NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JGW

NUMBER 2005 KA 1953 R

STATE OF LOUISIANA

VERSUS

ISAAC GRIFFIN, JR.

Judgment Rendered: SEP 14 2007

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne, Louisiana
Trial Court Number 438,678

Honorable Robert J. Klees, Judge Pro Tempore

* * * * * * *

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In Proper Person
Defendant – Appellant

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BEFORE: WHIPPLE, McCLENDON, AND WELCH, JJ.

Whipple, J. concurs.
McClendon, J. concurs by view.

WELCH, J.

The defendant, Isaac Griffin, Jr., was charged by bill of information with unauthorized entry of an inhabited dwelling (count 1), a violation of La. R.S. 14:62.3, and possession of a firearm by a convicted felon (count 2), a violation of La. R.S. 14:95.1. He pled not guilty. Following a trial by jury on the charge of possession of a firearm by a convicted felon, the defendant was convicted as charged. [1] The defendant was sentenced to imprisonment at hard labor for ten years, without benefit of probation, parole or suspension of sentence. The defendant appealed. Finding that the trial court erred in denying the defendant's challenges for cause of two prospective jurors, we reversed the conviction, vacated the sentence, and remanded for a new trial. **State v. Griffin**, 2005-1953 (La. App. 1st Cir. 6/21/06), 933 So.2d 257 (unpublished)(Whipple, J. dissenting). The State sought supervisory review of that decision. Following its reversal of this court's decision in **State v. Lindsey**, 2006-255 (La. 1/17/07), 948 So.2d 105, a case cited in our original decision, the Supreme Court remanded this case for consideration in light of **Lindsey**. **State v. Griffin**, 2006-1779 (La. 2/16/07), 949 So.2d 411. For the following reasons, we vacate our previous ruling and affirm the defendant's conviction and sentence.

FACTS

On July 9, 2004, the Terrebonne Parish Sheriff's Office received a report from a young male indicating that an individual was holding a gun to his sister's head. Deputies Corey Brunet and Dudley Authement were dispatched to 505 Fanguy Street in Houma to investigate. At the residence, Deputy Melodie Gilbert made contact with Israel Domangue who advised that the defendant entered the residence, went into the bathroom, and held a gun to his sister, Angela Toups's, head. The defendant had already left the residence. Deputy Gilbert also spoke

[1] The record does not reflect the final disposition of the unauthorized entry of an inhabited dwelling charge.

with Ms. Toups. Ms. Toups stated that the defendant had shoved a gun under her neck. She then lifted her hair and showed Deputy Gilbert a red mark left on her neck by the gun.

Meanwhile, while en route to the residence in response to the report, several other deputies received updated information indicating that the individual with the gun had fled the scene in an unknown type of vehicle. After receiving this information, they observed two vehicles in the parking lot of a convenience store approximately five minutes from Fanguy Street. Three black males were observed loitering around the vehicles. The deputies approached the men, advised them of the complaint received, and asked if they knew "Isaac Griffin." One of the men identified himself as "Harold Griffin" and stated that Isaac Griffin was a relative of his. During the course of the investigation, Deputy Brunet learned that this individual was actually the defendant, Isaac Griffin, Jr. Inside one of the vehicles, in plain view, Deputy Brunet observed two firearms, a sawed-off shotgun and a snub-nosed revolver, on the floor. This particular vehicle was driven by Doniver McKay.[2] McKay had given the defendant a ride to the convenience store. The defendant and the other two men were then arrested in the parking lot.

COUNSELED ASSIGNMENT OF ERROR

In his sole counseled assignment of error, the defendant contends the trial court erred in denying the defense challenges for cause. Specifically, he references the denial of cause challenges urged against prospective jurors Kenneth Portier and Gerald Collins from the first panel and Patricia O'Conell[3] and Catherine Freeman from the second panel. He argues the voir dire responses of each of these prospective jurors evince an inability to remain impartial. The defendant argues

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[2] The record establishes that the vehicle was actually owned by Doniver McKay's parents.

[3] There are several different spellings of this prospective juror's last name in the record and briefs. For consistency, we have adopted the spelling found in the jury list contained in the trial court minutes.

