

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 2320

STATE OF LOUISIANA

VERSUS

JUAN R. NOVOA

**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 405394, Division "J"
Honorable William J. Knight, Judge Presiding**

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and

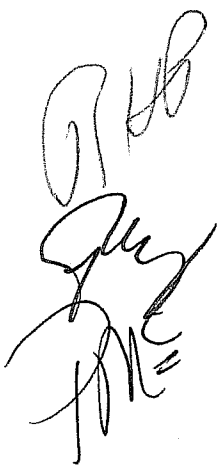
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Juan R. Novoa**

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered May 4, 2007



PARRO, J.

The defendant, Juan R. Novoa, was originally charged by bill of information with attempted second degree murder, a violation of LSA-R.S. 14:27 and 30.1 (count one), unauthorized entry of an inhabited dwelling, a violation of LSA-R.S. 14:62.3 (count two), possession of a concealed weapon by a convicted felon, a violation of LSA-R.S. 14:95.1 (count three), and failure to register as a sex offender, a violation of LSA-R.S. 15:542 (count four). The defendant pled not guilty to all charges. The defendant filed a motion to sever, requesting a separate trial on each count charged in the bill of information. The trial court granted the defendant's motion, in part, severing count four from counts one through three. Thereafter, prior to the trial, the state amended count one to charge second degree battery, a violation of LSA-R.S. 14:34.1. The defendant was re-arraigned on the amended bill of information. He again pled not guilty to all charges.

The defendant was tried by a jury of six on count four and convicted as charged. The defendant was tried by a jury of twelve on counts one, two, and three and convicted as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for a new trial. The state filed a multiple offender bill of information seeking to have the defendant adjudicated a habitual felony offender and sentenced under LSA-R.S. 15:529.1. Following a hearing, the trial court found the defendant to be a third felony offender and sentenced him to life imprisonment at hard labor on count one. On the remaining counts, the defendant was sentenced as follows: count two, six years of imprisonment at hard labor; count three, fifteen years of imprisonment at hard labor without benefit of probation, parole, or suspension of sentence, and a \$1,000 fine; and count four, five years of imprisonment at hard labor. The trial court ordered that the sentences on counts two, three, and four run consecutive to each other, and concurrent to the life sentence on count one. The defendant now appeals the convictions resulting from both trials.

The defendant raises the following assignments of error:

1. The evidence was insufficient to support the conviction for failure to register as a sex offender.
2. The evidence was insufficient to support the conviction for unauthorized entry of an inhabited dwelling.
3. The evidence was insufficient to support the conviction for possession of a concealed weapon by a convicted felon.
4. The evidence was insufficient to support the conviction for second degree battery.
5. The motion to sever the felon in possession of a concealed weapon charge should have been granted.
6. The trial court erred in finding [the defendant] to be a third felony offender based upon the evidence submitted by the state.

We affirm the defendant's convictions on counts one, three, and four, the habitual offender adjudication, and the sentences on counts one, three, and four. Finding the evidence insufficient to support the conviction on count two of unauthorized entry of an inhabited dwelling, we reverse the conviction and vacate the sentence on that count. We enter a modified judgment of conviction of the lesser included offense of criminal trespass on that count and remand the matter to the trial court for resentencing on the modified judgment of conviction.

FACTS

On November 15, 2005, the defendant was arrested in connection with a domestic-violence complaint made by his girlfriend, Devon Kenley. On the day in question, Kenley, who was unemployed, spoke with the defendant on the telephone several times. During one of the conversations, Kenley began to suspect that the defendant had been drinking. Kenley explained that she was bothered by the possibility of the defendant drinking because the defendant was very abusive when intoxicated. At approximately 6:00 p.m., the defendant arrived home. Kenley heard the gravel outside their home being tossed around by the defendant's driving. As usual, Kenley went outside to meet the defendant. When the defendant attempted to kiss Kenley, she refused. She was upset because the defendant smelled of alcohol. Kenley was disappointed to learn that the defendant had broken yet another promise to stop

drinking. The intoxicated defendant was very defensive. A verbal altercation ensued and eventually escalated to a physical one.

