NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1102

STATE OF LOUISIANA

VERSUS

JOHN STANFORD LINDSEY

Judgment rendered: February 9, 2007

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number 383021-1 "B"
The Honorable Elaine W. Dimiceli, Judge Presiding

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BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Hughes, J., dissents.

DOWNING, J.

The defendant, John Stanford Lindsey, was charged by bill of information with creation or operation of a clandestine laboratory for the unlawful manufacture of methamphetamine, a violation of La. R.S. 40:983 (count one); possession with intent to distribute methamphetamine, a violation of La. R.S. 40:967A(1) (count two); conspiracy to produce and manufacture methamphetamine, a violation of La. R.S. 14:26 and La. R.S. 40:967A(1) (count three); and possession of twelve grams or more of ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers, a violation of La. R.S. 40:962.1.1 (count four).[1] The trial court denied the defendant's motion to suppress.

Following a trial by jury, the defendant was found guilty of the responsive offense of attempted creation or operation of a clandestine laboratory for the unlawful manufacture of methamphetamine on count one; guilty of the responsive offense of attempted possession with intent to distribute methamphetamine on count two; and guilty as charged on counts three and four.

The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. On count one, the defendant was sentenced to seven years imprisonment at hard labor. On count two, the defendant was sentenced to ten years imprisonment at hard labor. On count three, the defendant was sentenced to ten years imprisonment at hard labor without the benefit of parole. On count four, the defendant was sentenced to

[1] In accordance with the original bill of information, the defendant was initially charged with possession of methaydretamine (sic) (count one) and possession of ephedrine (count two). The State amended the bill of information on May 11, 2005. Counts five, six, and seven of the amended bill of information were severed from the first four counts (listed above) and ultimately nol-prossed.

two years imprisonment at hard labor. The sentences were to be served concurrently.

The State filed a habitual offender bill of information. Defendant was adjudicated a fourth felony offender. On count two, the original sentence was vacated and the defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. Defendant appeals, raising the following counseled assignments of error:

> 1. The defendant's rights were violated as the result of an illegal search.
>
> 2. The trial court erred by allowing into evidence irrelevant but highly prejudicial photographs of the defendant when the pictures could not be authenticated as to relevance and were suggestive of other crimes.
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> 3. The evidence was insufficient to support the defendant's convictions.
>
> 4. The multiple offender hearing was flawed.

The defendant raises the following *pro se* assignments of error:

> 1. The defendant's rights were violated by the illegal forced entry and search of Room 130.
>
> 2. The defendant's rights were violated when officers failed to "knock and announce" prior to a forced entry.

For the following reasons, we affirm the convictions, habitual offender adjudication, and sentences.

STATEMENT OF FACTS

On or about April 27, 2004, sometime after 2:00 p.m., Detective Liberto and Deputy Bulloch (both of the St. Tammany Parish Sheriff's Office at the time of the offenses) were conducting traffic stops near the Gause Boulevard and I-10 intersection in Slidell, Louisiana. As Deputy Bulloch conducted one of the traffic stops, a white male approached Detective Liberto. Based on the complaint made by this anonymous source,

the officers conducted a drive-through surveillance of the Slidell Plaza Inn, located at 1662 Gause Boulevard. The officers observed a pizza deliverer approach Room 130 of the motel. A white female answered the door and made eye contact with the officers during the pizza transaction. She abruptly completed the transaction and closed the room door.

Detective Liberto beckoned the pizza deliverer and questioned him regarding the occupants of the motel room. Based on statements made by the pizza deliverer and the prior statements of the anonymous tipster, the officers knocked on the door of Room 130. A female occupant, who spoke through the closed door, asked who was at the door. The officers responded, "Sheriff's Office." At that point, the female occupant inquired as to the purpose of the visit. The officers responded, "We just want to talk." The female occupant then stated, "If you want to talk to me, you're going to need a search warrant." The officers continued to engage in conversation with the female occupant. They inquired as to whether there were any other occupants in the room. She initially responded negatively and then said yes. The officers asked the occupant if she could "crack the door open." The occupant complied, but affixed the chain lock on the door.

The officers asked the occupant to pass her identification and the identification of any other occupants through the opening. The female produced two pieces of identification. Based on the pieces of identification, the officers believed the room to be occupied by Candida Lane and Larry Lynn Tucker (later determined to be Stacy Ladner and the defendant). The officers were able to briefly observe the other occupant (initially described as a large white male) as he stood in the room with a blanket pulled over his back and draped over his head. The officers ran the identifications and discovered an outstanding arrest warrant for Tucker. The officers confirmed

the warrant as valid and active. They informed their supervisor, Sergeant Sharp, of the situation. They were instructed to execute the warrant.

Upon Sergeant Sharp's immediate arrival at the scene, the officers used bolt cutters to release the door chain and gain entrance of the room. Upon entry, the officers secured the occupants and observed several items in plain view including a digital scale, butane torches, pseudoephedrine blister packs, and glass smoking pipes. Based on their training and experience, the officers associated the items with methamphetamine production and consumption. The subject identified to the officers as Larry Lynn Tucker (the defendant) was lying in the bed located at the far end of the room (from the entrance) and was apparently sick (he was vomiting). He advised the officers that he was suffering from a spider bite. The officers placed the defendant under arrest and summoned an ambulance. The defendant was taken to Northshore Regional Medical Center for medical attention. Deputy Bulloch rode in the ambulance with the defendant while Detective Liberto sought and obtained a search warrant for the motel room.

While the search warrant was executed, Deputy Bulloch remained at the hospital with the defendant whose true identity unfolded during his hospital stay. Upon discharge, defendant was transported to jail and Deputy Bulloch returned to the scene. Captain Tyrney and Lieutenant Hart, commanders of the Narcotics Division, observed a 1995 gray Chevrolet pickup truck backed into the parking space located just in front of Room 130. The officers observed elements in open view in a toolbox located in the bed of the truck and suspected the presence of a mobile methamphetamine laboratory. At the time of Deputy Bulloch's arrival, the officers were seeking (and ultimately received) a search warrant for the vehicle.

Upon execution of the warrant for the motel room, several items were seized as evidence including the aforementioned items, a Gatorade container containing over twelve hundred pseudoephedrine tablets, paperwork with the defendant's and Ladner's actual names on it, mail addressed to the defendant, mail addressed to Ladner, gloves, a voice changer, sandwich bags, a white funnel, aluminum foil, a Sprint palm pilot, binoculars, a blue covered pan, a Sprint cellular phone, a twenty-five round magazine for an Uzi, a five hundred fifty-six millimeter full-metal jacket round, a High Times magazine containing references to illicit drugs, three thirty-round magazines, a Colt AR-15 firearm with a scope, an Uzi, a smoking apparatus, blister packs of pseudoephedrine MSM powder, a glass vial with a white residue, a candy container with suspected illegal narcotics, and a plastic baggie with suspected illegal narcotics. Several items were seized from the truck, including the toolbox (it contained bottled liquid substances, bore the defendant's initials, and was located in the bed of the pickup truck), a military-type grenade, four Motorola police-type radios, a stun gun, a revolver, and a knife. The contents of some items were later tested by the St. Tammany Parish Sheriff's Office Crime Laboratory. According to the scientific analysis report, in pertinent part, an orange plastic container of numerous round white tablets was determined to contain pseudoephedrine, a metal "sour candy" tin containing residue was determined to contain methamphetamine, a glass vial containing residue was determined to contain methamphetamine, and a clear plastic Ziploc bag containing gleanings of green vegetable material was determined to contain marijuana.

