NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1455

STATE OF LOUISIANA

VERSUS

ALBERT WOOLENS, JR.

Judgment rendered February 9, 2007.

* * * * * *

Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 438,860
Honorable David Arceneaux, Judge

* * * * * *

HON. JOSEPH L. WAITZ, JR.
DISTRICT ATTORNEY
JASON LYONS
ELLEN DAIGLE DOSKEY
ASSISTANT DISTRICT ATTORNEYS
HOUMA, LA

ATTORNEYS FOR
STATE OF LOUISIANA

MARGARET S. SOLLARS
THIBODAUX, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
ALBERT WOOLENS, JR.

* * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Hughes, J. concurs

PETTIGREW, J.

The defendant, Albert Woolens, Jr., was charged by bill of information with one count of simple burglary of an inhabited dwelling, a violation of La. R.S. 14:62.2, and pled not guilty. Following a jury trial, he was found guilty as charged. He moved for a new trial and a post-verdict judgment of acquittal, but the motions were denied. He was sentenced to twelve years at hard labor, the first year without the benefit of probation, parole, or suspension of sentence. Thereafter, the State filed a habitual offender bill of information against him, alleging he was a fourth or subsequent felony habitual offender. Following a hearing, he was adjudged a fourth felony habitual offender, the previously imposed sentence was vacated, and he was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, designating two counseled and three pro se assignments of error. For the reasons that follow, we affirm the conviction, the habitual offender adjudication, and the sentence.

ASSIGNMENTS OF ERROR

Counseled

1. The trial judge erred in allowing the case to proceed to trial after a sanity commission should have been invoked to determine the competency of the defendant.

2. The defendant received an unconstitutionally excessive sentence.

Pro se

1. The trial court erred in adjudicating the defendant a multiple offender based on three predicate offenses that derived from one criminal episode.

2. The prosecution failed to prove that the defendant was represented by counsel during either of the prior pleas.

3. The defendant received ineffective assistance of counsel.

FACTS

On August 1, 2004, between approximately 3:30 a.m. and 3:45 a.m., the eighty-two-year-old victim, Ludia Arcement, went to the bathroom of her mobile home in Terrebonne Parish. After returning to her bed, she heard a crashing noise like glass crumbling and felt the mobile home shake. The only light that was on in the mobile home was the light in the bathroom. In that light, the victim saw the figure of a man crouching in the hall. The victim tiptoed out of the mobile home and ran to her niece's home for help. The victim was so shaken by the incident that the police summoned Acadian Ambulance to examine her.

At approximately 3:40 a.m., Terrebonne Parish Sheriff's Office Sergeant Melodie Gilbert was notified of the incident and went to the victim's home. While Sergeant Gilbert was waiting for other police officers to get into position, she saw the defendant jump out the back of the victim's home. She ordered the defendant to stop and get on the ground, but he initially began running away. Thereafter, the defendant complied with Sergeant Gilbert's order.

A pair of stockings was located next to the defendant. Terrebonne Parish Sheriff's Office Deputy Corey Guidry indicated he advised the defendant of his rights and asked him where he had obtained the stockings. The defendant stated he had taken the stockings from the mobile home after he had broken into the home. Deputy Guidry asked the defendant why he had broken into the home. The defendant stated he thought the home was unoccupied.

Prior to the incident, the victim's ironing board had been against the victim's unbroken guest bedroom window. When the victim returned to her home after the incident, however, the ironing board was on the guest bed, covered in mud, and the guest bedroom window was broken. She indicated she never left the doors of her mobile home unlocked and made certain the doors were locked before she went to bed. After the incident, the stockings that the victim had left on top of an old television against her back door were missing. A drawer had also been pulled out from the dresser in the guest bedroom.

The defendant testified at trial. He denied burglarizing the victim's home. He conceded he had convictions for armed robbery, possession of cocaine, four counts of distribution of cocaine, conspiracy to distribute cocaine, two counts of simple battery, resisting arrest, and battery of a police officer. He claimed a guilty plea to simple burglary listed in his criminal record should have been listed as a guilty plea to possession of stolen things. He also claimed he pled guilty to simple escape after he escaped from a mental institution.

The defendant conceded he had been in the victim's home, but claimed he was making a sandwich. He denied breaking into the mobile home. He claimed he entered the mobile home through the unlocked front door after two men, on bicycles, that he saw in the neighborhood at the time, told him they lived in the mobile home and he could go inside and prepare something to eat. He claimed he accidentally took the stockings from the mobile home because they were hanging on the back door as he exited the home. He claimed he exited through the back door because he panicked after seeing the police dog truck. He denied making any statement concerning the offense to the police.

SANITY COMMISSION

In counseled assignment of error number one, the defendant argues sufficient evidence was introduced to bring into question his competency, and thus, reversible error occurred when the competency issue was not adjudicated before the matter proceeded to trial.