Kenley testified that during the encounter the defendant hit and pushed her and she hit him back. At some point, the defendant grabbed Kenley by her hair and "slammed" her head into a door in the kitchen/laundry room area. Kenley testified that she was certain that she passed out at this point. She explained that she saw darkness and did not remember what happened after she hit her head. Later, when she awakened, Kenley found herself in the living room on the floor. She did not recall traveling there. In pain, Kenley went to the bathroom to put some water on her face. As she stood in the bathroom, the defendant suddenly appeared. It is unclear as to whether the defendant hit Kenley again, but she testified that he "kept coming back" to the apartment.

Kenley eventually left the residence and went to the nearby home of some neighbors where she used the telephone to contact the police. Lieutenant Wade Sharp of the Covington Police Department testified that he was dispatched to the duplex apartment to investigate the domestic-disturbance report. Upon arrival, he found Kenley sitting in a chair visibly shaken and scared. Kenley appeared to be in a lot of pain. She told Lt. Sharp, "Look at what he did to me." According to Lt. Sharp, Kenley was quite hysterical as she relayed the events to the officer. Kenley told Lt. Sharp that the drunken defendant had grabbed her by the hair and slammed her head into the edge of a door, causing her to fall unconscious. Consistent with the victim's claims, Lt. Sharp observed a large, vertical bruise to the victim's head. The victim also had significant bruising to her arms.

Lt. Sharp and the other officers, who had arrived at the residence in connection with the dispatch, left Kenley's home in search of the defendant. The officers noticed what they believed to be evidence of a forced entry into the adjoining duplex apartment (1005 West 23rd Street). A windowpane in the back door of the vacant apartment had been busted out. The door was also partially ajar. The officers announced their

presence and entered the vacant apartment. The defendant was later found hiding in an upstairs closet. He was immediately arrested. As the defendant was transported back past the residence where Kenley was, he stated, "You know what's going to happen when I get out." This statement caused Kenley to become quite hysterical.

Further police investigation of the incident revealed that the defendant was a level three sexual offender in Massachusetts, which required him to register as a sexual offender for the rest of his life. While the defendant registered as a sexual offender in Baton Rouge when he initially relocated to the State of Louisiana, he did not register in Covington once he moved there.

The defendant did not testify at the trial. The defense presented the testimony of Kenley's thirteen-year-old son, Zachary Price. In conjunction with Zachary's testimony, the defense also introduced a videotaped statement that Zachary provided to Jo Beth Rickles of the Children's Advocacy Center shortly after the incident in question. At trial, Zachary's account of the events differed from his account at the time of the taped statement. In the taped statement, Zachary told Rickles that he did not believe the defendant was intoxicated when he returned home. Zachary explained that he had hugged the defendant and did not smell alcohol. Zachary also stated that his mother was slapping the defendant and that the defendant had bruises on his face and neck. At trial, however, Zachary stated that the defendant was intoxicated when he arrived home. Zachary testified that he did not recall telling Rickles that Kenley hit the defendant. Zachary explained in his trial testimony that some of the things he said in the taped statements were things that other people told him had happened. Zachary consistently stated that he was upstairs so he did not know if the defendant hit Kenley's head on the door. He came downstairs and observed Kenley on the floor.

On rebuttal, the state introduced a video-recorded statement from Kenley's daughter, Jade Kenley. In her statement, Jade explained that the defendant, who she referred to as "Papa Juan," hit her mother and caused her to suffer a period of unconsciousness on the night in question.

SUFFICIENCY OF THE EVIDENCE

In his first four assignments of error, the defendant challenges the sufficiency of the state's evidence in support of each of his convictions.

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

When analyzing circumstantial evidence, LSA-R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test is not a purely separate one from the **Jackson** constitutional sufficiency standard. Ultimately, all evidence, both direct and circumstantial, must be sufficient under **Jackson** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. **State v. Shanks**, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 159.

The **Jackson** standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **State v. Booker**, 02-1269 (La. App. 1st Cir. 2/14/03), 839 So.2d 455, 459, writ denied, 03-1145 (La. 10/31/03), 857 So.2d 476.

Failure to register as a sexual offender

First, the defendant challenges the sufficiency of the state’s evidence in support of the failure to register as a sexual offender conviction.

Louisiana Revised Statute 15:542, which sets forth the requirements for registration of sex offenders in Louisiana, provides, in pertinent part:

A. (1) Any adult residing in this state who has pled guilty to, has been convicted of, or where adjudication has been deferred or withheld for the perpetration or attempted perpetration of any sex offense and any juvenile who has pled guilty or has been convicted of a sex offense as provided for in Children's Code Article 857 shall register with the sheriff of the parish of each of the person's residences if there is more than one, and with the chief of police if the address of any of the person's residences is located in an incorporated area which has a police department. If the adult or juvenile resides in a parish with a population in excess of four hundred fifty thousand, he shall register with the police department of his municipality of residence.