DISCUSSION

COUNSELED ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, the defendant argues that the evidence presented herein was insufficient to support the convictions. He contends that not all reasonable hypotheses of innocence were eliminated. He notes that the State had a burden to prove that the defendant knowingly possessed items intended to be used to manufacture methamphetamine. The defendant argues that during his trial testimony, he gave a reasonable explanation for his presence near the items. He contends that his mere presence is insufficient. The defendant presumes that Larry Ross, the name on the motel room's leasing agreement, was responsible for the activities in question. He notes that the items seized during the search of the truck were not tested. The defendant further argues that the items seized, with the exclusion of the Sudafed tablets, were legal.

As to count two, the defendant specifically argues that there was no direct evidence that he was attempting to possess methamphetamine with the intent to distribute. The defendant argues that the small amount of methamphetamine seized was not prepared for distribution.

As to count three, the defendant specifically argues that there was no evidence of an overt act committed with another individual to manufacture methamphetamine. He contends that no other person was named. The defendant argues that there was no evidence of a combination or agreement between the defendant and another person to commit a crime. He also notes that there was no evidence of who bought the drugs and over what period of time. The defendant contends that he was unable to notice the items in the room and truck due to his spider bites.

The constitutional standard for testing the sufficiency of evidence, adopted by the Legislature in enacting La. Code Crim. P. art. 821, requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find 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). The ***Jackson*** standard of review 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 trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. ***State v. Graham***, 2002-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. ***State v. Richardson***, 459 So.2d 31, 38 (La. App. 1 Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is of the weight of the evidence, not its sufficiency. ***Richardson***, 459 So.2d at 38. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. ***State v. Creel***, 540 So.2d 511, 514 (La. App. 1 Cir. 1989). When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. ***State v. Captville***, 448 So.2d 676, 680 (La. 1984).

During the instant trial, State witness Jason Gill presented extensive testimony regarding the creation of a clandestine laboratory for the

manufacture of methamphetamine. Gill, a special agent with the United States Drug Enforcement Administration, was accepted as an expert in clandestine drug laboratory creation and operation. According to Gill, there are about seven different methods that can be used to manufacture methamphetamine. One of the most prevalent methods in the United States involves the utilization of iodine and red phosphorus. This method is commonly used on the West Coast and some northern areas. The most prevalent method in the Louisiana area is referred to as the "Birch" reaction or the "Nazi" method. This method requires the use of anhydrous ammonia and is commonly seen in areas where farming activity takes place. The first step in production is the extraction of a precursor chemical, particularly ephedrine or pseudoephedrine, commonly found in cold medication.

According to Gill, a common way to extract pure pseudoephedrine from tablets is to place the tablets in a grinder to grind them into a powder. This simply allows for a quicker breakdown of the Sudafed from the tablets. Thus, one of the common items used in a methamphetamine laboratory is a blender or a grinder. During the extraction step, the powder and a solvent, commonly ether (or denatured alcohol or isopropyl alcohol and heat), are placed into a vessel and shaken to develop a "biphase" solution. This results in the creation of a "pill wash" wherein a semi-sludge layer rests at the bottom and a solvent containing pure Sudafed rests at the top (which will later dissolve into the solvent). Coffee filters, bedspreads, cheesecloths, or any other strainer to strain a very fine powdery substance can be used to extract the pseudoephedrine from the biphase solution.

Gill described the next step as one of the most dangerous parts of the reaction. A solvent is released into the air in a vapor when the step is performed in an enclosed area with a burner plate and butane torches. The

environment is altered and becomes highly flammable. Anhydrous ammonia or any water-reactive metal can be used to actually form methamphetamine. Anhydrous ammonia can be manufactured with sodium hydroxide or Red Devil lye, ammonium nitrate, and a small amount of water. That chemical reaction forms a gas. Items needed during this reaction include a vessel, plastic tubing, a metal container, and a metal pipe. The three types of metal that can be used are lithium, sodium, or potassium. Lithium metal is commonly found in batteries. Gill further testified the presence of propane tanks and evident discoloration on the brass fitting on top of a container (brass has a very violent reaction to anhydrous ammonia) are two instant hints to the existence of a methamphetamine lab. When the reaction gets near the stage of completion, it turns into a porridge-looking oatmeal substance, methamphetamine base. The substance must be processed into a usable form to allow it to be dissolved into the body. In the final stage, a non-water solvent is added to the porridge-like substance (commonly starting fluid). The introduction of hydrogen chloride gas causes the liquefied methamphetamine base to form into a substance that can be smoked, snorted, or injected. Coke bottles with fish tank tubing sticking out of them with silicone glue on them are commonly seen during this phase. A rubber tube is placed in the oily liquid and then the gas will begin to bubble and come out of the gas tank.

The mixture begins to solidify and drops to the bottom of the container. The liquid is filtered. The formal name of the substance to be consumed is methamphetamine hydrochloride. The hydrogen chloride gas is a combination of sulphuric acid and table salt. Methamphetamine producers commonly use mobile laboratories to avoid detection.

Gill reviewed the evidence collected and photographs taken of the scene in the instant case. Gill particularly noted the presence of the following items: salt (necessary to create a hydrogen chloride gas), tubing, a large number of tubes, a small micro-bean crusher, a white apparatus (common tool that methamphetamine producers use to grind up tablets), a large number of funnels, a roll of fish-tank tubing, a two-liter bottle with tubing sticking out of it, coffee filters, acid (sulphuric acid is the same ingredient found in a car battery), acetone, paint thinners, several boxes of pseudoephedrine tablets, skillets, and an electric heating element. According to Gill, assuming an off-site reaction with anhydrous ammonia or lithium batteries, the scene herein included the necessities to start and finish methamphetamine production.

During his trial testimony, Detective Liberto further detailed the evidence collected herein. The approximate number of pseudoephedrine tablets (1,231) contained sixty milligrams each. Photographs of the defendant's tattoo, located on his back, were published to the jury. The tattoo was described as follows: "On the left there is a, looks like a skeleton-type individual holding what appears to be the make of an AR-15, with a chef's hat. I would have to say in the left hand he's holding some kind of glass container of some sort, wearing an apron[.]" The smoke from the weapon spells out the name "Meth Man."

During cross-examination, Detective Liberto testified regarding the renting information for the motel room. According to Detective Liberto, the room was leased by a Larry Ross. No further information regarding the rental of the room or the identity of Larry Ross was obtained. During re-direct examination, Detective Liberto responded positively when asked

whether the defendant could have checked in the motel room under the alias, Larry Ross.

