NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 0758

STATE OF LOUISIANA

VERSUS

TRAVIS TREVELL ISAAC

Judgment Rendered: JAN 2 7 2015

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Appealed from the
18th Judicial District Court
In and for the Parish of Pointe Coupee
State of Louisiana
Trial Court Number 77667

Honorable James J. Best, Judge

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE,[1] JJ.

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1 **Holdridge, J.**, serving as Supernumerary Judge *pro tempore* of the Court of Appeal, First Circuit, by special appointment of the Louisiana Supreme Court.

HOLDRIDGE, J.

The defendant, Travis Trevell Isaac, was charged by amended bill of information with one count of armed robbery with use of a firearm, a violation of La. R.S. 14:64 and La. R.S. 14:64.3(A) (count I); and one count of a convicted felon possessing a firearm or carrying a concealed weapon, a violation of La. R.S. 14:95.1 (count II).[2] The defendant pled not guilty at arraignment, but following a jury trial, was unanimously found guilty as charged on both counts. Motions for post-verdict judgment of acquittal, new trial, and arrest of judgment were filed, but denied by the trial court. On count I, the defendant was sentenced to imprisonment at hard labor for ninety-nine years, with an additional five years imprisonment at hard labor pursuant to La. R.S. 14:64.3, the firearm enhancement statute. On count II, he was sentenced to imprisonment at hard labor for twenty years. All of the defendant's sentences were ordered to run consecutively and without benefit of probation, parole, or suspension of sentence. A motion to reconsider sentence was filed, but denied by the trial court. The defendant now appeals, with one counseled assignment of error, and three pro se assignments of error. For the following reasons, we affirm the defendant's convictions, vacate the sentences, and remand for resentencing on both counts.

STATEMENT OF FACTS

Robert Carter, a security guard working at Pablo's Truck Stop ("Pablo's") in New Roads on the night of July 19, 2011, testified that at approximately 2:30 a.m., three men "buzzed" to gain entry into the casino. Carter, who stated this was a normal procedure, let them enter. One individual had on a suede jacket with a baseball cap and blue jeans. Carter later identified this individual as the defendant.

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[2] The defendant was charged and tried along with George Adonis Carter, herein referred to as the co-defendant, who was also convicted of one count of armed robbery with an additional penalty, and one count of a convicted felon possessing a firearm or carrying a concealed weapon. Carter separately appeals his convictions. See **State v. Carter**, 2014-0742 (La. App. 1st Cir. __/__/__), ___ So.3d ___.

The second individual was "dressed all in black," and the third was wearing a red hat, light clothing, and had a bandana covering his face. Carter asked the man to remove the bandana, but he refused. Carter asked a second time and drew his sidearm, but the man dressed in all black drew his gun and pointed it at Carter's head. The other two men removed Carter's weapon and his keys. They then began trying to open the "drawers." Further, Carter was instructed to lie down on the ground, where his hands were bound with duct tape by the defendant.[3] After the three men left, it was discovered that approximately eight-thousand dollars was missing from the casino.

Detective Shael Stringer of the New Roads Police Department, who was assigned to the investigation of the armed robbery, later received a tip from a confidential informant that the defendant should be investigated because he was seen at Pablo's prior to the incident. Detective Stringer located a photo of the defendant, and then presented Carter with a six-person photographic lineup. Detective Stringer testified that Carter was able to identify the defendant as one of the perpetrators "relatively quickly." Thereafter, Detective Stringer obtained a search warrant for the defendant's last known residence, the home of Alvin Isaac, and upon searching the house, discovered seven thousand, two hundred, and sixty-seven dollars ($7,267.00) in a bedroom closet. Alvin Isaac, the defendant's uncle, testified the money was his and that he had saved it over the past twenty years.

EXCESSIVE SENTENCES

In his sole counseled assignment of error, the defendant contends his sentences are unconstitutionally excessive. Specifically, he argues that his previous criminal history, along with the circumstances surrounding his involvement in the instant crimes, do not warrant maximum, consecutive

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[3] In his counseled brief, the defendant admits to binding Carter's hands with duct tape.

sentences.

We note that the trial court did not wait twenty-four hours, or secure a waiver of this required period, after denying the defendant's motions for post-verdict judgment of acquittal and for new trial before imposing sentence. See La. Code Crim. P. art. 873.[4] In cases where the defendant either contests his sentence or complains of the absence of a twenty-four hour delay, the failure of the trial court to observe the delay or to obtain a waiver thereof generally requires the sentence to be vacated and the case to be remanded for resentencing. See **State v. Augustine**, 555 So.2d 1331, 1333-35 (La. 1990). Here, the defendant avers that both of his sentences are excessive, and that the trial court erred by denying his motion to reconsider sentence. The defendant's sentences are not ones which are mandatory in nature. See **State v. Seals**, 95-0305 (La. 11/25/96), 684 So.2d 368, 380, cert denied, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997) (remand for resentencing not required for mandatory sentences of life imprisonment without benefits). Because the Louisiana Supreme Court's ruling in **Augustine** requires us to vacate the sentences, we find it inappropriate to review the merits of the excessive sentence challenge at this time. See **State v. Claxton**, 603 So.2d 247, 250 (La. App. 1st Cir. 1992). Accordingly, we vacate the sentences, and remand for resentencing on both counts.