Portier and Collins should have been excluded for cause because they both indicated that they had been the victims of crimes and indicated an inability to be impartial in a criminal trial. The State asserts the trial court successfully rehabilitated both Portier and Collins. The defendant contends the cause challenges against O'Conell and Freeman should have been granted because these prospective jurors repeatedly stated that they would give more weight to the testimony of police officers than other witnesses and were never rehabilitated. In response, the State asserts the trial court did not err in refusing to exclude O'Conell and Freeman for cause since "[t]he state's case did not rest solely on the officer's testimony."

Pursuant to La. C.Cr.P. art. 797(2), a prospective juror may be challenged for cause on the ground that:

> The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence[.]

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. La. Const. art. I, § 17(A). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. **State v. Martin**, 558 So.2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So.2d 318 (La. 1990). A refusal by the trial court to excuse a prospective juror on the ground that he is not impartial is not an abuse of discretion where, after further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. **State v. Copeland**, 530 So.2d 526, 534 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989). A trial court's ruling on a

motion to strike jurors for cause is afforded broad discretion because of the court's ability to get a first impression of prospective jurors during voir dire. See **State v. Kang**, 2002-2812, p. 6 (La. 10/21/03), 859 So.2d 649, 653-54.

A defendant must object at the time of the ruling on the refusal to sustain a challenge for cause of a prospective juror. La. C.Cr.P. art. 800(A). Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been reversible error warranting reversal of the conviction, defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. **State v. Robertson**, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1281-1280. It is undisputed that the defense counsel exhausted all of his peremptory challenges. Therefore, we need only determine the issue of whether the trial judge erred in denying the defendant's challenges for cause regarding certain prospective jurors.

Prospective jurors Portier and Collins

The defendant contends that prospective jurors Portier and Collins should have been excluded for cause because their voir dire responses revealed an inability to serve as fair and impartial jurors. The record reflects that, at the conclusion of the voir dire examination of the first panel of prospective jurors, counsel for the defendant challenged Portier and Collins because they both had been victims of crimes and appeared to have had "an ax to grind and they were looking for some justice." The trial court denied both cause challenges. The defendant used peremptory challenges to exclude both Portier and Collins.

During voir dire, when the prosecuting attorney asked if any of the venire members had been the victim of a crime, Portier and Collins, among others, responded affirmatively. Portier indicated he had been robbed two times. Collins, the owner of an automotive tire repair business, indicated that he had been robbed

and his business "broken in" numerous times. Both men stated that the perpetrators of the crimes against them were never caught. Both men likewise indicated that they wanted to see justice served in the instant case.

The fact that a juror personally has been the victim of a crime will not necessarily preclude that juror from serving on a jury as long as the juror's partiality has been unaffected. **State v. Walker**, 577 So.2d 770, 774 (La. App. 2nd Cir.), writ denied, 581 So.2d 704 (La. 1991). In reviewing the entirety of the voir dire responses of the prospective jurors in question, we note that, although Portier and Collins indicated that they were victims of crimes and wanted to see justice served, they did not, in any way, suggest that their past experiences would affect their ability to decide the case impartially according to the law and the evidence. In fact, the men indicated that they did not know the defendant and did not hold animosity towards him. Therefore, despite the defendant's contentions to the contrary, we find that the voir dire responses of Portier and Collins clearly indicate that they were willing to set aside past experiences, listen to the evidence, and follow the law. Therefore, we find no abuse of discretion in the trial court's ruling denying the challenges for cause of these prospective jurors. This portion of the assignment of error lacks merit.

Prospective jurors O'Conell and Freeman

Generally, an individual who will unquestionably credit the testimony of law enforcement officers over that of defense witnesses is not competent to serve as a juror. However, a mere relationship between a prospective juror and a law enforcement officer is not of itself grounds to strike the juror for cause. Additionally, a prospective juror's seemingly prejudicial response is not grounds for an automatic challenge for cause, and a trial judge's refusal to excuse him on the grounds of impartiality is not an abuse of discretion if, after further questioning, the potential juror demonstrates a willingness and ability to decide the

case impartially according to the law and evidence. But, a challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render a judgment according to law may be reasonably implied. **Kang**, 2002-2812 at pp. 4-5, 859 So.2d at 652-53. A trial judge has broad discretion in ruling on challenges for cause. Moreover, as previously noted, a refusal by a trial judge to excuse a prospective juror on the ground that he is not impartial is not an abuse of discretion where, after further inquiry and instruction, and viewing the entirety of the voir dire, he demonstrates a willingness and ability to decide the case impartially according to the law and the evidence. See **Copeland**, 530 So.2d at 534.

