NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1147

STATE OF LOUISIANA

VERSUS

BRUCE ALVIN ROBERTSON

Judgment Rendered: December 21, 2011

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 04-06-0211

The Honorable Richard "Chip" Moore, Judge Presiding

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Hillar C. Moore, III **District Attorney** **Allison Miller Rutzen** **Assistant District Attorney** **Baton Rouge, Louisiana**	**Counsel for Appellee** **State of Louisiana**
Frederick Kroenke **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellant** **Bruce Alvin Robertson**
Bruce Alvin Robertson **Kinder, Louisiana**	**Defendant/Appellant** ***Pro Se***

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs with reasons.

GAIDRY, J.

The defendant, Bruce Alvin Robertson, was charged by bill of information with attempted simple burglary, a violation of La. R.S. 14:62 and 14:27. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant was sentenced to six years imprisonment at hard labor. The defendant filed a motion to reconsider sentence. The trial court granted the motion and resentenced the defendant to five years imprisonment at hard labor. The State filed a habitual offender bill of information and, following a hearing on the matter, the defendant was adjudicated a fourth-felony habitual offender. The trial court vacated the previously imposed five-year sentence and resentenced the defendant to twenty-five years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating the following three assignments of error:

> 1. The trial court erred in imposing an unconstitutionally excessive sentence.
>
> 2. The failure of defense counsel to file a motion to reconsider sentence constitutes ineffective assistance of counsel.
>
> 3. Trial court rendered ineffective assistance of counsel for his failure to object to the State's impermissible comments made during closing argument.

We affirm the conviction and habitual offender adjudication. We vacate the habitual offender sentence and remand for resentencing.

FACTS

In the early hours of January 23, 2006, the defendant and Eddie Thomas attempted to gain entry into the Capital City Wholesale warehouse on North Foster Drive in Baton Rouge. The defendant and Thomas brought a splitting maul with them and climbed a ladder on the side of the warehouse to the second-floor roof. There they used the splitting maul to break about a

three-foot by three-foot hole in the cinder-block wall of the business. They were unable to gain access into the warehouse, however, because there was a metal wall beyond the cinder-block wall. Their activity set off a security alarm and, while they were still on the roof, police officers from the Baton Rouge Police Department arrived and set up a perimeter around the building. The defendant and Thomas ran in different directions from the building but were quickly apprehended by the police. They both told the police that they were in the area to buy drugs. The defendant did not testify at trial. Thomas testified at trial that he had pled guilty to attempted simple burglary. He further testified that he and the defendant agreed to burglarize the warehouse to "get some cash out." He stated that they both used the "sledgehammer"[1] in trying to gain entry into the warehouse.

COUNSELED ASSIGNMENTS OF ERROR NOS. 1 AND 2

In these related assignments of error, the defendant argues, respectively, that the sentence imposed is unconstitutionally excessive, and that defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel.

The trial court imposed the defendant's twenty-five-year sentence without the benefit of parole when neither the penalty provision of the substantive statute nor the habitual offender law authorized such a restriction on the defendant's parole eligibility.[2] The defendant points out this error in a footnote in his brief. The penalty for simple burglary is imprisonment with or without hard labor for not more than twelve years. La. R.S. 14:62(B). Further, whoever is convicted of an attempt shall be imprisoned in the same

[1] Although the tool was referenced by various names during the trial, its proper name, as indicated later in the opinion, is a "splitting maul."

[2] The minutes and criminal commitment form both indicate that the defendant's twenty-five-year sentence is without parole.

manner as for the offense attempted, such imprisonment not to exceed one-half of the longest term of imprisonment prescribed for the offense attempted. See La. R.S. 14:27(D)(3). While La. R.S. 15:529.1(G) prohibits probation or suspension of sentence, the applicable provision of the habitual offender law in this instance does not prohibit parole eligibility. See La. R.S. 15:529.1(A)(1)(c)(i) (prior to the 2010 amendments).

Thus, the inclusion of the parole restriction rendered this sentence illegal. The sentencing error herein involves discretion. Specifically, pursuant to La. R.S. 15:529.1(A)(1)(c)(i), the sentencing range is twenty years to life imprisonment without probation or suspension of sentence. Moreover, as the Supreme Court has previously admonished, "[t]o the extent that the amendment of defendant's sentence entails more than a ministerial correction of a sentencing error, the decision in *State v. Williams*, 00-1725 (La. 11/28/01), 800 So.2d 790, does not sanction the *sua sponte* correction made by the court of appeal on defendant's appeal of his conviction and sentence." *State v. Haynes*, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). See *State v. Morgan*, 2006-0506 (La. App. 1st Cir. 9/15/06), 943 So.2d 500, 501-02.

Accordingly, we vacate the sentence and remand for resentencing. We pretermit consideration of the excessive sentence argument and the related ineffective assistance of counsel argument raised by the defendant in his two assignments of error.

PRO SE ASSIGNMENT OF ERROR

In his sole pro se assignment of error, the defendant argues that defense counsel's failure to object to impermissible comments made by the prosecutor during closing arguments constituted ineffective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all of the circumstances. *State v. Morgan*, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

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 sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. *State v. Carter*, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438. The evidence before us is sufficient; therefore we will address the defendant's claim.

The defendant asserts that several statements made by the prosecutor in his closing argument went outside the scope of permissible argument

because "witnesses did not testify to certain facts as the [p]rosecutor said they did." In closing, the prosecutor stated in pertinent part:

> You heard testimony from Officer Martrain that he discovered that defendant sneak [sic] along the side of that house get on the front porch. You heard him claim that the house was his and he lived there. . . . Officer Martrain that the house [sic], in fact, was not his. Officer Martrain testified that when he caught up with the defendant he noticed that his pants had white dust on them. . . . [Officers Clark and Barcelona climbed] the ladder where they discovered an axe and a giant three-foot hole in the side of that cinderblock [sic] building. . . . They also testified that all around that scene where they were chasing the defendants down on the ground they didn't see any white dust.

The defendant correctly points out that Officer Martrain did not testify at trial that he saw the defendant sneaking alongside a house. Officer Martrain, in fact, testified that he noticed a black male (the defendant) standing on a porch. The defendant also notes that Officer Martrain did not testify at trial that the defendant told him the house was his. Officer Martrain, in fact, testified that the defendant told him that he lived at the house. According to the defendant, "[l]iving at the residence and owning the residence are two separate issues." The defendant further notes that Officer Martrain never gave chase to the defendant. However, the prosecutor did not state that the officer chased the defendant. He stated simply that he "caught up with" the defendant. The defendant also points out that, while the prosecutor stated that Officers Clark and Barcelona found an axe, neither of the officers in their trial testimony characterized the sledgehammer found on the roof as an axe. This characterization as an axe, according to the defendant, was "one affixed to the item by the attorneys, not the witnesses." Officer Clark, in fact testified at trial, "The axe handle, it wasn't a very smooth surface, and we were unable – the equipment that we had, we were unable to get – dust that surface for fingerprints." Moreover, our review of the photographs in evidence of the instrument used reveals a splitting maul,

rather than a sledgehammer, with a sledgehammer-like head on one side and an axe-like head on the other side. The defendant further contends that, while the prosecutor stated the officers testified that all around that scene where they were chasing the defendant they did not see any white dust, only Officer Clark testified the white powder was in a particular location. "Officer Barcelona could not recall whether he observed the white powder anywhere else." The relevant portion of Officer Barcelona's testimony on direct examination is as follows:

> [State] Did you observe any other white powder, or dust, or anything when you were searching for the defendant laying on the ground or –
>
> [Barcelona] I think on the ladder. But I didn't look on the ground exactly. It was mostly on the roof up there.
>
> [State] What about when you were searching for the defendant, around the sideway and around the fence, did you see any white dust or any white powder?
>
> [Barcelona] I didn't – I don't recall.

According to the defendant, this testimony reveals that Officer Barcelona could not recall whether he observed the white powder. However, another reasonable interpretation of the testimony is that Officer Barcelona did not recall seeing the white powder.

In any event, all of the aforementioned alleged factual errors noted by the defendant were minimal, at best, and did nothing to alter the accuracy of the prosecutor's narrative of events. Prosecutors are allowed wide latitude in choosing closing argument tactics. Louisiana Code of Criminal Procedure article 774 confines the scope of argument to "evidence admitted, to the lack of evidence, to conclusion of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The trial judge has broad discretion in controlling the scope of closing argument. Even if the

prosecutor exceeds these bounds, we will not reverse a conviction if not thoroughly convinced that the argument influenced the jury and contributed to the verdict. *State v. Frank*, 99-0553 (La. 5/22/07), 957 So.2d 724, 741, cert. denied, 552 U.S. 1189, 128 S.Ct. 1220, 170 L.Ed.2d 75 (2008). Furthermore, the trial court instructed the jury that closing arguments were not evidence, as follows:

> In closing arguments the attorneys are permitted to present for your consideration their contentions regarding what the evidence has shown or not shown and what conclusions they think may be drawn from the evidence. Therefore, the comments, the objections, the opening and closing arguments of the attorneys for either side are merely that and nothing else. They do not constitute evidence. It is their analysis, interpretation, conclusions and theories of the case. You can accept them or reject them just as they appear to be reasonable, and logical, and coinciding with whatever facts you find to have been proven or not proven.

Thus, considering the jury instructions and the evidence presented in the case, we find that any immaterial factual discrepancies by the prosecutor did not influence the jury or contribute to the guilty verdict. See *State v. Falkins*, 2004-250 (La. App. 5th Cir. 7/27/04), 880 So.2d 903, 917, writ denied, 2004-2220 (La. 1/14/05), 889 So.2d 266.

Finally, the defendant contends that, "[m]ost condemning," was the prosecutor's vouching for the truthfulness of Eddie Thomas, as well as the prosecutor's reference to the defendant's choice of going to trial. Regarding the reference to choosing to go to trial, the defendant states in his brief that the prosecutor's comparison between Thomas's taking responsibility by pleading guilty versus the defendant opting for a trial is an attack upon the defendant's right to remain silent and his right to a trial. That portion of the prosecutor's closing argument to which the defendant refers is the following:

> You've just got this man [Thomas] who is trying to set his life straight. He stood up. He admitted responsibility for what he did, said he was sorry for it. But he's gonna be a man, and he's

> going to take his punishment. He's not doing that. You've got a man caught with the same facts. He was caught with white dust on his pants. He was caught fleeing the scene. You have the testimony of the co-conspirator, the other principal in this matter. Mr. Thomas testified that, yeah, I was there. I was looking to get money to buy drugs. It kind of fits in to what Mr. Robertson told the officers, doesn't it? Yeah, they wanted drugs, but they had to get money to buy drugs. Where were they gonna get that money? They were gonna get that money from Capital Wholesale. All the evidence that you heard today points to that defendant. It says that that defendant climbed up that ladder, took that sledge and worked with Eddie Thomas to bust a three-foot hole in that building.

The prosecutor did not state that the defendant failed to testify, or chose to remain silent, or exercised his right to a trial. Since there were no direct references to the defendant's failure to testify, a reviewing court should inquire into the remark's intended effect on the jury. *State v. Juniors*, 2003-2425 (La. 6/29/05), 915 So.2d 291, 336, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006). Even if the comments indirectly referenced the defendant's failure to testify, we find the comments were directed to the strong evidence against the defendant. The prosecutor seemed to be focusing on the uncontroverted nature of the State's presentation of the facts. Assuming the prosecutor's argument referred obliquely to the defendant's failure to testify, we do not find that any such references were intended to focus the jury's attention on the defendant's failure to testify or present evidence in his behalf. See *State v. Smith*, 433 So.2d 688, 697 (La. 1983); La. Code Crim. P. art. 770(3). Moreover, even if the prosecutor exceeded the scope of what is permitted in closing argument by his arguably indirect reference to the defendant's failure to testify, we find that such reference did not influence the jury and contribute to the verdict. See *Frank*, 957 So.2d at 741.

Regarding the prosecutor's alleged vouching for the truthfulness of Eddie Thomas, the relevant portion of the closing argument is as follows:

> You have to ask yourself if it's reasonable that this other gentleman came up and, you know, made all this stuff up. It's your prerogative whether or not you want to believe Mr. Thomas. It's your job as jurors to evaluate his credibility, and I ask you to do that. And I ask you to look at the way he sat there today and testified, look at his mannerisms and what he told you today and decide whether or not you believe him in [this] matter. I think you should believe him. I think he is a man who is trying to tell the truth. And I think he's a man that knows if he does not tell the truth he could get hammered at sentencing.

While a prosecutor may not give his personal opinion regarding the veracity of a witness, it is permissible for a prosecutor to draw inferences about a witness's truthfulness from matters on the record. *State v. Palmer*, 2000-0216 (La. App. 1st Cir. 12/22/00), 775 So.2d 1231, 1236, writs denied, 2001-0211, 2001-1043 (La. 1/11/02), 807 So.2d 224, 229. We find that the prosecutor's comments regarding the veracity of Thomas were in response to the following portion of defense counsel's closing argument wherein he attacked Thomas's credibility:

> Eddie Thomas, or Eddie Cox, or Red, or Eric, whatever seven names he is using today -- he had seven names, at least two social security numbers we heard about, at least two drivers license numbers. He violated his probation. He violated his parole. And, yet, he's not sentenced -- his sentencing is in September. There's a lot that can be done between today and in September with Mr. Thomas.

We further find that the prosecutor's comments about Thomas were based on the evidence and not personal opinion based on anything outside the record. Accordingly, the prosecutor did not improperly vouch for the credibility of Thomas. See *Palmer*, 775 So.2d at 1236.

Based on the foregoing, we are thoroughly convinced that the complained of remarks by the prosecutor did not contribute to the verdict. Even assuming that the remarks were objectionable and that, thus, defense counsel should have objected to the remarks, the defendant was not prejudiced by the alleged deficient performance. See *Robinson*, 471 So.2d

at 1038-39. The defendant has failed to make the required showing of sufficient prejudice and, as such, his claim of ineffective assistance of counsel must fall.

This pro se assignment of error is without merit.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED. HABITUAL OFFENDER SENTENCE VACATED, AND REMANDED FOR RESENTENCING.

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COURT OF APPEAL

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STATE OF LOUISIANA

VERSUS

BRUCE ALVIN ROBERTSON

HUGHES, J., concurring.

It is not proper for an attorney to vouch for the credibility of a witness before the trier of fact. The personal opinion of an attorney is irrelevant and not proper argument.

While recognizing the language of State v Palmer, it is difficult to make a silk purse out of a sow's ear. But I see no prejudice in this case.