NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0997

STATE OF LOUISIANA

VERSUS

MICHAEL S. NELSON

DATE OF JUDGMENT: DEC 2 2 2010

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 458757, DIV. F, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

* * * * * *

Walter P. Reed
District Attorney
Covington, Louisiana

Kathryn W. Landry
Baton Rouge, Louisiana

Counsel for Plaintiff-Appellee
State of Louisiana

Jane L. Beebe
New Orleans, Louisiana

Counsel for Defendant-Appellant
Michael S. Nelson

* * * * * *

BEFORE: KUHN, PETTIGREW, AND KLINE, JJ,[1]

Disposition: CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.

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[1] The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

KUHN, J.

The defendant, Michael S. Nelson, was charged by bill of information with one count of simple burglary, a violation of La. R.S. 14:62(A). He pled not guilty. Following a jury trial, he was found guilty as charged. Thereafter, the State filed a habitual offender bill of information against him alleging he was a tenth-felony habitual offender.[2] Following a hearing, he was adjudged a fourth-felony habitual offender. Prior to sentencing the defendant as a habitual offender, the trial court sentenced him to ten years at hard labor. Thereafter, the trial court vacated the previously imposed sentence and sentenced the defendant to life imprisonment at hard labor without parole, probation or suspension of sentence. He now appeals, contending the trial court erred in denying the motion for mistrial and erred in

[2] Predicate #1 was set forth as the defendant's conviction, under Ninth Judicial District Court Docket #269186, for unauthorized use of a "movable," a violation of La. R.S. 14:68.4. The documentation introduced in support of predicate #1, however, indicated the defendant was charged with, and pled guilty to, unauthorized use of a motor vehicle. Predicate #2 was set forth as the defendant's conviction, under Twenty-Second Judicial District Court Docket #319244, for "[c]ontraband," a violation of La. R.S. 14:402. Predicate #3 was set forth as the defendant's convictions, under Twenty-Second Judicial District Court Docket #319244, for simple burglary (29 counts), violations of La. R.S. 14:62. Predicate #4 was set forth as the defendant's convictions, under Twenty-Second Judicial District Court Docket #319243, for theft (2 counts), violations of La. R.S. 14:67. The documentation introduced in support of predicate #4 indicated the defendant was charged with, and pled guilty to, two counts of theft of property valued over $500. Predicate #5 was set forth as the defendant's conviction, under Twenty-Second Judicial District Court Docket #260949, for possession of stolen property, a violation of La. R.S. 14:69. The documentation introduced in support of predicate #5 indicated the defendant was charged with, and pled guilty to, illegal possession of stolen things valued between $100 and $500. Predicate #6 was set forth as the defendant's conviction, under Twenty-Second Judicial District Court Docket #258770, for possession of stolen property, a violation of La. R.S. 14:69. The documentation introduced in support of predicate #6 indicated the defendant was charged with, and pled guilty to, illegal possession of stolen things valued over $500. Predicate #7 was set forth as the defendant's convictions, under Twenty-Second Judicial District Court Docket #258770, for simple burglary (3 counts), violations of La. R.S. 14:62. Predicate #8 was set forth as the defendant's conviction, under Orleans Parish Criminal District Court Docket #346754, for simple burglary, a violation of La. R.S. 14:62. Predicate #9 was set forth as the defendant's conviction, under Twenty-Second Judicial District Court Docket #170208, for theft, a violation of La. R.S. 14:67. The documentation introduced in support of predicate #9, indicated the defendant was charged with, and pled guilty to, theft of property valued more than $100, but less than $500.

imposing an excessive sentence. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On October 27, 2008, Sharon Shea went to a 4:00 p.m. medical appointment at Northshore Regional Medical Center (Northshore) in her 2003 Honda CRV, which was equipped with a car alarm. She had a bag containing her lunch as well as other items in the vehicle. When she returned to her vehicle, the passenger-side door had been damaged, and the window had been shattered. She subsequently spent approximately $210 to repair the damages. Shea testified that she did not give the defendant permission to break into her car.

Also on October 27, 2008, David J. Delahoussey traveled to Northshore for out-patient surgery. As he exited the facility following his surgery, he heard a vehicle alarm and glass breaking. Thereafter, he saw a man pull his arm out of the broken window of a Honda SUV, get into another vehicle, and drive away with a female passenger. Delahoussey memorized the license plate number of the fleeing vehicle, "RGJ 711," and subsequently provided it to the police.

