**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 KA 2328**

**STATE OF LOUISIANA**

**VERSUS**

**MARK WATTS**

Judgment Rendered: NOV - 3 2006

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On Appeal from the 21st Judicial District Court
In and For the Parish of Tangipahoa, State of Louisiana
Trial Court No. 103191, Division "H"

Honorable Zorraine M. Waguespack, Judge Presiding

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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

**HUGHES, J.**

The defendant, Mark Watts, was charged by amended bill of information with one count of unauthorized use of a movable, a violation of LSA-R.S. 14:68.4, and pled not guilty. He waived his right to a jury trial, and following a bench trial, was found guilty as charged. He was sentenced to two years in parish prison to run concurrently with any other sentence he was serving.[1] He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating three assignments of error: (1) the evidence was insufficient to sustain the jury's verdict; (2) the trial court erred in denying the motion to recuse and the motion for change of venue; and (3) the defendant made no valid waiver of his right to a jury trial on the record. We affirm the conviction and sentence, but remand with instructions.

## FACTS

On January 6, 2001, George Bedsole reported that his vehicle had been stolen. Bedsole also indicated that his bag cellular telephone had been in the vehicle. While investigating the crime, Hammond Police Department Officer James Parker saw broken glass on Bedsole's driveway where the vehicle had been parked. Officer Parker listed Bedsole's vehicle in the N.C.I.C. computer as stolen and alerted the officers of his department and the surrounding police departments to be on the lookout for the vehicle.

On January 7, 2001, at approximately 2:30 a.m., Tangipahoa Parish Sheriff's Office Lieutenant William Narretto saw a vehicle fitting the description of Bedsole's vehicle parked in the rear of the Leisure Oaks Apartments in Hammond. Lieutenant Narretto's police computer indicated

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[1] The minutes of sentencing indicate the defendant was sentenced "to be committed to the Department of Corrections for 002 Year(s) to run concurrent with any time." The transcript of sentencing, however, indicates the defendant was sentenced to "two years in the parish prison." When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

the license plate on the vehicle was registered to a different vehicle. Additionally, he saw that the plastic had been ripped away from the steering column of the vehicle and the lever to start the vehicle had been tampered with.

On January 11, 2001, at the Tangipahoa Parish Jail, Hammond Police Department Officer Brian McCormick advised the defendant of his Miranda rights and questioned him concerning the crime. The defendant indicated he had seen Bedsole's vehicle on January 6, 2001, when Ed Dangerfield drove the vehicle by him, stopped, and spoke to him. Dangerfield told the defendant that he (Dangerfield) had a "G-Ride[.]" When Officer McCormick asked the defendant if a "G-Ride" meant that the vehicle was stolen, the defendant answered affirmatively. The defendant noticed the rear passenger window of the vehicle was broken. He also noticed "the condition" of the ignition on the steering column. The defendant got into the vehicle as a passenger.[2]

On direct examination, Officer McCormick indicated the defendant rode around Hammond in Bedsole's vehicle. On cross-examination, however, Officer McCormick indicated the defendant had told him that he (the defendant) was going to go "around the corner" in the vehicle and, after going around the corner, Dangerfield dropped him off.

## SUFFICIENCY OF THE EVIDENCE

In assignment of error number one, the defendant argues no rational trier of fact could have found the State bore its burden of proving use of the vehicle in which he rode as a passenger for less than one block. He argues Louisiana case law indicates being a guest passenger in a stolen vehicle is

[2] Officer McCormick did not indicate whether the defendant got into the vehicle before or after making his observations concerning the broken window and damaged steering column.

insufficient evidence of unauthorized use of the vehicle, citing **State v. Ginn**, 2000-2169 (La. App. 1 Cir. 5/11/01), 798 So.2d 334 (table); **State v. Jefferson**, 97-2949 (La. App. 4 Cir. 4/21/99), 735 So.2d 769; and **State v. Carr**, 95-1118 (La. App. 4 Cir. 11/30/95), 665 So.2d 1234.