State witness Stephen Bordelon, an investigator with the St. Tammany Parish District Attorney's office, located digital images on the cellular phone seized from the room. The photographs were downloaded and saved onto a compact disc. The photographs became very unclear after they were enlarged. The CD photos were published to the jury via a laptop computer. Bordelon identified the first photograph as containing a pack of cigarettes and a smoking device. The defendant was also in the photograph. Photographs two through seven depict the defendant inhaling a substance with a smoking device. The eighth photograph depicts a "male individual" (who does not appear to be the defendant) with a smoking device. The ninth photograph depicts the defendant, a table, money, possibly a smoking device, possibly some lighters, and a computer. The final photograph also depicts a smoking device and a computer. During cross-examination, Bordelon confirmed that the date and locations shown in the photographs are unknown. He further confirmed that the existence of illegal behavior couldn't be discerned from the photographs.

Deputy Bulloch also testified during the trial. Deputy Bulloch stated that based on his training, the items observed in plain view upon the officers' forced entry were associated with the production and consumption of methamphetamine. According to Deputy Bulloch, the truck was registered to a Eunie Cavale at the time of the offense.[2] This individual was described (based on a Mississippi driver's license) as a white female. She has no identifiable criminal record.

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[2] According to the search warrant affidavit for the truck, the owner's name is Kvale Unni. (S-65).

Deputy James Folks of the St. Tammany Parish Sheriff's Office Crime Laboratory was called out to execute the search warrant on the room. Deputy Folks waited at the scene while a search warrant for the truck was being obtained. During the execution of the search warrant for the truck, Deputy Folks examined items for potential fingerprints as they were retrieved. According to Deputy Folks, most of the items of interest were covered with a chemical slime. He further stated that some of the ingredients that are used to make methamphetamine are toxic and remove the oil (from skin) that leaves prints on surfaces. Deputy Folks was unable to collect any fingerprints.

Detective Nicky Mistretta of the Slidell Police Department, a member of the St. Tammany Parish Narcotics Task Force at the time of the offense, executed the search warrant for the truck (along with Detective Justin Gibson). These two detectives were the only individuals in the area certified to conduct the search. The detectives suited up in protective gear, removed each item from the toolbox, and positioned them on a tarp according to their pH levels. Specifically, two two-liter Coke bottles containing a clear liquid and a large pickle-type jar containing crushed items in the bottom and liquid on top were removed. A sample was taken from the items believed to have high PH levels and placed in separate Crime Lab containers for testing. The items were then photographed, and the cleanup crew collected them. The Crime Lab containers failed, as the substances destroyed the containers. According to Detective Mistretta, the containers were not made of the proper type of plastic. Thus, the samples were never tested.

The defendant testified during the trial as the sole defense witness. According to the defendant, he lived in Carriere, Mississippi at the time of the offenses. The defendant worked near Slidell as a contractor with an

individual named Larry Ross. On April 25, 2004, the defendant claimed to be bitten by a spider. The defendant stated that he may have been bitten multiple times during a two-day period. After the first bite, his leg became swollen. The next day he noticed a second bite on the inside of his leg. The second bite was of a different characteristic than the first observed bite.

The following day, April 26th, the defendant became very ill and was unable to drive back to Mississippi. Larry Ross drove the defendant to his motel room and allowed the defendant to stay there to recover. As the defendant was sick at the time, he did not remember the details of the instant arrest. The defendant reiterated that the room did not belong to him. The defendant assumed that the items in the room belonged to Larry Ross. The defendant further explained that Larry Ross used the defendant's vehicle to drive the defendant to the motel. Before allowing Larry Ross the use of his vehicle to go back to the work site, the defendant removed his personal items and brought them into the room. The defendant stated that the truck parked in front of the motel room also did not belong to him and he had never been in the truck. The defendant did not know Eunie Cavale. The defendant also stated that he did not provide the false identification that was given to the police officers. The defendant further stated that the recovered weapons did not belong to him. The defendant admitted that he was in some of the photographs removed from the cellular phone located at the scene. The defendant also admitted that a computer seized from the scene belonged to him and that the toolbox seized from the bed of the truck belonged to him. According to the defendant, he was sick during his stay in the motel room and was unfamiliar with the bulk of the evidence collected at the scene. The defendant testified that his tattoos were very old and he admitted that he smoked methamphetamines when he was a young member of a motorcycle

club. The defendant stated that during the last few years prior to the trial (the trial took place December 12-December 14, 2005), his health condition, namely, Hepatitis C, prevented him from using methamphetamine. The defendant was unsure of the location of Larry Ross at the time of the trial.

During cross-examination, the defendant stated that he dated Stacy Ladner off and on since 1996. During inquiries regarding the defendant's criminal history, the defendant stated that he previously pled guilty to an offense so that charges against Ladner would be dismissed. When asked whether he was smoking methamphetamine in one of the cellular phone photographs (62-J), the defendant stated as follows, "I don't know. Can't tell what I was doing. Could have been smoking tobacco. The point is, I don't know when the pictures were taken. They're probably several years old." The defendant further testified that he did not know who Larry Tucker is. The defendant suggested that the items seized at the scene belonged to Larry Ross. When asked why such an amount of Sudafed would be purchased, the defendant responded, "I guess to make meth."

Count One (creation or operation of a clandestine laboratory)

La. R.S. 40:983 states, in pertinent part:

> A. Creation or operation of a clandestine laboratory for the unlawful manufacture of a controlled dangerous substance is any of the following:
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> (1)The purchase, sale, distribution, or possession of any material, compound, mixture, preparation, supplies, equipment, or structure with the intent that it be used for the unlawful manufacture of a controlled dangerous substance.
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> (2)The transportation or arranging for the transportation of any material, compound, mixture, preparation, supplies, or equipment with the intent that such material, compound, mixture, preparation, supplies, or equipment be used for the unlawful manufacture of a controlled dangerous substance.

(3)The distribution of any material, compound, mixture, preparation, equipment, supplies, or products, which material, compound, mixture, preparation, equipment, supplies, or products have been used in, or produced by, the unlawful manufacture of a controlled dangerous substance.

(4)The disposal of any material, compound, mixture, preparation, equipment, supplies, products, or byproducts, which material, compound, mixture, preparation, equipment, supplies, products, or byproducts have been used in, or produced by, the unlawful manufacture of a controlled dangerous substance.

B. It shall be unlawful for any person to knowingly or intentionally create or operate a clandestine laboratory for the unlawful manufacture of a controlled dangerous substance.

La. R.S. 14:27A sets forth the definition of "attempt," stating the following:

> Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

We conclude that the evidence more than supports the conviction of the attempted creation or operation of a clandestine laboratory for the unlawful manufacture of methamphetamine. The jury's rejection of the defendant's hypothesis of innocence was reasonable. It is unlikely that the defendant, who admittedly had a history of methamphetamine consumption, would not have observed the items that were upon plain view immediately apparent as part of a clandestine laboratory for the production of methamphetamine. The defendant was in possession of materials, supplies, and equipment necessary for the manufacturing of methamphetamine. Thus, it is evident that the defendant acted for the purpose of and tending directly toward the commission of this offense.

