NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 0421

STATE OF LOUISIANA

VERSUS

CHADRICK CARTER

Judgment Rendered: September 10, 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 2-08-161

Honorable Richard "Chip" Moore, Judge

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Defendant – Appellant
Chadrick Carter

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

WELCH, J.

The defendant, Chadrick Carter, was charged by bill of information with simple criminal damage to property (where the damage amounts to $500.00 but less than $50,000.00), a violation of La. R.S. 14:56. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post verdict judgment of acquittal and motion for new trial and sentenced the defendant to two years imprisonment at hard labor. The defendant entered a not guilty plea to the habitual offender bill of information filed by the State. After a hearing, the defendant was adjudicated a fourth-felony habitual offender and was sentenced to thirty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error to the sufficiency of the evidence, the constitutionality of his sentence, the effectiveness of his counsel's assistance, and the trial court's failure to observe the twenty-four hour delay before imposing the original sentence after the denial of post trial motions. For the following reasons, we affirm the conviction and habitual offender adjudication, vacate the sentences, and remand for resentencing.

STATEMENT OF FACTS

On or about the morning of March 6, 2007, Lieutenant Chris Becnel of the Baker Police Department responded to a 911 complaint by Ivery Spurlock and her daughter, Vanesheia Brooks. Upon arriving at the scene, Lieutenant Becnel spoke to the complainants and took photographs of a 1997 Honda Accord that was parked in the driveway. The vehicle was owned by Ms. Spurlock and Reginald Spurlock, Ms. Brooks' father. The taillights, front and back windshield, and side windows were shattered and the license plate was damaged. Ms. Spurlock and Ms. Brooks stated that they wanted to pursue criminal charges, and Ms. Spurlock provided a written statement. Based on the complainants' statements, the police obtained an

arrest warrant for the defendant for the instant offense.

ASSIGNMENT OF ERROR NUMBERS ONE AND TWO[1]

The defendant argues that because the evidence is insufficient to support the conviction, the trial court should have granted his motions for new trial and for post verdict judgment of acquittal. The defendant notes that three of the State's witnesses had been arrested the night before the trial for being in contempt of court for failing to appear and were forced to testify in prison garb. The defendant further notes that two of the witnesses, Mr. Spurlock and Ms. Brooks, adamantly testified that they did not see the defendant breaking the windows of the vehicle while Ms. Spurlock provided conflicting testimony. Finally, the defendant notes that the State offered no physical evidence or corroborating witnesses to show that he was the person who broke the windows of the vehicle.

The standard of review for sufficiency of the evidence to support a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See La. C.Cr.P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the

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[1] In his appeal brief, the defendant labels his combined argument for these assignments as "Assignments of Error Nos. 4 and 5." However, the argument corresponds to the assignments of error listed as one and two on pages two and three of the defendant's appeal brief. The defendant further mislabels the arguments for the remaining assignments of error. We will address the assignments as listed on pages two and three of the defendant's appeal brief.

defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. **State v. Holts**, 525 So.2d 1241, 1244 (La. App. 1st Cir. 1988). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Andrews**, 94-0842, p. 7 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453.

Simple criminal damage to property is the intentional damaging of any property of another, without the consent of the owner, and except as provided in La. R.S. 14:55 (aggravated criminal damage to property), by any means other than fire or explosion. La. R.S. 14:56(A). The applicable sentence for violation of La. R.S. 14:56(A) depends upon whether the damage is less than $500.00, $500.00 to less than $50,000.00, or $50,000.00 or more. See La. R.S. 14:56(B). In the instant case, the State alleged that the damage was from $500.00 to less than $50,000.00.

The defendant fathered three of Ms. Brooks' children. Ms. Brooks testified that she did not see the defendant on March 6, 2007, as she was in bed. She stated that she did, however, hear a knock on the door and her mother answering the door. Ms. Brooks confirmed that the windows were shattered on the date in question. When specifically asked if she knew who broke the vehicle's windows, Ms. Brooks stated "yes" and that it was the defendant. She also confirmed providing such information to the police. Ms. Brooks reiterated that she did not see the defendant on the date in question, but that she believed he damaged the vehicle. She testified that she was scared and did not want to go back to jail and that she had been told not to be untruthful. Ms. Brooks testified that she did not give the defendant permission to bash the windows on the vehicle.

Ms. Spurlock testified that on the morning in question she was asleep when someone started "badgering" on the door and awakened her. She testified that her grandson informed her that the defendant was "badgering the glasses." She confirmed having provided the police with a statement informing them that she heard the defendant talking to her daughter earlier and specifically said he was going to "mess the car up." Ms. Spurlock further stated that she told the defendant to leave her house, informing him that she was contacting the police. When she exited her home she saw the defendant "badgering the car in." She did not remember what the defendant used to bash the windows, but she was sure it was him. She then called 911 for police assistance and informed the dispatcher that the defendant damaged the windows of her vehicle. After damaging the vehicle, the defendant left the residence.