* * * *

(4) Any person required to register under this Section who is absent from his last address of registration for more than thirty days shall re-register with the sheriff of the parish of the person's new residence and with the chief of police if the relocation address is located in an incorporated area which has a police department. Any person required to register under this Paragraph shall provide community notification as required by Paragraphs (1), (2), (3), and (4) of this Subsection and R.S. 15:542.1(L). The offender shall also send written notice, within ten days after re-registering in the new parish, to the sheriff or the police chief with whom he had previously registered. If a person required to register under this Paragraph fails to register, keep registration current, give community notification, or notify the bureau of the relocation address, the person shall be in violation of this Section and subject to the penalties provided in R.S. 15:542(F).

Pursuant to the aforementioned statute, the defendant, who was already registered as a sex offender in East Baton Rouge Parish, was required to re-register in Covington (St. Tammany Parish) within ten days of establishing his residence there. On appeal, the defendant does not appear to contest that he established his residence in Covington. Instead, the crux of his argument is that the state failed to prove that he resided in Covington for more than ten days prior to his arrest. He argues that, absent evidence of the exact date on which he established residence in Covington, the failure to register as a sexual offender conviction must fall.

At the trial, Penny Givens, the individual who manages the sex offender register tracking program for St. Tammany Parish, testified that the defendant never registered in that parish. Detective Denise Blair of the Covington Police Department testified that in connection with her investigation in this case she spoke with Kenley, who indicated that she and the defendant moved to Covington approximately two weeks prior to the incident in question. As circumstantial evidence of the amount of time the defendant resided in St. Tammany Parish, the state also introduced records from the St. Tammany Parish School Board establishing that Kenley enrolled her children in school on October 25, 2005. The defendant was arrested on November 15, 2005.

On appeal, the defendant makes much of the fact that the state's evidence did not establish the exact date he established residence in St. Tammany Parish. We note, however, that although the state did not present direct evidence of the date of the defendant's residency, the circumstantial evidence (school enrollment for the minor children who resided with the defendant and Kenley) was sufficient to establish that the defendant had been a resident of Covington for more than ten days. Contrary to the defendant's assertions, this evidence, coupled with the evidence establishing the fact that the defendant failed to register in St. Tammany Parish, was sufficient to support the failure to register as a sex offender conviction.

Insofar as the defendant claims the state failed to provide sufficient proof of the prior sexual offense convictions, we note that both Penny Givens and Detective Blair testified that the defendant's NCIC rap sheet revealed that he had two prior sexual offense convictions (against a child under 14 years old) from Massachusetts. In connection with the testimony of these two officials, the state introduced an NCIC Interstate Identifications Index Response document and Sexual Registration Information printout, both of which contained the defendant's name, date of birth, and social security number. Certified copies of the Massachusetts convictions were also introduced into evidence. To further connect the defendant with the Massachusetts convictions, the state introduced the booking record for the instant offense, which

contained a photograph of the defendant and other identifying information (i.e., the defendant's full name, date of birth, and social security number). The state also introduced a printout from the Massachusetts Sexual Offender Registry Board, and printouts from the Louisiana Sexual Offender Registration Registry website, all of which contained identical identifying information and the defendant's photograph. The state also submitted the Sexual Offender Registration Form completed by the defendant in East Baton Rouge Parish. This form, which contained the defendant's signature, also listed specific information for the 1996 conviction. Considering the foregoing, it is clear that the defendant's claim that the state failed to provide sufficient proof of the prior sexual convictions and/or to connect him with the convictions is clearly without merit. The evidence introduced by the state was sufficient to prove the existence of the prior convictions and to establish the defendant's identity as the individual convicted of the sexual offenses in Massachusetts, such that a rational trier of fact could conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime.

This assignment of error lacks merit.

Unauthorized entry of an inhabited dwelling

Next, the defendant argues the state's evidence fell short of proving, beyond a reasonable doubt, all of the elements of the offense of unauthorized entry of an inhabited dwelling. Specifically, the defendant notes that it is undisputed in the record that the residence at 1005 West 23rd Street was uninhabited. The defendant asserts that in order to fulfill the inhabitation requirement of the statute, the state was required to prove that someone was actually living in the residence at the time of the offense. Absent such evidence, the defendant argues, the conviction cannot stand.

