NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0445

STATE OF LOUISIANA

VERSUS

ERRICK J. ARCENEAUX

On Appeal from the 20th Judicial District Court
Parish of East Feliciana, Louisiana
Docket No. 08-CR-424, Division "B"
Honorable William G. Carmichael, Judge Presiding

Samuel C. D'Aquilla District Attorney Clinton, LA and Stewart B. Hughes Special Assistant District Attorney Clinton, LA	Attorneys for State of Louisiana
Frank Sloan Louisiana Appellate Project Mandeville, LA	Attorney for Defendant-Appellant Errick J. Arceneaux
Errick J. Arceneaux Jackson, LA	Defendant-Appellant In Proper Person

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered December 21, 2011

PARRO, J.

The defendant, Errick J. Arceneaux, was charged by bill of information with obscenity, a violation of LSA-R.S. 14:106. The defendant entered a plea of not guilty. The defendant waived his right to a trial by jury and was found guilty as charged after a bench trial. The trial court denied the defendant's pro se motions for a new trial, arrest of judgment, and "direct verdict for having insufficient evidence." The trial court sentenced the defendant to two years of imprisonment at hard labor. The defendant now appeals, assigning error in a counseled brief to the sufficiency of the evidence and the waiver of counsel. The defendant also filed a pro se brief wherein he assigns error to the sufficiency of the evidence, the lack of a finding of probable cause, vindictive prosecution, conflict of interest, constitutional violations, the failure of the state to present an opening argument, and the trial court's denial of his request for an appeal bond.[1] For the following reasons, we affirm the conviction and the sentence.

STATEMENT OF FACTS

On May 7, 2008, Lieutenant Jason Harris, a supervisor at Dixon Correctional Institute, was working at Cellblock B when he observed the defendant lying on his bed in his jail cell with his genitals exposed. According to Lieutenant Harris, the defendant's penis was erect and he was stroking it with his right hand. Lieutenant Harris noted that, at that time, the defendant was looking at a female nurse, Cynthia Hall, who was standing in the cell doorway to administer medication to the defendant's cellmate, Major Taylor. Lieutenant Harris ordered the defendant to discontinue and properly fasten his clothing, and filed a report of the incident.

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

In assignment of error number one of the counseled brief and assignments of error numbers one and eight in the pro se brief, the defendant challenges the sufficiency of the evidence. As admitted in the counseled brief, the state successfully

[1] The arguments and issues presented in the defendant's pro se brief are not easily discernable, are ambiguous, and do not include record references. Nonetheless, in the interest of justice, the pro se assignments of error will be addressed herein to the extent such arguments may be determined and/or considered argued. We note that any assignments of error not argued may be considered as abandoned. See Uniform Rules—Courts of Appeal, Rule 2–12.4; see also LSA-C.Cr.P. art. 841.

proved that the defendant exposed his penis in his prison cell. However, the counseled brief presents the argument that the defendant did not have the intent to arouse the sexual desire of the prison guard or nurse, that his actions did not appeal to prurient interests, and that his actions were not patently offensive as he was merely attending to his "private needs" (quoting from **State v. Holmes**, 03-177 (La. App. 3rd Cir. 2/18/04), 866 So.2d 406, 408). In his pro se brief, the defendant argues that the trial court erred in denying his motion for new trial based on his challenge of the sufficiency of the evidence. The defendant further argues that the state failed to prove the "intentional" and "public view" elements of the offense. The defendant also contends that Lieutenant Harris's trial testimony was inconsistent with his report of the incident in that his report did not indicate that someone else saw the defendant masturbating, although he testified at trial that Ms. Hall saw the act. The defendant contends that Lieutenant Harris's testimony was not credible. In the eighth assignment of error of the pro se brief, the defendant confusingly inquires as to whether a finding of guilt is properly supported by a violation of the elements of the statute.