Louisiana's statutory scheme for detecting mental incapacity guards a defendant's right to a fair trial. In Louisiana, "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." La. Code Crim. P. art. 641. Our law also imposes a legal presumption that a defendant is sane and competent to proceed. La. R.S. 15:432. Accordingly, the defendant has the burden of proving by a preponderance of the evidence his incapacity to stand trial. A reviewing court owes the trial court's determinations as to the defendant's competency great weight, and the trial court's ruling thereon will not be disturbed on appeal absent a clear abuse of discretion. Specifically,

the appointment of a sanity commission is not a perfunctory matter, a ministerial duty of the trial court, or a matter of right. It is not guaranteed to every defendant in every case, but is one of those matters committed to the sound discretion of the court. The Louisiana Code of Criminal Procedure provides that a court shall order a mental examination of a defendant and accordingly appoint a sanity commission when it "has reasonable ground to doubt the defendant's mental capacity to proceed." La. Code Crim. P. art. 643. Reasonable ground in this context refers to information that, objectively considered, should reasonably raise a doubt about the defendant's competency and alert the court to the possibility that the defendant can neither understand the proceedings, appreciate the proceedings' significance, nor rationally aid his attorney in his defense. In the exercise of its discretion, the court may consider both lay and expert testimony before deciding whether reasonable grounds exist for doubting the defendant's capacity to proceed and ruling on the defendant's motion to appoint a sanity commission. **State v. Carmouche**, 2001-0405, pp. 30-31 (La. 5/14/02), 872 So.2d 1020, 1041-1042 (non-statutory citations omitted).

On September 17, 2004, the defendant was arraigned and pled not guilty. On December 8, 2004, the matter was called for trial. The defendant told the court he was not ready for trial and asked that the trial be rescheduled for another day. The following colloquy then occurred between the defense and the court:

> [Defense]: ... I have discussed the case with [the defendant] at Ashland. I have reviewed the police reports. The only possible defense in my opinion that he could possibly have would be the existence of two young guys whose name he does not know, and whose address he cannot furnish me with. I've advised him what the plea bargain offer was. I advised him of the consequences if he went to trial and was found guilty which, personally, for the record, I think there is a very good possibility that he will be found guilty; but he claims he either doesn't want me to represent him, because he feels that I'm not prepared, or he's just not prepared to go to trial. That's basically where it stands.
>
> [Court]: Well, are you prepared to go to trial?
>
> [Defense]: There [is] nothing else I can do. I mean I've read the police reports; I've done the discovery; I've talked to [the defendant] about the case, both at Ashland and again this morning; I've showed him what's in the police reports. I personally don't know of anything else I could do other than go to a mind reader or a gypsy and find out the names and addresses

> of these two mysterious people who [the defendant] claims gave him permission to go into the trailer.

The court reminded the defendant that he had been arrested on August 1, 2004, and that it was now December 8, 2004. The court added that defense counsel had done what he needed to do and that it was time to begin trial. The defendant stated he was not ready for trial. The court advised the defendant that it understood the defendant's position, but everyone else was ready for trial, including the defendant's attorney. The defendant stated he did not want to have the trial that day. The court told the defendant that trial would begin in two and one-half hours and that he should prepare. The defendant told the court he would not take the stand. The defendant told the court he did not have clean clothes. The court told the defendant that he would be provided with clean clothes.

Defense counsel moved to continue the case on the basis that he had not received his full fee. The court denied the motion.

Thereafter, defense counsel informed the court that the defendant "said he'd take the time if you give him parish time." The court told the defendant that the offense carried a mandatory hard labor sentence, and thus, the court could not legally sentence him to parish jail time. The defendant addressed the court:

> Excuse me. I want to make a statement. Number one, I did not burglarize anyone's home. I had two guys out there that actually we was (sic) talking. And I said – and we – I normally see them in the area all the time, around in that area. Because I lived in that area. So we was going on Johnson Ridge to get some weed. We was going to smoke some weed. Because I was drinking. I been drinking and I got drug abuse problems all my life. Medical – mental health problems all my life. Burglary is not me. I don't steal. I don't burglarize. I was raised right up there on Naquin Street. I don't have burglaries no where on my jacket. I do not burglarize.

The court advised the defendant that the purpose of a jury trial was for the jury to decide whether his account of the events was true. The defendant stated he wanted to see a psychiatrist, have a medical evaluation, and have all of his records present in court for the court to examine.

Defense counsel advised the court that the defendant had asked him to request a sanity commission. Counsel stated that he knew "personally" that the defendant had a history of alcohol and substance abuse.

The court noted defense counsel had been representing the defendant for some time and asked counsel if the reason he had not requested a sanity commission sooner was because he really did not have any reason to believe the defendant had a problem. Defense counsel answered negatively and stated he was not qualified to answer whether the defendant knew right from wrong, but a psychiatrist could answer that question after interviewing and looking at medical records.

