NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 0171

STATE OF LOUISIANA

VERSUS

CHRISTOPHER W. KING

Judgment Rendered: June 6, 2008

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 378,070

Honorable William J. Burris, Judge

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

WELCH, J.

The defendant, Christopher W. King, was charged by bill of information with first degree robbery, a violation of La. R.S. 14:64.1. Following a jury trial, the defendant was convicted as charged. The State filed a multiple-offender bill of information seeking to have the defendant adjudicated and sentenced under La. R.S. 15:529.1. Following a hearing, the trial court found the defendant to be a third-felony habitual offender and sentenced him to life imprisonment at hard labor. The defendant appealed. In an unpublished opinion, this court affirmed the defendant's conviction. Upon finding that the State failed to provide sufficient evidence of the defendant's identity as the individual previously convicted of one of the alleged predicate offenses, this court vacated the third-felony habitual offender adjudication and sentence, and remanded the matter to the trial court for further proceedings. **State v. King**, 2006-1994 (La. App. 1st Cir. 5/4/07), 956 So.2d 852 (unpublished), writ denied, 2007-1263 (La. 12/14/07), 970 So.3d 531. On remand, the State again sought a third-felony offender adjudication based upon the same two predicates (two burglary convictions in the 14th Judicial District Court ("14th JDC") docket numbers 5863-89 (predicate one) and 3733-00 (predicate two)). At the conclusion of another habitual offender hearing, the trial court again found the defendant to be a third-felony habitual offender and sentenced him to life imprisonment at hard labor. The defendant now appeals his habitual offender adjudication and sentence. Finding no merit in the assigned errors, we affirm the habitual offender adjudication and sentence.

FACTS

In the prior appeal, the facts of this case were summarized as follows:

> On February 1, 2004, at approximately 5:00 p.m., Terry Crawford was working at the Chevron service station (the store) on Gause Boulevard and Interstate 10 in Slidell, Louisiana. The defendant was present in the store with Crawford, Alfred "Buck" McKinley, and several other customers. They all had been engaged in

casual conversation. At some point thereafter, the defendant retrieved a quart of beer and approached the register to purchase it. When Crawford attempted to give the defendant his change, the defendant put his hand down toward the waistband of his pants and said, "give me all your money or I will shoot." Crawford admittedly did not take the defendant seriously initially. She stated that she thought he was "teasing." The defendant reached over the counter and attempted to remove the cash from the register. Crawford resisted and attempted to prevent the defendant from grabbing the money. A struggle ensued. During the struggle, Crawford called out to McKinley, who had gone to use the restroom. The defendant eventually removed the cash from the register and fled.

Once the defendant fled the store, Crawford immediately contacted the police. Detective Shawn Maddox and Sergeant Kevin Simon of the Slidell Police Department arrived on the scene and immediately utilized canine tracking to attempt to locate the perpetrator. The dog tracked to the Value Travel Inn Motel parking lot near the store. The dog lost track of the scent at a fence in the motel parking lot. From the parking lot, Sergeant Simon observed a white male exit room 213 of the motel. The man made eye contact with Sergeant Simon and then proceeded to walk towards the back of the motel.

Subsequently, once the dog failed to track any further, the officers returned to the store to continue their investigation. While viewing the surveillance footage, Sergeant Simon immediately recognized the perpetrator as the individual he had just observed exiting room 213 at the motel. The officers immediately returned to the motel and approached room 213. The door to the room was partially ajar. The officers announced their presence and demanded that any occupants of the room exit. No one came out. The officers looked inside to make sure no one was there and then they entered the room. On a bed inside the room, Sergeant Simon observed a tan ball cap and a blue shirt with white writing on it. He immediately recognized these items as matching the clothing worn by the perpetrator in the surveillance video. However, the items were not immediately seized. Instead, Sergeant Simon and Detective Maddox continued on their search for the defendant, walking towards the back of the motel. Upon observing an individual suspiciously exit room 207 and reenter after seeing them, the officers decided to approach. They knocked on the door of room 207, and the man answered. Through the opened door, the officers observed the defendant sitting on the bed. The defendant was arrested. During a search of the defendant's person incident to the arrest, the officers recovered a motel key to room 213 and approximately $106.00 from his pocket. The officers returned to room 213 and seized the clothing items observed earlier.

Meanwhile, Crawford and McKinley were separately transported to the motel where they both positively identified the defendant as the individual who had been inside the store and who had robbed it. Later, at the police station, after being informed of his

> **Miranda** rights, the defendant waived his rights and provided a written statement. In the statement, the defendant admitted taking money from the register at Chevron but denied possessing a gun. He claimed he never told Crawford he had a gun or threatened to shoot her.