In reviewing a claim challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308–09 (La. 1988). The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony; thus, a reviewing court may impinge on the fact finder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law. **State v. Johnson**, 03-1228 (La. 4/14/04), 870 So.2d 995, 998; **State v. Sylvia**, 01-1406 (La. 4/9/03), 845 So.2d 358, 361. In the absence of internal contradiction or irreconcilable conflict with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Higgins**, 03-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

Louisiana Revised Statute 14:106 provides, in pertinent part:

> A. The crime of obscenity is the intentional:
>
> (1) Exposure of the genitals ... in any public place or place open to the public view, or in any prison or jail, with the intent of arousing sexual desire or which appeals to prurient interest or is patently offensive.

Thus, in this case, the elements of the crime required the state to prove: (a) the defendant intentionally exposed his genitals in any prison or jail, and (b) such exposure: (1) was done with the intent of arousing sexual desire, or (2) appeals to prurient interest, or (3) is patently offensive. See **State v. Gradick**, 29,231 (La. App. 2nd Cir. 1/22/97) 687 So.2d 1071, 1073.

Lieutenant Harris testified that, at the time of the incident in question, the defendant was wearing prison garb, consisting of a jumpsuit. Lieutenant Harris and Ms. Hall were standing in the cell doorway as the defendant was lying on his bed with his jumpsuit unsnapped and his penis exposed. Lieutenant Harris estimated the distance between the defendant's bed and the cell doorway was about six feet, noting that the cell is small and that the defendant was in unobstructed, open view. Lieutenant Harris specifically described and labeled the defendant's actions as masturbation. During cross-examination, Lieutenant Harris denied telling the defendant to expose himself.

In **State v. Holmes**, the defendant was charged with two counts of obscenity. In that case, the first alleged act of obscenity occurred on August 14, 2001, when a female prison guard accused the defendant of "stroking his erect penis with his hand in a masturbating manner" while in the prison shower. **Holmes**, 866 So.2d at 406. The second act occurred on April 22, 2002, when the defendant allegedly exposed his penis to another female guard and masturbated. The defendant challenged his conviction for the August 14, 2001 offense, noting that the inclusion of "any prison or jail" in LSA-R.S. 14:106(A)(1), as a place where obscenity can be charged, occurred after the date on which that offense occurred.[2] As referenced in the defendant's counseled brief in this case, the **Holmes** court noted that a "prison shower" has been regarded as one of the

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[2] LSA-R.S. 14:106(A)(1) was amended, as referenced above, by 2001 La. Acts, No. 177, §1, which took effect on August 15, 2001.

few places a prisoner is permitted to attend to his "private needs," except for minimal security monitoring by authorized prison personnel. However, the **Holmes** court also specifically noted as follows, "While we today pass no judgment on the wisdom of the legislative amendment to La. R.S. 14:106(A)(1), we find the conduct for which this Defendant was charged did not amount to obscenity under the previous law." **Holmes**, 866 So.2d at 408. Thus, the holding in **Holmes** has no application to a case, as the instant one, involving an offense that occurred after the effective date of the pertinent amendment to LSA-R.S. 14:106(A)(1).

As amended, LSA-R.S. 14:106(A)(1) defines obscenity, in pertinent part, as the exposure of the genitals in any prison or jail with the intent of arousing sexual desire. The defendant does not deny exposing his genitals in prison. Moreover, the defendant's argument on appeal that he did not have the intent to arouse the sexual desire of the prison guard or nurse misconstrues the elements of the offense as stated in LSA-R.S. 14:106(A)(1). Evidence that a defendant's genitals were exposed and that he was masturbating indicates that his actions were intended to arouse *himself* and is sufficient to support an obscenity conviction. **State v. Poche**, 05-1042 (La. App. 3rd Cir. 3/1/06), 924 So.2d 1225, 1230; **State v. Arabie**, 507 So.2d 859, 861 (La. App. 5th Cir. 1987) (the court specifically noted that it is not necessary that the defendant intended to arouse the sexual desire of others, only that he intended to arouse his own sexual desire); **State v. Lewis**, 00-0053 (La. App. 4th Cir. 12/13/00), 776 So.2d 613, 620, writ denied, 01-0381 (La. 10/5/01), 798 So.2d 966. When viewed in a light most favorable to the prosecution, the evidence supports the trier of fact's finding that the state sufficiently proved all the elements of obscenity in this case beyond a reasonable doubt. Counseled assignment of error number one and pro se assignments of error numbers one and eight are without merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

The second counseled assignment of error challenges the defendant's waiver of counsel. Specifically, this assignment is based on the trial court's alleged failure to advise the defendant of the disadvantages of self-representation. As contended in the counseled brief, the defendant plainly misunderstood the law and intended to pursue a

frivolous legal defense, he had only a ninth or tenth grade education, and he was not warned of the practical consequences of his lack of familiarity with the law and rules of procedure and evidence.

A defendant's right to the assistance of counsel is guaranteed by both our state and federal constitutions. See U.S. Const. amends. VI & XIV; LSA-Const. art. I, §13; **State v. Brooks**, 452 So.2d 149, 155 (La. 1984) (on rehearing). The federal constitution further grants an accused the right of self-representation. **Faretta v. California**, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975); **State v. Penson**, 630 So.2d 274, 277 (La. App. 1st Cir. 1993). An accused has the right to choose between the right to counsel and the right to self-representation. **State v. Bridgewater**, 00-1529 (La. 1/15/02), 823 So.2d 877, 894, cert. denied, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003). A defendant who exercises the right of self-representation must knowingly and intelligently waive the right to counsel. **Penson**, 630 So.2d at 277. When a defendant requests the right to represent himself, his technical legal knowledge is not relevant in determining if he is knowingly exercising the right to defend himself. A trial judge confronted with an accused's unequivocal request to represent himself need determine only if the accused is competent to waive counsel and is "voluntarily exercising his informed free will." **Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541.

Although no minimum requirements have been established for judging the sufficiency of a waiver of counsel, there must be a sufficient inquiry to establish on the record a knowing and intelligent waiver under the overall circumstances. See **State v. Strain**, 585 So.2d 540, 542 (La. 1991). The record must show that a defendant waived his right "with eyes open" and with an awareness of the danger of self-representation. **Strain**, 585 So.2d at 542. This court previously has suggested that a trial court conduct a detailed inquiry into the dangers and disadvantages of self-representation and the defendant's intellectual capacity to determine if a defendant's waiver is voluntary and intelligent. **State v. Dupre**, 500 So.2d 873, 879-80 n.4 (La. App. 1st Cir. 1986), writ denied, 505 So.2d 55 (La. 1987). The determination of whether there has been an intelligent waiver of the right to counsel depends upon the

facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. **State v. Harper**, 381 So.2d 468, 471 (La. 1980). Although a defendant should be made aware of the dangers and disadvantages of self-representation, there is no particular formula that must be followed by the trial court in determining whether a defendant has validly waived his right to counsel. **State v. Carpenter**, 390 So.2d 1296, 1298 (La. 1980).

The burden of establishing that the defendant knowingly and intelligently waived his constitutional right to the assistance of counsel is on the state. **Brooks**, 452 So.2d at 155. The propriety of granting a defendant the right to represent himself should not be judged by what happens in the subsequent course of the representation; it is the record made in recognizing that right that is determinative. **Dupre**, 500 So.2d at 879.

In this case, the record reflects that on July 15, 2008, the trial court advised the defendant of the nature of the charge, the nature of the proceedings, and the right to counsel. The minutes further indicate that before the defendant was formerly arraigned, the trial court found the defendant understood the nature of the proceedings, had knowingly and intelligently waived the right to counsel, and was ready for arraignment. The trial court later appointed counsel to represent the defendant, and he was re-arraigned with appointed counsel on January 13, 2009. On July 14, 2009, at a hearing on the defendant's pro se motion to quash, the defendant again expressed his desire to represent himself, and the trial court relieved the appointed counsel.

On October 13, 2009, at another pretrial motion hearing, the trial court asked the defendant a series of questions regarding his decision to represent himself. In addition to having the defendant state his name, age (31 years of age), and educational background (ninth or tenth-grade education), the trial court again informed the defendant of his right to an appointed attorney. The trial court had the defendant restate his desire to represent himself. The trial court asked the defendant for the basis of his decision, and the defendant initially began arguing that he was never formally arrested and that his constitutional rights were violated, seemingly issues that he felt should have been argued on his behalf. The trial court requested a relevant

response. The defendant then responded as follows, "Because the lawyer didn't represent me proper the first time." The defendant added that he had two lawyers and both failed to properly represent him. The trial court questioned the defendant further regarding his displeasure with previous representation. The trial court then asked the defendant if he ever studied the law, and the defendant indicated that he had been studying law since 2002. He specifically began studying civil law in 2002 and criminal law in 2005. When asked if he had ever seen a criminal trial, the defendant stated he had a basic idea and added that it was just like civil law.

The trial court reiterated the defendant's charges and asked the defendant to define obscenity. In response, the defendant stated, "It's exposure of your genitals in a public place, place open to the public view" and with prompting by the trial court, added, or "in a prison in a patently . . . offensive manner." The trial court stated the statutory penalty for the offense and asked the defendant if he understood that provision, and he responded affirmatively. Upon warning, the defendant confirmed that he understood the trial court would not tell him how to conduct the defense or proceed with the case and that he would not have the advice or assistance of a lawyer during the trial. The defendant further confirmed his familiarity with the Code of Criminal Procedure, and when asked about his familiarity with the Louisiana Code of Evidence, the defendant stated, "Well, I can get familiar with it. I understand it."

The following colloquy then took place:

THE COURT:

Mr. Arceneaux, I must advise you that, in my opinion, you would be much better served if you were represented by a lawyer. It is unwise of you to think that you can represent yourself. You're not familiar with the law. You're not familiar with the rules of procedure. You're not familiar with the rules of evidence. I strongly urge you to consider allowing me to appoint a lawyer for you. Will you do that? Will you allow me to appoint a lawyer for you?

MR. ARCENEAUX:

Well, Your Honor, I have a speedy trial motion –

THE COURT:

My question, my question is, will you allow me to appoint a lawyer for you?

MR. ARCENEAUX:

I'd rather not, no, sir.

THE COURT:

Okay. Considering everything that I've just said, you still want to represent yourself?

MR. ARCENEAUX:

Yes, sir.

THE COURT:

And you are making this decision voluntarily? Are you voluntarily doing this?

MR. ARCENEAUX:

Yes, sir, I (sic) voluntary.

The trial court then found the defendant competent to waive counsel, adding that his decision was knowingly and voluntarily made. The trial court thereafter allowed the defendant to address the court on his pro se motion to quash.

We find that the record in this case reveals intensive questioning and sufficient warnings and advice by the trial court before accepting the defendant's waiver of trial counsel. Despite sufficient inquiry and warning, the defendant maintained his unequivocal desire to forgo assistance. The trial court did not err in concluding that the defendant knowingly and intelligently waived his right to trial counsel. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In the second pro se assignment of error, the defendant contends that the trial court erred in proceeding to trial and judgment despite the lack of a finding of probable cause upon preliminary examination. In this regard, the defendant notes that, at the preliminary examination hearing, the trial court found that the state had not shown probable cause. The defendant contends that the charge should have been dismissed. The defendant further contends that his sentence is unlawful on this basis.

As noted by the defendant, at a preliminary examination hearing on May 12, 2009, the trial court found a lack of probable cause to hold the defendant for the obscenity charge as the state submitted without witnesses. Though the preliminary

examination resulted in the trial court finding no probable cause to hold the defendant on the charge, the trial court's finding is not an acquittal for purposes of double jeopardy. As explained in **State v. Sterling**, 376 So.2d 103, 104 (La. 1979), the finding of no probable cause after a preliminary examination merely releases the defendant from custody or bail for that charge but does not determine the validity of the charge or preclude the filing of an indictment or bill of information against him for the same offense. Additionally, conviction renders moot any claim of an improper denial of a preliminary examination. **State v. Washington**, 363 So.2d 509, 510 (La. 1978).

Because the trial court's finding at the preliminary examination had no implications for a double jeopardy analysis, the defendant was not wrongly convicted and sentenced for the obscenity charge. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In the third pro se assignment of error, the defendant contends that the trial court erred in allowing a vindictive prosecution. The defendant contends that the decision to prosecute in this case was arbitrarily, capriciously, and maliciously made. The defendant argues that the events in this case will create a presumption of vindictiveness in the mind of a reasonable person. The defendant further argues that the vindictiveness can be explained by a desire to deter or punish his "exercise of [his] legal rights." Further the defendant contends that he has shown actual proof of vindictiveness.

As provided by LSA-C.Cr.P. art. 61, generally, "the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." Prosecuting agencies have broad powers in deciding whether to institute a prosecution in a given case. However, this discretion must not be used arbitrarily, capriciously, or maliciously, but rather must be used to further the ends of justice. **State ex rel. Guste v. K-Mart Corp.**, 462 So.2d 616, 620 (La. 1985). Additionally, a defendant has the burden of proving, by a preponderance of the evidence, the affirmative defense of prosecutorial vindictiveness. **State v. Lewis**, 461 So.2d 1250, 1253 (La. App. 1st Cir. 1984). In that regard, the

court will examine the state's actions in the context of the entire proceedings. The events in the case will create a presumption of vindictiveness if, to a reasonable mind, the filing of a prosecution can be explained only by a desire to deter or punish the exercise of legal rights. But where the government's conduct is equally attributable to legitimate reasons, a defendant must prove actual vindictiveness. **State v. Orange**, 02-0711 (La. App. 1st Cir. 4/11/03), 845 So.2d 570, 578-79, writs denied, 03-1352 (La. 5/21/04), 874 So.2d 161, and 03-2195 (La. 7/2/04), 877 So.2d 137.

The record establishes that the obscenity charge was legitimate; therefore, to a reasonable mind, a desire to deter or punish the defendant's exercise of his legal rights was not the explanation for the obscenity charge. Accordingly, there is no presumption of vindictiveness in the instant case, and the defendant must "affirmatively prove actual vindictiveness." **Orange**, 845 So.2d at 579. The defendant does not adequately expound on his claim of vindictiveness, and a review of the record does not reveal any prosecutorial vindictiveness. In light of the validity of the obscenity charge, we find insufficient evidence to establish that the prosecutor acted with vindictiveness in prosecuting the defendant and that the defendant failed to meet his burden of proof. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth pro se assignment of error, the defendant contends that the trial court and prosecution proceeded under a conflict of interest. In this regard the defendant contends, "everyone in the courtroom was working against the defendant in prejudice and [i]n [c]onflict of [i]nterest." The defendant further adds that the parties were working for the "arresting agency" and for the state. The defendant filed a pro se pretrial motion to recuse the trial judge, wherein he raised issues challenging the evidence, the lack of a probable cause determination, and generally argued that the trial judge is biased, prejudiced, or personally interested in the prosecution of the defendant in this matter.

Louisiana Code of Criminal Procedure article 671, in pertinent part, provides that, in a criminal case, a judge of any court, trial or appellate, shall be recused when he is biased, prejudiced, or personally interested in the cause to such an extent that he

would be unable to conduct a fair and impartial trial, or he would be unable, for any other reason, to conduct a fair and impartial trial. A trial judge is presumed to be impartial, and the burden is on the party seeking to recuse a judge to prove otherwise. See **State v. Edwards**, 420 So.2d 663, 673 (La. 1982). The grounds for recusal based on bias or prejudice must amount to more than conclusory allegations.

In accordance with LSA-C.Cr.P. art. 681, the district attorney may recuse himself, whether a motion for his recusation has been filed or not, in any case in which a ground for recusation exists. A motion to recuse the district attorney shall be in writing and shall set forth the grounds therefor. The motion shall be filed in accordance with Article 521 and shall be tried in a contradictory hearing. If a ground for recusation is established, the judge shall recuse the district attorney. LSA-C.Cr.P. art. 681. In a motion to recuse the district attorney, the defendant bears the burden of showing by a preponderance of the evidence that the district attorney has a personal interest in the cause that is in conflict with the fair and impartial administration of justice. See LSA-C.Cr.P. art. 680(1); **State v. Vaccaro**, 411 So.2d 415, 425 (La. 1982); **State v. Marcal**, 388 So.2d 656, 659 (La. 1980), cert. denied, 451 U.S. 977, 101 S.Ct. 2300, 68 L.Ed.2d 834 (1981).

The defendant failed to file a motion to recuse the assistant district attorney in the case at hand. Moreover, the defendant has failed to raise any basis for an ethical duty on the part of the assistant district attorney to recuse himself from this case. Regarding the defendant's pretrial motion to recuse the trial judge, at the hearing on the motion on April 6, 2010, the defendant's argument was consistent with the language in his pro se motion to recuse. The court noted that the defendant made a statement of several legal issues but did not present any evidence of personal interest, bias, or prejudice exhibited by the trial judge. This court agrees with the finding of the lower court. The defendant has made no showing that the trial judge was in any way prejudiced in the state's favor. No bias was shown on the part of the trial judge, and the motion for recusal was properly denied. Based on the foregoing, this assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER FIVE

In the fifth pro se assignment of error, the defendant contends that his substantial **Brady** due process rights were violated. In this regard, the defendant argues that he had no knowledge of what evidence would be presented by the state, that he was misinformed of the witnesses on the bill of particulars, and that he was stripped of his due process rights to have full notice of the accusation against him.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. **Brady v. Maryland**, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). Favorable evidence includes both exculpatory evidence and evidence impeaching the testimony of a witness when the reliability or credibility of that witness may be determinative of the defendant's guilt or innocence, or when it may have a direct bearing on the sentencing determination of the jury. **United States v. Bagley**, 473 U.S. 667, 675-76, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985); **Giglio v. United States**, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Regardless of the request, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. **Kyles v. Whitley**, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (citing **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence, he received a fair trial, which is understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. **Kyles**, 514 U.S. at 434, 115 S.Ct. at 1566; **Bagley**, 473 U.S. at 678, 105 S.Ct. at 3381.

The record reflects that the state attached the disciplinary report documentation in response to the defendant's request for a bill of particulars and according to the minutes, the defendant's discovery and inspection and **Brady** motions were deemed

satisfied. The documentation detailed Lieutenant Harris's complaint. At the trial, the defendant did not object or move for a continuance on the basis of a discovery violation. Moreover, the state only called one witness, Lieutenant Harris, and the defendant clearly had notice of his testimony. The defendant failed to raise any substantial claim of suppression of evidence by the state, nor has the defendant shown any substantial prejudice, such that he was deprived of any reasonable expectation of a fair trial. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER SIX

In pro se assignment of error number six, the defendant lists several issues, some of which were raised and addressed in other assignments of error. Specifically, the defendant's claims of vindictive prosecution, failure of the state to present probable cause at a preliminary examination and any double jeopardy argument in conjunction therewith, the conduct of the preliminary hearing, the sufficiency of the evidence, and the defendant's request for an appeal bond, have or will be addressed as raised in other assignments of error. One of the arguments raised in pro se assignment of error number six that was not raised or addressed under another assignment of error is the defendant's contention that he was denied compulsory process. The defendant specifically contends that the trial court denied his right to produce his own witness for trial. The defendant notes that his first subpoena was denied and further contends that he was not required to issue a second or third subpoena for that witness. Additionally, the defendant generally states in pro se assignment of error number six that he has another double jeopardy claim. In this regard, the argument presented in the pro se brief noted that, at the preliminary examination hearing, the state introduced an institutional disciplinary report reflecting the administrative actions taken as a result of the instant offense. The defendant claims that the administrative actions constituted the "first trial" and enhanced his sentence. The defendant argues that to find him guilty at a "second trial" is extremely prejudicial and constitutes double jeopardy. The defendant also states in assignment of error number six that preliminary procedures were disregarded in this case, indicating that he was not promptly booked and read his **Miranda** rights within seventy-two hours of his arrest.

Compulsory Process

The right of a defendant to compulsory process is the right to demand subpoenas for witnesses and the right to have those subpoenas served. This right is embodied in both the federal and state constitutions and in this state's statutory law. U.S. Const. amend. VI; LSA-Const. art. I, §16; LSA-C.Cr.P. art. 731; **State v. Latin,** 412 So.2d 1357, 1361 (La. 1982). However, this right does not exist in a vacuum, and a defendant's inability to obtain service of requested subpoenas will not be grounds for reversal of his conviction or new trial in each and every case. For a defendant to show prejudicial error, he must demonstrate that the testimony the witness might give would be favorable to the defense and would indicate the possibility of a different result if the witness were to testify. **State v. Jefferson**, 04-1960 (La. App. 4th Cir. 12/21/05), 922 So.2d 577, 601, writ denied, 06-0940 (La. 10/27/06), 939 So.2d 1276.

The record reflects that on December 15, 2008, the defendant filed a pro se motion entitled, "Compulsory Process In Writ of Habes (sic) Corpus" requesting the subpoena of Major Taylor (the defendant's cellmate at the time of the offense) for trial. The motion was denied. The trial took place on May 25, 2010. At the end of his opening statement, the defendant argued that the state would present fabricated evidence and noted that he asked for a witness to be present but was denied compulsory process. The trial court interrupted and inquired as follows, "What are you, what are you saying? You asked for a witness to be present to testify and that didn't happen?" The defendant showed the trial court the pro se motion. The trial court then stated, "But there has been no motion to have your cellmate present here today." The defendant noted that his previous motion in that regard was denied. The trial court reiterated that there was no motion or request by the defendant to have any witness appear on that day.

We note that the defendant did not move for a continuance of the trial or object to the lack of a subpoena of Taylor or otherwise raise the issue before the trial began. Further, the defendant did not proffer the testimony the witness would have given if present at trial, for our review. Absent a proffer of the evidence, we are unable to say that the testimony might have been favorable to the defense such that it would indicate

the possibility of a different result. Therefore, the defendant failed to show prejudicial error. Thus, we find no merit in this argument.

Double Jeopardy

In arguing that he was subjected to double jeopardy and his sentence was "enhanced" as a result of administrative actions, it appears that the defendant's claim is based on a forfeiture of good time. The Fifth Amendment to the United States Constitution and Louisiana Constitution article I, § 15 provide that no person shall twice be placed in jeopardy for the same offense. These clauses protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. **State v. Duncan**, 98-1730 (La. App. 1st Cir. 6/25/99), 738 So.2d 706, 709. The third of these protections is at issue in this case.

The Louisiana Supreme Court ruled in **State v. Johnson**, 94-1077 (La. 1/16/96), 667 So.2d 510, 513, that with respect to the definition of punishment "for purposes of double jeopardy," the Louisiana Constitution provided no greater individual rights than the Fifth Amendment to the United States Constitution and applied federal precepts when deciding the matter. Moreover, to constitute double jeopardy, the prior proceeding relied upon must have been in a court. **State v. Green**, 301 So.2d 590, 591 (La. 1974); **State v. Coney**, 258 La. 369, 379, 246 So.2d 793, 796 (1971). Generally, action taken by a disciplinary board against a prison inmate provides no basis for a plea of double jeopardy. See **Coney**, 258 La. at 379, 246 So.2d at 796; **Duncan**, 738 So.2d at 709. Federal jurisprudence and opinions of the Louisiana Supreme Court have indicated that a government may impose both a criminal and a civil sanction with respect to the same act or omission without violating double jeopardy guarantees. **Butler v. Department of Public Safety and Corrections**, 609 So.2d 790, 795 (La. 1992). In both **Green** and **Coney**, the Louisiana Supreme Court ruled that prior action by the Louisiana State Penitentiary Disciplinary Board, which ordered that the respective defendants be placed in isolation and deprived of good time for simple escape, did not provide a basis for double jeopardy.

The remaining inquiry presented is whether the "clearest proof" has been presented to indicate that administrative disciplinary proceedings cannot legitimately be viewed as civil in nature and are, in fact, criminal. **Duncan**, 738 So.2d at 710. In **Duncan**, this court noted that although the forfeiture of good time credit undoubtedly has a punitive effect, important non-punitive goals were also served. Specifically, the forfeiture of good time provides a remedial measure for the Department of Public Safety and Corrections (DPSC) to maintain discipline in prisons.

We find that the defendant has failed to show the "clearest proof" that any sanction imposed by DPSC in this case was criminal in nature. Based on our review of the jurisprudence as well as the circumstances presented herein, we find that the defendant has not provided a basis for double jeopardy. Thus, we find no merit in this argument.

Alleged violation of LSA-C.Cr.P. art. 230.1

We note that the defendant's claim that the seventy-two hour rule was violated in this case was not raised below. At any rate, we reject the defendant's argument. Generally, LSA-C.Cr.P. art. 230.1(A) requires that the period between arrest and counsel appointment not exceed 72 hours. However, the failure of the sheriff or law enforcement officer to comply with the requirements therein "shall have no effect whatsoever upon the validity of the proceedings thereafter against the defendant." LSA-C.Cr.P. art. 230.1(D); see **State v. Manning**, 03-1982 (La. 10/19/04), 885 So.2d 1044, 1075, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). Accordingly, the issue of compliance with Article 230.1 is moot where the defendant has been convicted and sentenced. See **State v. Durio**, 371 So.2d 1158, 1163 (La. 1979). Moreover, there is no indication of any prejudice. We therefore reject this argument. Considering this and the foregoing conclusions, we find no merit in the sixth pro se assignment of error.

PRO SE ASSIGNMENT OF ERROR NUMBER SEVEN

In the seventh pro se assignment of error, the defendant contends that the state should have been required to present an opening statement at trial. Contending that the error was not discovered until after the trial, the defendant contends that the state

had the option to make an opening statement first or wait until after the defendant "presented his case." The defendant also notes that the state failed to make a closing argument at the end of the trial.

At the outset, we note that clearly the error alleged in this assignment is not newly discovered evidence that would constitute grounds for a new trial pursuant to LSA-C.Cr.P. art. 851(3). Further, we note that the record does not reflect an option for the state to delay opening statement. The trial court simply asked the prosecutor if he wished to make an opening statement, and the prosecutor declined. The defendant did not object but stated his desire to make an opening statement and proceeded to do so. Further, the defendant did not object when the prosecutor declined to make a closing argument. The defendant's failure to make a contemporaneous objection precludes him from raising the issue on appeal. See LSA-C.Cr.P. art. 841; **State v. Mitchell**, 362 So.2d 501, 502 (La. 1978). Furthermore, since this was a bench trial, an opening or closing statement was not mandatory. See **Mitchell**, 362 So.2d at 502. Finally, the defendant's arguments on appeal fall short of a convincing demonstration of unfair surprise or prejudice. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER NINE

In the final pro se assignment of error, the defendant contends that the trial court erred in denying his appeal bond request although he was sentenced to only two years imprisonment. The defendant argues that the trial court violated LSA-C.Cr.P. art. 332 and cites **State v. Calloway**, 07-0012 (La. App. 1st Cir. 11/7/07), 978 So.2d 374 (reversed as hereafter noted).

The issue of whether or not the trial court has improperly refused bail is neither properly nor timely raised on appeal. The correct procedure is to invoke the supervisory jurisdiction of the appellate court through LSA-C.Cr.P. art. 343. **State v. Simmons**, 414 So.2d 705, 711 (La. 1982). In **State v. Gamberella**, 633 So.2d 595 (La. App. 1st Cir. 1993), writ denied, 94-0200 (La. 6/24/94), 640 So.2d 1341, the defendant was an AIDS patient who appealed the trial court's denial of his request for post-conviction bail pending his appeal. In affirming his conviction and sentence, this court stated, "[a]s is evident from this case, once a conviction has been either affirmed

or reversed on appeal, the issue of post-conviction bail pending appeal is moot." **Gamberella**, 633 So.2d at 608. Since the defendant asserted this issue in an appeal, we find that our decision in this appeal renders the defendant's claim moot.[3] Accordingly, this assignment has no merit.

CONVICTION AND SENTENCE AFFIRMED.

[3] Unlike the instant case, in **Calloway** (the case noted above as being cited by the defendant in his pro se brief) this court reversed the defendant's conviction, and therefore noted the violation of LSA-C.Cr.P. art. 332. The conviction was subsequently reinstated by the Louisiana Supreme Court in **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417.