Having reconsidered this matter as directed by the Supreme Court, we vacate our previous ruling. In **Lindsey**, Bonny Lewin, a prospective juror, initially indicated that she would give police officers more credibility. Later, upon further inquiry, Lewin indicated (on three separate occasions) that she would "do her best to be fair and impartial." **Lindsey**, 2006-255 at p. 8, 948 So.2d at 111. Even in the absence of an express statement indicating that she could or would put her bias aside, the Supreme Court found Lewin's assurance that she would do her best to be a fair and impartial juror to be sufficient demonstration of her willingness and ability to decide the case impartially, according to the law and evidence.

In the instant case, a review of the voir dire questions and the jurors' general and specific responses, considered in their entirety, demonstrate the jurors' willingness to follow the law and to be fair and impartial, consistent with the Supreme Court's dictates in **Lindsey**. The record reflects that although several prospective jurors initially indicated that they were biased in favor of police officers, after receiving these responses, the defense counsel then engaged in a lengthy discourse with the jurors, and eventually solicited a "promise" that the

jurors (O'Conell and Freeman included) could put aside such preconceived notions and could nonetheless follow the law and require the State to prove its case. The defense counsel was also allowed, without objection, to specifically instruct the potential jurors during voir dire that the testimony of police officers was not to be considered infallible merely because of their status as police officers.

Considering the entire exchange between the attorneys, the court, and the jurors in this case, we find no error in the trial court's denial of the challenges for cause as to prospective jurors O'Conell and Freeman. This assignment of error lacks merit.

POST-CONVICTION RELIEF DELAYS

In the conclusion of the counseled brief, the defendant asserts that the trial court failed to advise him of the prescriptive period for the filing of post-conviction relief applications.

Section C of Article 930.8 of the Code of Criminal Procedure states that at the time of sentencing, the trial court shall inform the defendant of the prescriptive period for seeking post-conviction relief. The record in this case reflects that the defendant is correct in his observation that the trial court failed to advise him of the article 930.8 prescriptive period. However, as the issue has been raised herein, it is apparent that the defendant has notice of the limitation period and/or has an attorney who is in the position to provide him with such notice. Although we have done so in the past, we decline to remand for the trial court to provide such notice. Instead, out of an abundance of caution and in the interest of judicial economy, we note that La. C.Cr.P. art. 930.8(A) generally provides that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C.Cr.P. arts. 914 or 922. See **State v. Godbolt**, 2006-0609, pp. 7-8 (La. App. 1st Cir. 11/3/06), 950 So.2d

727, 732.

PRO SE ASSIGNMENT OF ERROR 1[4]

In his first pro se assignment of error, the defendant asserts his trial counsel was ineffective in failing to challenge the sufficiency of the State's evidence introduced to prove that the ten-year statutory period had not elapsed.

It is well settled that a claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, where the record discloses evidence needed to decide the issue of ineffective assistance of counsel and that issue was raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Williams**, 632 So.2d 351, 361 (La. App. 1st Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So.2d 139.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient; and (2) the deficiency prejudiced him. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068. See also **State v. Felder**, 2000-2887, pp. 10-11 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369-370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Further, it is unnecessary to address

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[4] The defendant's pro se brief consists of numerous unnumbered assignments of error. For the purposes of this opinion, the defendant's arguments were handled in the order in which they were urged and have been numbered accordingly.

the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 860 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Louisiana Revised Statutes 14:95.1, the statute that makes it unlawful for individuals convicted of certain felonies to possess firearms and/or carry concealed weapons, provides, in pertinent part:

> (C)(1) The provisions of this Section prohibiting the possession of firearms and carrying concealed weapons by persons who have been convicted of certain felonies shall not apply to any person who has not been convicted of any felony for a period of ten years from the date of completion of sentence, probation, parole, or suspension of sentence.