As the defendant correctly notes, throughout the record in this case, it is undisputed that the side of the duplex where the defendant was found was uninhabited. The defendant and Kenley lived in one of the adjoining apartments and

the other was vacant. Thus, the only question that remains is whether a duplex apartment where no one lives can ever be considered an "inhabited dwelling."

Louisiana Revised Statute 14:62.3 defines the offense of unauthorized entry of an inhabited dwelling as "the intentional entry by a person without authorization into any inhabited dwelling or other structure belonging to another and used in whole or in part as a home or place of abode by a person." In its brief, the state cites the Second Circuit's decision in **State v. Bryant**, 34,244 (La. App. 2nd Cir. 12/6/00), 775 So.2d 596, writ denied, 01-0144 (La. 11/21/01), 802 So.2d 627, in support of its position that the evidence was sufficient to support the conviction. In **Bryant**, the defendant was charged with attempted simple burglary of an inhabited home for breaking into the carport storage room of a residence. The defendant argued that the storage room was not an inhabited dwelling. The court held that although the carport storage room had no direct entrance into the residence, it nevertheless formed part of the structure of the house since the room was under the same roof as the house. Applying this "under the same roof" analysis to the instant case, the state asserts it sufficiently proved the defendant's unauthorized entry into the 1005 West 23rd Street duplex apartment, which shared a roof with the residence the defendant and Kenley shared (1003 West 23rd Street), constituted unauthorized entry of an inhabited dwelling.

It is well established that criminal statutes are to be strictly construed. LSA-R.S. 14:3. Any doubt as to the extent of the coverage of a criminal statute must be decided in favor of the accused and against the state. See State ex rel. Mims v. Butler, 601 So.2d 649, 655 (La. 1992)(on rehearing). Strictly construing LSA-R.S. 14:62.3, we conclude the instant unauthorized entry of an inhabited dwelling conviction must be reversed. We find the Second Circuit's decision in **Bryant** distinguishable.

Louisiana Revised Statute 14:62.3 specifically requires entry of an "inhabited dwelling or other structure[.]" While the Second Circuit found that the carport storage room in **Bryant** was governed by the "other structure" portion of LSA-R.S. 14:62.2, the simple burglary of an inhabited dwelling statute, we look to the "dwelling" portion of

the statute in question. Each of the duplex apartments in question (1003 and 1005 West 23rd Street) constituted a separate dwelling and required inhabitation. Unlike the carport in **Bryant**, the duplex apartments were not "other structures." Thus, there was no need to apply the "under the same roof" analysis.

In the instant case, because it is undisputed that 1005 West 23rd Street, the dwelling where the defendant was found, was not inhabited, an essential element of the offense of unauthorized entry of an inhabited dwelling is lacking. Thus, as the defendant correctly asserts, the evidence presented by the state is insufficient to support the unauthorized entry of an inhabited dwelling conviction.

Louisiana Code of Criminal Procedure article 821(E) provides that an appellate court, in lieu of granting a post-verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive offense, if the evidence supports only a conviction for a lesser included responsive offense. Criminal trespass is a lesser included responsive offense to unauthorized entry into an inhabited dwelling. We find the evidence presented at the trial of this matter supports only a conviction of criminal trespass on count two. LSA-R.S. 14:63, which defines the offense of criminal trespass, provides, in pertinent part, that "no person shall enter upon immovable property owned by another without express, legal, or implied authorization." LSA-R.S. 14:63(B). Habitation is not a requirement.

At the trial, Steve Owens testified that he leased the duplex in question (1003 and 1005 West 23rd Street) from the owner, Dr. Michael Breen. Owens then subleased the unit to Jose' Garcia, a subcontractor, who, in turn, placed people in the units. The defendant worked for Garcia. According to Owens, the defendant was leasing 1003 West 23rd Street. The defendant did not have permission (from Owens or from Dr. Breen) to enter 1005 West 23rd Street. Accordingly, the defendant's conviction of unauthorized entry into an inhabited dwelling on count two is modified to a judgment of conviction of criminal trespass. The sentence on count two is vacated. The matter is remanded to the trial court for resentencing on the modified judgment of conviction.

This assignment of error has merit.

