NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 2241

STATE OF LOUISIANA

VERSUS

JOSHUA M. PASSMAN

Judgment Rendered: June 8, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 503879

Honorable Reginald T. Badeaux, III, Judge Presiding

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Walter P. Reed
Covington, LA
and
Kathryn W. Landry
Baton Rouge, LA

Counsel for Appellee,
State of Louisiana

Mary E. Roper
Baton Rouge, LA

Counsel for Defendant/Appellant,
Joshua M. Passman

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

The defendant, Joshua M. Passman, was charged by amended bill of information with one count of being a convicted felon in possession of a firearm, in violation of LSA-R.S. 14:95.1 ("Count 1"); one count of armed robbery with the use of a firearm, in violation of LSA-R.S. 14:64 and 14:64.3, respectively ("Count 2"); and one count of simple escape, in violation of LSA-R.S. 14:110 ("Count 3"). The defendant initially pled not guilty. After a lunacy hearing, the court found the defendant competent to stand trial and jury selection began. The defendant made a Motion to Suppress Evidence and a Motion to Suppress Statements made in a taped confession, both of which were denied by the trial court. After the motions to suppress were denied, the defendant changed his plea and entered a guilty plea pursuant to State v. Crosby, 338 So. 2d 584 (La. 1976), reserving the right to appeal the denial of the Motion to Suppress Statements.

The State then filed a multiple offender bill of information, alleging that the defendant was a second-felony habitual offender. The defendant admitted to the allegations in the multiple offender bill, and the trial court adjudicated the defendant to be a second-felony habitual offender. The defendant then waived sentencing delays and the trial court immediately sentenced the defendant.

On Count 1, the defendant was sentenced to ten years at hard labor and ordered to pay a fine of $1,000.00. On Count 2, having found the defendant to be a second-felony habitual offender, the trial court sentenced him to forty-eight and one-half years at hard labor without benefit of probation or suspension of sentence, pursuant to LSA-R.S. 15:529.1(A)(1). With respect to the additional penalty for armed robbery with use of a firearm, the trial court sentenced the defendant to five years at hard labor. On Count 3, the trial court sentenced the defendant to one year at hard labor. The sentence on Count 1 was ordered to run concurrently with the sentences on Counts 2 and 3. The five-year additional penalty was ordered to run

consecutively to the habitual offender sentence on Count 2. The sentence on Count 3 was ordered to run consecutively to the five-year additional penalty.

The defendant now appeals, designating one assignment of error. We affirm the convictions, habitual offender adjudication, and sentences.

STATEMENT OF FACTS

Although the defendant pled guilty, the following facts appear from stipulated facts, an audio recording of the police questioning the defendant, and testimony given at the motion to suppress hearing.

In the early morning hours of December 10, 2010, the defendant broke a door and entered the Covington, Louisiana home of Mrs. Gail Richardson, an elderly woman.[1] The defendant woke the victim, pointed a .410 Mossberg shotgun at her face, taped her hands together, and forced her to go through her house as he took money from her purse and forced her to open a safe and remove about $800.00. The defendant also took some jewelry and approximately ten guns. Mrs. Richardson gave the police a description of the perpetrator, which fit the description of the defendant, who was the grandson of the elderly victim's sitter. The defendant later indicated to the police that he knew the victim.

Later that morning, around 10:00 a.m., the police went to the defendant's grandmother's house to question him as a possible suspect and to look around the premises for any of the items taken. Detective Bart Ownby with the Covington Police Department was the lead detective on the case. At the motion-to-suppress hearing, Detective Ownby testified[2] that when he arrived at the house, he told the defendant's grandfather what he was investigating, and the grandfather allowed the detective to walk around the property. He conducted a brief search and no items

[1]The record has conflicting information regarding Mrs. Richardson's age, but she was at least sixty-five years old and perhaps as old as her eighties. In particular, while the State's recitation of the factual basis shows the victim's age as sixty-five, the affidavit of the investigating officer reflects that the victim was eighty-five years old at the time of the offense.

[2]Detective Ownby was the only person who testified at the suppression hearing.

were removed from the premises. While at the house, Detective Ownby also requested to talk to the defendant about where he had been that evening. Before questioning him at the residence, Detective Ownby read the defendant his Miranda rights, and the defendant signed a waiver-of-rights form. The detective observed that the defendant appeared to understand those rights and did not indicate any problems or disabilities. The detective also testified that the defendant was not forced, coerced, or threatened in any way; the defendant was not promised anything by him or any other police officer; and the defendant cooperated with the police.

