Guilty of Attempted Possession with Intent to Distribute Cocaine

3. Guilty of Possession of Cocaine

4. Guilty of Attempted Possession of Cocaine

5. Not Guilty

At trial, defense counsel suggested that the repeated emphasis on the word "guilty" could be remedied simply by including "not guilty" after each possible responsive verdict. However, the trial court stated that, while it believed defense counsel's suggestion would be an acceptable alternative, it chose not to alter the verdict form because it believed the verdict form presented the possible verdicts to the jury in a logical progression.

Initially, we note that the recitation of possible verdicts included on the verdict form basically replicates the responsive verdicts delineated in the Code of Criminal Procedure for the specific charges against defendant. See La. Code Crim. P. art. 814A(48) & (49). Further, La. Code Crim. P. art. 814A explicitly provides that the listed verdicts are the only responsive verdicts allowed for the included charges. Accordingly, the verdict form was proper, and the trial court did not err or abuse its discretion in refusing to revise the form. Additionally, we believe the inclusion of "not guilty" after each of the possible responsive verdicts may have resulted in confusion to the jury.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE

In his fifth assignment of error, defendant contends the trial court erred in accepting guilty verdicts that were non-unanimous. Defendant suggests that, since unanimous verdicts are constitutionally required in federal cases, fundamental logic mandates the same should be required in state criminal cases. In the instant case, defendant was found guilty on both counts by a vote of ten of the twelve jurors.

In Louisiana, criminal cases in which the punishment is necessarily imprisonment at hard labor are triable before a jury of twelve persons, ten of whom must concur to render a verdict. La. Const. Art. 1, §17(A); La. Code Crim. P. art. 782A. The courts of this state have repeatedly upheld the validity of non-unanimous verdicts in such cases against constitutional attack. See *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, 742-43; *State v. Smith*, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352. See also *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) (non-unanimous verdicts in state felony prosecutions do not violate the Sixth Amendment to the United States Constitution).

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER SIX

In his sixth assignment of error, defendant argues the trial court erred in denying his motion for post-trial discovery.

Defendant has cited no authority to support his contention that he is entitled to post-trial discovery. Initially, we note that the statutory provisions dealing with discovery contained in La. Code Crim. P. art. 716 *et seq.* in general anticipate the use of discovery to uncover evidence before or during a defendant's trial. According to La. Code Crim. P. art. 729.6, these

discovery articles are applicable to all criminal cases "to be tried" in district courts. Moreover, La. Code Crim. P. art. 729 provides that the time for filing a motion for discovery is governed by La. Code Crim. P. art. 521, which sets forth the time that pretrial motions should be filed, or within such reasonable time as the trial court may permit.[8]

In this case, defendant sought to discover information pertaining to the identity and chain of custody of the serialized currency utilized in the drug transaction that resulted in his arrest. Defendant maintains that issues concerning this currency were raised in his motion for new trial, and certain discrepancies in this vital evidence raise credibility questions that would greatly influence a jury. In denying the motion for discovery, the trial court opined that the post-trial motion was inappropriate, because defendant could have obtained this information through pretrial discovery. The trial court was of the opinion that the motion was part of a "fishing expedition" by defendant.

As a general matter, the regulation of discovery falls within the trial court's great discretion. *State v. Turner*, 2005-2425 (La. 7/10/06), 936 So.2d 89, 101, cert. denied, 549 U.S. 1290, 127 S.Ct. 1841, 167 L.Ed.2d 337 (2007). Under the circumstances herein, we find no abuse of discretion in the trial court's denial of defendant's post-trial motion for discovery.

This assignment of error lacks merit.

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[8] Louisiana Code of Criminal Procedure article 930.7(B) does provide for discovery in certain circumstances when a defendant had filed an application for post-conviction relief. However, this provision is not applicable to the present situation. See La. Code Crim. P. art. 924.1.

ASSIGNMENT OF ERROR NUMBER SEVEN

In his seventh assignment of error, defendant argues the trial court erred in denying his motion for new trial.[9] Specifically, defendant asserts the trial court should have granted a new trial in view of evidence newly discovered after trial that the state's key witness admitted he was coerced into testifying by the LPSDTF and that he lied during his testimony.

With respect to newly discovered evidence, La. Code Crim. P. art. 851 provides, in pertinent part, that:

> The court, on motion of the defendant, shall grant a new trial whenever:
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> ****
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty; ...[.]