Candie Thomas was involved in a "relationship" with the defendant. On October 27, 2008, they traveled together in the defendant's vehicle, license plate number "RGJ 711," to her doctor's appointment at Northshore. The defendant had a long screwdriver and white gloves in the vehicle. Thomas indicated the defendant used the gloves for "tree work," approximately five days per month. Following Thomas's appointment, she returned to the defendant's vehicle and argued with him because "[the defendant] was attempting or wanting to break into a vehicle." Thomas demanded the defendant take her home, but he refused to do

so and broke into a vehicle. After breaking the front-passenger side window of a vehicle, the defendant returned to his vehicle and Thomas with a "make-up" bag containing "a lunch." He put his long screwdriver on the floorboard. The defendant subsequently drove off and threw the bag out of the window.

Thomas had a college degree in secondary education, had attended LPN school, and had worked in nursing and the home health industry. She had been diagnosed with schizophrenia with paranoid manic and delusional episodes. She indicated her illness was manageable, however, as long as she took her medicine, and that on the day of the incident, she was taking her medicine. Thomas conceded she has seizures that result in memory lapses before, during, and sometimes after. She admitted that she had a seizure on the morning of October 27, 2008, but explained that her seizure had finished prior to the argument she had with defendant about him breaking into cars. Thomas testified that she remembered everything about that to which she had testified. Before the time of trial, the defendant telephoned and wrote letters to Thomas, encouraging her either not to testify against him or to claim she could not remember what had happened on the day of the incident.

MOTION FOR MISTRIAL

Defendant first contends the trial court erred in denying the motion for mistrial after the State played a DVD of the defendant's statement, which included statements he suggests were evidence of other crimes.

Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by La. C.Cr.P.

arts. 770 or 771. La. C.Cr.P. art. 775. The determination as to whether a mistrial should be granted under La. C.Cr.P. art. 775 is within the sound discretion of the trial court, and a denial of a motion for mistrial will not be disturbed on appeal absent an abuse of discretion. ***State v. Young***, 569 So.2d 570, 583 (La. App. 1st Cir. 1990), writ denied, 575 So.2d 386 (La. 1991).

Article 770(2) provides for a mandatory mistrial when a remark, within the hearing of the jury, is made by the judge, the district attorney, or a court official, and such remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. However, remarks by witnesses fall under the discretionary mistrial provisions of Article 771.

Article 771(2) provides in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury ... [w]hen the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

A mistrial pursuant to the provisions of Article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. See ***State v. Dixon***, 620 So.2d 904, 911 (La. App. 1st Cir. 1993).

At trial, the State moved to play a DVD of the defendant's October 31, 2008 statement, in which he admitted he had committed the offense. Following the

playing of a portion of the statement wherein the defendant indicated he had not "done anything" in the last eighteen months, the defense moved for mistrial. The trial court denied the motion and noted the defendant's objection. The defense also objected after the playing of a portion of the defendant's statement wherein he indicated he was "backing up" six years. The trial court did not grant a mistrial, but cautioned the State that it would send the jury home if the State "slip[ed] again[.]"

The trial court did not abuse its discretion in refusing to grant a mistrial on the basis of the challenged portions of the defendant's statement. The references at issue did not provide a basis for a mandatory mistrial under Article 770(2) because they were not remarks attributable to the State that "refer[red] to ... [a]nother crime committed or alleged to have been committed by the defendant as to which evidence [was] not admissible." Rather, the references implicated the discretionary mistrial provisions of La. C.Cr.P. art 771(1) as "irrelevant or immaterial and of such a nature that [they] might create prejudice against the defendant ... in the mind of the jury[.]" Further, although defense counsel objected, he failed to ask the trial court to admonish the jury to disregard the references. Article 771 mandates a request for an admonishment. ***State v. Jack***, 554 So.2d 1292, 1296 (La. App. 1st Cir. 1989), writ denied, 560 So.2d 20 (La. 1990).

Moreover, any error that occurred was harmless. Even the introduction of inadmissible "other crimes" evidence is subject to harmless error analysis. See ***State v. Johnson***, 94-1379, p. 17 (La. 11/27/95), 664 So.2d 94, 102. See also La. C.Cr.P. art. 921. The proper analysis for determining harmless error "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely

unattributable to the error." ***Sullivan v. Louisiana***, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). The verdict returned in this case was surely unattributable to the error, if any. The defendant confessed to committing the offense; Thomas testified he committed the offense in her presence; and another eyewitness, Delahoussey, memorized the license plate number of the getaway vehicle, which matched the license plate number of the defendant's vehicle.

This assignment of error is without merit.