Count Two (attempted possession with intent to distribute methamphetamine)

La. R.S. 40:967A provides in pertinent part that it shall be unlawful for any person knowingly or intentionally: (1) To produce, manufacture, distribute, or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance or controlled substance analogue classified in Schedule II. Methamphetamine is a Schedule II controlled dangerous substance (CDS). See La. R.S. 40:964 Schedule II C(2). As the defendant was found guilty of attempted possession of methamphetamine with the intent to distribute, the evidence must show that he did or omitted an act for the purpose of and tending directly toward the accomplishing of this offense.

One need not physically possess the controlled dangerous substance to violate the prohibition against possession; constructive possession is sufficient. **State v. Gordon**, 93-1922, p. 9 (La. App. 1 Cir. 11/10/94), 646 So.2d 995, 1002. A person not in physical possession of the drug is considered to be in constructive possession of a drug when the drug is under that person's dominion and control. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute constructive possession include: (1) the defendant's knowledge that illegal drugs were in the area; (2) his relations with the person found to be in actual possession; (3) the defendant's access to the area where the drugs were found; (4) evidence of recent drug use by the defendant; and (5) his physical proximity to the drugs. It is well settled that the mere presence in an area where drugs are located or the mere association with one possessing drugs does not constitute constructive possession. See **State v. Toups**, 01-1875, p. 4 (La. 10/15/02), 833 So.2d 910, 913. A person may be in joint possession

of a drug if he willfully and knowingly shares with another the right to control the drug. **Gordon**, 93-1922 at p. 9, 646 So.2d at 1002.

In cases where the intent to distribute a CDS is an issue, a court may look to various facts: (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of the drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute. **State v. House**, 325 So.2d 222, 225 (La. 1975).

During the trial, the officers testified that traffic stops were being conducted in the area in question to combat high crime. Herein, the police seized a container of over twelve hundred packs of pseudoephedrine tablets at sixty milligrams each; a scale for weighing drugs; syringes and baggies; chemicals and apparatus associated with the manufacture of methamphetamine; and, an arsenal of weapons and ammunition. The amount of drugs located at the scene is clearly inconsistent with personal use only. The defendant argues that he was too sick to notice the presence of the makings of a clandestine laboratory and controlled dangerous substances. The jury rejected this hypothesis (presented through the defendant's testimony) and we have concluded that such rejection was reasonable. We conclude that the evidence supports the conviction of attempted possession of methamphetamine with the intent to distribute.

Count Three (conspiracy to produce and manufacture methamphetamine)

La. R.S. 14:26A defines criminal conspiracy as follows: Criminal conspiracy is the agreement or combination of two or more persons for the

specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination." An essential element of the crime of conspiracy is specific intent. **State v. Leger**, 04-1467, p. 3 (La. App. 3 Cir. 6/1/05), 907 So.2d 739, 744-745, writ denied, 05-2263 (La. 4/17/06), 926 So.2d 509, cert. denied, 127 U.S.245, 127 S.Ct.245, (2006). Specific intent is that state of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequence to follow. As a question of fact, intent may be inferred from the circumstances of the actions of the offender. See La. R.S. 14:10(1). Criminal intent to commit a specific offense must exist in at least two minds. **Leger**, 04-1467 at pp. 35-36, 907 So.2d at 763.

Herein, the defendant does not argue that Stacy Ladner obtained the abovementioned items. Instead, the defendant argues that he was too sick to notice the presence of the items. As previously stated, the jury reasonably rejected this hypothesis of innocence. The existence of a relationship between Ladner and the defendant was established during the trial. During his testimony, the defendant confirmed that a prior indictment charged both him and Ladner with possession of methamphetamines. According to the defendant's testimony, he entered a guilty plea "so they would drop the charges against her."

Regarding the instant offenses, the defendant's hypothesis offers no explanation for Ladner's presence. Despite the obvious nature of the environment, Ladner remained in the room. She initially stated that she was in the room alone. After admitting there was another occupant, she provided

two pieces of false identification. Thus, Ladner concealed the true identity of herself and the defendant. Furthermore, Ladner denied the officers entrance to the room by affixing the chain lock. Based on the instant circumstances, it is reasonable to conclude that criminal intent to commit a specific offense existed in the minds of the two occupants of the room. By possessing necessary supplies and equipment with the intent that they be used for the unlawful manufacture of methamphetamine, the defendant and Ladner committed an act in furtherance of their object. We find that the record supports the jury's finding of guilt as to count three.

Count Four (possession of twelve grams or more of ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers)

To support a conviction for possession of pseudoephedrine in accordance with La. R.S. 40:962.1.1, the State must present evidence establishing beyond a reasonable doubt that the defendant was in possession of twelve grams or more of pseudoephedrine and that he knowingly and intentionally possessed it. Guilty knowledge may be inferred from the circumstances.

Upon their entry of the room, the officers herein immediately observed a digital scale, butane torches, pseudoephedrine blister packs, and glass smoking pipes in plain view. The pseudoephedrine tablets (over 1200 at sixty milligrams each) well exceeded the statutory requirement of twelve grams. The defendant obviously knew that drugs were in the room and he had complete access to them. Moreover, a metal "sour candy" tin containing residue was determined to contain methamphetamine. The evidence clearly supports the conviction on count four.

Based on the above conclusions, viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could

reasonably conclude that all of the essential elements of the offenses have been proven beyond a reasonable doubt. Assignment of error number three has no merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER ONE AND PRO SE ASSIGNMENTS OF ERROR

In his first assignment of error, the defendant argues that his rights were violated as a result of an illegal search. The defendant contends that the search was based on an uncorroborated, vague, anonymous tip and statements from a pizza deliverer. The defendant further contends that there was no probable cause to search the motel room. The defendant argues that the officers seized Ladner without a justifiable reason when they kept her at the door, blocked the only entrance to the room, and forced her to provide identifications. The defendant also notes that he is eight inches taller than the height description provided in the driver's license upon which his arrest was based. The defendant further notes that the male in the photograph had hair while the defendant was bald at the time of his arrest. The defendant concludes that it was obvious that the license did not belong to him and the arrest warrant was faulty. The defendant argues that the circumstances did not present an exigency and any concerns for Ladner's safety should have been dispelled prior to the officers' entrance into the room.