Thereafter, defense counsel indicated the defendant had informed him there were proceedings, which counsel had just been made aware of, whereby the State had appointed the defendant's sister as his legal guardian to handle his affairs. The court instructed defense counsel to present whatever evidence he had concerning the defendant's mental incapacity to proceed. Defense counsel attempted to present testimony from the defendant, but the defendant refused to take the stand. When asked why he would not take the stand, the defendant stated: "Under no circumstances, because I don't feel right. I don't feel mentally capable. I have a third grade education. I don't have no understanding, I'm trying to plead with the Court and talk with these people. I don't know those people."

The court asked defense counsel what evidence he had that would create reasonable grounds for the court to doubt the defendant's mental capacity to proceed. Counsel cited his personal knowledge of the defendant's long history of alcohol and substance abuse, the defendant's claim that his sister had been appointed his guardian through some type of court procedure, the defendant's claim that he received a "crazy check," the defendant's claim that he had been to "the crazy house" several times, and the defendant's claim that he was constantly going back and forth to counseling with "shrinks."

The court asked the defendant why he received a check from the federal government. The defendant claimed he had a nervous breakdown on his job and had gone to "East State Hospital."

In response to questioning from the court, the defendant indicated defense counsel was an attorney, and his job was to help the defendant. The defendant indicated the gentleman in the blue suit "said he get paid or something for giving me life." He indicated the court was there to help him.

The trial court found no reasonable grounds to doubt the defendant's mental capacity to proceed, noting:

> Quite frankly, I've listened to [the defendant] here today, and it's obvious to me that he is trying to manipulate this system. He is trying to con the Court. He is a charlatan. He is – I have no reasonable grounds to believe that he lacks mental capacity to proceed. He understands very well why he is here. He understands very well what he is facing. And it's because of that that he now pretends to have mental incapacity to proceed. I have no reason to believe that he does, and I find at this very moment that he has mental capacity to proceed. And that's what we will do, we will proceed with his trial.

There was no clear abuse of discretion in the trial court's ruling concerning the defendant's competency. The defendant failed to prove his incapacity to stand trial.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In counseled assignment of error number two, the defendant argues the sentence imposed upon him was constitutionally excessive.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as

excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

In order for a trial court to depart from a mandatory minimum sentence, the defendant must clearly and convincingly show that, "[he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case." **State v. Johnson**, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676.

Whoever commits the crime of simple burglary of an inhabited dwelling shall be imprisoned at hard labor for not less than one year, without the benefit of parole, probation, or suspension of sentence, nor more than twelve years. La. R.S. 14:62.2.

Louisiana Revised Statutes 15:529.1, in pertinent part, provides:

> A. (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
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> . . . .
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> (c) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:
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> . . . .
>
> (ii) If the fourth felony and two of the prior felonies are felonies defined 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 adjudicated a fourth felony habitual offender and sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

In imposing the original sentence in this matter, the court noted the evidence at trial revealed that the defendant entered the home of an elderly woman between 3:00 a.m. and 4:00 a.m. and was captured as he jumped out of the back door, after the

woman slipped out of her home and notified family, friends, and the police. The court noted the defendant claimed some other individuals he had seen in the neighborhood told him he could go into the home, and he was only in the home to make a ham sandwich. The court also noted, however, that the defendant never turned on the lights in the home and was in the victim's bedroom.

At the habitual offender sentencing, the court noted it had considered the evidence adduced by the State, including the records in the criminal proceedings resulting in the defendant's convictions relied upon in the habitual offender hearing, as well as other documents detailing the defendant's history of convictions and incarceration. The court was convinced beyond a reasonable doubt that the defendant had been convicted of the four predicate felonies referenced in the habitual offender bill of information.

In the instant case, the defendant failed to clearly and convincingly show that because of unusual circumstances he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Accordingly, there was no reason for the trial court to deviate from the provisions of La. R.S. 15:529.1(A)(1)(c)(ii) in sentencing the defendant. Further, the sentence imposed was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive.

This assignment of error is without merit.

PRO SE ASSIGNMENTS OF ERROR

In pro se assignment of error number one, the defendant argues the three counts of distribution of cocaine used as predicate offenses at the habitual offender hearing should have counted as one predicate offense because they arose from the same criminal episode. In pro se assignment of error number two, the defendant argues the State failed to establish that he was represented by counsel at the time he entered the guilty pleas offered as predicate offenses. In pro se assignment of error number three, the defendant argues he received ineffective assistance of counsel because his attorney failed to investigate and familiarize himself with relevant case law pertaining to habitual offender proceedings.