Convicted felon in possession of a concealed weapon

Next the defendant argues the evidence presented at the trial was insufficient to support the conviction for carrying a concealed weapon by a convicted felon. Specifically, he maintains the state did not carry its burden of proving that the defendant was in possession of a concealed weapon, arguing that the box cutter and knife were tools of his trade used in connection with his employment as a construction worker.

Louisiana Revised Statute 14:95.1 makes it unlawful for persons convicted of certain felonies to possess a firearm or carry a concealed weapon. The statute provides:

A. It is unlawful for any person who has been convicted of a crime of violence as defined in R.S. 14:2(B) which is a felony or simple burglary, burglary of a pharmacy, burglary of an inhabited dwelling, unauthorized entry of an inhabited dwelling, felony illegal use of weapons or dangerous instrumentalities, manufacture or possession of a delayed action incendiary device, manufacture or possession of a bomb, or any violation of the Uniform Controlled Dangerous Substances Law which is a felony, or any crime which is defined as a sex offense in R.S. 15:541(14.1), or any crime defined as an attempt to commit one of the above-enumerated offenses under the laws of this state, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be one of the above-enumerated crimes, to possess a firearm or carry a concealed weapon.

B. Whoever is found guilty of violating the provisions of this Section shall be imprisoned at hard labor for not less than ten nor more than fifteen years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars.

C. Except as otherwise specifically provided, this Section shall not apply to the following cases:

(1) The provisions of this Section prohibiting the possession of firearms and carrying concealed weapons by persons who have been convicted of certain felonies shall not apply to any person who has not been convicted of any felony for a period of ten years from the date of completion of sentence, probation, parole, or suspension of sentence.

(2) Upon completion of sentence, probation, parole, or suspension of sentence the convicted felon shall have the right to apply to the sheriff of the parish in which he resides, or in the case of Orleans Parish the

superintendent of police, for a permit to possess firearms. The felon shall be entitled to possess the firearm upon the issuing of the permit.

(3) The sheriff or superintendent of police, as the case may be, shall immediately notify the Department of Public Safety, in writing, of the issuance of each permit granted under this Section. (Footnote omitted).

Thus, to convict the defendant of possession of a concealed weapon by a convicted felon, the state must prove beyond a reasonable doubt: (1) the possession of a concealed weapon; (2) a previous conviction of an enumerated felony; (3) absence of the ten-year statutory period of limitation; and, (4) general intent to commit the offense. LSA-R.S. 14:95.1; see **State v. Husband**, 437 So.2d 269, 271 (La. 1983). The defendant does not contest his status as a felon convicted of one of the enumerated felonies. This element was established by stipulation. The only issue that remains is whether the defendant was justified in carrying the items in question as "tools of his trade."

The defendant's argument that he possessed the knife and box cutter for purposes associated with his employment has no bearing on whether he was a convicted felon in possession of a concealed weapon. See **State v. Thomas**, 625 So.2d 206, 208-09 (La. App. 3rd Cir. 1993). The reason(s) for possessing the items in question, which by their very nature can be considered weapons, are irrelevant; the law does not require that the convicted felon possess the concealed weapon with the intent to use it in an illegal manner. Furthermore, there is no explanation as to why the defendant kept the alleged "tools of his trade" concealed in his pocket many hours after returning home from work. Kenley testified that the defendant returned from work at some time in the early evening. He was not arrested until sometime after midnight. Reviewing the evidence in a light most favorable to the prosecution, the evidence introduced at trial was sufficient to support a verdict of guilty of possession of a concealed weapon by a convicted felon. Therefore, the defendant's assignment of error is without merit.

Second degree battery

In his final challenge to the sufficiency of the state's evidence, the defendant contends that the evidence was legally insufficient to support a verdict of second degree battery because the state failed to prove that he was responsible for the injuries sustained by Kenley. He asserts that Kenley easily could have sustained the injuries when she fell.

Battery includes the intentional use of force or violence upon the person of another. LSA-R.S. 14:33. Second degree battery is a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury. Serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death. LSA-R.S. 14:34.1. In order to prove a second degree battery, the state had to prove that the defendant: (1) committed a battery upon another, (2) without his consent, and (3) intentionally inflicted serious bodily injury. **State v. Young**, 00-1437 (La. 11/28/01), 800 So.2d 847, 852. The defendant disputes all of the elements.