The defendant was not arrested, but he left his grandmother's house and went with Detective Ownby to the police station. Detective Ownby recalled that he began questioning the defendant while in the police vehicle en route to the police station, but the defendant did not make any confessions at that time. Thus, questioning of the defendant continued at the station. Detective Ownby testified that during all this time, the defendant never asked for an attorney or said he wanted the questioning to stop, the defendant was never forced or coerced, and no one used physical violence against him or made any threats or promises. At least part of the conversation between the defendant and Detective Ownby, including the confession, was captured in an audio recording. According to the audio recording, while at the police station, the defendant did ask when he would be able to leave, and Detective Ownby responded that he did not know.

Detective Ownby admitted that at various times during the questioning, he told the defendant that he was just trying to help him and that he needed to be truthful. He told the defendant that what he did at that time would go a long way in the future. He observed that the defendant was on probation for attempted simple robbery, and speculated that he got probation for that offense because he cooperated with the police. Shortly before confessing, the defendant asked

Detective Ownby what punishment he might face for this crime. Detective Ownby recalled saying he did not know, so he retrieved a Louisiana statute book and looked up crimes that he thought had something to do with the case. He then read aloud some of the elements of, and the sentences for, aggravated burglary and home invasion (crimes that carry sentences of one to thirty years and five to twenty years, respectively).[3] The detective testified that he intended to continue reading anything else that might apply, including armed robbery (which carries a ten to ninety-nine-year sentence), but the defendant confessed first. He also told the defendant that the judge would find a "happy medium" in sentencing. Though the defendant had initially denied any involvement in the instant offenses, he then confessed, saying "I did it." Thereafter, the defendant continued to talk and gave details of the crime. Detective Ownby testified at the suppression hearing that when the defendant confessed his involvement in the instant offenses, he was not forced or coerced to do so, and that the defendant had not been promised anything, including what the District Attorney would charge or any certain sentence.

While still in custody at the police station, but after he had confessed and was aware of the potential charges against him, the defendant said he wished to use the restroom. The restroom was in the front of the building, and the defendant acted like he was going to go in the back after using the restroom. Instead, he ran out of the front door of the police station. The defendant escaped about fifteen feet in the breezeway before he was restrained by police officers.

At the time the defendant committed the instant offenses, he was on probation for the crime of attempted simple robbery, to which he pled guilty in July 2008. The defendant obtained the shotgun used in the early morning hours before the crimes were committed, and the gun was still in his possession in the early

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[3]We note that although the detective stated that the penalty for home invasion was five to twenty years (the general penalty range), if charged with this offense, defendant actually would have faced a penalty of five to twenty-five years under LSA-R.S. 14:62.8(B)(2), since the victim was over the age of sixty-five.

morning hours afterwards.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in denying the motion to suppress where the statement: (1) was obtained after the defendant indicated that he wished to discontinue the questioning, and (2) was induced by the detective's misrepresentation as to how much incarceration the defendant was facing if he confessed.

In the first of the defendant's two-part argument, the defendant asserts that he should have been informed that he was free to leave and to stop participating in the questioning process, but instead was only given the impression that he could not leave. The defendant contends that as a result, he was effectively under arrest, while there was no probable cause to arrest him at that point. Thus, he contends any confession obtained should have been suppressed as "fruit of the poisonous tree." See Wong Sun v. U.S., 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The only basis cited by the defendant for his position that he wished to discontinue questioning is a single time at the police station, when he asked Detective Ownby "when am I going to be able to leave?" and the detective replied that he did not know.

At the outset, we note that in the trial court, the defendant did not argue that the confession should be suppressed because of an illegal detention or arrest, nor did the defendant raise the issue of a lack of probable cause for his arrest. The defendant raises these specific grounds for the first time on appeal. However, Louisiana courts have long held that a defendant may not raise new grounds for suppressing evidence on appeal that he did not raise at the trial court in a motion to suppress. State v. Montejo, 2006-1807 (La. 5/11/10), 40 So. 3d 952, 967-68, cert. denied, __ U.S. __, 131 S. Ct. 656, 178 L. Ed. 2d 513 (2010). Instead, the defendant is limited on appeal to the grounds he articulated below, and a new basis

for a claim, even if it would be meritorious, cannot be raised for the first time on appeal. See State v. Johnson, 2007-1040 (La. App. 4th Cir. 9/10/08), 993 So. 2d 326, 330-331, writ denied, 2008-2649 (La. 6/5/09), 9 So. 3d 868. In accordance with the provisions of LSA-C.Cr.P. arts. 703(F) and 841, to allow an objection on new grounds to be presented for the first time on appeal would deprive the trial court of the opportunity to consider the merits of the particular claim. See State v. Cressy, 440 So. 2d 141, 142-43 (La. 1983). Further, this prohibition exists because the State is also entitled to timely and adequate notice of the alleged ground or objection so that it will have an opportunity to present evidence and address the issue in the proceedings below. As the State points out, while Detective Ownby testified that the defendant was a possible suspect at the time of the questioning, no detailed information was given at the hearing regarding the information the police had at the time to detain and question him. Accordingly, we conclude that this argument is not properly before us on appeal, and the defendant is limited to the grounds articulated in the motion to suppress or at the hearing on same in the proceedings below.

