NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1151

STATE OF LOUISIANA

VERSUS

DARIEN P. HINKEL

Judgment Rendered: February 11, 2011

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 460,590

Honorable William J. Crain, Judge

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

WELCH, J.

The defendant, Darien P. Hinkel, was charged by bill of information with theft wherein the value amounts to over $500.00, a violation of La. R.S. 14:67B(1).[1] The defendant entered a plea of not guilty, was tried before a jury, and was found guilty as charged. The State filed a habitual offender bill of information and the defendant was adjudicated a fourth-felony habitual offender. The trial court denied the defendant's motion for new trial and sentenced the defendant to forty years imprisonment at hard labor without the benefit of probation or suspension of sentence.[2] The defendant now appeals, challenging the denial of his motion to continue, the sufficiency of the evidence, the habitual offender adjudication, the failure to appoint separate counsel, and the constitutionality of the enhanced sentence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

Evidence consisting of fingerprints, surveillance footage, and witness testimony established that on the evening of November 18, 2008, the defendant and codefendant, Damon Caliste, entered a Wal-Mart Supercenter in Slidell, Louisiana, and stole several digital photo cameras. The cameras were stored on a locked peg in the photography department of the store. The items were discovered missing the following day when a store manager recovered several empty camera packages placed throughout the store and reported the missing items to the store's loss prevention manager, Brandon Brown. Brown retrieved video surveillance of the photography department and other areas of the store showing two men taking

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[1] The defendant was charged and tried with codefendant, Damon David Caliste. Caliste also filed an appeal with this court. See **State v. Caliste**, 2010-0650 (La. App. 1st Cir. 10/29/10)(unpublished).

[2] The minutes reflect that the sentence contained a parole restriction. However, the sentencing transcript and the reasons for judgment indicate that the sentence was not imposed with a parole restriction. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

cameras and opening and discarding packages in different parts of the store. Later that afternoon, defendant and Caliste came back to the Wal-Mart store, where they were identified by Brown and were apprehended by the Slidell Police Department. Following an inventory check, Brown determined that the defendant and Caliste stole twelve to fourteen cameras with an approximate combined total value of $1,377.96.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, the defendant argues that the evidence was constitutionally insufficient to support the verdict. The defendant specifically argues that the State failed to prove that he was guilty of theft over $500.00, noting that his fingerprints were found only on one camera box. The defendant further contends that the State failed to demonstrate that the amount of stolen merchandise exceeded $500.00. The defendant also notes that the stolen cameras or camera accessories were never recovered and that the Wal-Mart representative wavered on the actual number of cameras that were stolen. Finally, the defendant asserts that the State failed to present evidence that the cameras and/or accessories were taken from the store.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That **Jackson** standard of review, incorporated in Article 821, is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Wright**, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748

So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732. The **Jackson** standard is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Theft is the misappropriation or taking of anything of value which belongs to another, without the consent of the other to the misappropriation or taking, with the intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking. La. R.S. 14:67A. All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:24. However, the defendant's mere presence at the scene is not enough to concern him in the crime. **State v. Neal**, 2000-0674, p. 12 (La. 6/29/01), 796 So.2d 649, 659, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002). Only those persons who knowingly participate in the planning or execution of a crime may be said to be concerned in its commission, thus making them liable as principals. A principal may be connected only to those crimes for which he has the requisite mental state. **Neal**, 2000-0674 at pp. 12-13, 796 So.2d at 659. It is sufficient encouragement that the accomplice is standing by at the scene of the crime ready to give some aid if needed; however in such a case, it is necessary that the principal actually be aware of the accomplice's intention. **State v. Anderson**, 97-1301, p. 3 (La. 2/6/98), 707 So.2d 1223, 1225 (per curiam).