The test to be employed in evaluating whether or not newly discovered evidence warrants a new trial is not simply whether another jury might bring in a different verdict, but whether the new evidence is so material that it ought to produce a verdict different than that rendered at trial. Moreover, the trial court's denial of a motion for new trial will not be disturbed on appeal absent a clear abuse of discretion. *State v. Maize*, 94-0736 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451.

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[9] Although defendant also asserts in this same assignment of error that the trial court erred in denying his motion in arrest of judgment and motion for post-verdict judgment of acquittal, his appellate brief contains no argument concerning these motions. Because all specifications or assignments of error not briefed are considered abandoned, we will not consider herein any issues related to these motions. See Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4.

When the alleged newly discovered evidence consists of a witness' recantation of trial testimony, it must be borne in mind that recantations are highly suspicious. Except in rare circumstances, a motion for new trial should not be granted on the basis of a recantation, since the repudiation of prior testimony is tantamount to an admission of perjury so as to discredit the witness at a later trial. *State v. Prudholm*, 446 So.2d 729, 736 (La. 1984). In ruling on a motion for new trial pursuant to La. Code Crim. P. art. 851, the trial court can only consider the weight of the evidence, not its sufficiency, and sits as a thirteenth juror. *State v. Steward*, 95-1693 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1014. In contrast, an appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases, since that determination rests solely within the discretion of the trier of fact. *Steward*, 681 So.2d at 1014. Appellate courts may review the grant or denial of a motion for new trial only for errors of law. See La. Code Crim. P. art. 858.

At the hearing held on defendant's motion for new trial in this case, Sigrist admitted that he wrote a letter to defense counsel after trial stating that he was under the influence of drugs on the day of trial and was coerced by the LPSDTF into testifying as he did when they held him in a motel against his will for three days without allowing him to contact his family. He further admitted that he subsequently contacted defense counsel's office and requested a meeting. At that meeting, he made statements similar to those in the letter, as well as stating that he lied at trial when he testified the police did not promise to take care of charges pending against him if he testified against defendant. However, when defense counsel presented Sigrist with an affidavit containing these allegations to sign, Sigrist refused

to do so, telling the attorney he wanted to wait until his pending charges were resolved, so that the police could not penalize him.

Sigrist further testified that, at the time he wrote the letter and contacted defense counsel, he and defendant were both incarcerated in the Lafourche Parish Detention Center. He repeatedly testified that both the statements contained in the letter and those he made to defense counsel at the meeting were untrue, and that he only made them out of fear for his safety. He explained that, even though he was housed in a separate cell block than defendant, they were able to communicate. Moreover, he testified that, while defendant could not personally get to him, he was fearful that defendant could have someone in Sigrist's cell block harm him. Sigrist further testified that defendant told him what to put in the letter, and that he wrote it because he felt that defendant might have someone "do me something" if he refused.

Additionally, three police officers who provided security to Sigrist during the three-day trial and stayed with him overnight during that time also testified at the motion hearing. According to their testimony, Sigrist was not coerced or threatened, nor was he under the influence of drugs. Further, contrary to the allegation that Sigrist was not allowed to see his family, the officers on one occasion complied with Sigrist's request that they escort him to his child's baseball game.

In denying the motion for new trial, the trial court specifically found credible Sigrist's testimony that he wrote the letter and made the statements at issue to defense counsel, because Sigrist felt coerced and under duress due to his incarceration at the same detention center as defendant, even though defendant did not directly threaten him. Thus, the trial court rejected the evidence offered by defendant as newly discovered evidence supporting its

motion for new trial as being not credible. The trial court further indicated that Sigrist's testimony at the hearing supported a conclusion that "what he [Sigrist] testified to during the trial is more or less the way it occurred." Thus, the trial court obviously did not believe the evidence relied upon by defendant would have had changed the guilty verdicts, if introduced at trial. See La. Code Crim. P. art. 851(3). Considering these circumstances, we find no error or abuse of discretion in the trial court's denial of defendant's motion for new trial on the basis of newly discovered evidence.

Defendant also contends as an additional ground for new trial that evidence was discovered after trial indicating the jury may have been contaminated by outside influences. Moreover, defendant maintains the trial court erred in prohibiting him from subpoenaing the jurors to testify concerning this issue.

The information relied upon by defendant was received from an individual who attended the trial as a friend of defendant's brother, Nathaniel Bell. Based on this information, defense counsel requested that the state subpoena the jurors to testify regarding this allegation at its motion for new trial, and it was agreed that the state would do so. However, when the state did not have subpoenas issued, defense counsel requested issuance of subpoenas to the jurors. The state responded by filing a "Motion to Enforce Jury Shield Law" requesting that defendant show cause why the jury shield law should not be enforced.