DENIAL OF MOTION IN ARREST OF JUDGMENT

In his first pro se assignment of error, the defendant contends that the trial court erred in denying his motion in arrest of judgment. Specifically, he claims

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4 Louisiana Code of Criminal Procedure article 873 does not explicitly require a twenty-four hour delay in sentencing after the denial of a motion for post-verdict judgment of acquittal, as it does after the denial of a motion for new trial. However, this Court previously has applied the twenty-four hour delay required by Article 873 to motions for a post-verdict judgment of acquittal. See **State v. Coates**, 2000-1013 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1226; **State v. Jones**, 97-2521 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53; see also **State v. Wilson**, 526 So.2d 348, 350 (La. App. 4th Cir. 1988), writ denied, 541 So.2d 851 (La. 1989) ("[La. Code Crim.] P. art. 873 refers to both motions for a new trial and in arrest of judgment when it requires the twenty-four hour delay. Thus, the trial court's failure to delay after denying...a motion for post-verdict judgment of acquittal should be analogously treated.").

that he was not informed of his right to waive trial by jury, and had he known this, he "assures that he would have opted for a judge trial." The defendant further claims that "[t]he judge would not have allowed the circumstantial evidence [to be] presented." Ultimately, because he was never "advised or informed that he could waive jury trial and proceed to trial by a judge," the defendant concludes that his conviction and sentence should be set aside.

Louisiana Code of Criminal Procedure article 859(4), in pertinent part, provides that the court shall arrest the judgment when "[t]he tribunal that tried the case did not conform with the requirements of Article[]...780...of this code." At the time of his arraignment, La. Code Crim. P. art. 780(A) provided that "[a] defendant charged with an offense other than one punishable by death may knowingly and intelligently waive a trial by jury and elect to be tried by the judge. At the time of arraignment, the defendant in such cases shall be informed by the court of his right to waive trial by jury." (Prior to amendment by Acts 2013 No. 343, § 1). However, during trial, at the time when the motion in arrest of judgment was filed, and at the hearing on the motion, a revised version of Article 780 was in effect, which deleted the last sentence of Section A.

While the defendant argues his rights were violated because of the trial court's failure to inform him of his ability to waive trial by jury, we note that La. Const. art. I, § 17(A) does not state that a defendant must be advised of his right to waive a jury trial; it merely establishes the right to a jury trial in felony cases and the varying juror concurrence requirements. In **State v. Sewell**, 342 So.2d 156, 160 (La. 1977), the defendant argued that the trial court erred by failing to inform him of his option to waive trial by jury and to proceed with a bench trial. The Louisiana Supreme Court noted that, at his arraignment, the "defendant was represented by able, experienced, and competent counsel. He was formally

arraigned and entered a plea of not guilty and not guilty by reason of insanity."

However, the Court continued by stating:

> Consequently, the judge did not comply with Article 780 in that he did not inform defendant of his right of waiver and election. Defendant was apparently, at the time, uninterested in waiving his right to trial by jury, for no motion to be tried by the judge alone was made in the time allotted. Indeed, defense counsel participated in the selection of the jury without objection in the full knowledge that this was a noncapital case.

The **Sewell** Court explained:

> While Article 780 does state that the defendant shall be informed by the court of his right to waiver and election, the constitutional provision, Article I, § 17, merely relates that defendant may knowingly and intelligently waive his right to a trial by jury. While we are disinclined to treat this statutory directive lightly, we are equally satisfied that this defendant did not suffer deprivation of a substantial statutory right (see Article 920), that is, of being advised by the court of his right to waiver and election, since we are satisfied that through informed, able and experienced counsel he was aware of the right to waive the jury and did opt not to do so. Counsel in argument candidly admits that, in effect, the crux of his argument is simply that defendant should have been instructed appropriately by the trial judge at his arraignment. He does not argue that he was not aware of the option, nor that he did not deliberately exercise it. He likens the directive of Article 780 to the on-the-record requirement of a Boykinization. We do not sanction and will not hold to a hard and fast rule to the effect that failure of the court to verbalize the option at arraignment of defendant necessarily constitutes reversible error. We are satisfied in this case that defendant was aware of his option through advice of counsel and opted to be tried by jury and not waive that right.