The factual issue of whether there is a "taking" for purposes of a theft concerns whether the offender exerts control over the object adverse to or usurpatory of the owner's dominion. Under the jurisprudence, it is not always

necessary for goods to actually be removed from a store in order to form the basis for a conviction of theft. The crime of theft is completed upon the exercise of wrongful dominion or unauthorized control of the object of the theft whether or not the item is removed from the general area where it is kept. **State v. Bean**, 2004-1527, p. 9 (La. App. 1st Cir. 3/24/05), 899 So.2d 702, 710, writ granted on other grounds, 2005-1106 (La. 3/8/06), 925 So.2d 489, writ denied, 2005-1106 (La. 11/3/06), 940 So.2d 652.

Brandon Brown, loss prevention manager for Wal-Mart, explained that the store places digital cameras in the photo area on a locked peg device requiring an associate to remove the package from the peg. On November 19, 2008, a store manager informed Brown that several empty camera packages had been recovered. Two empty camera packages were recovered from the sporting goods area by Brown after he viewed the surveillance footage. In viewing the video footage for the night before, Brown observed the defendant and Caliste approach the cameras with what appeared to be a small pair of scissors and cut and remove packages from the locked peg. The video surveillance evidence reveals the defendant and Caliste making several trips to the camera aisle and removing several packages together and individually. They can also be observed opening packages, placing their hands in their pockets, and discarding packaging in the sporting goods area. Based on his viewings of the video, Brown was able to discern the combined removal of at least twelve cameras by the defendant and Caliste during their trips on the aisle. Brown noted that the number may be underestimated, as the removal of two cameras simultaneously would not be readily apparent on the video. The defendant and Caliste did not attempt to purchase any cameras when they went to the check-out area with Ashmore.

Brown explained that an on-hand check was performed by the department manager each morning and that the cameras located on the locked pegs were

closely guarded and tracked. The on-hand check for November 19th revealed that a total of fourteen cameras were missing with values ranging from $79.84 to $149.84, with a combined total value of $1,377.96. Store associates searched the store for the cameras and they were not recovered. Detective Shawn Bartley, of the Slidell Police Department, examined several of the recovered empty boxes for valuable fingerprint evidence and two of the boxes yielded fingerprint evidence of value. Fingerprint identification and analysis expert, Sergeant Bobby Campbell (also of the Slidell Police Department), was able to match individual fingerprint evidence to both of the defendant and Caliste. A pair of scissors was recovered from Ashmore's vehicle.

Ashmore, the sole defense witness, testified that she, the defendant, and Caliste went to Wal-Mart on the night in question to purchase a television and that her bank declined the purchase as a precaution, adding that the size of the purchase indicated that her card may have been stolen. She did however purchase $259.00 worth of household items that night that did not include any cameras. She testified that the defendant and Caliste did not take anything without paying for it to her knowledge, and that she did not see them with any camera or camera accessories after that night. Ashmore acknowledged that she shopped separately from the defendant and Caliste on the night in question and was unaware of what the defendant and Caliste were there to purchase. Ashmore stated that she did not know how the scissors got in her vehicle but noted that she had grandchildren. She noted that she was able to complete the purchase of the television the next day after speaking to a bank representative.

As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its

sufficiency. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, p. 5 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

A reviewing court is not called upon to decide whether the conviction is contrary to the weight of the evidence. **State v. Smith**, 600 So.2d 1319, 1324 (La. 1992). We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. See **State v. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460; **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). The evidence, consisting of video footage of the defendant and Caliste removing numerous packages from the secured pegs in an unauthorized fashion, discarding packaging, and entering their pockets, the inventory taken the next morning showing how many supposed on-hand cameras that were missing, the empty boxes that were recovered, and the fingerprint evidence, supports the conclusion that the defendant and Caliste were non-consensually taking valuable items belonging to another with the intent to permanently deprive the owner. A principal to the crime of theft is held culpable for the entire value of the merchandise. **State v. Coleman**, 2002-0345, p. 5 (La. App. 5th Cir. 9/18/02), 829 So.2d 468, 472. The evidence

clearly shows that the defendant and Caliste knowingly participated in the execution of the crime in a collaborative fashion. The jury reasonably rejected any hypothesis of innocence. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Accordingly, after a thorough review of the record, viewing the evidence in the light most favorable to the prosecution, we are convinced that a rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of theft over $500.00. Assignment of error number two lacks merit.