In the instant case, the defendant contends the State failed to produce any documentary evidence of the prior offense, date of conviction, where the prior conviction occurred, or that the offense occurred less than ten years since the sentence terminated. The defendant was convicted on November 19, 2003 of possession of Xanax. The defendant stipulated to the existence of this conviction. The defendant committed the crime charged in this case on July 9, 2004, less than one year after his drug conviction. In its jury instructions, the trial court specifically advised the jury that in order to convict the defendant of the offense charged, the State was required to prove "[t]hat a period of less than ten years had lapsed since the [d]efendant's completion of the sentence, probation, parole or suspension of sentence for Possession of Xanax."

For purposes of the statute, the requisite element that less than ten years has elapsed since the date of completion of sentence is not established by proving only the initial sentence imposed; that fact is not the sole criterion for enabling determination of the date when defendant's sentence was **completed**, as discharge from supervision can take place earlier than the theoretical date on which an initial

sentence would have terminated. See **State v. Miller**, 499 So.2d 281, 283 (La. App. 1st Cir. 1986). Although the State did not prove exactly when the defendant was released from prison, the State introduced the entire record of the defendant's prior drug conviction, including the sentencing. From the evidence introduced, it is clear that the ten-year statutory period did not elapse. The instant offense occurred only eight months after the prior conviction. Accordingly, in our view, sufficient evidence was presented to support the defendant's conviction for this offense. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR 2

In this pro se assignment of error, the defendant makes another claim of ineffective assistance of counsel. Specifically, the defendant asserts his trial counsel rendered ineffective assistance in failing to object to hearsay testimony offered by Deputy Gilbert.

Deputy Gilbert was the officer dispatched to the Fanguy Street residence in response to the 911 call. She testified concerning her investigation. The defendant alleges Deputy Gilbert was allowed, without objection from the defense counsel, to testify regarding a statement allegedly made to her by Israel Domangue. At the trial, Deputy Gilbert testified that, upon arriving at the residence, she made contact with Domangue. Domangue indicated that he dialed 911 "because supposedly [the defendant] had gotten into the house and went into a bathroom where his sister was and stuck a gun to his sister's head." The defendant asserts that this testimony, which he argues was offered for the truth of the matter asserted, was highly prejudicial hearsay and should not have been allowed since Domangue did not testify at the trial.

Hearsay evidence is evidence of an unsworn, out-of-court statement made by a person other than the testifying witness, which is introduced for the truth of its content. If such a statement is offered for any other purpose, however, then the

statement is not hearsay. **State v. Valentine**, 464 So.2d 1091, 1093 (La. App. 1st Cir.), writ denied, 468 So.2d 572 (La. 1985).

It is well settled that, under certain circumstances, the testimony of a police officer may encompass information provided by another individual without constituting hearsay if offered to explain the course of a police investigation and the steps leading to the defendant's arrest. **State v. Smith**, 400 So.2d 587, 591 (La. 1981); **State v. Young**, 99-1264, p. 9 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005. However, in **State v. Broadway**, 96-2659, p. 8 (La. 10/19/99), 753 So.2d 801, 809, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000), the Louisiana Supreme Court discussed the limitations on the admission of such testimony:

> Information about the course of a police investigation is not relevant to any essential elements of the charged crime, but such information may be useful to the prosecutor in "drawing the full picture" for the jury. However, the fact that an officer acted on information obtained during the investigation may not be used as an indirect method of bringing before the jury the substance of the out-of-court assertions of the defendant's guilt that would otherwise be barred by the hearsay rule. [Citations omitted].

The **Broadway** court, quoting the Supreme Court's earlier opinion of **State v. Hearold,** 603 So.2d 731, 737-38 (La. 1992), further stated:

> Absent some unique circumstances in which the explanation of purpose is probative evidence of a contested fact, such hearsay evidence should not be admitted under an "explanation" exception. The probative value of the mere fact that an out-of-court declaration was made is generally outweighed greatly by the likelihood that the jury will consider the statement for the truth of the matter asserted.

Broadway, 96-2659 at p. 9, 753 So.2d at 809.

