NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 1031

STATE OF LOUISIANA

VERSUS

GARY J. LEBLANC, III

Judgment Rendered: December 21, 2018

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 1601360, 1601361

The Honorable Brenda B. Ricks, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Guidry, J. Concurs in the result.

THERIOT, J.

The defendant, Gary J. Leblanc, III, was charged by bill of information on count one with intimidating a witness, a violation of La. R.S. 14:129.1, on count two with home invasion, a violation of La. R.S. 14:62.8, and on count three with second degree battery, a violation of La. R.S. 14:34.1. He originally pled not guilty on all counts. The defendant later withdrew his former pleas of not guilty and entered pleas of guilty as charged on counts one and two, and guilty of the responsive offense of simple battery on count three.[1] Pursuant to a plea agreement, the trial court sentenced the defendant on count one to five years imprisonment at hard labor, on count two to thirteen years and four months imprisonment at hard labor, on count three to six months imprisonment, and ordered that the sentences be served concurrently.[2] The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, arguing in three related assignments of error that he did not waive his right to appeal the sentencing, that the guilty pleas were not freely and voluntarily made, and that the sentence imposed on count two is unconstitutionally excessive. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

Because the defendant pled guilty, the facts were not fully developed at trial. At the **Boykin**[3] hearing, the parties agreed to a stipulation that the factual basis for the guilty pleas was based on the police report and open-file discovery. According to the police reports in the record, on April 11, 2016, at 1:15 a.m., Deputy Harold Conner and Detective Stephen Jenkins of the Tangipahoa Parish Sheriff's Office

[1] In the same proceeding, the defendant also pled guilty to two additional simple battery charges that were filed under separate docket numbers below (district court docket numbers 1601361 and 1601439). The charges in the instant case were filed under district court docket number 1601360.

[2] The defendant was also sentenced to six months in parish jail on each of the misdemeanor convictions under docket numbers 1601361 and 1601439, to be served concurrently with the sentences imposed in the instant case.

[3] **Boykin v. Alabama**, 395 U.S. 238 (1969).

were dispatched to Tangi Lakes Drive in Hammond, in reference to a home invasion with the suspect on the scene. Upon his arrival, Deputy Conner observed one female subject, later identified as victim Olivia Pevey. At the time, Pevey was crying and two other females, Haley Long and Emily Cheatwood, appeared to be comforting her. Long and Cheatwood advised that the defendant committed the act and fled the scene on foot, providing his name and a description of his attire. Deputy Conner observed lacerations on the victim's right side of her cheek and what appeared to be swelling in the facial area. Deputy Conner further identified a male subject (victim Alex Herbert) walking down the roadway towards the officer. Herbert had cuts, bite marks, and scratches on his person. Deputy Conner entered Pevey's residence and observed the broken frame of the door with detached pieces and an engaged dead bolt.

Pevey advised that she received a text message from the defendant, her ex-boyfriend, just before his arrival. As she did not reply to the text message, the defendant called her. Pevey answered and told the defendant that he needed to stop calling her, but after she hung up the phone, the defendant kept texting her. She called the defendant back and told him that if he did not stop harassing her, she would call the police. The defendant warned Pevey that if she called the police, "it would be the last phone call that she made." Pevey told the defendant that someone was with her at her residence sleeping on her sofa, and that she had called the police, further explaining that the police were in close proximity, hoping to discourage the defendant from coming to her residence. Pevey was unaware that the defendant was already outside of her residence until she heard a loud crash. The defendant kicked the front door in, punched her in the face several times, choked her, and made several threats against her life. As he fled from the apartment, the defendant pushed down Long as she was approaching Pevey's apartment to investigate the noises she heard coming from the apartment.

Herbert advised that prior to the offense, Pevey asked him to be on the lookout for the defendant's vehicle, a four door Toyota with license plate AYS-D46, indicating that she feared the defendant would come to her residence. Herbert observed the vehicle fitting the description arrive at Pevey's residence and, a short time later, heard a noise coming from the apartment. Herbert observed the defendant run out of the residence, at which point, Herbert stopped the defendant and began to question him. The defendant became aggressive and a physical altercation ensued, causing Herbert to suffer the bite marks and lacerations. Herbert pursued the defendant as he fled on foot. Herbert lost sight of the defendant in a field that led to a wood line. Long and Cheatwood observed the altercation that the defendant had with Herbert. Pevey, Herbert, Long, and Cheatwood provided Deputy Conner with voluntary statements detailing the incident. Detective Jenkins received a copy of surveillance footage from Pevey's apartment complex and observed the defendant arriving at Pevey's apartment and forcing entry, the defendant running into Long as he fled from the apartment, and the defendant's engaging in a physical altercation with Herbert. [4]