Initially, we note the decision of this court in **Ginn** was marked "Not Designated for Publication." Further, the instant case is not continuing or related litigation to **Ginn**. Accordingly, the defendant's reference to **Ginn** violates Uniform Rules - Courts of Appeal, Rule 2-16.3.[3]

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, that assuming every fact to be proved that the evidence tends to prove, in order to convict, every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601, p. 2 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writ denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, writ denied, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting LSA-R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct

[3] We note effective August 15, 2006, LSA-C.C.P. art. 2168 has been amended to require posting of unpublished opinions of the supreme court and courts of appeal on the courts' Internet web sites, and allowing opinions so posted to be cited as authority. However, since the case cited by appellant, **Ginn**, was decided prior to the effective date of this legislation, it has not been posted to this court's web site and therefore continues to be governed by Uniform Rules - Courts of Appeal, Rule 2-16.3, and cannot be cited to this court. Nevertheless, we note the facts of the **Ginn** case are distinguishable to those of the instant case, and consideration thereof would not change the outcome herein.

evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at p. 3, 730 So.2d at 487.

Unauthorized use of a motor vehicle is the intentional taking or use of a motor vehicle which belongs to another, either without the other's consent, or by means of fraudulent conduct, practices, or representations, but without any intent to deprive the other of the motor vehicle permanently. LSA-R.S. 14:68.4(A).

**Jefferson** involved a conviction for unauthorized use of a motor vehicle. **Jefferson**, 97-2949 at p. 1, 735 So.2d at 770. Jefferson was the front seat passenger in a stolen vehicle pulled over by the police in Plaquemines Parish after midnight on April 25, 1996. Neither her name nor the name of another passenger in the vehicle nor the name of the driver appeared on the rental agreement found in the vehicle. When questioned about the ownership of the stolen vehicle, Jefferson conceded she did not own the vehicle, but claimed she borrowed the vehicle from a woman in New Orleans East. Jefferson could not, however, supply the last name, address, or telephone number of the woman. **Jefferson**, 97-2949 at pp. 2-3, 735 So.2d at 771.

The stolen vehicle had been leased by Budget Rent-A-Car to Janet W. Naff on June 29, 1995 at the Nashville, Tennessee airport. The vehicle was recovered in good condition with no broken windows and without damage to the steering wheel. **Jefferson**, 97-2949 at p. 3, 735 So.2d at 771-72.

In affirming the denial of Jefferson's motion for new trial, the court noted she was not simply a passenger in the vehicle, but had obtained the

vehicle from an unknown person for her own personal use. The court also noted the trier of fact could have concluded that Jefferson's story about how she obtained the vehicle was suspicious and indicative of criminal knowledge and/or intent. Additionally, the court noted Jefferson knew or should have known that the vehicle did not belong to her friend, from whom she allegedly borrowed the vehicle. **Jefferson**, 97-2949 at p. 7, 735 So.2d at 773.

**Carr** involved a guilty plea to unauthorized use of a movable valued over $1,000.00. Fredene Hughes testified at the preliminary examination of Godfrey Edinburg. Hughes loaned her car to her boyfriend, who, without Hughes's consent, gave the car to "Godfrey." When Hughes called Godfrey and asked for the return of her vehicle, he demanded $80.00. Hughes made arrangements for the exchange and informed the police. When Hughes's vehicle was stopped, Godfrey Edinburg was driving the vehicle and Carr was a passenger in the vehicle. **Carr**, 95-1118 at pp. 1-2, 665 So.2d at 1235.

In an application for post-conviction relief, Carr claimed ineffective assistance of counsel on the basis that his counsel had recommended he (Carr) plead guilty without investigating the evidence against Carr. At a subsequent evidentiary hearing, Carr testified his attorney advised him to plead guilty to avoid a prison sentence. Carr denied knowing the car was taken without the permission of its owner. He claimed Edinburg asked him to take a ride shortly before the police stopped them. He further claimed that Edinburg told him that the car belonged to a friend. Carr claimed he would not have pled guilty but for counsel's advice. **Carr**, 95-1118 at p. 2, 665 So.2d at 1235.

