NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 2089

STATE OF LOUISIANA

VERSUS

CHRISTOPHER LEE RISNER

RHP by [illegible]

[illegible]

EGD by [illegible]

On Appeal from the 22nd Judicial District Court
Parish of Washington, Louisiana
Docket No. 11-CR8-115163, Division "G"
Honorable Scott Gardner, Judge Presiding

Walter P. Reed
District Attorney
Covington, LA

and

Kathryn Landry
Special Appeals Counsel
Baton Rouge, LA

Attorneys for Appellee
State of Louisiana

Lieu T. Vo Clark
Louisiana Appellate Project
Mandeville, LA

Attorney for
Defendant-Appellant
Christopher Lee Risner

Christopher Lee Risner
Angola, LA

Defendant-Appellant
In Proper Person

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered JUL 1 1 2014

PARRO, J.

Defendant, Christopher Lee Risner, was charged by an amended bill of information with one count of distribution of methamphetamine, a Schedule II controlled dangerous substance (count 1), a violation of LSA-R.S. 40:967(A)(1), and one count of distribution of an imitation or counterfeit controlled dangerous substance (count 2), a violation of LSA-R.S. 40:971.1(A). Defendant pled not guilty[1] and, after a jury trial, was found guilty as charged on both counts. On count 1, he was sentenced to ten years of imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence for the first two years. On count 2, he was sentenced to five years of imprisonment at hard labor to run concurrently with the sentence imposed on count 1. The defendant moved for reconsideration of sentence, but the trial court denied the motion. He subsequently appealed to this court, alleging two assignments of error: first, that the trial court erred in denying the motion to reconsider sentence; and second, for imposing a constitutionally excessive sentence. In this court's previous opinion, **State v. Risner**, 12-1893 (La. App. 1st Cir. 6/7/13) (unpublished), 2013 WL 2484249, both convictions, as well as the sentence on count 2, were affirmed. However, the sentence imposed on count 1 was vacated due to an illegal parole restriction. As such, the case was remanded to the trial court for resentencing on count 1.

Following remand, the state filed a habitual offender bill of information seeking enhancement on count 1. At the habitual offender hearing, the defendant was adjudged a fourth felony habitual offender[2] on both counts, and was sentenced to sixty years of imprisonment at hard labor on count 1, without benefit of

[1] As noted in this court's earlier decision, **State v. Risner**, 12-1893 (La. App. 1st Cir. 6/7/13) (unpublished), 2013 WL 2484249, the trial court minutes failed to reflect that defendant was arraigned or that he entered a plea to the charges in the bill of information. We found the absence of the minute entry was a mere clerical error. Even if defendant was not arraigned and did not plead to the charges against him, these deficiencies were waived when defendant proceeded to trial without objection, and it shall be considered as if he pled not guilty. See LSA-C.Cr.P. art. 555.

[2] Predicates #1 and #2 were set forth as the defendant's January 21, 2005 guilty pleas, under Twenty-Second Judicial District Court Docket no. 363033, to possession of cocaine (count 1) and forgery (count 2). Predicate #3 was set forth as the defendant's October 26, 2005 guilty pleas, under Twenty-Second Judicial District Court Docket no. 02-CR2-086409, for three counts of forgery, Docket no. 03-CR2-086623 for theft, Docket no. 03-CR2-087178 for forgery, Docket no. 03-CR2-087507 for theft greater than $500.00, and Docket no. 03-CR2-089385 for four counts of forgery.

probation, parole, or suspension of sentence, and twenty years of imprisonment at hard labor on count 2 without benefit of probation, parole, or suspension of sentence, with both sentences to run concurrently. He now appeals, with one counseled assignment of error and five pro se assignments of error. For the following reasons, we affirm the habitual offender adjudication and sentence on count 1, vacate the enhanced sentence on count 2, and reinstate the original sentence on count 2 of five years at hard labor to run concurrently with the enhanced sentence on count 1.