In the first *pro se* assignment of error, the defendant argues that he (as an overnight guest of the room) and Larry Ross (as the leased dweller of the room) had an expectation of privacy and protection to be free from unreasonable searches and seizures occurring at the room. The defendant further argues that an arrest warrant would have been sufficient to enter the room if it had been leased to Larry Tucker. The defendant notes that in the absence of exigent circumstances, the officers needed a search warrant to

enter the dwelling of a third party to search for the subject of an arrest warrant. The defendant argues that there were no exigent circumstances in this case. The defendant contends that there was no reason for the officers to be concerned about Ladner's safety. The defendant notes that Ladner never indicated that she was in harm's way and that the officers did not question her regarding her safety. The defendant also notes that Ladner informed the officers that the male occupant of the room, the defendant, was sick. The officers briefly observed the defendant and knew that he was in no condition to flee. The defendant further notes that the subject of the arrest warrant was wanted for failure to pay a misdemeanor fine. The defendant also notes that he did not identify himself as Larry Tucker and that there was no evidence that he knew Ladner had provided such identification for him. The defendant contends that the officers did not have a right to be in the room and the exclusionary rule applies to the evidence herein.

In the second *pro se* assignment of error, the defendant argues that the record contains conflicting testimony as to whether the officers actually announced their authority, intent and purpose before entering the room. The defendant contends that there is no evidence or testimony to support the trial court's ruling that the officers complied with the knock and announce provisions of the Fourth Amendment. The defendant cites a recent United States Supreme Court opinion, **Hudson v. Michigan**, ___ U.S. ___, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), wherein the court held that violations of the knock and announce provisions embodied in the Fourth Amendment by officers executing a search warrant did not require the suppression of evidence seized pursuant to a search warrant. The defendant argues that the instant case is distinguishable from *Hudson* because herein the search warrant was based solely upon plain view observations made subsequent to

an illegal entry. The defendant specifically argues that the officers' entry of the room was illegal because they failed to knock and announce their authority and intention to enter and arrest Tucker. The defendant concludes that the trial court erred in denying the motion to suppress the evidence.

The Fourth Amendment to the United States Constitution and Article I, section 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the State to affirmatively show it was justified under one of the narrow exceptions to the rule requiring a search warrant. La. Code Crim. P. art. 703D; **State v. Lowery**, 04-0802, p. 6 (La. App. 1 Cir. 12/17/04), 890 So.2d 711, 717, writ denied, 05-0447 (La. 5/13/05), 902 So.2d 1018. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703A. Alhough not absolute, the constitutional expectation of privacy from nonconsensual entry and unreasonable searches and seizures extends to guests in a motel room. **Stoner v. State of Cal.**, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964); **State v. Stewart**, 27,049, p. 2 (La. App. 2 Cir. 5/10/95), 656 So.2d 677, 679.

An exception to the search warrant requirement exists for items in plain view. Two conditions must be satisfied to trigger the applicability of the plain view doctrine: (1) there must be a prior justification for an intrusion into the protected area; and, (2) it must be immediately apparent without close inspection that the items are evidence or contraband. "Immediately

apparent" requires no more than probable cause to associate the property with criminal activity. **State v. Howard**, 01-1487, p. 8 (La. App. 1 Cir. 3/28/02), 814 So.2d 47, 53.

In **State v. Fisher**, 97-1133, pp. 4-5 (La. 9/9/98), 720 So.2d 1179, 1182-83, the Louisiana Supreme Court recognized a three-tiered analysis governing the Fourth Amendment's application to interactions between citizens and police. At the first tier, mere communications between officers and citizens implicate no Fourth Amendment concerns where there is no coercion or detention. **United States v. Watson**, 953 F.2d 895, 897 n.1 (5 Cir. 1992); **State v. Britton**, 93-1990 (La. 1/27/94), 633 So.2d 1208 (per curiam) (noting that police have the same right as any citizen to approach an individual in public).

At the second tier, the investigatory stop recognized by the United States Supreme Court in **Terry v. Ohio**, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884-85, 20 L.Ed.2d 889 (1968), the police officer may briefly seize a person if the officer has an objectively reasonable suspicion, supported by specific and articulable facts, that the person is, or is about to be, engaged in criminal conduct or is wanted for past criminal acts. **State v. Moreno**, 619 So.2d 62, 65 (La. 1993). La. Code Crim. P. art. 215.1A provides that an officer's reasonable suspicion of crime allows a limited investigation of a person. However, reasonable suspicion is "insufficient to justify custodial interrogation even though the interrogation is investigative." **Florida v. Royer**, 460 U.S. 491, 499, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983).

Lastly, at the third tier, a custodial "arrest," the officer must have "probable cause" to believe that the person has committed a crime. **Watson**, 953 F.2d at 897 n.1; **Moreno**, 619 So.2d at 65. La. Code Crim. P. art. 213

uses the phrase "reasonable cause."[3] The "probable cause" or "reasonable cause" needed to make a full custodial arrest requires more than the "reasonable suspicion" needed for a brief investigatory stop. See **Terry**, 392 U.S. at 17-22, 88 S.Ct. at 1877-80; **State v. Flowers**, 441 So.2d 707, 712 (La. 1983) (noting that a less intrusive stop does not require the same "probable cause" needed for an arrest). When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it is reasonable for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his immediate control' -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." **U. S. v. Chadwick**, 433 U.S. 1, 14, 97 S.Ct. 2476, 2485, 53 L.Ed.2d 538, 550 (1977); **Chimel v. California**, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969).

Probable cause exists when the facts and circumstances within the affiant's knowledge and of which he has reasonable trustworthy information are sufficient to support a reasonable belief that an offense has been committed or that evidence or contraband may be found at the place to be searched. **State v. Casey**, 99-0023, pp. 3-4 (La. 1/26/00), 775 So.2d 1022, 1027-28. An issuing magistrate must make a practical, common sense decision whether, given all the circumstances set forth in the affidavit, there is a "fair probability" that evidence of a crime will be found in a particular place. The task of the reviewing court is simply to insure that the magistrate

[3] The "reasonable cause" standard of Article 213 is equivalent to "probable cause" under the general federal constitutional standard. **Fisher**, 97-1133 at p. 5 n.4, 720 So.2d at 1183 n.4, (citing **State v. Weinberg**, 364 So.2d 964, 969 (La. 1978)). To read Article 213 as allowing an arrest on less than probable cause would put the article afoul of the Fourth Amendment. **Fisher**, 97-1133 at p. 5 n.4, 720 So.2d at 1183 n.4.

had a "substantial basis" for concluding that probable cause existed. **Illinois v. Gates**, 462 U.S. 213, 238-239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Probable cause for the issuance of a search warrant does not involve certainties of proof beyond a reasonable doubt, or even a prima facie showing, but rather involves probabilities of human behavior as understood by persons trained in law enforcement and based on the totalities of the circumstances. **State v. Rodrigue**, 437 So.2d 830, 832-833 (La. 1983).

La. Code Crim. P. art. 224 states as follows:

> In order to make an arrest, a peace officer, who has announced his authority and purpose, may break open an outer or inner door or window of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where the person to be arrested is or is reasonably believed to be, if he is refused or otherwise obstructed from admittance. The peace officer need not announce his authority and purpose when to do so would imperil the arrest.