A review of the trial transcript in this case reveals that Deputy Gilbert did, in fact, testify regarding the substance of information related to her during her investigation. Deputy Gilbert's testimony, however, was not offered for the truth of the matter asserted, *i.e.*, that the defendant assaulted Ms. Toups with the weapon. La. C.E. art. 801(C). Instead, Deputy Gilbert's testimony reflected why

she reported to the residence, how her investigation progressed, and why the defendant became a suspect. Furthermore, Deputy Gilbert's testimony, insofar as it established that the defendant possessed a firearm, was corroborated by the testimony of Doniver McKay, who testified that he transported the defendant to the Fanguy Street residence on the evening in question and he personally observed the defendant with a gun inside his vehicle. Therefore, even if the testimony was to be considered inadmissible hearsay, we find it to be harmless beyond a reasonable doubt because it was cumulative and corroborative of other testimony establishing the defendant's guilt. La. C.Cr.P. art. 921. The defendant has failed to make the required showing of sufficient prejudice and, as such, his claim of ineffective assistance of counsel on this issue must fall.

This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR 3

Next, the defendant contends the trial court erred in allowing the 911 tape to be played for the jury because the caller did not testify at the trial and thus, was not subjected to confrontation by cross-examination. The defendant also complains that the defense was not notified of the State's intent to offer the 911 recording until the "last minute."

In **Crawford v. Washington**, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant ... had a prior opportunity for cross-examination." **Crawford**, 541 U.S. at 53-54, 124 S.Ct. at 1365. The court specifically declined to define the term "testimonial," stating only that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." **Crawford,** 541 U.S. at 68, 124 S.Ct. at 1374. However, in **Davis v. Washington**,

___ U.S. ___, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the court revisited **Crawford** and specifically addressed the issue of whether "statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." **Davis**, ___ U.S. ___, 126 S.Ct. at 2270.

In **Davis**, the victim initiated a 911 call while involved in a domestic disturbance with her former boyfriend. In response to the 911 operator's questions, the victim identified her attacker as Davis and described the specifics of the ongoing assault. At trial, the court admitted the recording of the 911 call despite the fact that the victim did not testify. After noting that **Crawford** was not helpful in characterizing the victim's statements as testimonial or non-testimonial, the court delineated the following framework:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, ___ U.S. ___, 126 S.Ct. at 2273-74.

After applying this test to the facts in **Davis**, the court concluded that the victim's statements in the 911 call at issue were not testimonial. The court reasoned that "[a] 911 call, ... at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." **Davis**, ___ U.S. ___, 126 S.Ct. at 2276. The court noted that the victim was "speaking about events as they were actually happening, rather than 'describ[ing] past events'" and that, "[a]lthough one might call 911 to provide a narrative report of a crime absent any imminent danger, [the victim's] call was

plainly a call for help against bona fide physical threat." The court also found that the nature of the questions posed by the 911 operator indicated that the purpose of the interrogation was to "resolve the present emergency, rather than simply to learn ... what had happened in the past." Finally, the court noted that the fact that the victim's answers were frantic and "provided over the phone, in an environment that was not tranquil, or even ... safe" indicated that the statements were not testimonial. **Davis**, ___ U.S. ___, 126 S.Ct. at 2276-2277.

Considering the facts of this case, in light of the court's decision in **Davis**, we find that the statement on the 911 tape was non-testimonial and, therefore, the admission of the recording did not implicate the Confrontation Clause. When the recording is viewed objectively, it is clear that the primary purpose of Domangue's statement and of the questioning by the 911 operator was to address and resolve the ongoing emergency. At the time Domangue initiated the 911 call, his sister was being held at gunpoint in her home and he feared for her life. Furthermore, the questions posed by the operator were necessary to evaluate the situation and to dispatch the required assistance to the residence. See **United States v. Clemmons**, 461 F.3d 1057, 1060 (8th Cir. 2006) (finding that a police officer's questioning of a gunshot victim about who shot him at the scene, but after the shooting, was non-testimonial in that the primary purpose was to "enable [the officer] to assess the situation and to meet the needs of the victim").

