NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 1612

STATE OF LOUISIANA

VERSUS

LIONELL BELLAZER

Judgment Rendered: December 23, 2008.

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On Appeal from the
21st Judicial District Court,
in and for the Parish of Tangipahoa
State of Louisiana
District Court No. 502070

The Honorable Robert H. Morrison, II, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

CARTER, C.J.

The defendant, Lionell Bellazar, was charged by amended grand jury indictment with one count of attempted aggravated rape (count I), a violation of La. R.S. 14:27 and 14:42; and one count of aggravated burglary (count II), a violation of La. R.S. 14:60. [1] The defendant entered a plea of not guilty and, following a jury trial, he was found not guilty on count I and guilty of the responsive offense of simple burglary, a violation of La. R.S. 14:62, on count II. On count II, he was sentenced to twelve years at hard labor.[2]

Thereafter, the State filed a habitual offender bill of information against the defendant, alleging he was a fourth felony habitual offender.[3] Following a hearing, the defendant was adjudged a second felony habitual offender on count II, the court vacated the previous sentence imposed on count II, and sentenced the defendant to fifteen years at hard labor on count II.

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1 LaMarcus McGee was charged by the same amended indictment with one count of aggravated rape (count III), a violation of La. R.S 14:42; one count of aggravated burglary (count IV), a violation of La. R.S. 14:60; and one count of aggravated escape (count V), a violation of La. R.S. 14:110C(1). He was tried separately from the defendant.

2 Although the sentencing transcript reflects the court imposed the sentence on count II with no restrictions, the sentencing minutes indicate the court sentenced the defendant to twelve years at hard labor without benefit of probation or parole. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

3 Predicate no. 1 was set forth as the defendant's January 3, 1990, conviction, under Tangipahoa Parish Docket no. 58234, of possession of a Schedule II controlled dangerous substance. Predicate no. 2 was set forth as the defendant's March 27, 1991, conviction, under Tangipahoa Parish Docket no. 60601, of simple burglary. Predicate no. 3 was set forth as the defendant's May 24, 1993, conviction, under Tangipahoa Parish Docket no. 65410, of attempted first-degree robbery. Predicate no. 4 was set forth as the defendant's November 5, 2001, conviction, under St. Helena Parish Docket no. 11896, of simple burglary. Predicate no. 5 was set forth as the defendant's November 5, 2001, conviction, under St. Helena Parish Docket no. 12175, of attempted simple burglary. Predicate no. 6 was set forth as the defendant's November 5, 2001, conviction, under St. Helena Parish Docket no. 12330, of simple burglary. Predicate no. 7 was set forth as the defendant's November 5, 2001, conviction, under St. Helena Parish Docket no. 12343, of simple escape.

The defendant now appeals, contending that the trial court erred in denying the motion to exclude other crimes evidence, in adjudicating him a second felony habitual offender, and in imposing an excessive sentence. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

The victim, C.H.,[4] testified that she was seventy-six years old at the time of trial. She identified the defendant in court and indicated she was familiar with him because he had worked for her and had borrowed money from her in the past. On April 12, 2005, at approximately 11:30 p.m., the defendant knocked on the victim's door, and after she recognized him through the peep hole in the door, she opened the door to see what he needed. She indicated someone else burst through the door and knocked her to the floor. The second person kept a firm grip on the victim and asked her where the guns were and where was the money. The victim told the man that she did not have a gun, but she had money in the top drawer of her dresser in the bedroom. The man threatened to shoot the victim, but she did not see him with a gun.

The man forced the victim into the bedroom, holding her so that she could not see his face. The defendant also walked into the bedroom, went to the dresser, opened the top drawer, and then left the bedroom. The second person dragged the victim around the bedroom, looking for things to take. He then banged her head against a wall and took her to the bed. He tried to push her over the bed, and then put "something" between her legs and tried to penetrate her. He then pushed her into a closet and barricaded it closed with chairs.

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4 We reference the victim only by her initials. See La. R.S. 46:1844W.

After the defendant and the second person left, the victim managed to release herself and discovered her money was missing from her dresser, her deceased husband's wedding ring and other personal items were missing, and her car keys, car, and wallet containing credit cards and cash were missing. The living room telephone had also been pulled out of the wall.