However, even if this claim were deemed to be properly before us, we find that the record sufficiently shows that probable cause existed to arrest the defendant. Probable cause to arrest without a warrant exists when the facts and circumstances known to the arresting officer and of which he has reasonably trustworthy information are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. Although mere suspicion cannot justify an arrest, the officer does not need proof sufficient to convict. Probable cause must be judged by the probabilities and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act. State v. Jarvis, 98-0522 (La. App. 1st Cir. 12/28/98), 727 So. 2d 605, 608. One of the most important elements in

determining whether or not probable cause exists is satisfied when the police know that a crime actually has been committed. When a crime has been committed and the police know it, they have only to determine whether or not there is reasonably trustworthy information to justify a man of ordinary caution in believing the person to be arrested has committed the crime. See State v. Thomas, 589 So. 2d 555, 562 (La. App. 1st Cir. 1991).

In the instant case, the police knew that a crime had been committed. In addition, Detective Ownby testified that at the time he went to the defendant's grandmother's house on the morning of December 10, 2010, he had been given information from the victim that the defendant fit the description of the person who committed the crime. In the audio recording of the detective's questioning of the defendant, the detective said that the victim had described the defendant "to a T." Further, as demonstrated in the audio recording, the defendant and Mrs. Richardson apparently knew each other.[4] Familiarity with the defendant gave greater credibility to the victim's description, as well as the weight with which the detective could rely upon that information. Accordingly, although the defendant failed to preserve the issue of probable cause for appellate review, the record shows that the police had probable cause for his arrest.

Moreover, contrary to the defendant's assertions, he did not indicate that he wished to discontinue questioning and the police did not act improperly in continuing to question him. Thus, we find no grounds for suppression of the evidence on this alleged basis. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was

[4]In State Exhibit 4/Defense Exhibit 1, Track 1 at 5:15, the defendant says that he knows that the victim just got out of the hospital. In Track 1 at 6:30, the defendant says he knows that the victim has "kids" and "grandkids." In Track 1 at 7:00, in response to the detective's speculation that the victim is so nice that he thinks that a stranger could knock on her door and ask for whatever they wanted, within reason, and she would give it them, the defendant says "I know she would." In Track 2 at 13:32, after confessing, Detective Ownby asked the defendant if he wanted the officer to tell the victim something, the defendant responded "Please forgive me, and don't hold nothing against my grandma for what I've done."

unconstitutionally obtained. LSA-C.Cr.P. art. 703(A). The State bears the burden of proving that an accused, who makes an inculpatory statement or confession while in custodial interrogation, was first advised of his constitutional rights and made an intelligent waiver of those rights. LSA-C.Cr.P. art. 703(D). See State v. Davis, 94-2332 (La. App. 1st Cir. 12/15/95), 666 So. 2d 400, 406, writ denied, 96-0127 (La. 4/19/96), 671 So. 2d 925. In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court promulgated a set of safeguards to protect the therein delineated constitutional rights of persons subject to custodial police interrogation. The warnings must inform the person in custody that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. In addition to showing that the Miranda requirements were met, the State must affirmatively show that the statement or confession was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises in order to introduce into evidence a defendant's statement or confession. LSA-R.S. 15:451.

As set forth in Miranda, if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Miranda, 384 U.S. at 473-474, 86 S. Ct. at 1627. When a defendant exercises his privilege against self-incrimination, the validity of any subsequent waiver depends upon whether police have "*scrupulously honored*" his right to remain silent. State v. Taylor, 2001-1638 (La. 1/14/03), 838 So. 2d 729, 739, cert. denied, 540 U.S. 1103, 124 S. Ct. 1036, 157 L. Ed. 2d 886 (2004) (citing Michigan v. Mosley, 423 U.S. 96, 104, 96 S. Ct. 321, 326, 46 L. Ed. 2d 313 (1975)). The critical safeguard in the right to remain silent is the person's right to cut off questioning. Through the exercise of his option to terminate questioning,

he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. State v. Hebert, 2008-0003 (La. App. 1st Cir. 5/2/08), 991 So. 2d 40, 45, writs denied, 2008-1526 & 1687 (La. 4/13/09), 5 So. 3d 157 & 161.