Insofar as the defendant complains of the timeliness of the State's disclosure of the evidence, the record reflects that the defense counsel admitted at trial that the district attorney also received the tape at "the last minute." The State could not possibly have provided the defendant access to a tape it did not have in its possession. Furthermore, although he argued that the introduction of the 911 tape came as a surprise, counsel for the defendant did not move for a continuance and/or recess to prepare for the tape.

This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR 4

In this assignment of error, the defendant contends that the trial court erred when it allowed Deputy Gilbert to testify in the field of psychology, concerning her opinion relating to Domangue's emotional state, over his attorney's objection. The transcript reflects that when Deputy Gilbert was asked to describe Domangue's emotional state, the defense objected on the basis of hearsay because Domangue was present at the trial. The judge overruled the objection and Deputy Gilbert stated that "[h]e was excited. You know, you can tell that something had taken place. He was --" At that point, defense counsel objected, stating, "I don't think she's been sworn in as an expert, as a psychologist or anybody to testify to his emotional state. She's a sheriff's deputy." The trial court sustained the objection, and ordered the witness to describe Domangue's physical appearances. The witness then stated that Domangue was speaking quickly and was not standing still in one spot, like someone who was "excited."

Contrary to the defendant's claim, the court did sustain the objection to the State's attempt to elicit testimony regarding Domangue's emotional condition. Furthermore, Deputy Gilbert stated that Domangue was "excited," an emotional state easily observed by any lay person and for which expert testimony clearly is not required. Therefore, we find no merit to this assignment of error.

PRO SE ASSIGNMENT OF ERROR 5

Next, the defendant presents another ineffective assistance of counsel claim. This time, he questions his trial counsel's failure to object to the admission of the "inculpatory statement" he made at the time of his arrest. He contends this statement should not have been allowed into evidence because the State failed to prove that the officers advised him of his constitutional rights prior to the time the statement was made.

In connection with this assignment of error, the defendant cites a portion of Deputy Gilbert's testimony wherein she recalls the events that transpired at the police station following the defendant's arrest. Deputy Gilbert testified that, after preparing the necessary paperwork in connection with the defendant's arrest, she prepared to leave. At this time, the defendant accused Deputy Gilbert of violating his civil rights because she had not taken a statement from him. The defendant advised that he wished to make a statement. Deputy Gilbert agreed to allow the defendant to make a statement. According to Deputy Gilbert, the defendant proceeded to profess his innocence, stating that he did not break in, but had "knocked before entering the residence." The defendant also told Deputy Gilbert that she did not have any evidence on him since she had not dusted the gun for prints. Thereafter, upon realizing that the defendant wished to argue his case rather than provide a statement, Deputy Gilbert ended the meeting.

Initially, we note that the record reflects that at the time of his arrest, the defendant was advised of his **Miranda** rights by Deputy Corey Brunet. Also, the statement in question was not inculpatory. The defendant did not admit in his statement that he committed the offense with which he was charged. The defendant's statement was essentially exculpatory, with the defendant denying that he unlawfully entered the residence and/or handled the gun. The defense counsel's failure to object to this statement was neither deficient performance nor prejudicial. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR 6

In this assignment of error, the defendant contends reversible error occurred when the State elicited testimony from Deputy Gilbert, on direct examination, regarding the defendant's post-arrest silence. The defendant asserts his trial counsel was ineffective in failing to object to this evidence.

In **Doyle v. Ohio**, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the use, for impeachment purposes, of the defendant's silence at the time of arrest and after receiving the **Miranda** warnings, violates the Due Process Clause of the Fourteenth Amendment. See also **Portuondo v. Agard**, 529 U.S. 61, 74-75, 120 S.Ct. 1119, 1128, 146 L.Ed.2d 47 (2000). However, not every mention of the defendant's post-arrest silence is prohibited by **Doyle**. As specified by the Louisiana Supreme Court, in **State v. George**, 95-0110, p. 9 (La. 10/16/95), 661 So.2d 975, 980 (quoting **Doyle**, 426 U.S. at 619, 96 S.Ct. at 2245), "*Doyle* condemns only 'the use **for impeachment purposes** of [the defendant's] silence at the time of arrest, and after receiving *Miranda* warnings ...'" The prosecutor may not use the fact of an accused's exercise of his constitutional right to remain silent, after he has been advised of this right, solely to ascribe a guilty meaning to his silence or to undermine, by inference, an exculpatory version related by the accused, for the first time at trial. **State v. Arvie**, 505 So.2d 44, 46 (La. 1987). A brief reference to post-**Miranda** silence does not mandate a mistrial or reversal where the trial as a whole was fairly conducted, the proof of guilt is strong, and the State made no use of the silence for impeachment. See **State v. Smith**, 336 So.2d 867, 868-870 (La. 1976). See also **State v. Stelly**, 93-1090 (La. App. 1st Cir. 4/8/94), 635 So.2d 725, 729, writ denied, 94-1211 (La. 9/23/94), 642 So.2d 1309.