FACTS

The following facts are summarized from this court's previous discussion in **Risner**, 2013 WL 2484249. Officers Craig James and James Folks, both of the Franklinton Police Department, used a confidential informant to conduct narcotics purchases from the defendant on January 18, 2011, and January 28, 2011. On January 18, 2011, the confidential informant successfully purchased 0.15 grams of methamphetamine from defendant. On January 28, 2011, the confidential informant attempted to purchase MDMA (also known as ecstasy) from defendant, but subsequent chemical testing revealed that defendant actually sold the confidential informant caffeine pills. On both occasions, the confidential informant recorded the transactions via concealed audio and video devices. After a jury trial, defendant was found guilty as charged on both counts.

EXCESSIVE SENTENCES

In his sole counseled assignment of error, the defendant does not challenge the validity of the habitual offender adjudications, but rather alleges the sentences imposed were unconstitutionally excessive.

Louisiana Code of Criminal Procedure article 881.1, in pertinent part, provides:

> 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.

* * * *

> 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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> * * * *
>
> 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.

The defendant failed to make or file a motion to reconsider sentence following resentencing in this matter. A new motion for reconsideration of sentence must be filed in the trial court in order to preserve appellate review of a new sentence imposed on remand. See **State v. Emerson**, 04-0156 (La. App. 1st Cir. 10/29/04), 888 So.2d 975, 980, writ denied, 05-0089 (La. 4/22/05), 899 So.2d 557. Accordingly, review of this assignment of error is procedurally barred.[3] See LSA-C.Cr.P. art. 881.1(E); **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

IMPROPER HABITUAL OFFENDER ADJUDICATION

In his first pro se assignment of error, the defendant raises four sub-arguments contesting his adjudication as a fourth felony habitual offender. At the habitual offender hearing, the state and defense counsel stipulated to the defendant's identity in all the predicate offenses.

Insufficient Number of Predicate Offenses

In his first argument, the defendant contends he has not been convicted of the requisite number of predicate offenses in order to be adjudged a fourth felony offender pursuant to LSA-R.S. 15:529.1(A)(4)(a). Specifically, he argues that he did not commit predicates 1 and 2 after being adjudged a first felony offender and, therefore, predicates 1 and 2 cannot be used to enhance his sentence.

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[3] We note, however, that in defendant's pro se brief, while referring to the sixty-year sentence imposed on count 1, he states: "[t]he appellant received a 60 year sentence, which is in the mid-range for a fourth habitual offender, so [it's] very clear that said sentence is not excessive."

In **State v. Johnson**, 03-2993 (La. 10/19/04), 884 So.2d 568, 572, the supreme court faced a similar sequential argument to that raised by the defendant in the instant appeal. The court tracked the legislative and jurisprudential history of the habitual offender statute, and noted that prior to 1956, the statute did not include a sequential component. However, in 1956, in response to the Louisiana Supreme Court's decision in **State v. Williams**, 226 La. 862, 77 So.2d 515 (1955), the Louisiana legislature amended the statute to include a clearly delineated sequential requirement, which remained in place until 1982, when the language was removed. In **State ex rel. Mims v. Butler**, 601 So.2d 649 (La. 1992), based on the 1982 amendment, the sequential crime and conviction issue was presented to the court, which held that the sequencing requirement survived the amendment; in other words, the **Mims** court continued to follow the jurisprudence which "consistently held that under the Habitual Offender Law, second offender status could only result from an offense committed after a first conviction, and third offender status after a conviction which would have qualified as a second offender conviction, and so on." **Mims**, 601 So.2d at 652. However, in **Johnson**, the supreme court overruled **Mims**, and stated "[t]his language is simple and straightforward; it mentions nothing about a sequential requirement." **Johnson,** 884 So.2d at 576. The court presumed that by changing the wording of LSA-R.S. 15:529.1 in 1982 to delete the language setting forth the sequential requirement, "1) the legislature was aware of the interpretation that had been given the language of section B by the jurisprudence . . . and 2) it intended to change the law." Furthermore, previously undiscovered Louisiana Senate Committee minutes were examined and the court noted that "[b]oth sets of minutes underscore our conclusion that the legislature intended to remove the sequential requirement and expand the application of the habitual offender law." The court summed up its opinion by stating:

> The statute simply does not contain a sequential conviction requirement. Rather, the only requirement in the statute is one which has been imposed from the inception: for sentence

> enhancement purposes, the subsequent felony must be committed after the predicate conviction or convictions.
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> * * * *
>
> An accused becomes a recidivist at the time of the commission of the subsequent crime, whether or not he has previously been exposed to sentencing as a habitual offender.