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is also a command of the Fourth Amendment. **Wilson v. Arkansas**, 514 U.S. 927, 931-936, 115 S.Ct. 1914, 1916-1919, 131 L.Ed.2d 976 (1995). It is not necessary to knock and announce when "circumstances presen[t] a threat of physical violence[,]" or if there is "reason to believe that evidence would likely be destroyed if advance notice were given[,]" **Wilson,** 514 U.S. at 936, 115 S.Ct. at 1919, or if knocking and announcing would be "futile," **Richards v. Wisconsin**, 520 U.S. 385, 394, 117 S.Ct. 1416, 1421, 137 L.Ed.2d 615 (1997). The police must have a reasonable suspicion under the particular circumstances that one of these grounds for failing to knock and announce exists. **Hudson,** 126 S.Ct. at 2163.[4]

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[4] In an effort to distinguish **Hudson v. Michigan** from the instant case, the defendant correctly notes that the officers in that case were executing a search warrant at the time of the entry. The court specifically held that the knock-and-announce rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant. Nonetheless, the principle regarding the application and exceptions to the knock-and-announcement requirement are applicable to the instant case.

During the motion to suppress hearing, Detective Liberto detailed his brief conversation with the anonymous tipster. The tipster informed Detective Liberto that suspicious activity was taking place in a room at the Slidell Plaza Inn. The motel was in view at the time of the tip. The tipster did not state the room number, but identified the room by pointing to the backside of the motel and stating that it was the "second or third door," and noting that it "wasn't the first one near the hallway." The tipster stated that the room had two occupants and that there was recurrent traffic in and out of the room. Based on the information provided by the tipster, Detective Liberto was interested in the area. Detective Liberto and Deputy Bulloch decided to monitor the area. The officers were traveling in an unmarked police vehicle and wore a visible badge and a vest that bore the word "Sheriff" across the front and back. The officers' attention was specifically directed to Room 130 (seemingly the room designated by the tipster) of the motel when a female occupant made eye contact with them and hurriedly closed her door after completing a transaction with a pizza deliverer. After Detective Liberto flagged down the pizza deliverer, they inquired as to whether he observed any suspicious behavior in the room in question. The pizza deliverer stated that the occupant(s) of the room might be under the influence of something.

The officers knocked on the room door, and conversed with a female occupant. She appeared extremely nervous and provided inconsistent responses when questioned regarding the existence of further occupants. She ultimately provided supposed identification for herself and the male occupant of the room. The officers stated that the identification photographs resembled the occupants of the room. Detective Liberto ran the identifications through the local and national computer on his laptop for

detection of any outstanding warrants. After an arrest warrant for Larry Lynn Tucker was detected, the dispatcher verified (with the corresponding agency) that the individual was, in fact, wanted. Such verification was made prior to the attempted execution of the arrest warrant.

In denying the defendant's motion to suppress, the trial court concluded that the officers were reasonable in investigating the complaint of the anonymous tipster. The court found that questioning the female occupant through the room door was reasonable and proper. The court further noted that the officers confirmed the attachment before the attempted execution.

We find that no coercion or detention took place prior to the attempted execution of the arrest warrant. The officers decided to approach the room to speak to its occupants. Ladner initially spoke to the officers through a closed door and only agreed to a partial opening with continued use of the chain lock. The officers did not enter the room prior to the confirmation of an arrest warrant for a supposed occupant. As a matter of fact, according to trial testimony, Deputy Bulloch asked Ladner "if she minded if we come in." She responded negatively, informing the officers that she would prefer to keep her door chain locked. The room door remained chain locked during the conversation with Ladner.

Ladner was free to walk away from the door and discontinue the conversation. Instead, she provided false pieces of identification for the occupants of the room. Based on the presentation of Ladner and their brief observation of the defendant (despite any discrepancy in height or length of hair between the defendant and the person pictured in the identification) the officers were reasonable in believing that they had been provided with proper identification for the occupants of the room. The officers had no

reason to believe that the occupants were not the lessees of the room. Conversely, Ladner guarded the entrance of the room as if she were a dweller as opposed to a guest. The defendant notes inconsistent testimony as to whether the officers announced their authority and purpose before entering the room. At the motion to suppress hearing, when questioned during direct examination as to the procedure for entering the room, Detective Liberto testified as follows:

> . . . I said, 'Hey, we got warrants for you.' I didn't know what was behind that door at that particular time, and we were kind of telling them, 'Hey, we got something for you,' then making the entry. If they're in there and they do have some kind of weapon -- I mean, you want to go in there when their guard is somewhat down. And at that point, I felt that she was content with us being there, having that safety of her lock on there, so we decided at that point in time to go ahead, grab the boltcutters, cut the bolt and make entry into the room and effect the arrest.

However, Deputy Bulloch specifically testified that they informed Ladner they had an 'outstanding warrant' and 'wished to effect an arrest on the subject.' The trial court determined that the officers announced that they were executing the arrest warrant before they entered the room.

When reviewing a trial court's ruling on a motion to suppress based upon findings of fact, great weight is placed upon its determination, because the trial court had the opportunity to observe the witnesses and weigh the relative credibility of their testimony. **State v. Parfait**, 96-1814, p. 13 (La. App. 1 Cir. 5/9/97), 693 So.2d 1232, 1240. Even if we were to find that the officers did not comply with the knock-and-announce requirement, as stated in **Hudson,** it is not always necessary to knock and announce. The United States Supreme Court requires only that the police have a reasonable suspicion that one of the grounds for failing to knock and announce exists

and has acknowledged that this "showing is not high." **Hudson**, 126 S.Ct. at 2163.

Although Ladner did not specifically state that she was in danger, based on her behavior (including nervousness and inconsistent answers as to whether there were any co-occupants) and the statements made by the tipster and the pizza deliverer, the officers were reasonable in suspecting that the situation may pose a danger or that evidence could be disposed of as a result of an announcement. We find that the officers' brief observation (prior to their entry) of the defendant's condition was insufficient to dispel such safety concerns. Thus, the entry of the room was proper and the search warrants were based on information obtained and observations made during reasonable investigatory procedures. The evidence was seized pursuant to the search warrants. We find no abuse of discretion in the trial court's denial of the defendant's motion to suppress. This assignment of error lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant avers that the trial court erred in admitting irrelevant, highly prejudicial photographs of the defendant retrieved from a cellular phone. The defendant notes that identification was not at issue in this case. The defendant argues that the photographs depict evidence of alleged other crimes. The defendant contends that the photographs were introduced to portray the defendant as a person of bad character. The defendant argues that the State failed to meet its obligation under La. Code Crim. P. art. 720 and **State v. Prieur**, 277 So.2d 126 (La. 1973). He contends that the probative value of these photographs is outweighed by their prejudicial effect. The defendant notes that the time and place of the photographs were not absolutely established.

Photographs that illustrate any fact, shed light upon any fact or issue in the case, or are relevant to describe the person, place, or thing depicted, are generally admissible, provided their probative value outweighs any prejudicial effect. **State v. Glynn**, 94-0332, p. 9 (La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1298. 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. **State v. Dilosa**, 01-0024, p. 15 (La. App. 1 Cir. 5/9/03), 849 So.2d 657, 670. However, La. Code Evid. art. 404B(1) provides the following exceptions to this general rule of inadmissibility:

> 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.