Sewell, 342 So.2d at 161(quoting **State v. Sharp**, 338 So.2d 654, 660 (La. 1976)).

We find **Sewell** and **Sharp** instructive in the instant case. There is no indication that, prior to the pro se motion filed by the defendant on the day of sentencing, the defendant wished to exercise his right to waive trial by jury. Further, as in **Sewell**, not only was the instant defendant represented by able and

competent counsel, but he had a co-defendant, who was also represented by counsel. Both defendants proceeded through the trial without any indication of desire to have a bench trial.

Moreover, the defendant has failed to present any evidence which would suggest a bench trial would have resulted in a different outcome. Security footage depicting the robbery was introduced at trial, the victim identified the defendant as one of the perpetrators from a six-person photographic lineup, and also made an in-court identification of the defendant. In fact, at the hearing on the motion in arrest of judgment, the defendant did not necessarily argue that the outcome would have been different, stating "[w]e just wanted to, you know, have that option to exercise our right dealing with the situation. No matter what your outcome would have been, we would have still had that option; whether you would have found us guilty or not."

Therefore, we find that the defendant has failed to establish how his substantial rights were violated, and agree with the trial court that his motion was simply "subterfuge [to] get a new trial." See La. Code Crim. P. art. 921. As such, we find the trial court did not err in denying the motion in arrest of judgment, and that this assignment of error lacks merit.

SUGGESTIVE IDENTIFICATION PROCEDURE

In his second pro se assignment of error, the defendant argues that the six-person photographic lineup shown to security guard Carter was suggestive, as he was previously shown a single photograph of the defendant, and therefore, was already informed, "through deceit and underhandedness, who defendant was and who to pick." As such, the defendant contends his identification was suggestive, which therefore warrants a reversal of his conviction and sentence. The defendant filed a pre-trial motion to suppress the lineup, which was denied.

A defendant seeking to suppress an identification must prove *both* that the identification itself was suggestive and that there was a likelihood of misidentification as a result of the identification procedure. **State v. Prudholm**, 446 So.2d 729, 738 (La. 1984). An identification procedure is unduly suggestive if, during the procedure, the witness's attention is focused on the defendant. However, even if the identification could be considered to be suggestive, that alone does not indicate a violation of the accused's right to due process. **State v. Kimble**, 2010-1559 (La. App. 1st Cir. 3/25/11), 62 So.3d 782, 789. The question for the reviewing court is to determine whether the procedure is so conducive to irreparable misidentification that due process was denied. **State v. Bright**, 98-0398 (La. 4/11/00), 776 So.2d 1134, 1145.

In determining whether a photographic lineup was reliable, the factors to be considered are: (1) the opportunity of the witness to view the criminal at the moment of the crime; (2) the degree of attention of the witness; (3) the accuracy of the prior description of the criminal; (4) the level of certainty of the identification; and (5) the elapsed time between the crime and the confrontation. **Manson v. Brathwaite**, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977); **Kimble**, 62 So.3d at 790.

While the defendant states that Carter was shown a single photograph of himself prior to the identification procedure, this contention is not supported in the record. Rather, using the security footage from Pablo's from the night of the robbery, Carter was able to identify and show Detective Stringer which individual bound his hands with duct tape. Detective Stringer testified that "[t]he only pictures that - - the only pictures that [Carter] saw [was] a six photo line up." Additionally, Carter testified that he was not shown a single photo before he viewed the photographic lineup. Detective Stringer then used the information from

the security footage to generate a six-person photographic lineup.

At trial, Carter testified that through his training, he was taught to watch "everything about the person; try to get their facial features, as much [of a] description of the assailants." He testified that he let the defendant into the casino. Furthermore, Carter stated that as his hands were being bound, he was looking at the defendant, whom he recognized as visiting Pablo's on a previous occasion. Further, when he was shown the photographic lineup nine days after the robbery, Carter testified it took him "one, point, three seconds" to identify the defendant as one of the perpetrators of the crime. Also, as noted above, when presented with the photographic lineup, Detective Stringer testified that Carter identified the defendant as one of the robbers "relatively quickly."

A thorough review of the record reveals the procedure surrounding the identification made herein was neither suggestive nor likely to lead to misidentification. Moreover, Carter's identification of the defendant as one of the perpetrators was reliable. Carter had an excellent opportunity to view the defendant at the time of the robbery, which occurred at close range. As such, a review of the overall circumstances indicates the identification was reliable, and, therefore, this assignment of error lacks merit.

DENIAL OF MOTION TO SEVER DEFENDANTS

In his final pro se assignment of error, the defendant contends that the trial court erred by not granting the Motion to Sever defendants. Specifically, the defendant alleges that he "was forced [into a] joint trial, where the bulk of the evidence was directed at [the co-defendant] and not [him]." Further, he avers that "even though [the co-defendant] did not testify at trial under the advise [sic] of his very own counsel, defendant's counsel knew that [the co-defendant] could exonerate him of all accusations by the State."