Johnson, 884 So.2d at 577-79.

In the instant appeal, the defendant's convictions on predicates 1 and 2 were obtained on April 19, 2006, and his conviction on predicate 3 was obtained on October 26, 2005. The defendant's current offenses were committed on January 18 and 28, 2011, after all three of his predicate convictions. Therefore, the requirements of **Johnson** are satisfied, and defendant's argument is without merit.

Defendant's Mental Capacity at Time of Predicate Convictions

In his second argument attacking his habitual offender adjudication, the defendant claims his previous guilty pleas taken on October 26, 2005, and April 19, 2006, are invalid for enhancing purposes because at the time of both convictions, due to a right leg injury, he could not understand the nature and consequences of pleading guilty. He avers his medical state prohibited him from understanding the rights he was giving up by pleading guilty.

If a 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 they were taken. If the state meets its 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 his plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the state. 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. 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**[4] rights. **State v. Shelton**, 621 So.2d 769, 779-80 (La. 1993). 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 attaches to promote the interests of finality. See **State v. Deville**, 04-1401 (La. 7/2/04), 879 So.2d 689, 691 (per curiam).

A review of the defendant's October 26, 2005 plea colloquy reveals that, while represented by counsel, he pled guilty to six offenses: one count theft (Docket no. 03-CR2-086623); one count forgery (Docket no. 03-CR2-087178); three counts forgery (Docket no. 02-CR2-086409); four counts forgery (Docket no. 03-CR2-089385); one count theft over $500.00 (Docket no. 03-CR2-087507); and one count unauthorized use of a motor vehicle (Docket no. 03-CR2-087179). Prior to doing so, the defendant engaged in a full **Boykin** colloquy with the trial court. During this conversation, the trial court clearly informed the defendant of his right to plead not guilty, to be represented by counsel, his right to a trial by jury, his right to confront his accusers, and his right against self-incrimination. The defendant admitted that he was not under the influence of drugs, alcohol, or other substances, and that any medication he was taking did not affect his ability to understand the trial court. After the full colloquy, the trial court asked if defendant's counsel was satisfied that the defendant freely, voluntarily, and intelligently entered his pleas. Defense counsel replied he was, noting "[w]e've discussed it at length." Additionally, after the colloquy, the trial court again

[4] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

confirmed that the defendant understood his rights, understood his sentence, and that he did not have any questions. After reviewing the transcript of the October 2005 guilty plea hearing, we conclude the state met its burden of proving the constitutionality of these pleas and convictions. The defendant was represented by counsel and properly informed of his rights under **Boykin**. Nothing in the record lends any weight to the defendant's contention that his October 26, 2005 guilty pleas were unconstitutionally secured.

A review of the defendant's April 19, 2006 plea colloquy reveals that, while represented by counsel, he pled guilty on that day to possession of a Schedule II controlled dangerous substance and forgery under docket number 363033. Prior to doing so, the defendant engaged in a full **Boykin** colloquy with the trial court. During this conversation, the trial judge clearly informed the defendant of his right to be represented by counsel, his right to trial by jury, his right to confront his accusers, and his right against self-incrimination. The court specifically mentioned that the defendant "has the necessary mental capacity and does, in fact, understand the nature of the charges against him." Furthermore, the defendant denied that he was under the influence of any alcohol, drugs, medication, or any other substance that might impair his ability to understand the proceedings. After reviewing the transcript of the April 2006 guilty plea hearing, we conclude the state met its burden of proving the constitutionality of these pleas. The defendant was represented by counsel and properly informed of his rights under **Boykin**. Nothing in the record lends any weight to the defendant's contention that his April 19, 2006 guilty pleas were unconstitutionally secured.