After a thorough review of the record, we are convinced the evidence presented in this case, viewed in the light most favorable to the state, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree battery and the defendant's identity as the perpetrator of that offense against the victim. As previously noted, the victim testified that the defendant pulled her by the hair and "slammed" her head into a door causing her to fall unconscious. The guilty verdict rendered against the defendant for this offense indicates the jury accepted the victim's account of these events (as well as the evidence of her injuries). A rational interpretation of the evidence adduced is that the defendant, in grabbing Kenley by the hair and ramming her head into a solid door, intended to cause extreme physical pain and caused her to suffer a period of unconsciousness.

On review, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. As the trier of fact, the jury was entitled to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

This assignment of error is without merit.

DENIAL OF MOTION TO SEVER OFFENSES

In his fifth assignment of error, the defendant claims the trial court erred in refusing to sever the charge of being a convicted felon in possession of a concealed weapon from the remaining offenses. The defendant claims joinder of this offense was improper and prejudicial because it allowed the jury to hear the otherwise inadmissible evidence that he was a convicted felon. The state introduced evidence that defendant had a 1997 conviction for possession of cocaine and a conviction for indecent assault on a child under 14 years of age. The defendant contends the trial court failed to consider the prejudice that would result to him from trying the charges together with the same jury. See LSA-C.Cr.P. art. 495.1.

Louisiana Code of Criminal Procedure article 493 provides for the joinder of two or more offenses, as follows:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial.

However, if it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires. LSA-C.Cr.P. art. 495.1.

A defendant in any case bears a heavy burden of proof when alleging prejudicial joinder of offenses as grounds for a motion to sever; factual, rather than conclusory, allegations are required. **State v. Davis**, 92-1623 (La. 5/23/94), 637 So.2d 1012, 1019, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994). In ruling on a motion for severance, the trial court must weigh the possibility of prejudice to the defendant against the important considerations of economical and expedient use of judicial resources. **State v. Brooks**, 541 So.2d 801, 804 (La. 1989). An appellate court will not reverse the trial court's ruling denying a motion for severance absent a clear showing of prejudice. **State v. Machon**, 410 So.2d 1065, 1068 (La. 1982); see State v. Allen, 95-1515 (La. App. 1st Cir. 6/28/96), 677 So.2d 709, 713, writ denied, 97-0025 (La. 10/3/97), 701 So.2d 192.

Because all of the charged offenses that were not severed were triable by the same number of jurors and required the same concurrence, joinder was not improper. Thus, the only question is whether the introduction of evidence of defendant's prior convictions for possession of cocaine and indecent assault on a child were so prejudicial that the trial court's failure to sever that count was an abuse of discretion.

As a general rule, evidence of criminal conduct that takes place in a series of events is admissible at the trial of one of the offenses. See LSA-C.E. art. 404(B); see also State v. Colomb, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1075 (per curiam). Any time the state introduces evidence of other criminal activity by the accused, the possibility exists that the trier of fact will be affected to some degree by the evidence; for that reason, the state must be mindful of the circumstances in which it elects to try a charge of felon in possession of a firearm with other substantive offenses to insure that justice is served. Nevertheless, there is no absolute ban on the introduction of

evidence of other unrelated crimes, including felony convictions; instead, statutory and jurisprudential guidelines establish the circumstances under which this evidence is admissible. See LSA-C.E. arts. 403 and 404(B); see also **State v. Prieur**, 277 So.2d 126, 130 (La. 1973).

In ruling on a motion for severance, the trial court should consider a variety of factors to determine if prejudice may result from the joinder: whether the jury would be confused by the various counts; whether the jury would be able to segregate the various charges and the evidence; whether the defendant could be confounded in presenting his various defenses; whether the crimes charged would be used by the jury to infer a criminal disposition; and whether, considering the nature of the offenses, the charging of several crimes would make the jury hostile. **State v. Gaines**, 633 So.2d 293, 297 (La. App. 1st Cir. 1993), writ denied, 93-3164 (La. 3/11/94), 634 So.2d 839.

Considering the **Gaines** criteria, we find the defendant did not establish that the evidence relating to the convicted felon in possession of a concealed weapon charge was likely to confuse the jury and make the jury unable to segregate the charges and evidence, because the charges and evidence pertinent to each of the crimes charged were easily distinguishable. The defendant's identity as the perpetrator of each of the charged offenses was not in dispute. Instead, his only defense concentrated on discrediting the victim's account of the events. Introduction of evidence of the prior convictions did not, in any way, confound the defense. The remaining factors require the determination of whether the crimes charged would be used by the jury to infer a criminal disposition or, when considering the nature of the offenses, the joinder of the crimes would make the jury hostile.