Whether the police have scrupulously honored a defendant's right to cut off questioning is a determination made on a case-by-case basis under the totality of the circumstances. See Michigan v. Mosley, 423 U.S. at 101-06, 96 S. Ct. at 325-27; State v. Prosper, 2008-839 (La. 5/14/08), 982 So. 2d 764, 765. Factors going into the assessment include: (1) who initiates further questioning, although, significantly, the police are not barred from reinitiating contact; (2) whether there has been a substantial time delay between the original request and subsequent interrogation; (3) whether Miranda warnings are given before subsequent questioning; (4) whether signed Miranda waivers are obtained; (5) whether the later interrogation is directed at a crime that had not been the subject of the earlier questioning; and (6) whether or not pressures were asserted on the accused by the police between the time he invoked his right and the subsequent interrogation. State v. Hebert, 991 So. 2d at 46; State v. Brooks, 505 So. 2d 714, 722 (La. 1987), cert. denied, 484 U.S. 947, 108 S. Ct. 337, 98 L. Ed. 2d 363 (1987).

In this case, the only evidence the defendant cites regarding his purported desire to cease questioning is that he asked Detective Ownby, "When am I going to be able to leave?" The detective responded that he did not know, and that he was really trying to help the defendant out. We do not find that this statement indicated a wish to discontinue questioning. In so concluding, we note that prior to any questioning, the defendant was read his Miranda rights, and he signed a waiver-of-rights form. At no time did the defendant state that he wanted the detective to stop questioning him or that he did not want to talk anymore, nor did he request an attorney. A careful review of the audio recording of the interview reflects that this

single question is the only time during the interview that the defendant expressed to Detective Ownby, even ambiguously, a desire to leave. We note that after the defendant inquired about leaving, Detective Ownby only began to urge him again to tell the truth, and advised him that telling the truth early would benefit him later. There is nothing in the record to show that the defendant was induced or led to believe that he had to confess before he would be able to leave. Instead, shortly thereafter, the defendant asked Detective Ownby, "How much time am I looking at doing?" which prompted the detective to reference the Louisiana statute book. Considering the totality of the circumstances, we find that the police did not act improperly in continuing questioning after the defendant's inquiry about when he would be able to leave.

In the second part of his argument that the statement should have been suppressed, the defendant contends that his confession was involuntary because it was induced by the detective's misrepresentation as to how much incarceration he was facing. The defendant points out that Detective Ownby observed how the defendant had received probation on an attempted simple robbery charge a few years prior and intimated that the defendant could receive probation again if he cooperated, saying "what you do now will go a long way in the future," and that if the defendant did not cooperate, he would "be in there for a while." In response to the defendant's inquiry about how much time he was looking at doing, Detective Ownby looked up what he thought were applicable crimes in the Louisiana criminal statutes and read the penalties for aggravated burglary and home invasion, which are one to thirty years and five to twenty years, respectively.[5] However, the detective did not read armed robbery and its possible penalty, which is ten to ninety-nine years at hard labor. The defendant also notes that Detective Ownby told him that a judge would reach a "happy medium" in sentencing. The defendant

[5] See footnote 3, supra.

contends that these statements about possible sentences are what induced him to confess, and that he did so in reliance upon the accuracy of that information.

The State must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. State v. Thomas, 461 So. 2d 1253, 1256 (La. App. 1st Cir. 1984), writ denied, 464 So. 2d 1375 (La. 1985). Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. State v. Benoit, 440 So. 2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible, State v. Hernandez, 432 So. 2d 350, 352 (La. App. 1st Cir. 1983), and the testimony of the interviewing officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. State v. Maten, 2004-1718 (La. App. 1st Cir. 3/24/05), 899 So. 2d 711, 721, writ denied, 2005-1570 (La. 1/27/06), 922 So. 2d 544.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See State v. Green, 94-0887 (La. 5/22/95), 655 So. 2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 2009-1589 (La. 12/1/09), 25 So. 3d 746, 751. In denying the motion to suppress, the trial judge stated that he found the defendant's inculpatory statements were "made freely and voluntarily and knowingly without any fear of duress, or coercions, or promises. That he may have misinterpreted the officer's statements to him as a promise after reading him the statute on aggravated burglary with a maximum of 30 years and saying that the judge may find a happy medium, that's not a promise as far as I'm concerned. And he was ill advised to take his own counsel on that."