Use of Previously Withdrawn Guilty Pleas

In his third argument contesting his adjudication as a habitual offender, the defendant contends the state used previously withdrawn guilty pleas to support his fourth felony habitual offender adjudication. Specifically, he argues that the guilty pleas taken in connection with predicates 1 and 2 were initially entered on January 21, 2005, but were subsequently withdrawn on April 19, 2006, and therefore,

cannot be used by the state to support his adjudication. Initially, we note that in connection with the defendant's first two arguments, he admits to pleading guilty to predicates 1 and 2. Furthermore, when questioned by the trial court during the instant habitual offender proceeding, defendant confirms that he did withdraw the guilty pleas previously entered on January 21, 2005, but subsequently re-entered them on April 19, 2006. After a review of the transcript taken April 19, 2006, we find the defendant did properly re-enter his guilty pleas for predicates 1 and 2. This argument is without merit.

Trial Court Failed to Specify the Predicate Offenses

In the defendant's last argument challenging his habitual offender status, he argues he was prejudiced and denied his equal protection and due process rights because the trial court failed to specify which convictions and offenses were being used to support his adjudication as a habitual offender. As such, he claims his adjudication and sentences are illegal.

After a review of the record, we find this argument lacks merit. Not only was a habitual offender bill of information filed by the state in December 2012 detailing eight specific convictions (including dates, docket numbers, and statute references) it planned to use to support defendant's habitual offender adjudication, but during the habitual offender hearing, the trial court specifically stated which previous felonies, including the crimes and docket numbers, were being used to support the defendant's habitual offender adjudication. This argument is without merit.

Therefore, based on the foregoing conclusions, and after a thorough review of the record, we find the state presented sufficient evidence to establish defendant's adjudication as a fourth felony habitual offender. This assignment of error is without merit.

DENIAL OF REVIEW ON COMPLETE RECORD

In the defendant's second pro se assignment of error, he argues that he was denied a proper judicial review based on a complete record, pursuant to Louisiana Constitution Article I, § 19, because various transcripts, medical records, and reports pertaining to the predicate offenses were not made a part of the record. He claims these missing records would have established he was prejudiced during the habitual offender proceeding.

A criminal defendant has a right of appeal based on a complete record of all evidence upon which the judgment is based. See LSA-Const. art. I, § 19; see also **State v. Hoffman**, 98-3118 (La. 4/11/00), 768 So.2d 542, 586, cert. denied, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000). Additionally, in felony cases, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel. LSA-C.Cr.P. art. 843.

Material omissions from the transcript of the proceedings at trial, bearing on the merits of an appeal, will require reversal. See **State v. Boatner**, 03-0485 (La. 12/3/03), 861 So.2d 149, 153. However, an incomplete record may be adequate for full appellate review. See **State v. Hawkins**, 96-0766 (La. 1/14/97), 688 So.2d 473, 480. Where a defendant cannot show any prejudice from the missing portions, he is not entitled to relief based on the missing portions. See **Hawkins**, 688 So.2d at 480 (citing **State v. Rodriguez**, 93-0461 (La. App. 4th Cir. 3/29/94), 635 So.2d 391, writ denied, 94-1161 (La. 8/23/96), 678 So.2d 33).

As set forth hereinabove, based on the record provided to this court, we have addressed defendant's pro se assignments of error in relation to his habitual offender adjudication and find that the state presented sufficient evidence to establish defendant's status as a fourth felony habitual offender. Accordingly, this claim is without merit. See LSA-C.Cr.P. art. 921.