Carr's attorney testified that a preliminary hearing was conducted and probable cause was found. He claimed he advised Carr to plead guilty based

on testimony at the preliminary examination and based upon his concern that the defendant would be adjudicated a multiple offender if convicted because he was on probation. **Id.**

The court in **Carr** noted the record indicated no preliminary examination was held for Carr and he did not testify at the preliminary examination held for Edinburg. Following the preliminary examination in Edinburg's case, the trial court found no probable cause. **Id.**

The appellate court in **Carr** reversed the denial of Carr's application for post-conviction relief. The court held that Carr's guilty plea had not been intelligently and voluntarily made. The court found the police report and the victim's testimony did not implicate Carr other than placing him in the victim's vehicle; there was no preliminary examination in Carr's case and no probable cause was found at the preliminary examination in Edinburg's case; Hughes did not know or speak to Carr; Carr testified he was an unwitting passenger in the car and did not know it was taken without authorization; Carr's only connection (with Hughes's vehicle) was that he was a passenger in the vehicle; the inference which might be drawn from Carr's presence in the vehicle was insufficient to sustain a conviction for unauthorized possession of a movable; Carr was already on probation and faced revocation of that probation if he was convicted of a felony, and a guilty plea would have resulted in imprisonment. **Carr**, 95-1118 at pp. 3-6, 665 So.2d at 1236-37.

After a thorough review of the record in the instant case, we are convinced the evidence, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of unauthorized use of a motor vehicle and the defendant's identity as a perpetrator of that offense. The

defendant in the instant case was not an unwitting passenger in Bedsole's vehicle without knowledge of the vehicle being stolen. Rather, unrebutted testimony at trial from Officer McCormick indicated the defendant rode in Bedsole's vehicle after Dangerfield told him that the vehicle was stolen. Additionally, the defendant conceded knowledge of the broken rear passenger window of the vehicle and the damaged steering column.

This assignment of error is without merit.

**MOTION TO RECUSE/MOTION FOR CHANGE OF VENUE**

In assignment of error number two, the defendant argues because a judge in the same judicial district was a witness in the case, all of the judges should have recused themselves to avoid any appearance of impropriety or of politics.

Louisiana Code Criminal Procedure Article 671, in pertinent part, provides:

> A. In a criminal case a judge of any court, trial or appellate, shall be recused when he:
>
> (1) Is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial;
>
> * * *
>
> (4) Is a witness in the cause;
>
> * * *
>
> (6) Would be unable, for any other reason, to conduct a fair and impartial trial.

It is well settled that a trial judge is presumed to be impartial. Recusation of a trial judge on the grounds of bias, prejudice, and personal interest, is only warranted when such bias, prejudice, and personal interest is of a substantial nature based on more than mere conclusory allegations. See

**State v. Carter**, 96-0337, pp. 8-9 (La. App. 1 Cir. 11/8/96), 684 So.2d 432, 437.

Prior to trial, the defense filed a motion to recuse the judges of the 21st Judicial District Court, in pertinent part, stating:

> 1.
>
> Defendant Mark Watts is charged with violating [LSA-] R.S. 14:69 ILLEGAL POSSESSION OF STOLEN THINGS.
>
> 2.
>
> The purported victim is the late father of 21st Judicial District Court Division ["E"[4]] Judge Brenda Bedsole Ricks, whose father's death, on information and belief, is unrelated to the offense charged.
>
> 3.
>
> This matter was originally allotted to Judge Ricks' division. Judge Ricks subsequently recused herself from this matter, which was then allotted to Division "H".
>
> 4.
>
> The State of Louisiana has admitted in a pre-trial conference with the Division "H" Judge and the undersigned that Division "E" Judge Brenda Ricks shall testify as a fact witness in this matter. The State of Louisiana has failed to disclose their expected content of said testimony.
>
> 5.
>
> Given that this matter relates to an alleged offense against Judge Ricks' late father, Judge Ricks has a direct and substantial interest in the outcome of this judicial proceeding.
>
> 6.
>
> In order to provide defendant Mark Watts with a constitutionally adequate defense, and as ethically required to provide a legally competent defense, the undersigned is obligated to vigorously cross-examine, and perhaps impeach the credibility of Division "E" Judge Brenda Bedsole Ricks.
>
> 7.
>
> Upon information and belief, the judges of the 21st Judicial District Court maintain a cordial professional and personal relationship with one another, and the undersigned reasonably anticipates that the aforementioned vigorous cross-examination would be unduly limited in scope by Judge Ricks['] friends and co-workers, the Judges of the 21st Judicial District Court.

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[4] The motion to recuse set forth that Judge Ricks was judge of Division "H" of the 21st Judicial District Court. The minutes however, indicate that Judge Ricks was judge of Division "E" of the 21st Judicial District Court.

8.