Several other statutory and jurisprudential rules also play a role in determining the admissibility of such evidence. One of the factors listed in Article 404(B) must be at issue, have some independent relevance, or relate to conduct that constitutes an integral part of the act. The Louisiana Supreme Court has also held other crimes evidence admissible as proof of other crimes exhibiting almost identical modus operandi or system, committed in close proximity in time and place. The State must show sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. **State v. Millien**, 02-1006, pp. 10-11 (La. App. 1 Cir. 2/14/03), 845 So.2d 506, 513-514. Even if

independently relevant, the evidence may be excluded if its probative value is substantially outweighed by the dangers 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. Finally, the State must comply with the notice requirements and limiting instructions set out in **Prieur**. Thereunder, the State must, within a reasonable time before trial, provide written notice of its intent to use other acts or crimes evidence and describe these acts in sufficient detail. The State must show the evidence is neither repetitive nor cumulative, and is not being introduced to show the defendant is of bad character. **State v. Schleve**, 99-3019, p. 14 (La. App. 1 Cir. 12/20/00), 775 So.2d 1187, 1198. La. Code Crim. P. art. 720 provides:

> Upon motion of defendant, the court shall order the district attorney to inform the defendant of the state's intent to offer evidence of the commission of any other crime admissible under the authority of Louisiana Code of Evidence Article 404. Provided however, that such order shall not require the district attorney to inform the defendant of the state's intent to offer evidence of offenses which relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding or other crimes for which the accused was previously convicted.

A trial court's ruling on the admissibility of evidence of other crimes will not be overturned absent an abuse of discretion. **State v. Galliano**, 02-2849, pp. 3-4 (La. 1/10/03), 839 So.2d 932, 934 (per curiam).

As previously discussed, some of the photographs in question depict the defendant inhaling a substance with a smoking device. Another photograph depicts the defendant, a table, money, possibly a smoking device, possibly some lighters, and a computer. Testimony confirms that the dates and locations of the photographs are unknown. Moreover, the existence of illegal behavior cannot be discerned from the photographs.

According to Deputy Bulloch's testimony, some of the photographs depict a smoking pipe and other items similar to items seized from the scene.

Regarding at least one of the photographs, Deputy Bulloch testified that the depiction was consistent with someone using a smoking device to consume methamphetamine. During cross-examination, Deputy Bulloch confirmed that the substance, if any, being consumed in the photographs is unknown. He further confirmed that the photographs did not conclusively depict any illegal activity.

Prior to the admission of the photographs in question, the defense counsel filed an oral motion in limine. The defense counsel contended that the State provided the defense with the photographs a week prior to the trial pursuant to notice that was filed on a pretrial date (the defense counsel speculated that the date of notice was December 2).

The defense counsel objected on the grounds that the photographs were prejudicial, irrelevant (specifically noting the lack of evidence that the photographs depict the instant scene on the date in question), the photographs consist of other crimes evidence for which there was no hearing. The State argued that the photographs showed the defendant and Stacy Ladner consuming methamphetamine in a similar hotel or motel room. The State concluded that the photographs show knowledge, intent, and identity. The State further noted that the photographs were found on a cell phone that was located in the bathroom of the motel room, Room 130, which is the subject of the instant offenses. The trial court found the photographs admissible since they were part of the crime scene.

At the outset, we note that the criminal nature of the photographs at issue is questionable. To the extent that the photographs depict the consumption of drugs, we find that they consisted of evidence of intent,

knowledge, identity, absence of mistake or accident. See La. Code Evid. art. 404B(1); see also **State v. Jackson**, 05-923, pp. 11-12 (La. App. 5 Cir. 3/28/06), 926 So.2d 72, 78-79. We further note that the defense counsel admitted that he had been given notice prior to the trial and did not contest below the reasonableness of the notice. To the extent that he raises this issue on appeal, he is precluded from doing so. **State v. Lanieu**, 98-1260, p. 7 (La. App. 1 Cir. 4/1/99), 734 So.2d 89, 94.

Even assuming, arguendo, that the other crimes evidence was erroneously admitted, we conclude that its admission was harmless beyond a reasonable doubt. See La. Code Crim. P. art. 921. The proper inquiry for a harmless error analysis is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial 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).

In the instant case, the defendant was arrested in the presence of apparent items necessary for the creation of a clandestine laboratory for the production of methamphetamine. Drug paraphernalia, a weighing scale, and an immense amount of pseudoephedrine were also present at the scene. Considering the evidence in support of the instant convictions, we find that the guilty verdicts rendered herein were surely unattributable to any error in the admission of the photographs in question.

COUNSELED ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth and final assignment of error, the defendant avers that the multiple offender adjudication was flawed. The defendant contends that the documentation linking him to the prior convictions was woefully inadequate and based on hearsay testimony. The defendant notes that no

fingerprint evidence was provided that linked him to the previous convictions. The defendant further notes that State Witness Kurt Hodge did not present any certified documents showing the reasons for and dates of his supervision of the defendant. The defendant avers that the State failed to meet the authenticity requirements of La. Code Evid. art. 902(1). The State sought and obtained enhancement of the conviction in count two, attempted possession with intent to distribute methamphetamine.

To obtain a multiple offender adjudication, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. In attempting to do so, the State may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. **State v. Payton**, 00-2899, p. 6 (La. 3/15/02), 810 So.2d 1127, 1130. In **State v. Shelton**, 621 So.2d 769, 779-780 (La. 1993), the Louisiana Supreme Court discussed the State's burden of proof in a habitual offender proceeding as follows:

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

> of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* rights. (Footnotes omitted).

See **Boykin v. Alabama**, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

In **State v. Westbrook**, 392 So.2d 1043 (La. 1980) (on rehearing), a case where defendant was convicted of a second offense of driving while intoxicated, the defendant complained of an insufficient connexity to prove he was actually the prior offender. In affirming his second offense DWI conviction, the Louisiana Supreme Court held "the driver's license number, sex, race, and birth date all identified the prior offender with defendant. The State [therefore] carried its burden of proving that this defendant is the Westbrook previously convicted[.]" **Westbrook**, 392 So.2d at 1045. See also **State v. Lee**, 97-1035, p. 4 (La. App. 5th Cir. 2/11/98), 709 So.2d 226, 228-29 (affirming the defendant's adjudication as a multiple offender even though the bill of information for a predicate conviction did not contain the defendant's fingerprints); **State v. Hawthorne**, 580 So.2d 1131, 1132-33 (La. App. 4th Cir. 1991) (affirming the defendant's second felony habitual offender adjudication because the defendant's fingerprints matched those on the arrest register in the defendant's name for a charge of aggravated rape, and conviction documentation showed same crime, same defendant, same date of crime, and same victim's name as that found on the arrest register).

Herein, the multiple offender bill of information alleges the following prior convictions: a December 17, 2002 conviction in case number 84320 of the 22nd Judicial District Court for attempted possession of a firearm by a convicted felon (a violation of La. R.S. 14:27 & La. R.S. 14:95.1); a December 17, 2002 conviction in case number 84450 of the 22nd Judicial District Court for possession of methamphetamine (a violation of La. R.S.

