NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1038

STATE OF LOUISIANA

VERSUS

LUQMAN MALIK SHABAZZ

Judgment Rendered: December 28, 2006

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On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 4-05-277

Honorable Leon Cannizzaro, Jr., Presiding

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Luqman Malik Shabazz

Luqman Malik Shabazz
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Defendant/Appellant
In Proper Person

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

GUIDRY, J.

The defendant, Luqman Malik Shabazz a/k/a Eric Gross, was charged by grand jury indictment with one count of second-degree murder, a violation of La. R.S. 14:30.1. He initially pled not guilty and not guilty by reason of insanity. Following a sanity hearing, he was found competent to stand trial and assist in his defense. Thereafter, pursuant to a plea agreement, he withdrew his former plea and pled guilty to the responsive offense of manslaughter, a violation of La. R.S. 14:31. Pursuant to the plea agreement, he was sentenced to forty years at hard labor. The State filed a habitual offender bill of information against the defendant, alleging he was a second felony habitual offender.[1] Also pursuant to the plea agreement, he agreed with the allegations of the habitual offender bill of information, he was adjudged a second felony habitual offender, and the court vacated the forty-year sentence and sentenced him to sixty years at hard labor. He now appeals, designating one counseled and two pro se assignments of error. We affirm the conviction, the habitual offender adjudication, and the sentence.

ASSIGNMENTS OF ERROR

Counseled

The trial judge erred in accepting the defendant's guilty plea without explaining the nature of the offense to which he was pleading guilty or ascertaining that there was a factual basis for the plea. The plea is constitutionally invalid. The record does not establish that the plea was entered into knowingly and voluntarily. In addition, the defendant's actions following the plea demonstrate his lack of understanding.

Pro se

1. Ineffective assistance of counsel.

2. The plea was not made knowingly, intelligently, or voluntarily.

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[1] The predicate offense was set forth as the defendant's April 30, 2002 guilty plea, under 19th Judicial District Court docket # 9-97-416, to simple robbery on April 21, 1997.

FACTS

Due to the defendant's guilty plea, there was no trial testimony concerning the facts in this matter. The State attempted to set forth a factual basis at the *Boykin* hearing, but the trial court moved to another matter. The police reports contained in the record gave the accounts of witnesses to the crime that the defendant, without provocation, shot and killed the unarmed victim, Abdullah Ghoram, in a mosque. The victim suffered ten gunshot wounds. The indictment set forth that the offense occurred on February 5, 2005.

INVALID GUILTY PLEA

In the counseled assignment of error, the defendant argues he entered his guilty plea without being informed of the elements of the offense, and thus, the plea was constitutionally invalid, citing Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). He also argues that in order for a plea of guilty to be considered voluntary, La. C.Cr.P. art. 556.1 mandates that the elements of the offense be explained. In pro se assignment of error number 2, the defendant argues the plea was involuntary because: (a) he had been prescribed drugs for paranoid schizophrenic shocks; (b) he was a psychotic patient; and (c) his level of education was not great.

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, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). *Boykin* only requires that a defendant be informed of the three rights enumerated above. The jurisprudence indicates that

courts have been unwilling to extend the scope of *Boykin* to include advising the defendant of any other rights which he may have. State v. Brockwell, 2000-2547, pp. 2-3 (La. App. 1st Cir. 6/22/01), 797 So.2d 735, 736.

Louisiana Code of Criminal Procedure article 556.1, in pertinent part, provides:

> A. In a felony case, the court shall not accept a plea of guilty ... without first addressing the defendant personally in open court and informing him of, and determining that he understands, all of the following:
>
> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.
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> * * *
>
> E. Any variance from the procedures required by this Article which does not affect substantial rights of the accused shall not invalidate the plea.

Initially, we note La. C.Cr.P. art. 556.1 does not provide an independent basis for upsetting a guilty plea. Violations of La. C.Cr.P. art. 556.1, which do not rise to the level of *Boykin* violations, are not exempt from the broad scope of La. C.Cr.P. art. 921. State v. Guzman, 99-1528, 99-1753, p. 10 (La. 5/16/00), 769 So.2d 1158, 1164.