Statements by the police to a defendant that he would be better off if he

cooperated are not promises or inducements designed to extract a confession, and a confession is not rendered inadmissible by the fact that law enforcement officers exhort or adjure an accused to tell the truth, provided the exhortation is not accompanied by an inducement in the nature of a threat or one which implies a promise of reward. See State v. Robertson, 97-0177 (La. 3/4/98), 712 So. 2d 8, 31, cert. denied, 525 U.S. 882, 119 S. Ct. 190, 142 L. Ed. 2d 155 (1998). The test for voluntariness requires a review of the totality of the circumstances under which the statement was given; any "inducement" offered is but one factor in that analysis. State v. Lavalais, 95-0320 (La. 11/25/96), 685 So. 2d 1048, 1053, cert. denied, 522 U.S. 825, 118 S. Ct. 85, 139 L. Ed. 2d 42 (1997).

In the instant case, the defendant contends that his confession was not given voluntarily because it was induced, intentionally or negligently, by misleading information about possible penalties. In addition, the defendant contends that the totality of the circumstances shows that the defendant's will was overborne in this case. He points out that he was an "unsophisticated twenty-year old, with limited education," who was later evaluated for competency due to questions about his ability to assist his counsel with the proceedings.

After a careful review of the record and the audio recording of the questioning, we do not find that the defendant's reliance upon the detective's statements regarding possible prison terms rendered his confession involuntary, or that the detective's statements constituted inducements or promises. We agree with the trial court that the defendant may have misinterpreted some of the detective's statements, but the audio recording reveals that Detective Ownby never made any promises of probation or promises of a more lenient sentence or charge in exchange for a confession. Further, the defendant appeared to understand that the

crime was a serious one that would carry a substantial penalty.[6] The detective did urge the defendant to confess and did cite the possible benefits of admitting to the crime, including a lesser sentence. However, rather than being promises or inducements designed to extract a confession, these comments were more likely musings not much beyond what this defendant might well have concluded for himself. Lavalais, 685 So. 2d at 1053-54. In addition, the detective never told or implied to the defendant that the statutes he read aloud to him were the actual or only ones under which the defendant might be charged.

Lastly, the defendant argues that any statements he made should be considered in light of the fact that he was young, unsophisticated, and with limited education. However, we note that the defendant was not unfamiliar with the criminal justice system, as he pled guilty to a prior felony and was still under probation at the time of the instant offenses. Detective Ownby testified at the suppression hearing that when he read the defendant his Miranda rights, the defendant appeared to understand them and did not indicate any problems or disabilities. In any event, diminished mental or intellectual capacity does not of itself vitiate the ability to make a knowing and intelligent waiver of constitutional rights and a free and voluntary confession. See State v. Lindsey, 404 So. 2d 466, 472 (La. 1981). Instead, the critical factor is whether the defendant was able to understand the rights explained to him and voluntarily gave a statement. State v. Benoit, 440 So. 2d at 131.

In sum, we find that, considering the totality of the circumstances, the defendant's confession was freely and voluntarily made. Consequently, the trial court did not err or abuse its discretion in denying the motion to suppress.

The assignment of error is without merit.

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[6]When Detective Ownby asked the defendant if he knew what charges somebody in this circumstance would face, the defendant said: "I imagine pretty f__ big charges."

SENTENCING ERROR

Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found sentencing errors. See State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277.

Upon conviction for armed robbery, the defendant faced a sentence of imprisonment at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. See LSA-R.S. 14:64(B). As a second-felony habitual offender, the defendant should have been sentenced for armed robbery to imprisonment for a term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction. See LSA-R.S. 15:529.1(A)(1). Thus, the defendant should have been sentenced to at least forty-nine and one-half years imprisonment.

However, a review of the sentencing transcript indicates that the trial court sentenced the defendant to forty-eight and one-half years imprisonment, an illegally lenient sentence. In addition, upon conviction for simple escape, the defendant faced a sentence of not less than two years nor more than five years imprisonment, with or without hard labor. See LSA-R.S. 14:110(B)(3). A review of the sentencing transcript shows that the trial court sentenced the defendant to one year at hard labor, which is also illegally lenient. However, since these sentences are not inherently prejudicial to the defendant, and neither the State nor the defendant has raised these sentencing issues on appeal, we decline to correct the errors. See Price, 952 So. 2d at 123-25.

CONCLUSION

For the above reasons, the defendant's convictions, habitual offender adjudication, and sentences are hereby affirmed.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.