The defendant claims the trial on the concealed weapon by a convicted felon charge joined with the trial on the other offenses allowed the jury to learn that he had prior convictions and to infer that he had a criminal disposition, which he contends resulted in his convictions based upon insufficient evidence. In **State v. Morris**, 99-3075 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 913-14, writ denied, 00-3293 (La.

10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002), this court concluded that the defendant failed to meet the burden of establishing prejudice resulting from the joinder of a charge of possession of a firearm by a felon with other charges of second degree murder, armed robbery, and aggravated kidnapping. In that case, the prior felony supporting the charge of possession of a firearm by a felon was first degree robbery. In so concluding, we stated:

We find defendant has offered only conclusory allegations and failed to meet the burden of establishing prejudicial joinder. The trial court's instructions, both after the presentation of the evidence and during general instructions, that the evidence of defendant's prior conviction was admitted only to establish an element of the felon in possession of a firearm charge and not as evidence of defendant's character, limited any prejudice.

State v. Morris, 770 So.2d at 915.

In the instant case, we likewise find that the defendant has offered only conclusory allegations and failed to meet the burden of establishing prejudicial joinder. The trial court took great care to limit any potential prejudice to the defendant. As the defendant notes in his brief, the trial court specifically instructed the jury that the evidence of defendant's prior convictions was admitted only to establish the elements of one of the charged offenses and not as evidence bearing on the defendant's character. The court explained, "You may not find him guilty of this offense merely because he may have committed another offense."

Accordingly, under these circumstances, we find no merit in the defendant's claim that the trial court erred in refusing to sever the charge of felon in possession of a concealed weapon.

SUFFICIENCY OF HABITUAL OFFENDER EVIDENCE

In his final assignment of error, the defendant avers that the evidence presented at the multiple offender hearing was insufficient to prove that the defendant was a third felony habitual offender. Specifically, the defendant contends the state failed to

provide sufficient documentation to connect him to the prior convictions. The defendant also asserts the state failed to establish the validity of the prior guilty pleas.

To obtain a multiple offender adjudication, the state is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. In attempting to do so, the state may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. **State v. Payton**, 00-2899 (La. 3/15/02), 810 So.2d 1127, 1130. The Habitual Offender Law does not require the state to use a specific type of evidence in order to carry its burden at the hearing, and the prior convictions may be proved by any competent evidence. **State v. Payton**, 810 So.2d at 1132.

In **State v. Shelton**, 621 So.2d 769, 779-80 (La. 1993), the Louisiana Supreme Court discussed the state's burden of proof in a habitual offender proceeding as follows:

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 (sic), 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 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).

See **Boykin v. Alabama**, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

In **State v. Westbrook**, 392 So.2d 1043 (La. 1980) (on rehearing), a case where the defendant was convicted of a second offense of driving while intoxicated, the

defendant complained of an insufficient connexity to prove he was actually the prior offender. In affirming his second offense DWI conviction, the Louisiana Supreme Court held "the driver's license number, sex, race and birth date all identified the prior offender with defendant. The State [therefore] carried its burden of proving that this defendant is the Westbrook previously convicted[.]" **Westbrook**, 392 So.2d at 1045. See also **State v. Lee**, 97-1035 (La. App. 5th Cir. 2/11/98), 709 So.2d 226, 228-29 (affirming the defendant's adjudication as a multiple offender even though the bill of information for a predicate conviction did not contain the defendant's fingerprints); **State v. Hawthorne**, 580 So.2d 1131, 1132-33 (La. App. 4th Cir. 1991) (affirming the defendant's second felony habitual offender adjudication because the defendant's fingerprints matched those on the arrest register in the defendant's name for a charge of aggravated rape, and conviction documentation showed the same crime, same defendant, same date of crime, and same victim's name as that found on the arrest register).