Further, Henderson is distinguishable. Therein, the defendant pled guilty to second-degree murder, but the record failed to indicate a finding after trial or an admission that the defendant possessed the requisite intent to commit second-degree murder. Henderson, 426 U.S. at 646, 96 S.Ct. at 2258. Therefore, the defendant's plea of guilty to a charge of second-degree murder was involuntary because an essential element of the crime to which he was pleading (the requisite intent) had been omitted. See State v. Young, 93-2187, p. 5 (La. App. 1st Cir. 11/10/94), 646 So.2d 445, 447.

In the instant case, however, the record fully supported the charged offense and the defendant's guilty plea to the responsive offense of manslaughter.[2] The defendant, without provocation, repeatedly shot the unarmed victim, causing ten gunshot wounds and killing him.

The transcript of the *Boykin* hearing indicates the State and the defendant agreed that the State would allow the defendant to plead guilty to the responsive offense of manslaughter with a sentence of forty years and a sentence of sixty years, following the filing of a habitual offender bill of information, and the defendant's waiver of a hearing in connection therewith. The trial court asked the defendant if he understood the plea agreement, and he replied, "I understand." The court asked the defendant if the agreement set forth what the defendant wished to do, and he replied, "Yeah. Yeah." Defense counsel indicated he had discussed the plea agreement with the defendant in detail. Thereafter, the trial court advised the defendant that by pleading guilty, he was giving up his right to trial by jury or by the judge, his right to confront and cross-examine the witnesses who had accused him of the offense, and his privilege against self-incrimination. The defendant indicated that he understood. The defendant also indicated that no one had forced, threatened, or intimidated him to plead guilty. He also indicated that no one had promised him anything in order to get him to plead guilty. Additionally, the defendant indicated that he was satisfied with defense counsel's handling of himself and representation of the defendant. The court asked the defendant if he was pleading guilty to the charge because he was guilty of the charge, and the defendant answered, "Yes, Sir." Lastly, the court asked the defendant if there was anything he would like to say about himself or about his case before the court accepted his guilty plea. The defendant replied, "No, Sir." The trial court found

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[2] In brief to this Court, the defendant claims that in his interview with Dr. Robert Blanche, he consistently denied any knowledge of the offense. Dr. Blanche and Dr. Marc Zimmermann both found, however, that the defendant was malingering.

the defendant had knowingly, intelligently, freely, and voluntarily waived his constitutional rights and entered his plea of guilty. Herein, the trial court sufficiently advised the defendant of all of his *Boykin* rights and made certain that his guilty plea was entered both voluntarily and intelligently. In exchange for the State's agreement not to prosecute him for second-degree murder, and with the advice of counsel, the defendant entered a guilty plea to manslaughter and avoided the possibility of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. See La. R.S. 14:30.1(B). He made no motion to withdraw the plea in the trial court, and the record fails to support his claims that he did not, or could not, know what he was doing at the *Boykin* hearing. The defendant fails to specify which of his actions following the plea, if any, demonstrated his lack of understanding.

These assignments of error are without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In pro se assignment of error number 1, the defendant argues trial counsel was ineffective: (a) by failing to move for pre-trial discovery; (b) by failing to "file discovery;" (c) by failing to move for a bill of particulars; and (d) by failing to move to quash based on the not guilty and not guilty by reason of insanity plea. The defendant also argues: (e) trial counsel allowed him to plea bargain to the charge of convicted felon in possession of a firearm; (f) trial counsel failed to file notice of appeal regarding claim (e); and (g) trial counsel failed to object to the procedure used to find the defendant competent.

Initially, we note a claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. State v. Miller, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. State v. Serigny, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

In the instant case, claims (a) and (b) are without support in the record. The defense moved for, and obtained, pretrial discovery.

Claims (c), (d), and (g) concern matters of strategy. Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. State v. Folse, 623 So.2d 59, 71 (La. App. 1st Cir. 1993).

Claims (e) and (f) concern matters outside of the record. Only matters contained in the record can be reviewed on appeal. State v. Vampran, 491 So.2d 1356, 1364 (La. App. 1st Cir.), writ denied, 496 So.2d 347 (La. 1986).

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.