EXCESSIVE SENTENCE

The defendant next contends the trial court erred in failing to deviate from the mandatory sentence because the defendant cooperated with the police; he was trying to "cover" for his mentally ill girlfriend, who received probation; and because the crime was a "snatch and grab" of a lunch bag from a parked and unattended vehicle.

La. Const. art. I, § 20 prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. ***State v. Hurst***, 99-2868, pp. 10-11 (La.

App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

In ***State v. Dorthey***, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounts to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he is duty bound to reduce the sentence to one that would not be constitutionally excessive.

But the holding in ***Dorthey*** was made only after, and in light of, express recognition by the court that, "the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. (Citations omitted.)" ***Dorthey***, 623 So.2d at 1278.

In ***State v. Johnson***, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when ***Dorthey*** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. The court noted:

> A trial judge may not rely solely upon the non-violent nature of the instant crime or of past crimes as evidence which justifies rebutting the presumption of constitutionality. While the classification of a defendant's instant or prior offenses as non-violent should not be discounted, this factor has already been taken into account under the Habitual Offender Law for third and fourth offenders. [La.] R.S. 15:529.1 provides that persons adjudicated as third or fourth offenders may receive a longer sentence if their instant

> or prior offense is defined as a "crime of violence" under [La.] R.S. 14:2(13). Thus the Legislature, with its power to define crimes and punishments, has already made a distinction in sentences between those who commit crimes of violence and those who do not. Under the Habitual Offender Law those third and fourth offenders who have a history of violent crime get longer sentences, while those who do not are allowed lesser sentences. So while a defendant's record of non-violent offenses may play a role in a sentencing judge's determination that a minimum sentence is too long, it cannot be the only reason, or even the major reason, for declaring such a sentence excessive.

Johnson, 97-1906 at pp. 7-8, 709 So.2d at 676.

The court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. (Citation omitted.)

Johnson, 97-1906 at p. 8, 709 So.2d at 676.

Whoever commits the crime of simple burglary shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than twelve years, or both. La. R.S. 14:62(B).

Prior to amendment by 2010 La. Acts Nos. 911 and 973, La. R.S. 15:529.1, in pertinent part, provided:

> A. (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows ...
>
> (c) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then ...
>
> (ii) If the fourth felony and two of the prior felonies are ... punishable by imprisonment for twelve years or more ... the person

> shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

In this case, the instant offense and predicates #s 3, 7, and 8 were punishable by imprisonment for twelve years. At the beginning of the sentencing hearing, the defendant filed a *pro se* motion to deviate from the mandatory minimum sentence, citing ***Dorthey***. The motion set forth, "The defendant is exceptional in this context because of unusual circumstances. The defendant is a victim of Legislature failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case."

Prior to sentencing the defendant as a habitual offender, the trial court sentenced him to ten years at hard labor. The trial court noted it had ordered a pre-sentence investigation (PSI), which indicated the defendant had "conducted a documented life of crime." The trial court judge also stated any lesser sentence would deprecate the seriousness of the offense. According to the PSI:

> [The defendant] is a 40 year old male presently awaiting sentencing for the offense of [s]imple [b]urglary. According to his FBI and Louisiana State [P]olice rap sheets[,] he is classified as a fifth offender. It appears [the defendant] has made a career of criminal activity through burglaries and thefts. He listed his first arrest occurring before his sixteenth birthday. At age 17[,] he began his adult criminal career. Since then, any lapses in entries on his rap sheet can be attributed to his incarceration. ... More than likely[,] the subject will continue his criminal enterprise whenever out of prison. The best Louisiana residents can hope for is a reprieve during his incarceration.

Thereafter, on the basis of a earlier habitual offender hearing, the trial court found the defendant was the same person previously convicted in predicate #s 1, 2, 3, 4, 5, 7 and 9, and adjudged him a "fourth felony offender." The trial court

vacated the previously imposed sentence and sentenced the defendant to life imprisonment at hard labor without parole, probation or suspension of sentence. The defense moved for reconsideration of sentence, and the trial court denied that motion as well as the motion under ***Dorthey***.

In the instant case, the defendant failed to clearly and convincingly show that because of unusual circumstances, he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Accordingly, there was no reason for the trial court to deviate from the provisions of La. R.S. 15:529.1(A)(1)(c)(ii) in sentencing the defendant.

This assignment of error is without merit.

REVIEW FOR ERROR

The defendant requests that this court examine the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such errors regardless of whether such a request is made by a defendant. Under Article 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. Price***, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

DECREE

For all these reasons, we affirm the conviction, habitual adjudication, and sentence imposed against defendant-appellant, Michael S. Nelson.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.