Furthermore, because of Judge Ricks' direct and substantial interest in the outcome of this judicial proceeding, any ruling pertaining to this case by a sitting Judge of the 21st Judicial District Court necessarily has the appearance of impropriety or of politics in violation of Cannons 2 and 3 of the Cannons of Judicial Ethics: a ruling which hurts the State's case ([i.e.] Judge Ricks' interest) would necessarily be perceived as political; a ruling which helps the State's case ([i.e.] Judge Ricks' interest) would necessarily appear partial and biased.

9.

The only remedy consistent with [the] Louisiana and United States Constitution and with the Cannons of Judicial Ethics is for each and every Judge of the 21st Judicial District Court to be recused, and for an ad-hoc Judge to be appointed in accordance with [LSA-C.Cr.P. art.] 674.

* * *

**WHEREFORE** defendant Mark Watts prays that after due hearing be had regarding this matter that [the] Honorable Judges of the 21st Judicial District Court recuse themselves in accordance with [LSA-C.Cr.P. art.] 674, and that an ad hoc judge be appointed to adjudicate this matter henceforth.

Following a hearing, Judge Waguespack, the trial judge, denied the motion to recuse and a motion for change of venue (discussed below). Judge Waguespack found the fact that Judge Ricks was a witness was not unduly prejudicial to the defendant.

There was no abuse of discretion in the denial of the motion to recuse. No violation of LSA-C.Cr.P. art. 671(A)(4) occurred because Judge Ricks readily recused herself in this matter and was not the trial judge in the case. In regard to any other grounds for recusal under LSA-C.Cr.P. art. 671(A), the conclusory allegations of the motion to recuse failed to rebut the presumption of impartiality afforded to Judge Waguespack. See **State v. Page**, 2002-689, pp. 24-26 (La. App. 5 Cir. 1/28/03), 837 So.2d 165, 180-82, writ denied, 2003-0951 (La. 11/7/03), 857 So.2d 517 (statement that victims of armed robbery charged against the defendant were parents of Jefferson Parish magistrate held insufficient to support allegations of bias or prejudice on part of Twenty-

Fourth Judicial District Court trial judge presiding over the defendant's case or other Twenty-Fourth Judicial District Court judges).

Nor do we find abuse of discretion in the denial of the motion for change of venue.

Louisiana Code Criminal Procedure Article 622 provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

The pretrial motion for change of venue alleged that the mere identity of Judge Ricks as a witness and the daughter of the victim would unfairly prejudice the defendant, and the questioning of potential jurors to determine whether they were aware of the identity of Judge Ricks would not cure the defect. Thereafter, the defendant waived his right to a jury trial, and the case was tried before the trial judge. Judge Ricks was not a critical witness at trial.

This assignment of error is without merit.

## WAIVER OF RIGHT TO JURY TRIAL

In assignment of error number three, the defendant argues that although the minutes of April 18, 2005 reflect a jury trial waiver, the waiver is not reflected in the transcript of the April 18, 2005 court proceedings.

The April 18, 2005 minutes contained in the record, in pertinent part, state, "Defense waived Jury Trial." The transcript of the proceedings of April 18, 2005, originally filed with this court, was incomplete and failed to reflect the jury trial waiver shown in the minutes for that date. The record

was subsequently supplemented, however, with a complete transcript of the proceedings of April 18, 2005, which contained the jury trial waiver shown in the minutes for that date.

This assignment of error is without merit.

## ADVICE OF PRESCRIPTIVE PERIOD FOR POST-CONVICTION RELIEF

In his brief to this court, the defendant contends the trial court failed to advise him of the delay for applying for post-conviction relief. The defendant is correct.

At the time of sentencing, the trial court shall inform the defendant of the LSA-C.Cr.P. art. 930.8(A) prescriptive period for post-conviction relief. See LSA-C.Cr.P. art. 930.8(C). However, the trial court's failure to properly advise the defendant of the LSA-C.Cr.P. art. 930.8(A) delay has no bearing on the sentence and is not grounds to reverse the sentence or remand the case for resentencing. The trial court is hereby directed to give the defendant written notice of the correct prescriptive period for applying for post-conviction relief within ten days of the rendition of this opinion and to file written proof in the record of the proceedings with the clerk of the trial court that the defendant has received notice.

**CONVICTION AND SENTENCE AFFIRMED; REMANDED WITH INSTRUCTIONS.**