The alleged **Doyle** violation occurred when Deputy Gilbert testified that the defendant only wished to argue his case, and not to make a statement. The defendant contends this particular testimony constituted an impermissible reference to the invocation of his right to remain silent. This assignment of error lacks merit for several reasons. First, the record reflects that the defendant did not remain silent. Instead, after having been advised of his **Miranda** rights at the time of his arrest, the defendant opted to waive his rights and speak to Deputy Gilbert.

Furthermore, the defendant did not testify at the trial and thus, the statement in question, which is not clearly inculpatory, certainly was not used for impeachment purposes. **Doyle** does not apply. Therefore, it is clear why the defendant's counsel did not object on this ground. Counsel's performance on this issue was in no way deficient. This assignment of error lacks merit.

PRO SE ASSIGNMENTS OF ERROR 7 AND 8

By these assignments of error, the defendant challenges the sufficiency of the State's evidence to support the conviction. He contends the trial court should have granted his motion for post-verdict judgment of acquittal because the evidence presented by the State was inconsistent, incredible and "mere[ly] circumstantial." Specifically, the defendant asserts the testimony of the investigating officers was inconsistent. He further contends Doniver McKay's testimony was not credible because it was motivated by his desire to be released from jail. The defendant also argues the State failed to prove that he owned a gun or that he constructively or actually possessed a gun on the night in question.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency

standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885, pp. 3-4 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 159.

At the trial of this matter, Deputy Brunet testified that he was dispatched to the area in connection with the complaint in this case. At the convenience store, Deputy Brunet observed the defendant and the other men loitering outside. The defendant was observed attempting to enter the passenger side of McKay's vehicle. Two guns, a sawed-off shotgun and snubbed-nose revolver, were observed in plain view on the floor of McKay's vehicle.

Doniver McKay testified that on the day in question, the defendant asked him for a ride. McKay transported the defendant to the Fanguy Street residence in question. The defendant went inside the residence and returned approximately three or four minutes later. McKay further testified that the defendant had a handgun in his possession inside the vehicle. Of the guns found in the vehicle, McKay testified that the handgun was the one the defendant had in his possession.

The defendant presented testimonial evidence attempting to discredit McKay's testimony. Darlene Duncan testified that McKay, who had been in custody, was released from jail shortly after his testimony at the defendant's trial.

The defendant argues that the evidence presented at trial failed to establish that he ever owned or possessed a gun. We disagree. Although there was no evidence of who owned any of the guns found, ownership is not an element of the offense charged. The State was only required to show that the defendant, a convicted felon, possessed the weapon. McKay's testimony, if believed, was sufficient to place the defendant in possession of the handgun found in the vehicle. Having found the defendant guilty, the jury apparently found McKay's testimony credible. That testimony, which was corroborated by the victim's excited utterance

indicating that the defendant came to her residence and placed a gun to her neck, was sufficient to place the defendant in possession of the handgun.

Considering the foregoing, it is clear that the defendant's claim that the entirety of the State's case was "mere[ly] circumstantial" lacks merit. The defendant's claim that McKay's testimony was not credible also lacks merit. The jury was aware of the fact that McKay was in custody prior to the defendant's trial. Interestingly, the defendant fails to mention that McKay was in custody only based upon a contempt of court citation for failure to appear at a prior setting in this case. Therefore, once McKay's appearance at the trial was secured, there was no longer a need for his incarceration, and thus, he was released. McKay's release from prison had no relationship to his credibility.