40:967);[5] an October 1, 1996 conviction in case number 89-CR1-44551 of the 22nd Judicial District Court for attempted possession of a firearm by a convicted felon (a violation of La. R.S. 14:27 & 14:95.1); [6] a November 10, 1989 conviction in case number 39592 of the 22nd Judicial District Court for possession of dihydrocodeine (a violation of La. R.S. 40:969); a November 10, 1989 conviction in case number 39592 of the 22nd Judicial District Court for possession of codeine (a violation of La. R.S. 40:969); two May 30, 1985 convictions in case number 39440 of the 22nd Judicial District Court for simple burglary (both counts) (violations of La. R.S. 14:62); a May 30, 1985 conviction in case number 39440 of the 22nd Judicial District Court for burglary of an inhabited dwelling (a violation of La. R.S. 14:62.2);[7] a May 30, 1985 conviction in case number 39440 of the 22nd Judicial District Court for burglary of a pharmacy (a violation of La. R.S. 14:62.1); a May 30, 1985 conviction in case number 39593 of the 22nd Judicial District Court for simple burglary (a violation of La. R.S. 14:62). During the first day of the multiple offender hearing, February 3, 2006, the State introduced evidence regarding case numbers 84320, 84455, 89-CR1-44551, 39592, 39440 and 39593.

As to case numbers 84320 and 84455, the bill of information, minute entry, and a transcript of the no contest and guilty pleas were introduced. Julie M. Knight, the assistant district attorney who was present and represented the State at the time of the pleas in those cases, testified at the

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[5] The case number for this particular conviction is actually 84455 in accordance with the corresponding bill of information, minute entry, and transcript in S-1.

[6] The bill of information, minute entry, and transcript for this case number actually reflect guilty pleas entered on two counts. According to those documents, on count one the defendant pled guilty to attempted possession of a firearm by a convicted felon and on count two the defendant pled guilty to possession of a firearm by a convicted felon.

[7] The record reflects that the defendant actually pled guilty to simple burglary on this count and the remaining charges were nol-prossed. (S-4).

hearing. Knight testified that she signed the bills of information for the offenses and had an independent recollection of the pleas. She confirmed that this defendant is the same person tried and convicted in those cases.

As to case numbers 89-CR1-44551, 39593, and 39440, the State introduced the bills of information, minute entries, and transcripts of the guilty pleas. As to case number 39592, the State introduced the bill of information and minute entries for jury trial convictions on two counts and sentencing on two counts of possession of a controlled dangerous substance.[8] According to the testimony of Kurt Hodge, an employee of the Louisiana Department of Probation and Parole, he supervised the defendant regarding the convictions in the above four case numbers. Hodge stated that he had fifteen to twenty personal contacts with the defendant and easily recognized him.

The multiple offender hearing resumed on April 10, 2006.[9] On this date the defendant (acting as co-counsel) personally cross-examined Hodge regarding his supervision of the defendant for the conviction in case number 89-CR1-44551. According to Hodge's testimony, the defendant was released from WCI on October 4, 1996.[10] The defendant's diminution certificate was signed by Lynn Pigott. Hodge consulted his records to confirm his personal visit to the defendant's home on October 7, 1996. On redirect examination, Hodge reiterated that he was very familiar with the defendant and had an independent recollection of supervising him as to all

[8] We note that the minute entry for the jury trial convictions reflects a finding of guilt as to counts one and three, while the minute entry for the sentencing hearing reflects sentence being imposed on counts one and two. The three counts in the bill of information consist of charges for possession of three different controlled dangerous substances. (S-3).

[9] The multiple offender hearing began on February 3, 2006.

[10] In accordance with Hodge's testimony, the defendant was released only four days after the October 1, 1996 conviction. According to the transcript for the conviction and sentencing, the defendant was sentenced to five years imprisonment at hard labor (to run concurrently with a seven and one-half year sentence on a conviction in a second count). (S-2). The defendant was given credit for time served.

four cases. The defense counsel also cross-examined Hodge. Hodge confirmed that his testimony regarding the 1996 conviction was based on his recollection and notes. Hodge did not complete any formal paperwork as to the brief (less than one month) period of supervision that he provided for this particular conviction. Regarding this particular conviction the State noted that the judge need not rely on it to find the defendant a multiple offender pursuant to La. R.S. 15:529.1A(1)(c)(ii). Upon defense inquiry, the State noted that it was not, however, formally withdrawing the 1996 conviction. The trial court ruled that the State presented sufficient evidence to show that the defendant is a multiple offender in accordance with La. R.S. 15:529.1A(c)(ii).

The evidence submitted by the State reflects prior guilty plea convictions that were counseled and intelligent, as the defendant was informed of his ***Boykin*** rights as to each conviction. The evidence further shows that the documentation for each of the defendant's prior convictions was linked by name, age, date of birth and/or address. Moreover, the transcript in case number 89-CR1-44551 specifically makes reference to a prior burglary conviction during the factual basis statement. The testimony of Knight, Hodge, and the defendant's trial testimony support the documentation submitted by the State. La. Code Evid. art. 902(1), the article cited in the defendant's appeal brief, relates to self-authenticating documents and is inapplicable to the issue presented herein. We find that the State proved the existence of the prior felony convictions and that the defendant is the same person convicted of those felonies.

La. R.S. 15:529.1A(1)(c)(ii), at the time of the offenses, provided:

> If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(13), a sex offense as defined in R.S. 15:540 et seq. when the victim is

> under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

The defendant was subject to a statutory maximum imprisonment term of fifteen years for the attempted possession with intent to distribute methamphetamine conviction (a violation of the Uniform Controlled Dangerous Substances Law) on count two (the enhanced conviction). La. R.S. 40:967 & La. R.S. 14:27. The May 30, 1985 simple burglary and burglary of an inhabited dwelling convictions under case numbers 39440 and 39593 support the adjudication under La. R.S. 15:529.1A(1)(c)(ii) as they are offenses punishable by twelve years. La. R.S. 14:62 & 14:62.2. See **State v. Dorsey**, 2004-1358, pp. 3-4 (La. App. 1 Cir. 3/24/05), 907 So.2d 154, 156-157.

The defendant argues that the State failed to show that the convictions did not result from the same incident and/or were underlying felonies, thus counting for only one conviction.

One of the offenses, however, in case number 39440 was committed on July 27, 1984, and consisted of the simple burglary of a structure known as J.K. Hardware owned by Joe Klimczak. In case number 39593, the offense was committed on July 16, 1984, and consisted of the simple burglary of a structure known as First Baptist Church. We conclude that the record sufficiently indicates that these burglary convictions were based on separate incidents. Based on the above conclusions, we find that the record adequately supports the habitual offender adjudication herein. The final assignment of error lacks merit.

DECREE

Accordingly, we affirm the convictions, habitual offender adjudication and sentences.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED