NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0018

STATE OF LOUISIANA

VERSUS

DAVID W. BELSETH

Judgment rendered June 11, 2010.

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Appealed from the
22nd Judicial District Court
in and for the Parish of Washington, Louisiana
Trial Court No. 08 CR3 99838
Honorable Raymond Childress, Judge

* * * * * *

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DAVID W. BELSETH

* * * * * *

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

PETTIGREW, J.

The defendant, David W. Belseth, was charged by bill of information with one count of unauthorized entry of an inhabited dwelling, a violation of La. R.S. 14:62.3. He pled not guilty. Following a trial by jury, the defendant was convicted of the responsive offense of attempted unauthorized entry of an inhabited dwelling, in violation of La. R.S. 14:27 and 14:62.3. The trial court sentenced the defendant to three years imprisonment at hard labor. The State filed a multiple offender bill of information seeking to have the defendant adjudicated and sentenced pursuant to La. R.S. 15:529.1. At the conclusion of the multiple-offender hearing, the trial court adjudicated the defendant to be a second-felony habitual offender. Thereafter, the trial court vacated the previously imposed sentence and resentenced the defendant to six years imprisonment at hard labor. The defendant moved for reconsideration of the sentence, which was denied by the trial court. The defendant now appeals, urging the following assignments of error:

1. The trial court erred in failing to charge the jury that criminal trespass was a responsive verdict in this case.

2. The trial court abused its discretion by imposing an excessive sentence.

Finding no merit in the assigned errors, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

FACTS

On July 6, 2008, after working and drinking together for most of the day, the defendant and his friend, Gerald Dahlem, became involved in an altercation over a crowbar. The defendant had brought the crowbar to Dahlem's residence claiming that it belonged to him. Dahlem claimed he recognized the crowbar as his property. The men argued and struggled over the tool outside Dahlem's residence. Eventually, both men withdrew from the altercation and left the area. The defendant drove away in his Dodge pickup, and Dahlem left in his Ford Ranger pickup.

Shortly thereafter, the defendant returned to the area. Meanwhile, Laura Colley, Dahlem's girlfriend who had been inside the residence, heard the sound of a "revving"

vehicle's engine outside. She looked out and observed the defendant's vehicle stuck in the ditch. Because she was aware that the defendant had been drinking and she had witnessed the altercation between the defendant and Dahlem, Colley decided not to go outside. The defendant then asked Colley for a light for a cigarette and when she refused, the defendant became enraged and started yelling and screaming. Colley opened the door and told the defendant to leave the premises. He refused to comply. The defendant told Colley he was "coming in." Colley closed the door, and the defendant started beating on the doorknob. Colley leaned against the door to prevent the defendant from entering. Colley again told the defendant to leave and threatened to call the police. According to Colley, the defendant told her to go ahead and call the police and by the time they got there, she would be dead. The defendant, still enraged, started beating the trailer and breaking the windows with a baseball bat. The defendant eventually moved toward the backdoor of the trailer. When he opened the backdoor and entered the trailer, Colley ran out of the front door.

Colley ran through a nearby wooded area to a neighbor's home and called the police. Deputy Christopher Morgan, of the Washington Parish Sheriff's Office, was dispatched to the area to investigate the complaint. Colley advised Deputy Morgan that the defendant, her boyfriend's friend, had chased her out of her home with a baseball bat. At the residence, Deputy Morgan observed that the front and back doors were open. The kitchen window was also broken. As Deputy Morgan walked toward his vehicle to get his camera to photograph the scene, Colley advised that the defendant and his stepfather had just passed by in a silver Ford pickup truck. Deputy Morgan entered his vehicle and attempted to locate the defendant.

The silver Ford pickup was eventually located and stopped. After the defendant exited the passenger side of the vehicle, a baseball bat was found on the right floorboard of the vehicle. The baseball bat was seized as evidence. The defendant was returned to the scene where Colley identified him as the individual who chased her from the residence. The defendant, who was obviously "highly intoxicated," was placed under arrest.

ASSIGNMENT OF ERROR # 1:
CRIMINAL TRESPASS JURY CHARGE

In his first assignment of error, the defendant contends the trial court erred when it failed to include the misdemeanor offense of criminal trespass, La. R.S. 14:63, as a responsive verdict. Specifically, he asserts that since the jury chose the lesser included verdict of attempted unauthorized entry of an inhabited dwelling, it would likely have found him guilty of the misdemeanor offense of criminal trespass had it been given the option. Thus, he argues, the trial court's failure to include the misdemeanor criminal trespass option put him in an unfair position and therefore constitutes reversible error.

Louisiana Code of Criminal Procedure article 803 requires a trial court to advise the jury of the law applicable to all offenses charged, as well as any other offenses for which the accused could be found guilty under La. Code Crim. P. arts. 814 or 815. Because Article 814 does not provide any statutory responsive verdicts for unauthorized entry of an inhabited dwelling, the provisions of Article 815 apply. Article 815 states that in those cases not provided for by Article 814, the responsive verdicts are guilty, not guilty, or "[g]uilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense [is] a misdemeanor."

In this case, the defendant was charged with unauthorized entry of an inhabited dwelling. The trial court's instructions to the jury included responsive verdicts for unauthorized entry of an inhabited dwelling, attempted unauthorized entry of an inhabited dwelling, and not guilty. As the defendant acknowledges in his brief, the record shows no objection to the instructions given or any request that the responsive verdict of criminal trespass be included in the jury's instructions. Louisiana Code of Criminal Procedure article 801(C) provides, in pertinent part, that "[a] party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error." Louisiana Code of Criminal Procedure article

841(A) provides, in pertinent part, that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."

The contemporaneous objection rule is specifically designed to promote judicial efficiency by preventing a defendant from gambling for a favorable verdict and then, upon conviction, resorting to appeal on errors that either could have been avoided or corrected at the time or should have put an immediate halt to the proceedings. **State v. Taylor**, 93-2201, p. 7 (La. 2/28/96), 669 So.2d 364, 368, cert. denied, 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996). In his brief, the defendant cites **State v. Ruffins**, 41,033 (La. App. 2 Cir. 9/20/06), 940 So.2d 45, writ denied, 2006-2779 (La. 6/22/07), 959 So.2d 494 and **State v. Williamson**, 389 So.2d 1328 (La. 1980), and notes that jurisprudential exceptions to Article 801's objection requirement exist in situations "where the error causes such a fundamental defect in the proceedings that the defendant is deprived of a fair trial." The defendant argues that such an exception should be made in this case. We disagree.

The jurisprudence has allowed exceptions in cases where there have been fundamentally erroneous misstatements of the essential elements of the charged offense. In such cases, the Louisiana Supreme Court has adopted the view that such fundamentally incorrect jury instructions so affect the fairness of the proceedings and the accuracy of the fact-finding process that due process of law requires reversal, even in the absence of compliance with legislative procedural mandates. "Such an error is of such importance and significance as to violate fundamental requirements of due process." **Williamson**, 389 So.2d at 1331.

In his brief, the defendant points to **State v. Simmons**, 2001-0293, pp. 6-7 (La. 5/14/02), 817 So.2d 16, 21, wherein the Louisiana Supreme Court held that criminal trespass is a lesser included offense and a responsive verdict to a charge of unauthorized entry of an inhabited dwelling. He argues that **Simmons** requires that the trial court include criminal trespass as a responsive verdict when a person is tried for unauthorized entry into an inhabited dwelling. However, in **Simmons**, the Louisiana Supreme Court, on review of the trial court's refusal to include the requested

instruction, specifically noted that the "defendant specifically asked the trial court to charge the jury on the law applicable to the offense of criminal trespass." **Simmons**, 2001-0293 at 6, 817 So.2d at 20. See also **State v. Hernandez**, 2002-340, p. 3 (La. App. 5 Cir. 7/30/02), 824 So.2d 529, 530 (wherein the reviewing court refers to **Simmons** and notes, "[i]n this case, defendant likewise specifically requested the trial court to charge the jury on the law applicable to the offense of criminal trespass.") Herein, the defendant did not make such a request. Therefore, this case is distinguishable from **Hernandez** and **Simmons**.

We do not find that an exception to the objection requirement is warranted in this case. As previously noted, exceptions are allowed in cases involving misstatements or errors involving the very definition of the crime of which the defendant was in fact convicted. The jurisprudence has not extended the application of the exception to include error relating to the elements of a responsive offense or the failure to include a responsive offense not specifically requested. See **State v. Johnson**, 98-1407, pp. 10-11 (La. App. 1 Cir. 4/1/99), 734 So.2d 800, 806-807, writ denied, 99-1386 (La. 10/1/99), 748 So.2d 439. See also **State v. Dossman**, 2006-449, pp. 9-16 (La. App. 3 Cir. 9/27/06), 940 So.2d 876, 882-886, writ denied, 2006-2683 (La. 6/1/07) 957 So.2d 174.

Accordingly, the defendant has waived appellate review of this alleged error by his failure to enter a contemporaneous objection. See **State v. Sisk**, 444 So.2d 315, 316 (La. App. 1st Cir. 1983), writ denied, 446 So.2d 1215 (La. 1984).

ASSIGNMENT OF ERROR # 2: EXCESSIVE SENTENCE

In his second assignment of error, the defendant contends the trial court erred in imposing an excessive sentence. Specifically, he argues that the maximum sentence was not warranted in this case because he is an alcoholic and was under the influence of alcohol when the offense was committed. Noting that alcoholism is a disease that requires treatment, not punishment, the defendant argues that imposition of the maximum sentence in this case was a needless imposition of pain and suffering.

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. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); **State v. Lanieu**, 98-1260, p. 12 (La. App. 1 Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

As a general rule, maximum sentences are appropriate in cases involving the most serious violation of the offense and the worst type of offender. **State v. James**, 2002-2079, p. 17 (La. App. 1 Cir. 5/9/03), 849 So.2d 574, 586. The maximum sentence permitted under a statute may also be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. See **State v. Hilton**, 99-1239, p. 16 (La. App. 1 Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113.

As a second-felony habitual offender, the defendant faced a possible penalty of imprisonment at hard labor for up to six years for his conviction of attempted unauthorized entry into an inhabited dwelling. La. R.S. 14:27(D)(3) & 14:62.3(B); La. R.S. 15:529.1(A)(1)(a). As he notes, he received the maximum sentence. Prior to imposing sentence the trial court reviewed the facts of the case and a presentence investigation report. In support of the original sentence, the court noted:

> The Court notes that this case involved a very fearsome and vicious attack upon the trailer in which the victim was residing.

> It put her, I think, certainly in fear of great bodily harm, as well as possibly even death, and caused her to flee from her dwelling where she should have had the right to her own privacy, as well as the right to assume that she could have a peaceful existence there.
>
> She left there under duress, and ran to a neighbor in order to seek safe harbor, really.
>
> The defendant used a baseball bat, I think it was, in a very violent and menacing manner so as to, as I said previously, put this particular victim in tremendous fear for her safety.

The defendant's contention that the trial court failed to give adequate weight to the mitigating circumstances lacks merit. The record in this case clearly indicates that the trial court was aware of the relevant mitigating factors set forth by the defense in its brief before this court. Thus, it is clear that the trial court considered the mitigating evidence. Because the evidence presented at the trial was clearly sufficient to support a conviction of the charged offense, the trial court could have easily concluded that the defendant had already received mitigating consideration for his intoxication. Furthermore, there is no requirement that any specific mitigating factors be given any particular weight by the sentencing court. **State v. Dunn**, 30,767, p. 2 (La. App. 2 Cir. 6/24/98), 715 So.2d 641, 643.

Considering the reasons stated by the trial court and based on the entire record before us, we find no abuse of discretion by the trial court in sentencing the defendant to the maximum term of imprisonment in this case. The maximum sentence is not so grossly disproportionate to the severity of the offense, nor so disproportionate as to shock our sense of justice. Therefore, we conclude that the maximum sentence imposed in this case is not unconstitutionally excessive.

This assignment of error lacks merit.

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

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.