RIGHT TO CONFLICT-FREE COUNSEL

In his fourth assignment of error, the defendant contends that he was entitled to have his own attorney represent him at trial. The defendant contends that the trial court ignored the dictates of La. C.Cr.P. art. 517 in failing to inquire as to joint representation and advise each defendant on the record of his right to separate representation. The defendant contends that, at a minimum, the trial court should have held a hearing to adequately safeguard each defendant's right to conflict-free counsel.

The Sixth Amendment to the United States Constitution and Louisiana Constitution Article I, Section 13 guarantee that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. See **State v. Cisco**, 2001-2732, p. 16 (La. 12/3/03), 861 So.2d 118, 129, cert. denied, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004). The right to counsel secured under the Sixth Amendment includes the right to conflict-free representation. See **Holloway v. Arkansas**, 435 U.S. 475, 482, 98 S.Ct. 1173,

1177, 55 L.Ed.2d 426 (1978). An actual conflict of interest is defined as follows:

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir.), cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979). Generally, "Louisiana courts have held that an attorney laboring under an actual conflict of interest cannot render effective legal assistance to the defendant she is representing." **Cisco**, 2001-2732 at p. 17, 861 So.2d at 129.

Louisiana Code of Criminal Procedure article 517 provides:

> A. Whenever two or more defendants have been jointly charged in a single indictment or have moved to consolidate their indictments for a joint trial, and are represented by the same retained or appointed counsel or by retained or appointed counsel who are associated in the practice of law, the court shall inquire with respect to such joint representation and shall advise each defendant on the record of his right to separate representation.
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> B. Unless it appears that there is good cause to believe that no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Article 517 is a procedural vehicle to lessen the possibility that after conviction a jointly represented defendant will assert a claim that his counsel was not conflict-free and thus was ineffective. Joint representation is not per se illegal and does not violate the right to assistance of counsel under the Sixth Amendment to the U.S. Constitution or Article I, Section 13 of the Louisiana Constitution unless it gives rise to an actual conflict of interest. **State v. Kahey**, 436 So.2d 475, 484 (La. 1983) (citing **State v. Ross,** 410 So.2d 1388, 1390 (La. 1982)). Accordingly, the failure of the trial court to inquire into the joint representation on the record does not rise to the level of a denial of a constitutional right and is subject to a harmless error review. **State v. Miller**, 2000-0218, p. 14 (La. App. 4th

Cir. 7/25/01), 792 So.2d 104, 115, writ denied, 2001-2420 (La. 6/21/02), 818 So.2d 791; see **State v. Castaneda**, 94-1118, p. 5 (La. App. 1st Cir. 6/23/95), 658 So.2d 297, 301.

Holloway creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. **Mickens v. Taylor**, 535 U.S. 162, 168, 122 S.Ct. 1237, 1241-42, 152 L.Ed.2d 291 (2002). In **Holloway**, prior to trial, the defense counsel moved for the appointment of separate counsel for each of the three defendants on the basis of conflict of interest and the motion was denied. **Holloway**, 435 U.S. at 477, 98 S.Ct. at 1175. Prior to the empanelling of the jury, the motion was renewed, but was again denied. **Holloway**, 435 U.S. at 478, 98 S.Ct. at 1175. At trial, the court refused to permit defense counsel to cross-examine any of the defendants on behalf of the other defendants. **Holloway**, 435 U.S. at 479, 98 S.Ct. at 1176. The United States Supreme Court in **Holloway** reversed the defendants' convictions, holding, "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." **Holloway**, 435 U.S. at 488, 98 S.Ct. at 1181.

In **Cuyler v. Sullivan**, 446 U.S. 335, 337-38, 100 S.Ct. 1708, 1712-13, 64 L.Ed.2d 333 (1980), no objection was made against multiple representation of three defendants until post-conviction. The defendants were tried separately, represented by the same two attorneys. Sullivan was tried first and convicted without his defense attorneys presenting any evidence. The other defendants were acquitted in their trials. **Cuyler**, 446 U.S. at 338, 100 S.Ct. at 1713. In a post-conviction hearing, one of the defense attorneys testified he remembered he had been concerned about exposing defense witnesses for the other trials. **Cuyler**, 446 U.S. at 338-39, 100 S.Ct. at 1713.

The United States Third Circuit Court of Appeals reversed Sullivan's

conviction, holding a defendant was entitled to reversal of his conviction whenever he makes some showing of a possible conflict of interest or prejudice, however remote. **United States ex rel. Sullivan v. Cuyler**, 593 F.2d 512, 519-21 (3d Cir. 1979). The United States Supreme Court subsequently vacated the decision of the Third Circuit, holding, "the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." **Cuyler**, 446 U.S. at 350, 100 S.Ct. at 1719.

The court in **Cuyler** additionally held that unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry into the propriety of a multiple representation. **Cuyler**, 446 U.S. at 347, 100 S.Ct. at 1717. Even where an actual conflict of interest exists and the trial judge fails to make a **Cuyler** inquiry, reversal is not automatic absent a showing that the conflict adversely affected the adequacy of counsel's performance. See **Mickens**, 535 U.S. at 171-74, 122 S.Ct. at 1243-45.

When a defendant raises a pretrial objection because of a possible conflict of interest, **Holloway** requires the trial court to appoint separate counsel or take adequate steps to determine if the claimed risk is too remote. Failure to take either action warrants automatic reversal, even in the absence of specific prejudice. However, should the objection to multiple representation be made after trial, **Cuyler** is controlling and the defendant must show an actual conflict of interest adversely affected the adequacy of counsel's performance. **State v. Marshall**, 414 So.2d 684, 687-88 (La.), cert. denied, 459 U.S. 1048, 103 S.Ct. 468, 74 L.Ed.2d 617 (1982).

Courts of appeal applying **Cuyler** traditionally ask two questions: (1) whether there was an actual conflict of interest, as opposed to a merely potential or hypothetical conflict; and (2) whether the actual conflict adversely affected

counsel's representation. If a conflict does not adversely affect counsel's performance, no actual conflict exists. An actual conflict exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client. If a defendant establishes an actual conflict that adversely affected counsel's performance, prejudice is presumed without any further inquiry into the effect of the actual conflict on the outcome of the defendant's trial. See **United States v. Infante**, 404 F.3d 376, 391-393 (5th Cir. 2005). In the instant case, the defendant first raised the issue of conflict of interest due to joint representation post-trial in a motion for a new trial. Thus, the defendant must show that an actual conflict of interest adversely affected the adequacy of his counsel's performance.

In **Cisco**, the Louisiana Supreme Court reversed a defendant's capital murder conviction and death sentence due to the defendant's attorney simultaneously representing the defendant, the lead deputy sheriff investigator in his case, and the deputy sheriff's wife. The attorney represented the deputy sheriff and his wife in domestic matters. The State's case against the defendant rested on the defendant's multiple statements, nineteen of which were introduced at trial. The majority of the statements, certainly the most damning of them, were secured by the deputy sheriff alone, or at his direction, during the time the attorney represented both the defendant and the deputy sheriff. The Supreme Court held that defendant's attorney "was necessarily confronted with an actual conflict of interest when she was called upon to cross-examine her client [the deputy sheriff] at the trial of her other client, the defendant." **Cisco**, 2001-2732 at pp. 20-21, 861 So.2d at 121, 132.

In the instant case, the record does not indicate an actual conflict of interest or actual prejudice. The defendant and Caliste did not testify in this case. The

defense presented at trial was that the evidence did not show that the defendant and Caliste left the store with the property and that fingerprint evidence was only collected from one box per defendant, with a combined total value of less than $300.00. As noted by the trial court in denying the motion for new trial and as discussed herein in the context of the sufficiency of the evidence assignment of error, the overwhelming evidence showed both of the defendant and Caliste worked together to steal several cameras from a secured area in Wal-Mart. Under the jurisprudence, the mere allegation that one codefendant intends to point an accusing finger at the other is not sufficient to support a claim of actual conflict of interest. **Kahey**, 436 So.2d at 485; **State v. Murphy**, 463 So.2d 812, 825 (La. App. 2nd Cir.), writ denied, 468 So.2d 570 (La. 1985). As the trial court instructed the jury, all persons concerned in the commission of a crime are principals and are guilty of the crime charged if, whether present or absent, they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. La. R.S. 14:24. The defendant was a principal to the theft of the cameras taken by the codefendant and equally culpable in those thefts. The theft of the cameras was a joint, concerted effort between the defendant and Caliste. Therefore, the defendant failed to make a showing of antagonistic defenses. Since the defendant did not urge the existence of a conflict of interest before the trial and did not demonstrate the existence of an actual conflict of interest or prejudice, this assignment of error lacks merit.

DENIAL OF MOTION TO CONTINUE TRIAL

In his first assignment of error, the defendant contends that the trial court erred and abused its discretion in denying the motion to continue the trial. The defendant argues there was actual prejudice because the trial was not continued to give him the opportunity to have his own conflict-free attorney represent his interests at trial. The defendant further contends that he and the codefendant did

not have an opportunity to prepare and file motions to exclude the new evidence that the State surprised the defense with on the morning of the trial consisting of fingerprints on discarded camera boxes.

A motion for continuance, if timely filed, may be granted, at the discretion of the court, in any case if there is good ground therefore. La. C.Cr.P. art. 712. A motion for continuance shall be in writing and filed at least seven days prior to the commencement of trial. La. C.Cr.P. art. 707. Upon written motion at any time, the trial court may grant a motion for continuance after a contradictory hearing but only upon a showing that such motion is in the interest of justice. La. C.Cr.P. art. 707. An oral motion for a continuance presents nothing for review on appeal. **State v. Buckenburger**, 428 So.2d 966, 969 (La. App. 1st Cir. 1983). However, where the occurrences that allegedly make the continuance necessary arose unexpectedly, and the defense had no opportunity to prepare a written motion, an appellate court may review the denial. **State v. Spencer**, 444 So.2d 354, 356 (La. App. 1st Cir. 1983), writ denied, 488 So.2d 694 (La. 1986). The trial court's ruling on the motion to continue will not be disturbed on appeal absent a clear abuse of discretion. Whether a refusal to grant a continuance was justified depends primarily on the circumstances of the particular case. Convictions will not be reversed absent a showing of specific prejudice caused by the denial of a continuance. **State v. Sensley**, 460 So.2d 692, 698 (La. App. 1st Cir. 1984), writ denied, 464 So.2d 1374 (La. 1985).

The defendant's argument regarding his right to conflict-free counsel was addressed above. Thus, at the outset we find that as the defendant failed to demonstrate the existence of an actual conflict of interest or prejudice, this assignment of error has no merit to the extent that the defendant reiterates that argument in the context of the denial of his motion to continue the trial. We will now address the defendant's argument that his motion to continue the trial should

have been granted due to surprise fingerprint evidence.

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the State's case against him in order to prepare his defense. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1st Cir. 1986), writ denied, 501 So.2d 228 (La. 1987). If a defendant is lulled into a misapprehension of the strength of the State's case by the failure to fully disclose, such a prejudice may constitute reversible error. **State v. Ray**, 423 So.2d 1116, 1118 (La. 1982). A conviction will not be reversed on the basis of the State's discovery violation unless prejudice is shown. **State v. Harris**, 2000-3459, p. 8 (La. 2/26/02), 812 So.2d 612, 617.

In this case, the defendant was arraigned on February 20, 2009. The record reflects that on May 11, 2009, the trial court ordered motions and the trial was continued on motion of the defense. On the day reset for trial, July 27, 2009, the defense attorney made an oral motion for continuance, noting that the State informed him that morning of the fingerprint evidence and that the defendant and Caliste wanted to hire private counsel. The State noted that the evidence was received that morning and then given to the defense. The State further noted fingerprints were not taken from all of the boxes that were found because the evidence was being used to establish identification as opposed to value. The State argued that the defendant and Caliste would not be prejudiced in this case due to the corroborating and cumulative identification evidence including a video of the defendant and Caliste. In denying the motion, the trial court found that the evidence was appropriate and that it was not necessary to continue the trial. The voir dire began the next day.

The record herein does not establish that the defendant was lulled into a

misapprehension of the strength of the State's case by any actions of the State. While the defendant argues that he did not have an opportunity to prepare and file motions to exclude the evidence in question, the record reflects that the defendant moved to suppress the evidence and such motion was considered and denied by the trial court. Further, the defendant has not shown how the introduction of the evidence in question required him to change his trial strategy. As noted by the State, the fingerprint evidence in question amounted to cumulative identification evidence and did not establish the value to be attached to the theft.

Based on the foregoing, we find that the defendant has not presented proof of any prejudice suffered as a result of the trial court's denial of the motion to continue. Thus, this assignment of error lacks merit.

HABITUAL OFFENDER ADJUDICATION

In assignment of error number three, the defendant contends that his multiple offender status was not established by competent and sufficient evidence. The defendant contends that he objected to the prior convictions because the **Boykin** transcripts were defective in that he was not properly advised of the possible future applicability of La. R.S. 15:529.1 and/or the rights he was giving up by tendering a guilty plea. The defendant contends that the arrest record used by the State was insufficient and constituted inadmissible hearsay.

In **Boykin v. Alabama**, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that because a guilty plea constitutes a waiver of constitutional rights, including the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers, the prosecution is required to show that the plea was intelligent and voluntary. 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 the pleas were taken. **State v. Shelton**, 621 So.2d

769, 779 (La. 1993). 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. **Shelton**, 621 So.2d at 779. If the defendant is able to do this, then the burden 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 that 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. **Shelton**, 621 So.2d at 779-780. 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 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. **Shelton**, 621 So.2d at 780.

The purpose of the rule of **Shelton** is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity attaches to promote the interests of finality. See **State v. Deville**, 2004-1401, p. 4 (La. 7/2/04), 879 So.2d 689, 691 (per curiam). The State is not required to use a specific type of evidence in order to carry its burden of proof pursuant to the Habitual Offender Law, La. R.S. 15:529.1. **State v. Lindsey**, 99-3302, p. 7 n.3 (La. 10/17/00), 770 So.2d 339, 344 n.3, cert. denied, 532 U.S. 1010, 121 S.Ct. 1739, 149 L.Ed.2d 663 (2001). Rather, any competent evidence may be used to prove a defendant's prior convictions. Accordingly, the State's burden of proof may be met by various means including

the testimony of witnesses to prior crimes, expert testimony matching fingerprints of the defendant with those in the record of prior convictions, or photographs contained in a duly authenticated record. **State v. Mays**, 2005-2555, p. 2 (La. 5/26/06), 929 So.2d 1231, 1232 (per curiam).

Herein, the State presented evidence in support of the following predicate convictions in Orleans Parish: a May 29, 1991 guilty plea to possession of cocaine (a violation of La. R.S. 40:967) in case number 343691, a September 3, 1992 guilty plea to theft between $100 and $500 (a violation of La. R.S. 14:67) in case number 357168, and a February 2, 1994 guilty plea to distribution of cocaine (a violation of La. R.S. 40:967) in case number 364488. At the hearing, the State presented the bill of information, waiver of constitutional rights form, minute entries, and arrest register for each of the predicate convictions. The defendant objected to the sufficiency of the evidence.

As noted by the State, the defendant did not specifically argue below that the **Boykin** transcripts were defective because he was not properly advised of his rights or the possible future applicability of La. R.S. 15:529.1. In order to preserve the right to appellate review of an alleged trial court error, the party must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for the objection. La. C.Cr.P. art. 841. A new basis for an objection may not be raised for the first time on appeal. See **State v. Bennett**, 591 So.2d 1193, 1197 (La. App. 1st Cir. 1991), writ denied, 594 So.2d 1315 (La. 1992). At any rate, the code provision requiring trial courts to advise the defendant that he would face enhanced penalties under the Habitual Offender Law for future offenses, La. C.Cr.P. art. 556.1 (enacted by 1997 La. Acts No. 1061, § 1, effective August 15, 1997) did not apply to defendant's predicate guilty pleas entered prior to effective date of the provision. **State v. Scott**, 2000-0337, p. 8 (La. App. 1st Cir. 11/3/00), 769 So.2d 1286, 1292. Moreover, as the State further notes, the arrest

documentation submitted by the State was proffered and not admitted as evidence in support of the State's burden of proof.

Based on our review of the evidence presented, we agree with the trial court's finding that the State proved the truth of the above allegations of the habitual offender bill of information, including the defendant's identity and that the defendant was represented by counsel at the time of the guilty pleas. Thereafter, the burden shifted to the defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. The defendant failed to carry said burden. We find no error in the habitual offender adjudication. Assignment of error number three lacks merit.

EXCESSIVE SENTENCE

In his fifth and final assignment of error, the defendant contends that the enhanced sentence is excessive. The defendant contends that the trial court gave minimal reasons for the forty-year sentence, did not consider any mitigating factors, and failed to tailor the sentence to fit the facts of this case. The defendant argues that the sentence imposes needless suffering upon him in light of the facts and circumstances. The defendant contends that the trial court abused its sentencing discretion.

Article I, Section 20 of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See **State v. Guzman**, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167.

The trial court has wide discretion in imposing a sentence within the statutory limits and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. **State v. Loston**, 2003-0977, pp. 19-20 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Leblanc**, 2004-1032, p. 10 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 2005-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); **State v. Faul**, 2003-1423, p. 4 (La. App. 1st Cir. 2/23/04), 873 So.2d 690, 692.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that the determination and definition of acts that are punishable as crimes are purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. **Dorthey**, 623 So.2d at 1278.

Pursuant to La. R.S. 14:67(B)(1), for the underlying offense of theft where the value amounts to $500.00 or more, the defendant was subject to a sentence of

not more than ten years, with or without hard labor, and a fine of not more than three thousand dollars, or both. As a fourth-felony habitual offender, the defendant was subject, under La. R.S. 15:529.1(A)(1)(c)(i), to a minimum of twenty years imprisonment and not more than life imprisonment. See also La. R.S. 40:967(C)(2), La. R.S. 14:67B(2), & La. R.S. 40:967(B)(4)(b). As previously stated, the defendant was sentenced to forty years imprisonment at hard labor. In imposing sentence, the trial court considered the evidence in the instant offense and the defendant's lengthy criminal record in its entirety. The trial court noted that the defendant was thirty-seven years of age at the time of the sentencing. The trial court concluded that it was unlikely that the defendant would be rehabilitated by imprisonment and concluded that the defendant is a career criminal. Contrary to the defendant's claim otherwise, the trial court noted the lack of a history of violent criminal activity. Before imposing the sentence, the trial court noted its review of the factors in La. C.Cr.P. art. 894.1.

Based on the record before us, we do not find that the trial court abused its discretion in imposing sentence. The defendant was exposed to a maximum sentence of life imprisonment and the trial court imposed a mid-range, forty-year sentence. Considering the facts of the instant offense combined with the defendant's extensive criminal history, the sentence is not shocking or grossly disproportionate to the defendant's behavior. The final assignment of error is without merit.

CONCLUSION

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

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.