King, 2006-1994 at pp. 3-4.

ASSIGNMENT OF ERROR ONE
VALIDITY OF PREDICATE TWO

In his first assignment of error, the defendant contends the trial court erroneously adjudicated him a third-felony offender. He claims the evidence presented at the habitual offender hearing established that there were procedural and substantive irregularities in the June 2, 2000, 14th JDC, docket number 3733-00 guilty plea proceeding in alleged predicate two. Thus, he asserts the State was required to prove the constitutionality of that guilty plea before the conviction could be used for enhancement.[1]

Where the prior conviction was obtained pursuant to a plea of guilty, the State must meet the burden of proof outlined by the Louisiana Supreme Court in **State v. Shelton**, 621 So.2d 769 (La. 1993). In **Shelton**, the supreme court revised the scheme of allocating burdens of proof in habitual offender proceedings. The court stated:

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self incrimination, 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

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[1] The defendant does not challenge the use of predicate one.

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

Shelton, 621 So.2d at 779-80.

In vacating the habitual offender adjudication in our prior opinion, we found that the State failed to meet its initial burden of proof on predicate two under the aforementioned scheme. We found that while the State's evidence in support of predicate two proved the existence of the prior conviction, it did not sufficiently prove the defendant's identity as the person convicted. At the habitual offender hearing on remand, the State successfully met its initial burden of proof on both predicates. In regard to predicate one, the State introduced certified copies of the bill of information, court minutes, and a Calcasieu Parish Sheriff's Office fingerprint card from the defendant's June 30, 1989 arrest. In regard to predicate two, the State introduced certified copies of the bill of information, court minutes, and guilty plea form; also, a computer-generated mug shot photograph from the defendant's March 6, 2000 arrest and a ten-print fingerprint card collected from the Automated Fingerprint Identification System (reflecting the defendant's March 6, 2000 arrest). In addition, the State introduced a Calcasieu Parish Sheriff's Office fingerprint card from the defendant's October 29, 2000 arrest, a printout from the CAJUN system (used by the Department of Public Safety and Corrections, Office of Probation and Parole to track offenders), and a Calcasieu Parish Sheriff's Office mug shot profile; and a Calcasieu Parish Sheriff's Office Criminal History Report. Each of these items contained some identifying information regarding the defendant (*i.e.*, date of birth, social security number, Department of Corrections number, Prisoner Identification number, etc.). The State also introduced expert testimony confirming that the defendant's fingerprints (taken the day of the hearing) matched the prints taken in connection with the arrests on both of the alleged predicates. Herein, the defendant does not dispute that, with this evidence,

the State successfully carried its initial burden of proving the existence of the prior guilty plea and that the defendant was represented by counsel when the plea was taken.

Once the State met this burden, the defendant was required to produce some affirmative evidence of an infringement of his rights or a procedural irregularity in the taking of the predicate two guilty plea. At the hearing, the defendant argued that the offenses to which he pled guilty in the June 2, 2000 proceeding are unclear.[2] The defendant advised the court that the Third Circuit Court of Appeal recently remanded 14th JDC docket numbers 3732-00 and 3733-00 to the district court for a hearing to clarify the offenses to which the defendant pled guilty in the June 2, 2000 proceeding. Thereafter, the trial court recessed the habitual offender hearing in this case to allow the defense time to follow up on the actions of the 14th JDC in those cases.

Several months later, when the instant case came back before the court on the previously recessed habitual offender hearing, the prosecutor advised the court that the 14th JDC had not yet held the hearing ordered by the Third Circuit. The defendant proceeded with his attempt to meet his burden of proof by introducing the transcript of the June 2, 2000 guilty plea proceeding, the guilty plea form, and a copy of the ruling from the Third Circuit. The defendant reiterated his argument that the prior offense is not a valid predicate because the offense of conviction is unclear. The trial court concluded that further clarification on the alleged predicate conviction was not necessary for the habitual offender proceeding in this case. After considering the evidence presented and the argument from counsel, the court adjudicated the defendant a third-felony offender.

On appeal, the defendant argues the trial court erred in adjudicating him a

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[2] The defendant also pled guilty under 14th JDC docket number 3732-00 in the June 2, 2000 proceeding. That conviction was not alleged as a predicate in the instant case.

third-felony habitual offender without first requiring the State to prove the constitutionality of the June 2, 2000 predicate two guilty plea. He argues that the evidence introduced failed to show that the guilty plea was knowing and voluntary since the offenses were misstated on the record and the trial court failed to explain the nature of the offenses and the penalty ranges. Thus, he contends, it is unclear what offenses the defendant pled guilty to in that proceeding. Initially, we note the defendant is correct in his assertion that a discrepancy exists between the guilty plea transcript and some of the other documentary evidence introduced in support of predicate two. While the bill of information reflects that the defendant was charged with simple burglary of an inhabited dwelling and the minutes of the June 2, 2000 proceeding and the other Department of Corrections records reflect that he pled guilty and was sentenced on the charged offense, the transcript of the proceeding and the guilty plea form indicate he pled guilty to two counts of simple burglary (not simple burglary of an inhabited dwelling). Thus, there are clearly discrepancies in the evidence introduced in support of this predicate. These discrepancies, however, do not constitute a defect in the proceeding that renders the felony conviction invalid for enhancement purposes. It is well settled that in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

We find that the transcript of the June 2, 2000 proceeding clearly reflects that, although he was charged with the more serious offense of simple burglary of an inhabited dwelling, the defendant actually pled guilty to the lesser and included offense of simple burglary. During the **Boykin** proceeding, the trial judge referred only to the offense of simple burglary. For instance, when addressing the defendant, the trial court specifically inquired, "I understand that you want to plead guilty to two counts of simple burglary; is that correct?" The defendant responded affirmatively. The only reference to the offense of simple burglary of an inhabited

dwelling occurred at the beginning of the proceeding when the prosecutor advised the trial court of the defendant's desire to plead guilty. The prosecutor referenced the docket numbers of the cases and the original charges. Even then, the prosecutor did not indicate that the defendant would be pleading to the offenses charged.

Furthermore, at the time of the predicate two offense, simple burglary was defined, in pertinent part, as the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, with the intent to commit a felony or any theft therein. La. R.S. 14:62. The more serious offense of simple burglary of an inhabited dwelling is the unauthorized entry of any inhabited dwelling, house, apartment or other structure used in whole or in part as a home or place of abode by a person or persons with the intent to commit a felony or any theft therein. La. R.S. 14:62.2. The factual basis for the June 2, 2000 guilty pleas, as provided by the prosecutor and accepted by the trial court as sufficient, was as follows: "[u]nder 3732-00, on or about June 11th of '98, Mr. King committed simple burglary of a residence at 303 Matthew Street in Sulphur. Under 3733, on June the 10th of '98, he committed burglary of a dwelling at the same location." This factual basis, which fails to indicate whether the burglarized dwelling was inhabited, supports our finding that the defendant pled guilty to simple burglary. Additional support for our finding is found in the ten-year sentence jointly recommended by the parties and subsequently imposed by the trial court during the proceeding. The offense of simple burglary is punishable by a fine of not more than two thousand dollars, imprisonment with or without hard labor for not more than twelve years, or both. See La. R.S. 14:62(B). Simple burglary of an inhabited dwelling is punishable by imprisonment at hard labor "for not less than one year, *without benefit of parole*, probation or suspension of sentence, nor more than twelve years." La. R.S. 14:62.2. (Emphasis added.) In response to the June 2,

2000 guilty pleas and resulting convictions, the defendant was sentenced to two concurrent terms of imprisonment at hard labor for ten years. The parties did not recommend, and the trial court did not order, one year of the ten-year imprisonment sentence to be served without benefit of parole, probation, or suspension of sentence, as mandated by the simple burglary of an inhabited dwelling statute. Clearly, the sentence imposed is a legal sentence for the offense of simple burglary. The sentence would be illegally lenient if imposed on a conviction for simple burglary of an inhabited dwelling.

Considering the foregoing, we find that the minutes and any other documents reflecting a conviction for simple burglary of an inhabited dwelling in predicate two (14th JDC docket number 3733-00) are in error. As previously noted, however, this error does not constitute a defect in the guilty plea proceeding. Thus, the defendant in this case failed to meet his burden of proving an infringement of his rights or a substantial defect in the June 2, 2000 proceeding. Consequently, the burden of proving the constitutionality of the predicate two guilty plea never shifted back to the State. However, even if the defendant had met his burden of proof, it would have been unnecessary for the State to introduce any further evidence to meet its burden. The transcript produced by the defendant was sufficient to also carry the State's burden of proving the constitutionality of the plea. The transcript is a "perfect" one in that it reflects a colloquy between the judge and the defendant wherein the defendant was informed of and specifically waived his right to a trial by jury, his privilege against self-incrimination, and his right to confront his accusers. See **Shelton**, 621 So.2d at 779-80. The trial court, on the record, advised the defendant of each of his **Boykin** rights. The defendant assured that he understood the rights and wished to waive them by pleading guilty. The defendant voluntarily agreed to waive the rights. **Boykin** only requires that a defendant be informed of the three rights enumerated above. The jurisprudence

has been unwilling to extend the scope of **Boykin** to include advising the defendant of any other rights that he may have. **State v. Hardeman**, 2004-0760, p. 6 (La. App. 1st Cir. 2/18/05), 906 So.2d 616, 623. In **State v. Guzman**, 99-1528, 99-1753, p. 9 (La. 5/16/00), 769 So.2d 1158, 1164, the Louisiana Supreme Court stated that "[t]his Court has never extended the core **Boykin** constitutional requirements to include advice with respect to sentencing."

Insofar as the defendant argues the trial court erred in failing to advise him of the nature of the offenses, we note that the test for the validity of a guilty plea does not depend upon whether or not the trial court specifically informed the accused of every element of the offense. Rather, the defendant must establish that his unawareness of the elements resulted in his lack of awareness of the essential nature of the offense to which he was pleading. **State v. Hall**, 537 So.2d 321, 322 (La. App. 1st Cir. 1988); **State v. Bowick**, 403 So.2d 673, 675-76 (La. 1981). Moreover, noncompliance with La. C.Cr.P. art. 556.1 (setting out statutory requirements for guilty pleas) involves a statutory requirement rather than a constitutional requirement (*i.e.*, advising of the three **Boykin** rights) and is subject to harmless error analysis. **Guzman**, 99-1528 at p. 15, 769 So.2d at 1161.

In the instant case, the defendant specifically alleges that the trial court failed to satisfy the requirements of La. C.Cr.P. art. 556.1 by failing to advise him of the nature of the charges, and he further argues that the grade of the burglary offense to which he pled is unclear from the evidence introduced at the habitual offender hearing, he does not, however, specifically allege any misunderstanding as to the nature of the charges at the time he entered the guilty plea. Therefore, since the evidence clearly reflects that the defendant was properly Boykinized, informed of the charges and of the factual basis for the charges, we find the trial court's failure to delineate the specific elements of the offenses to be harmless error insofar as the instant habitual offender proceeding is concerned.

Considering the foregoing, we find no error in the trial court's consideration of the June 2, 2000 simple burglary conviction as a predicate in adjudicating the defendant a third-felony habitual offender. We find no merit in the defendant's argument that the predicate two conviction was rendered invalid for future enhancement purposes simply because the minutes and other records contain erroneous information.[3] This assignment of error lacks merit.

ASSIGNMENT OF ERROR TWO
CLEANSING PERIOD

In his second assignment of error, the defendant argues that because the June 2, 2000 conviction (for an offense that occurred in 1998) is invalid to be used as a predicate to enhance the instant offense, the 1989 conviction alleged as predicate one is also barred as it was outside the ten-year cleansing period set forth in the habitual offender statute. In light of our finding that the simple burglary conviction in June 2000 is a valid conviction for the purpose of enhancement, we find this assignment of error to be without merit.

Louisiana Revised Statutes 15:529.1(C) provides:

> C. The current offense shall not be counted as, respectively, a second, third, fourth, or higher offense if more than ten years have elapsed between the date of the commission of the current offense or offenses and the expiration of the maximum sentence or sentences of the previous conviction or convictions, or adjudication or adjudications of delinquency, or between the expiration of the maximum sentence or sentences of each preceding conviction or convictions or adjudication or adjudications of delinquency alleged in the multiple offender bill and the date of the commission of the following offense or offenses. In computing the intervals of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said ten-year periods between the expiration of

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[3] Furthermore, we note that even if the June 2, 2000 conviction is determined to have been for the offense of simple burglary of an inhabited dwelling, the habitual offender sentence would be the same. At all times pertinent to this case, La. R.S. 15:529.1 provided, in pertinent part, that a sentence of life imprisonment shall be imposed if the third felony and the two prior felonies are crimes punishable by imprisonment for twelve years or more. La. R.S. 15:529.1(A)(1)(b)(ii). Because simple burglary of an inhabited dwelling and simple burglary are both felonies punishable by imprisonment for twelve years, a predicate conviction on either offense, when coupled with the instant conviction for first degree robbery and the 1989 simple burglary conviction, would result in the imposition of a sentence of life imprisonment. See La. R.S. 14:62(B) & 14:62.2.

the maximum sentence or sentences and the next succeeding offense or offenses.

In the instant case, even absent any evidence of the date of discharge on the 1989 predicate offense, it is clear that an un-incarcerated period of ten years did not elapse before the commission of the burglary offenses in 1998. Thus, the trial court did not err in allowing the 1989 burglary conviction to be used as a predicate.

This assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, the defendant's habitual offender adjudication and sentence are affirmed.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.