INEFFECTIVE ASSISTANCE OF COUNSEL

In defendant's pro se assignments of error numbers 3 and 4, he argues his counsel was ineffective during the habitual offender sentencing hearing and on the instant appeal. Concerning his appellate counsel, the defendant argues that she was ineffective for filing a brief on an incomplete record, for not filing a motion to supplement the record, and for not raising the same issues and assignments of error that he did in his pro se brief. Additionally, although raised in pro se assignment of error number 2, the defendant argues his appellate counsel was ineffective by only assigning error to the excessiveness of his sentence. Regarding his counsel during the habitual offender proceedings, the defendant argues she was ineffective by not properly challenging the habitual offender proceedings by presenting sufficient evidence demonstrating that he was, at most, a second felony habitual offender. Further, the defendant argues his counsel failed to argue at the sentencing hearing that he was a victim of drug use, and should be punished as such, rather than being punished as a "drug lord."

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 (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). However, where the claim is raised as an assignment of error on direct appeal, and where the record on appeal is adequate to resolve the matter, the claims should be addressed in the interest of judicial economy. **State v. Calhoun**, 96-0786 (La. 5/20/97), 694 So.2d 909, 914.

All of the deficiencies alleged by defendant in his pro se brief regarding his sentencing and appellate counsel address matters of preparation and strategy. Decisions relating to investigation, preparation, and strategy require an evidentiary hearing[5] and, therefore, cannot possibly be reviewed on appeal. **State v. Allen**, 94-1941 (La. App. 1st Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946

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[5] The defendant would have to satisfy the requirements of LSA-C.Cr.P. arts. 924, et seq., in order to receive such a hearing.

(La. 3/15/96), 669 So.2d 433. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of 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). Furthermore, when the substantive issue an attorney failed to raise has no merit, then the claim that the attorney was ineffective for failing to raise the issue also has no merit. **State v. Williams**, 613 So.2d 252, 256-57 (La. App. 1st Cir. 1992). Moreover, as discussed hereinabove regarding the instant defendant's pro se assignments of error, the record presented to this court was not insufficient for a proper judicial review, as we have found the state presented sufficient evidence to establish defendant's status as a fourth felony habitual offender.

These assignments of error are without merit.

EQUAL PROTECTION VIOLATION

In defendant's final pro se assignment of error, he argues his adjudication and sentence as a fourth felony habitual offender violates his equal protection rights under the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the Louisiana Constitution. Specifically, he claims it is a denial of these rights for another prisoner, who may be serving an indefinite life sentence, to be allowed to go before the Parole Board before he, as a habitual offender serving a fixed term, could be heard.

It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. First, a party must raise the unconstitutionality issue in the trial court; second, the unconstitutionality of a statute must be specifically pleaded; and third, the grounds outlining the basis of the unconstitutionality must be particularized. Raising a constitutional challenge and particularizing the grounds in a memorandum is insufficient. **State v. Hatton**, 07-2377 (La. 7/1/08), 985 So.2d 709, 722. A defendant is limited on appeal to grounds for objection articulated to the trial court.

A new basis for objection, albeit meritorious, cannot be raised for the first time on appeal. **State v. Coates**, 509 So.2d 438, 440 (La. App. 1st Cir. 1987).

In the instant case, the defendant failed to properly raise his constitutional challenge to LSA-R.S. 15:529.1 in the trial court. In both the defendant's answer and the motion to quash filed in response to the state's habitual offender bill, he did not allege with sufficient particularization his equal protection challenge, nor was this issue raised during the habitual offender hearing. Accordingly, we pretermit consideration of this assignment of error.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2).

In the habitual offender bill of information, the state did not seek to establish defendant's habitual offender status as to count 2. Further, during the habitual offender hearing, enhancement on count 2 was not sought by the state. The trial court, however, resentenced defendant on count 2 as if the state had sought enhancement on count 2. This court may correct the illegal sentence by amendment on appeal, rather than by remand for resentencing, by merely reinstating the sentence on count 2 that was previously affirmed by this court on the prior appeal. See LSA-C.Cr.P. art. 882(A). Accordingly, we vacate the enhanced sentence on count 2, and reinstate the original sentence of five years at hard labor to run concurrently with the enhanced sentence on count 1.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE ON COUNT 1 AFFIRMED; ENHANCED SENTENCE ON COUNT 2 VACATED; AND ORIGINAL SENTENCE ON COUNT 2 REINSTATED.