PLEAS AND SENTENCING

In three related assignments of error, the defendant argues that he did not waive the right to appeal the sentence imposed by the trial court; that the guilty pleas were not entered freely and voluntarily; and that the sentence imposed on count two was excessive. The defendant argues that the guilty plea colloquy in this case is the same as the colloquies reviewed by the courts in **State v. Smith**, 47,800 (La. App. 2d Cir. 2/27/13), 110 So.3d 628 and **State v. Foster**, 42,212 (La. App. 2d Cir. 8/15/07), 962 So.2d 1214, wherein the courts reasoned that the defendants may not have contemplated that by pleading guilty they were waiving their right to

[4] Pevey and Herbert are the victims in the charges filed in this case, and Long is the victim in the misdemeanor charge filed under docket number 1601361. The record before us does not indicate who the victim was under docket number 1601439 and/or whether the offense was related to the incident involved in the instant case.

appeal their sentence as excessive. The defendant further argues that his guilty plea is constitutionally infirm because his consent was vitiated by duress, stating that he was advised that if he turned down the plea offer and was found guilty, he would be sentenced to fifty years imprisonment. Finally, the defendant argues that the sentence imposed on count two is grossly out of proportion to the severity of the crimes committed. The defendant claims that while home invasion is a crime of violence, he did not inflict any serious physical harm to Pevey that would require medical treatment.

A guilty plea is a conviction and, therefore, should be afforded a great measure of finality. A defendant may not withdraw a guilty plea simply because the sentence imposed is heavier than anticipated. **State v. Roberts**, 2001-3030 (La. App. 1st Cir. 6/21/02), 822 So.2d 156, 158, writ denied, 2002-2054 (La. 3/14/03), 839 So.2d 31. The defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. La. Code Crim. P. art. 881.2 A(2).

In order for a guilty plea to be used as a basis for actual imprisonment, enhancement of actual imprisonment, or conversion of a subsequent misdemeanor into a felony, the trial judge must have informed the defendant that by pleading guilty he waives: (a) his privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront his accuser. The judge also must have ascertained that the accused understands what the plea connotes and its consequences. See **Boykin v. Alabama**, 395 U.S. 238, 243-45, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274 (1969); **State v. Fields**, 95-2481 (La. App. 1st Cir. 12/20/96), 686 So.2d 107, 109. **Boykin** only requires that a defendant be informed of the three rights enumerated above. Courts have been unwilling to extend the scope of **Boykin** to include advising the defendant of any

other rights he may have. **State v. Brockwell**, 2000-2547 (La. App. 1st Cir. 6/22/01), 797 So.2d 735, 736.

A guilty plea is constitutionally infirm if it was not entered freely and voluntarily, if the **Boykin** colloquy is inadequate, or if the defendant was induced to plead guilty by a plea bargain that was not kept. **State v. Lewis**, 421 So.2d 224, 226 (La. 1982); **State v. Hayes**, 423 So.2d 1111, 1114 (La. 1982); **State v. Tingle**, 2012-1928 (La. App. 1st Cir. 6/7/13), 2013 WL 2484316 (unpublished). In determining the validity of agreements not to prosecute or of plea agreements, the courts generally refer to rules of contract law. Contractual principles may be helpful by analogy in deciding disputes involving plea agreements. However, the criminal defendant's constitutional right to fairness may be broader than his or her rights under contract laws. Moreover, commercial contract law can do no more than to serve as an analogy or point of departure, since plea agreements are constitutional contracts. **State v. Canada**, 2001-2674 (La. App. 1st Cir. 5/10/02), 838 So.2d 784, 787. A long-standing rule of contract law is that consent of both parties is required for a valid contract. La. Civ. Code art. 1927. Consent may be vitiated by error, fraud, or duress. La. Civ. Code art. 1948. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. La. Civ. Code art. 1949. "Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object ..., or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation." La. C.C. art. 1950. **Canada**, 838 So.2d at 786-87.

As noted, the defendant argues that the guilty plea colloquy in the instant case is analogous with the colloquies in **Smith** and **Foster**. In both cases, the defendants entered into plea agreements with sentencing caps. During the guilty plea colloquy in **Foster**, the trial judge informed the defendant that he was

waiving his right to appeal, "except as to the amount of the sentence." **Foster**, 962 So.2d at 1217-18. The Second Circuit found that Foster had not intelligently waived his right to appeal his sentence and therefore the court reviewed the sentence for excessiveness. The trial judge in **Smith** informed the defendant during the plea colloquy that he "may not be allowed to appeal ... the length or severity of [the] sentence." **Smith**, 110 So.3d at 630. The **Smith** court, noting its decision in **Foster**, found a "potential question" as to whether the trial judge's statement affected the voluntariness of Smith's plea; it therefore reviewed the sentences for excessiveness. We first note that neither the **Foster** nor **Smith** courts granted relief on the basis of excessiveness of sentence. We also note that the defendant has not cited any analogous jurisprudence in our circuit or the Louisiana Supreme Court. Further, in both **Foster** and **Smith**, the right to appeal the sentence was stated during the plea colloquy.