Defendants who are jointly indicted are to be tried together unless the court finds that justice requires a severance. La. Code Crim. P. art. 704. The courts have permitted a severance to co-defendants whose defenses are antagonistic to each other. Defenses are antagonistic when each defendant intends to exculpate himself by putting the blame for the offense on a co-defendant. However, a mere allegation that the defenses are antagonistic is insufficient because convincing evidence of actual antagonism must be presented to justify a severance. An accused is not entitled to a severance as a matter of right; the decision is one resting within the sound discretion of the trial judge. A denial of a motion to sever will not be overturned on appeal absent a clear abuse of discretion. Reversal of a conviction for failure to sever where antagonism is shown is not always mandated unless prejudice can be shown. **State v. Price**, 93-0625, 93-0626 (La. App. 1st Cir. 3/11/94), 636 So.2d 933, 936-37, writs denied, 94-0742 (La. 6/17/94), 638 So.2d 1091 and 94-1566 (La. 10/14/94), 643 So.2d 159. Justice does not require a severance where only the extent of participation of each defendant is at issue. **State v. Dilosa**, 2001-0024 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 669, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.

A hearing was held on the motion to sever. At the hearing, the defendant, through counsel, denied his presence at the robbery, and supported his position with an affidavit filed by the co-defendant attesting that he did not participate in any crime with the defendant on July 19, 2011. Further, at the hearing, both the defendant and co-defendant denied, through counsel, the charge that they were together at Pablo's on the day in question. The trial court denied the motion, stating, in pertinent part, that "[t]here's nothing peculiar about their denial to the police, and their not guilty [plea] that suggests that they should be severed." After reviewing the record, we are unable to find convincing evidence of antagonistic

defenses, and as such, we find the trial court did not abuse its discretion in denying the motion to sever. Therefore, this pro se assignment of error lacks merit.

REVIEW FOR ERROR

In his pro se brief, the defendant requests that this Court examine the record for error under La. Code Crim. P. art. 920(2). This Court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 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. See **State v. Price**, 2005-2514 (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. After a careful review of the record, we have found a sentencing error on count II.

For his conviction of a convicted felon possessing a firearm or carrying a concealed weapon on count II, the defendant was sentenced to twenty years at hard labor, without benefit of probation, parole, or suspension of sentence. La. R.S. 14:95.1(B) states in pertinent part, that "[w]hoever is found guilty of violating the provisions of this Section shall be imprisoned at hard labor for not less than ten nor more than twenty years without benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars." Here, the trial court failed to impose the mandatory fine and, therefore, the defendant's sentence on this count is illegally lenient.

Ordinarily, because the trial court's failure to impose the mandated fine was not raised by the State in either the trial court or on appeal, and because the defendant was not prejudiced in any way by the trial court's failure to impose the fine, we would decline to correct the illegally lenient sentence. See **Price**, 952 So.2d at 123-25. However, since the matter is being remanded due to the

previously noted failure of the trial court to wait twenty-four hours between denying the defendant's post-trial motions and imposing sentence, we also remand for resentencing on count II because of the trial court's failure to impose the mandatory fine in connection with La. R.S. 14:95.1(B). See **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, 798 ("When an illegal sentence is corrected, even though the corrected sentence is more onerous, there is no violation of the defendant's constitutional rights.").

CONCLUSION

For the foregoing reasons, the defendant's convictions are affirmed, the sentences are vacated, and this matter is remanded for resentencing.

CONVICTIONS AFFIRMED; SENTENCES VACATED; REMANDED FOR RESENTENCING.

STATE OF LOUISIANA

VERSUS

TRAVIS TREVELL ISAAC

STATE OF LOUISIANA

COURT OF APPEAL

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CRAIN, J. concurs.

I concur only because I would not ordinarily decline to correct an illegally lenient sentence as suggested by the majority. I disagree with *State v. Price,* 05-2514 (La. App. 1 Cir. 12/28/06), 952 So. 2d 112 (*en banc*), *writ denied,* 07-0130 (La. 2/22/08), 976 So. 2d 1277, *see State v. Odom*, 12-1163 (La. App. 1 Cir. 3/22/13), 2013WL1189404 (Crain dissenting), *State v. Hollingsworth*, 12-1035 (La. App. 1 Cir. 2/15/13), 2013WL595926 (Crain dissenting), and believe that the option of allowing an illegally lenient sentence to stand has been rejected by the Louisiana Supreme Court, most recently in *State v. Kondylis*, 14-0196 (La. 10/3/14), 149 So. 3d 1210.