In a criminal case, extraneous influences on the jury invalidate the jury's verdict unless it can be shown that their effect was harmless. *State v. Sinegal*, 393 So.2d 684, 686 (La. 1981). A defendant's constitutional due process right to fair trial is violated if the jurors are subjected to outside influences that may cause their verdict to be influenced by circumstances

other than the evidence presented at trial. *State v. Wisham*, 371 So.2d 1151, 1153 (La. 1979); *State v. Marchand*, 362 So.2d 1090, 1092-93 (La. 1978). Therefore, if there is a reasonable possibility that extraneous information considered by the jury influenced its decision, a new trial is mandated. *Sinegal*, 393 So.2d at 687

Louisiana Code of Evidence article 606B provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

This prohibition against juror testimony is intended to preserve the finality of jury verdicts and the confidentiality of discussions among jurors. However, this prohibition is not absolute and must yield to a substantial showing that the defendant was deprived of his constitutional rights. *State v. Smith*, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 15, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352. Generally, juror testimony is not allowed as to jury conduct within the jury room or as to the mental processes and reasons of the jury in reaching its decision. On the other hand, jurors may be allowed to testify regarding overt acts by third parties or extraneous influences upon the jury. See *Marchand*, 362 So.2d at 1093-94. Moreover, only well-pleaded allegations of prejudicial juror misconduct violating a defendant's constitutional rights will require an evidentiary hearing at which jurors shall testify. *Smith*, 952 So.2d at 15.

At the hearing on the state's motion to shield the jurors from testifying, the defense presented the testimony of Frederick Green, a close friend of defendant's brother. Green indicated he rode home to Raceland after the verdicts were rendered with one of the female jurors and her relatives, who lived in his neighborhood. According to Green, the juror was upset and indicated that defendant did not receive a fair trial. He testified she stated that a pregnant juror and a male juror changed their votes to "guilty" after defendant's rap sheet was "pulled out" and discussed in the jury room. She gave no indication of how the rap sheet was brought to the jury's attention. Further, Green admitted that he did not know whether the juror was referring to an actual physical document when she mentioned a "rap sheet" or whether she merely meant that the jurors speculated or inferred that defendant had a criminal history. In fact, defense counsel conceded at the hearing that Green's testimony was insufficient to establish that the juror was referring to an actual physical document.

In reaching its decision on the state's motion, the trial court found it particularly significant that Green could not testify with any clarity as to whether the juror's comments referred to a physical rap sheet, an outside contact who told a juror about defendant's criminal history, or merely speculation by jurors based on facts produced during trial as to defendant's possible criminal history. Additionally, the court stated it was unaware of any physical rap sheet being given to the jury, nor was one found in the jury room following trial. Further, the court noted that the jury went directly from the courtroom into the jury room, although they were permitted to visit the restroom, and the court knew of no contact between any jurors and any of the attorneys, witnesses, or any other members of the public.

Moreover, the trial court found suspect Green's testimony that a pregnant juror changed her vote to "guilty" after the jury discussed defendant's rap sheet. According to records reviewed by the court, the pregnant female juror actually voted "not guilty" on both charges against defendant. The court indicated other issues also called into question Green's ability to recount what occurred, thereby leading the court to disbelieve at least some portions of his testimony. Based on these reasons, the trial court refused to allow defendant to subpoena the jurors, effectively granting the state's motion to apply the provisions of the jury shield law. Additionally, the trial court concluded defendant failed to establish any jury contamination or extraneous influences occurred, and denied his motion for new trial on this basis.

Considering the trial court's extensive reasons for judgment, we find no error or abuse of discretion in the trial court's rulings prohibiting juror testimony and denying defendant's motion for new trial on the ground of jury contamination or extraneous influences. In order to justify the granting of a new trial, defendant relied upon hearsay testimony that totally lacked specificity as to any actual jury contamination or extraneous influences upon the jury. Moreover, the trial court did not find the testimony to be entirely credible. Accordingly, absent any credible evidence of jury contamination or extraneous influences, there has been no substantial showing of a deprivation of defendant's constitutional rights due to juror misconduct requiring the jurors to testify. See *Smith*, 952 So.2d at 15. While the jurors may have inferred or speculated from evidence presented at trial that defendant had a "rap sheet" or criminal history, La. Code Evid. art. 606B prohibits inquiry into the jurors' mental processes and reasoning. Under

these circumstances, the trial court did not err in applying the jury shield law and in denying defendant's motion for new trial.

This assignment of error lacks merit.

DECREE

The defendant's convictions are affirmed.

AFFIRMED.