Here, the trial court did not tell the defendant that he had a right to appeal his sentence. At the outset, the State read the agreed upon guilty pleas and the sentences that would be imposed on each count, including the sentence of thirteen years and four months imprisonment on count two, and that there would be no habitual offender bill of information filed. The trial court then questioned the defendant's attorney as to whether the agreement read by the State was the agreement that counsel understood and that the client was willing to take, and counsel responded affirmatively. The trial court then addressed the defendant personally, inquiring as to his full name, address, date of birth, and education. The trial court instructed the defendant to stop the court and ask questions if he did not understand any portion of the proceeding at any point. The defendant confirmed that he understood the proceedings and stated that he had fourteen years of education.

The trial court read the statutory elements of the offenses and the statutory sentencing ranges under each statute and informed the defendant of the possibility of sentencing enhancements. The trial court, in part, advised the defendant of his right to plead not guilty, of the State's burden of proof, of his privilege against compulsory self-incrimination, of his right to trial and jury trial where applicable, and of his right to confront his accusers. The trial court further stated and inquired, "You also have the right to appeal the various decisions of this Court. Do you understand each and every one of these rights?" The defendant responded, "Yes, ma'am." The trial court then stated, "Do you understand by entering a plea today you're giving up or waiving -- specifically waiving the right to go to trial, to confront your accusers, to maintain your innocence, to call witnesses on your own behalf, as well as giving up the other rights that I've read to you. Do you understand you're giving that up?" The defendant again responded, "Yes, ma'am." The defendant confirmed that he wished to plead guilty.

The defendant denied that he had been threatened or coerced into entering the pleas or that he had been promised any leniency other than the plea agreement that he and his attorney worked out with the State. The defense counsel agreed that he advised the defendant of his constitutional rights and that the defendant fully understood the advice. The trial court again asked the defendant if he was confused about anything or had any questions or concerns. After the defendant consulted with his counsel, the defense counsel informed the court that their only request was that the defendant be considered for any type of Vo-tech program, rehabilitation program, and/or anger management and that his conviction not prevent him from continuing to teach GED classes to other inmates while incarcerated. The trial court, unopposed by the State, agreed to such recommendations. After the defendant confirmed that he had no other questions or concerns and stated that he was "[d]efinitely" satisfied with the legal

representation provided by his attorney, the trial court accepted the guilty pleas. The defendant waived any delay in sentencing, the trial court heard a victim impact statement, and the trial court imposed the agreed upon sentences.

The record establishes that the defendant voluntarily and with assistance of counsel accepted the plea agreement to avoid the possibility of a harsher sentence if convicted at trial. The defendant had every right to reject the plea agreement and face the risk of a harsher result, and chose not to do so. His choice appears reasoned, considering that he was facing a charge of second degree battery on count three and pled guilty to the responsive offense of simple battery, significantly reducing his sentencing exposure. The record reflects that the defendant did not claim actual innocence, but only objects to the length of his sentence. It is well-settled that dissatisfaction with a sentence is not a basis for withdrawing a guilty plea. **State v. Boatright**, 406 So.2d 163, 165 (La. 1981); **State v. Cook**, 591 So.2d 1248, 1252 (La. App. 5th Cir. 1991).

We find the pleas were knowingly and intelligently entered, that they were not forced or coerced, and were within constitutional dimensions. A plea agreement was offered to the defendant, it was accepted, and the terms were kept. The pleas were not rendered involuntary because of any communication to the defendant of the risk that he could receive a longer sentence if he proceeded to trial and was convicted. The facts show that the sentences imposed herein were in conformity with the plea agreement that was set forth in the record at the time of the plea. Thus, the defendant is precluded from appellate review of the sentence. **Canada**, 838 So.2d at 791; **State v. Smith**, 99-0946 (La. App. 1st Cir. 2/18/00), 755 So.2d 351; **State v. Sorenson**, 98-0520 (La. App. 1st Cir. 12/28/98), 725 So.2d 604; **State v. Lewis**, 633 So.2d 315 (La. App. 1st Cir. 1993). Considering the foregoing, assignments of error numbers one, two, and three lack merit.

CONVICTIONS AND SENTENCES AFFIRMED.