At trial, the State played an April 15, 2005, videotaped statement by the defendant. On the tape, the defendant indicated he was thirty-eight years old. He claimed that, on the night of the offense, he obtained crack cocaine from his eighteen or nineteen-year-old cousin, LaMarcus "Mickey" McGee. The defendant claimed that McGee demanded that the defendant pay him for the crack and for some crack that he had previously sold to the defendant on credit. The defendant claimed he told McGee that he (the defendant) could borrow money from the victim and, while smoking crack, went to the victim's home with McGee and knocked on the door. The defendant told the victim, "It's Lionell, the one that got the $50 from you." The defendant claimed as soon as the victim opened the door, McGee punched her while holding a gun. The defendant claimed he had no knowledge of the gun until that moment. He claimed McGee threatened him with the gun, demanded money from the victim, and then forced her into the bedroom where he took a "bank thing" from her drawer, raped her, and then took her credit cards and car keys. The defendant then claimed McGee forced him to leave with him in the victim's car. The defendant indicated he smoked crack once in the car. According to the defendant, McGee drove to McGee's father's place, where the defendant smoked more crack and told McGee's father and brother that McGee had robbed and raped a lady. The defendant claimed McGee then left with his

brother but later returned and cooked some crack. The defendant denied getting any of the victim's money.

OTHER CRIMES EVIDENCE

In the first assignment of error, the defendant argues that the trial court erroneously allowed other crimes evidence to be admitted against him at trial because the evidence was irrelevant to the proof of the elements of the crimes charged.

Louisiana Code of Evidence article 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

Louisiana Code Evidence article 404B(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. However, La. Code Evid. art. 404B(1) authorizes the admission of evidence of other crimes, wrongs, or acts when the evidence "relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." In **State v. Brewington**, 601 So.2d 656, 657 (La. 1992) (per curiam), the Louisiana Supreme Court indicated its approval of the admission of other crimes

evidence, under this portion of La. Code Evid. art. 404B(1), "when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it."

The *res gestae* doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances. **State v. Taylor**, 2001-1638, pp. 10-11 (La. 1/14/03), 838 So.2d 729, 741, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004).

Further, the *res gestae* doctrine incorporates a rule of narrative completeness by which, "the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." **Taylor**, 2001-1638 at pp. 12-13, 838 So.2d at 743 (quoting **Old Chief v. United States**, 519 U.S. 172, 188, 117 S.Ct. 644, 654, 136 L.Ed.2d 574 (1997)).

Following selection of the jury, but prior to the presentation of opening statements, the defense reiterated its objection to the admission of other crimes evidence, specifically the defendant's alleged cocaine possession or use prior to or after the offense. The defense argued there was no allegation that the defendant was not present, and thus, what he was doing on the way to the house or how he got there was irrelevant, immaterial, and unfairly prejudicial. Additionally, the defense argued that

the State should be forced to edit the defendant's videotaped statement to remove any references to drugs.

The trial court noted that because the defense had waited until the morning of trial to raise the issue, it did not know if the State would have time to edit the videotape in question prior to presenting it to the jury. Moreover, the court noted the drug use was the motive for entering the victim's residence (specifically to obtain something of value with which to purchase additional drugs) and, thus, was evidence of motive and part of the *res gestae*. The court denied the motion to exclude the other crimes evidence.

There was no abuse of discretion in the denial of the motion to exclude other crimes evidence. The challenged evidence was "related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it." **Brewington**, 601 So.2d at 657. This evidence constituted an integral part of the defendant's crime and was part of the *res gestae*.

Additionally, even assuming *arguendo* that the balancing test of La. Code Evid. art. 403 is applicable to integral act evidence admissible under La. Code Evid. art. 404B,[5] that test was satisfied in this matter. The evidence of the defendant's drug use was highly probative under the State's theory of the case, *i.e.*, that the defendant while high on crack, needed money to pay for more crack and needed money to pay Magee for drugs he had already consumed, and that he took Magee to the victim's home, knowing she was

[5] The Louisiana Supreme Court has left open the question of the applicability of the Article 403 test to integral act evidence admissible under La. Code Evid. art. 404B. See **State v. Colomb**, 98-2813, pp. 4-5 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam).

alone because her husband died approximately two years earlier, intending to rob the victim of money. Evidence that the defendant's unauthorized entry of the victim's home was made, "with the intent to commit a felony or any theft therein," was part of the State's burden of proof under La. R.S. 14:60. The prejudicial effect to the defendant from the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence.