In this case, the multiple offender bill of information alleged the following prior convictions: 1) a November 12, 1999 conviction in case number 9962CR008892 of the Worcester District Court for indecent assault and battery on a child under 14; 2) a July 2, 1997 conviction in case number 9762CR5620 of the Worcester District Court for possession of cocaine; 3) a June 3, 1997 conviction in case number 9662CR7618 of the Worcester District Court for larceny over \$250; 4) a June 16, 1993 conviction in case number 93-0150-2 of the Superior Court of Massachusetts for indecent assault and battery on a child under 14; 5) a March 2, 1992 conviction in case number 9262CR1378 of the Worcester District Court for assault and battery; and 6) a March 2, 1992 conviction in case number 9262CR1378 of the Worcester District Court for unarmed robbery.

In support of the alleged prior convictions, the state introduced certified copies of the Massachusetts bills of information and the criminal case summaries for these offenses. The state also presented testimony from Jill Walker, the probation and parole

officer who prepared a presentence investigation report on the defendant in connection with this case. Walker testified that the defendant advised her that he had two prior convictions in Massachusetts (1993 and 1999) for indecent assault and battery on a child under 14.¹ Walker further testified that the defendant advised her that each of the aforementioned convictions was a result of a guilty plea. Walker explained that she specifically recalled the details of her conversation with the defendant because he claimed he was innocent of the offenses to which he pled guilty. Walker identified the defendant in open court as the individual who made the statements regarding his prior convictions.

The testimonial evidence and documentation for each of the defendant's prior convictions was sufficient to connect the defendant by name, age, date of birth, and social security number. The jurisprudence supports the use of testimony, photographs, fingerprint experts, or evidence of identical driver's license numbers, sex, race, and date of birth to establish the defendant's identity as the person convicted of the prior offense. **State v. Clesi**, 06-1250 (La. App. 1st Cir. 2/14/07), __ So.2d ___, ___, 2007 WL 466531. Thus, we find this information sufficient to connect the defendant to the prior convictions. The state proved beyond a reasonable doubt that the defendant is the same person convicted of the prior felonies. The defendant's claim that the state failed to establish his identity is clearly meritless.

Insofar as the defendant's challenge to the constitutional validity of the predicate convictions is concerned, we likewise find the defendant's claim to lack merit. In finding the evidence submitted by the state to be sufficient, the trial court specifically noted that the documentation reflects that the defendant was attended by counsel in both of the prior guilty pleas at issue. Thus, the state satisfied its initial burden pursuant to **Shelton**. The burden then shifted to the defendant to show an infringement of his rights or a procedural irregularity in the taking of the pleas. The

¹ These two prior convictions served as the predicates for the third felony offender adjudication.

defendant could have attempted to meet this burden by introducing testimony regarding the taking of the pleas or any other affirmative evidence.

The record is devoid of any attempt by the defendant to produce any such affirmative evidence. Instead, at the multiple offender hearing, counsel for the defendant only argued that the state failed to produce a transcript or other evidence that the trial judge explained the **Boykin** rights to him or that he waived these rights before pleading guilty in the predicates at issue. Because the defendant failed to meet his burden, the burden of proving the constitutionality of the prior guilty pleas at issue never shifted back to the state.

The trial court adjudicated the defendant a habitual offender pursuant to LSA-R.S. 15:529.1(A)(1)(b) (ii), which, at the time of the offense, provided:

If the third felony and the two prior felonies are felonies defined as a crime of violence under R.S. 14:2(13), a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

The instant offense and the two predicate convictions at issue meet the requirements of LSA-R.S. 15:529.1(A)(1)(b)(ii). Considering the foregoing, we find that the record adequately supports the habitual offender adjudication.

This assignment of error lacks merit.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under LSA-Cr.P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under LSA-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 in these proceedings, we have found no reversible errors. See **State v. Allen**, 94-1941

(La. App. 1st Cir. 11/9/95), 664 So.2d 1264, 1273, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433.

CONVICTIONS ON COUNTS ONE, THREE, AND FOUR AFFIRMED; HABITUAL OFFENDER ADJUDICATION AFFIRMED; HABITUAL OFFENDER SENTENCE ON COUNT ONE AND SENTENCES ON COUNTS THREE AND FOUR AFFIRMED; CONVICTION OF UNAUTHORIZED ENTRY OF AN INHABITED DWELLING (COUNT TWO) REVERSED, SENTENCE VACATED, MODIFIED JUDGMENT OF CONVICTION OF CRIMINAL TRESPASS ENTERED, AND REMANDED FOR RESENTENCING ON THE MODIFIED JUDGMENT OF CONVICTION.