On review, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. As the trier of fact, the jury was entitled to accept or reject, in whole or in part, the testimony of any witness. See **State v. Lofton**, 96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

After a careful review of the record, we find that the evidence supports the jury's verdict. Having viewed all of the evidence in a light most favorable to the prosecution, any rational fact finder could have concluded that the State proved the offense of illegal possession of a firearm by a convicted felon beyond a reasonable doubt. Thus, the trial court did not err in denying the defendant's motion for post-verdict judgment of acquittal.

These assignments of error are without merit.

PRO SE ASSIGNMENT OF ERROR 9

In this assignment of error, the defendant contends the trial court erred in allowing Deputy Gilbert to testify, over defense objection, regarding statements made to her by the victim. He asserts these hearsay statements were offered for

truth of the matter asserted as proof of his guilt.

Louisiana Code Evidence article 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible unless it falls within an exception. La. C.E. art. 802. Louisiana Code Evidence article 803(2) provides that a statement relating to a startling event or condition is not excluded by the hearsay rule if it was made while the declarant was under the stress of excitement caused by the event or condition. Because of the special reliability regarded as furnished by the declarant's excitement, a statement within the exception may be admitted whether or not the declarant is shown to be unavailable. **State v. Yochim**, 496 So.2d 596, 599 (La. App. 1st Cir. 1986). There is no violation of the Confrontation Clause when properly admitted excited utterances are introduced for the truth of the matter asserted. See **State v. Robinson**, 2000-2284 (La. 1/12/01), 776 So.2d 431, 432 (per curiam) (introduction of victim's properly admitted excited utterance does not violate the Confrontation Clause even when it constitutes the only direct evidence that the defendant committed the offense).

There are two basic requirements for the excited utterance exception. There must be an occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative. Additionally, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. **State v. Hilton**, 99-1239, p. 11 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1034, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. The fact that the statement is made in response to an inquiry does not automatically defeat it as an exception as long as the statement is a spontaneous reaction and not the result of reflective thought. **Yochim**, 496 So.2d at 599-600. Instead, spontaneity must be determined from the particular facts and

circumstances of each case. **Yochim**, 496 So.2d at 599. The trial court has wide discretion in determining whether the declarant was, at the time of the statement, still under the influence of the exciting event. **Yochim**, 496 So.2d at 600.

We have carefully reviewed the record herein and we find, contrary to the defendant's assertions, that the evidence reflects that the victim's statement qualified as an excited utterance exception to the hearsay rule. It is clear that the victim was still under the stress of the ongoing traumatic event when she made the statement. Deputy Gilbert testified that the victim was crying and was visibly emotionally upset when Deputy Gilbert arrived at the residence. When Deputy Gilbert approached her, the victim was crying and shaking. When the victim made the statement in question, the incident had just occurred and the victim had not yet regained her composure after having her life threatened at gunpoint. Thus, we find the victim's statement to have been a product of the ongoing traumatic event and not of any reflective thought.

Considering the foregoing, it is clear that the declaration in question clearly falls within the ambit of the excited utterance hearsay exception. The trial court did not err in admitting the statement. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR 10

By this assignment of error, the defendant asserts his final ineffective assistance of counsel claim. Specifically, he argues his trial counsel rendered deficient performance by failing to lodge a hearsay objection when the prosecutor told the jury, during closing arguments, "you've got the statement that the girl friend (sic), Angela Toups told Deputy Gilbert, that it was Isaac Griffin who broke into the house." He claims this statement constituted inadmissible hearsay and had already been ruled inadmissible by the trial court.

As previously discussed, this particular statement did not constitute hearsay. The statement falls within the excited utterance exception to the hearsay rule.

Therefore, the defendant's attorney's failure to object to the prosecutor's statement was in no way deficient. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR 11

The defendant asks that this court examine the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/2006), 952 So.2d 112, 123-125 (en banc) (petition for cert. filed at La. Supreme Court on 1/24/07, 2007-K-130).

CONCLUSION

For the foregoing reasons, the previous ruling is vacated and the conviction and sentence are affirmed.

PREVIOUS RULING VACATED; CONVICTION AND SENTENCE AFFIRMED.