This assignment of error is without merit.

HABITUAL OFFENDER ADJUDICATION

In assignment of error number 2, the defendant argues he was found to be a multiple offender in error. He argues the convictions for predicates nos. 4, 5, 6, and 7 were all on the same day and so were only one conviction for purposes of the Habitual Offender Law. He further argues that these "convictions" were amended on January 16, 2004. He further argues that the probation officer who identified the defendant as the man he supervised was not at the original hearing and failed to testify as to any knowledge of the actual charges or their date of occurrence. He also argues that no one proved that the convictions were constitutionally valid. He also complains that the second felony adjudication was deficient because the State failed to provide adequate plea forms, transcripts, and minute entries and that there were no fingerprints on the bills of information.

If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that the defendant was represented by counsel when the pleas were taken. **State v. Shelton**, 621 So.2d 769, 779 (La. 1993). If the State meets this burden,

the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. **Id.** If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. **Id.** 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 the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. **Shelton**, 621 So.2d at 779-780. If the State introduces anything less than a perfect transcript, for example, a guilty plea form, a minute entry, an imperfect transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three **Boykin**[6] rights. **Shelton**, 621 So.2d at 780; **State v. Bickham**, 98-1839, p. 4 (La. App. 1 Cir. 6/25/99), 739 So.2d 887, 889-890. The purpose of the rule of **Shelton** is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity

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[6] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), requires that a trial court ascertain, before accepting a guilty plea, that the defendant has voluntarily and intelligently waived: 1) his right against compulsory self-incrimination; 2) his right to trial by jury; and 3) his right to confront his accusers. **Boykin** only requires a defendant be informed of these three rights. Its scope has not been expanded to include advising the defendant of any other rights that he may have, nor of the possible consequences of his actions. **State v. Smith**, 97-2849, p. 3 (La. App. 1 Cir. 11/6/98), 722 So.2d 1048, 1048.

attaches to promote the interests of finality. See **State v. Deville**, 2004-1401, p. 4 (La. 7/2/04), 879 So.2d 689, 691 (per curiam).

Although the State attempted to establish the defendant had seven predicate offenses, the trial court adjudicated him a second felony habitual offender. The court noted the basis for its ruling was the most recent offense, which was the subject of Agent Bill Sellers's testimony.

At the habitual offender hearing, Agent Sellers testified he was a Louisiana Probation and Parole Officer. He identified the defendant in court and indicated he had supervised him on parole after the defendant was released on parole on June 19, 2004, in connection with predicates nos. 4, 5, 6, and 7. In connection with its proof of predicates nos. 4, 5, 6, and 7, the State introduced certified true copies of bills of information, a certified true copy of the minute entry reflecting the defendant's guilty pleas to the offenses entered with the benefit of counsel, and a certified true copy of the transcript of the guilty plea hearing reflecting the defendant's guilty pleas to the offenses after advice of his **Boykin** rights and while represented by counsel. The defense offered a certified true extract of the minutes of January 16, 2004, reflecting an amendment of the sentences (rather than the convictions) imposed in connection with predicates nos. 4, 5, 6, and 7.

A careful review of the documentation introduced by the State in support of the use of predicates nos. 4, 5, 6, and 7 to establish the defendant's habitual offender status convinces us that the State met its initial burden under **Shelton**. Thereafter, the defendant failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. Accordingly, the State had no burden

to prove the constitutionality of predicates nos. 4, 5, 6, and 7 by "perfect" transcript or otherwise. The State went beyond its burden, however, and produced a "perfect" transcript in connection with predicates nos. 4, 5, 6, and 7.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 3, the defendant concedes that he was sentenced within the correct sentencing range for a conviction for simple burglary and adjudication as a second felony habitual offender, but argues this was a case where any sentence within the statutory range of six to twenty-four years was too severe.

The defendant was adjudged a second felony habitual offender and was sentenced to fifteen years at hard labor. The defense noted an assignment of error as to the second felony habitual offender adjudication.

Louisiana Code Crim. P. art. 881.1 provides in pertinent part:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
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> . . .
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> B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.
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> . . .
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> E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.

In the instant case, the defendant failed to either make or file a motion to reconsider sentence in accordance with La. Code Crim. P. art. 881.1. Accordingly, review of the instant assignment of error is procedurally barred. See La. Code Crim. P. art. 881.1E; **State v. Duncan**, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.