Under **State ex rel. Mims v. Butler**, 601 So.2d 649 (La. 1992) (on rehearing), prior convictions had to precede the commission of subsequent felonies for sentencing enhancement purposes. Under **State ex rel. Porter v. Butler**, 573 So.2d 1106, 1109 (La. 1991), multiple convictions obtained the same day for offenses arising out of one criminal episode had to be considered as one conviction for purposes of applying the habitual offender law in sentencing.

In **State v. Johnson**, 2003-2993, p. 18 (La. 10/19/04), 884 So.2d 568, 579, the court held **Mims** was incorrectly decided on the basis of an incomplete legislative record and expressly overruled that decision. Thereafter, effective August 15, 2005, La. R.S. 15:529.1(B) was amended to provide, in pertinent part, "[m]ultiple convictions obtained on the same day prior to October 19, 2004, shall be counted as one conviction for the purpose of this Section." See 2005 La. Acts No. 218, § 1.

The record reflects the defendant was adjudged a fourth felony habitual offender, in connection with the instant offense, on the basis of: his January 24, 1995 guilty plea, under Terrebonne Parish docket #250,677, to distribution of cocaine (Predicate No. 1), a violation of La. R.S. 40:967; his January 24, 1995 guilty plea, under Terrebonne Parish docket #250,678, to distribution of cocaine (Predicate No. 2), a violation of La. R.S. 40:967; his January 24, 1995 guilty plea, under Terrebonne Parish docket #250,679, to distribution of cocaine (Predicate No. 3), a violation of La. R.S. 40:967; and his November 20, 1987 guilty plea, under Terrebonne Parish docket #171,264 to two counts of illegal possession of stolen things having a value between $100 and $500 (Predicate No. 4), a violation of La. R.S. 14:69.[1] The State introduced the entire records for Predicate Nos. 1-4 into evidence. Those documents indicate the defendant committed Predicate No. 1 on February 14, 1994, committed Predicate No. 2 on February 23, 1994, and committed Predicate No. 3 on February 16, 1994.

[1] The habitual offender bill of information also set forth that the defendant pled guilty on December 12, 1987, under Orleans Parish Criminal Court docket #293,675, to armed robbery (Predicate No. 5), a violation of La. R.S. 14:64. The State withdrew Predicate No. 5, however, stating it was unable to obtain documents from Orleans Parish in connection with the predicate.

In his brief, the defendant concedes that the record indicates that the cocaine distribution offenses occurred on different dates, but claims that counsel for the State alleged that all of the predicate distribution offenses were committed on February 14, 1994. The record, however, indicates counsel for the State referenced the offense date of February 14, 1994, only in regard to Predicate No. 1.

The instant offense was committed on August 1, 2004, prior to the effective date of 2005 La. Acts No. 218, § 1. Additionally, the applicable habitual offender provisions are those in effect on the date the defendant committed the underlying offense. **State v. Parker**, 2003-0924, p. 17 (La. 4/14/04), 871 So.2d 317, 327. Accordingly, the habitual offender law in effect on August 1, 2004, as interpreted by **Johnson** rather than **Mims**, controlled this case. Under the applicable law, there was no bar to the State using Predicate Nos. 1-3 to enhance the instant offense.

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 the 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 the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, 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 the defendant's prior guilty plea was

informed and voluntary, and made with an articulated waiver of the three **Boykin** rights.[2] **State v. Shelton**, 621 So.2d 769, 779-780 (La. 1993); **State v. Bickham**, 98-1839, p. 4 (La. App. 1 Cir. 6/25/99), 739 So.2d 887, 889-890.

Contrary to the defendant's argument, the documents introduced into evidence by the State established that the defendant was represented by counsel in connection with Predicate Nos. 1-4.

With regard to the defendant's claim of ineffective assistance of counsel, we note that such a claim is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components.

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[2] In **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court reversed five robbery convictions founded upon guilty pleas because the court accepting the pleas had not ascertained that the defendant voluntarily and intelligently waived his right against compulsory self-incrimination, right to trial by jury, and right to confront his accusers. **Boykin** only requires a defendant be informed of these three rights. "Its scope has not been expanded to include advising the defendant of any other rights which he may have, nor of the possible consequences of his actions." **State v. Smith**, 97-2849, p. 3 (La. App. 1 Cir. 11/6/98), 722 So.2d 1048.

State v. Serigny, 610 So.2d 857, 859-860 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

In the instant case, the defendant claims he was prejudiced by defense counsel's failure to object under **Shelton**, and counsel's alleged unawareness of the rule of **Johnson**. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. **State v. Lockhart**, 629 So.2d 1195, 1208 (La. App. 1 Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. An evidentiary hearing would be required to determine whether trial defense counsel's allegedly deficient performance was strategic.[3] See **State v. Allen**, 94-1941, p. 8 (La. App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, that must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1 Cir. 1993).

The defendant's pro se assignments of error are either without merit or otherwise not subject to appellate review.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

[3] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.