When shown photographs of the damaged vehicle, Ms. Spurlock confirmed that the defendant caused the damage and was not given permission to do so. She further testified that she obtained an estimate of about $1,500.00 to repair the damages, but she did not get the car repaired. During cross-examination, Ms. Spurlock admitted that she did not see the defendant break all of the windows, reiterating that her grandson initially witnessed and reported what was happening. After she went outside, she personally observed the defendant break one of the windows of the vehicle. She stated that she was very angry as a result of her observations. The vehicle in question was in need of repair at the time of the offense and was junked after the offense, but to the best of her knowledge, none of the windows were broken before the defendant came that morning.

Mr. Spurlock testified that he did not give the defendant permission to damage his vehicle. Mr. Spurlock was at work at the time of the offense and did not witness it. He was not bothered by the incident, although he later saw the damage. He purchased the vehicle for Ms. Brooks' use and felt the damage was

"her problem."

Michelle Melancon, an automobile paint and body shop operator who testified as an expert witness in the field of paint and bodywork, stated that it would cost an estimated $2,300.00 to replace the broken glass on the vehicle.

The evidence shows that Ms. Spurlock witnessed the defendant damaging the vehicle in question and the damage to the vehicle exceeded $500.00. Any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found proof beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, of the essential elements of simple criminal damage to property and the defendant's identity as the perpetrator of that offense. Thus, assignments of error numbers one and two lack merit.

ASSIGNMENT OF ERROR NUMBER FIVE

In the fifth assignment of error, the defendant contends that the trial court erred in imposing the original sentence immediately after ruling on his post trial motions without an express waiver of sentencing delays. Regarding this assignment of error, we at the outset note that when the trial court sentenced the defendant as a habitual offender on February 9, 2010, it failed to vacate the October 27, 2009 original sentence for the instant offense. The habitual offender statute requires the sentencing court, when imposing a habitual offender sentence, to vacate any sentence already imposed. La. R.S. 15:529.1(D)(3). However, when faced in previous criminal appeals with the failure of a trial court to vacate the original sentence, this court has simply vacated the original sentence to conform to the requirements of the habitual offender statute and has found it unnecessary to vacate the habitual offender sentence or remand for resentencing. See **State v. Jackson**, 2000-0717, pp. 3-6 (La. App. 1st Cir. 2/16/01), 814 So.2d 6, 9-11 (en banc), writ denied, 2001-0673 (La. 3/15/02), 811 So.2d 895. Accordingly, we vacate the original two-year hard-labor sentence to conform to the requirements of

La. R.S. 15:529.1(D)(3).[2]

REVIEW FOR ERROR

As mandated by La. C.Cr.P. art. 920(2), a review for error has been made of the record in this case, and a sentencing error has been discovered that was not raised by either the defendant or the State. The trial court sentenced the defendant under La. R.S. 15:529.1(A)(1)(c)(i) to thirty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. However, parole eligibility is not prohibited by La. R.S. 15:529.1(A)(1)(c)(i) and also is not prohibited for the crime of simple criminal damage to property. See La. R.S. 14:56(B)(2). Thus, the denial of parole eligibility on the defendant's habitual offender sentence is unlawful. Correction of the sentencing error involves discretion, as pursuant to La. R.S. 15:529.1(A)(1)(c)(i), the sentencing range herein is twenty years to life imprisonment without benefit of probation or suspension of sentence. See also La. R.S. 15:529(G). Moreover, as the Supreme Court has previously admonished, "[t]o the extent that the amendment of defendant's sentence entails more than a ministerial correction of a sentencing error, the decision in **State v. Williams**, [20]00-1725 (La.11/28/01), 800 So.2d 790, does not sanction the *sua sponte* correction made by the court of appeal on defendant's appeal of his conviction and sentence." **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Thus, we must vacate the habitual offender sentence and remand for resentencing.[3]

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[2] Because we have vacated the original sentence, the trial court's failure to observe the twenty-four hour delay before imposing the original sentence as required by La. C.Cr.P. art. 873, after the denial of post trial motions is moot.

[3] In the third assignment of error, the defendant argues that the trial court erred in imposing a constitutionally excessive sentence. In assignment of error number four, the defendant argues that the failure of his trial counsel to file a motion to reconsider the sentence should not preclude consideration of the constitutionality of the sentence. The defendant alternatively argues that should review of the sentence be precluded, the failure of his trial counsel to file a motion to reconsider sentence constitutes ineffective assistance of counsel. Because we have vacated the habitual offender sentence, we pretermit discussion of these assignments of error.

CONCLUSION

For the foregoing reasons, the defendant's conviction and habitual offender adjudication are affirmed, the original sentence and enhanced sentence are vacated, and the matter is remanded for resentencing.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; ORIGINAL SENTENCE AND ENHANCED SENTENCE VACATED AND REMANDED FOR RESENTENCING.