STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0535

STATE OF LOUISIANA

VERSUS

KELLY B. COCKERHAM

Judgment Rendered: SEP 21 2017

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On Appeal from the 18th Judicial District Court
In and for the Parish of West Baton Rouge
State of Louisiana
Trial Court Nos. 103430 and 111967

The Honorable J. Robin Free, Judge

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

Holdridge J. agrees in part & dissents in part. Without an amendment to the habitual offender bill of information by the State, the district court was limited to sentencing the defendant as a third-felony offender.

PENZATO, J.

The defendant, Kelly B. Cockerham, was charged by bill of information with attempted simple burglary, in violation of La. R.S. 14:62 and La. R.S. 14:27. He pled not guilty and, following a jury trial, was found guilty as charged. He timely moved for a new trial; however, the record does not reflect that the trial court ruled on that motion. The trial court sentenced the defendant to six years imprisonment at hard labor, and the State then filed a multiple offender bill. After a hearing on the multiple offender bill, the trial court adjudicated the defendant a fourth-felony habitual offender, vacated the previous sentence, and resentenced him to twenty years at hard labor without benefit of parole, probation, or suspension of sentence, to be served concurrently with any other sentence being served. He appealed, arguing five assignments of error. Finding merit in assignment of error number two, regarding the trial court's failure to rule on the motion for new trial before sentencing, this court vacated the enhanced sentence, remanded the matter to the trial court for a hearing and ruling on the defendant's motion for new trial, and pretermitted discussion of the remaining assignments of error. This court further reserved for the defendant his right to appeal his conviction and sentence once more to this court. **State v. Cockerham**, 2012-0465 (La. App. 1st Cir. 11/14/12), 111 So.3d 384, 386. See also **State v. Cockerham**, 2014-1150, 2014 WL 12569974 (La. App. 1st Cir. 10/5/14) (unpublished).

On remand, the trial court denied the motion for new trial. While the defendant reserved the right to appeal the fourth-felony adjudication, the parties stipulated to the evidence presented at the previous hearing on the multiple offender bill of information. The trial court resentenced the defendant to twenty years imprisonment at hard labor.[1] The defendant now appeals, re-assigning error to the sufficiency of the evidence, the habitual offender adjudication, the

[1] The trial court did not restrict parole in resentencing the defendant.

constitutionality of the sentence, and sentencing error. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On July 24, 2010, while sitting on his trailer porch during the night hours, Terry Shivers (the victim) noticed the dome light inside of his nearby truck come on. He walked over to the truck and saw a man getting into his truck. The victim pushed the door shut, told the man to back away, and asked the individual what he was doing digging around in the truck. The man replied that he was working for the district attorney's office, trying to find out who was stealing amps in the area. The victim asked the individual to present a badge, told him to get away from his truck, and an argument ensued. The two men argued for a few minutes, then the victim heard what he thought was the sound of a pocketknife being opened, at which point he retreated and called the police.

West Baton Rouge Parish Sheriff's Office patrol officer Ezram Brown arrived at the trailer park and began patrolling the area for the perpetrator. The victim described the perpetrator as a white male between five feet ten inches, and six feet one inch tall, wearing a dark baseball cap, a gray muscle shirt, and beige shorts made out of material similar to jogging pants. Officer Brown saw the defendant, who was wearing beige shorts and no shirt, standing outside talking with another male. He began questioning the defendant and became suspicious when the defendant said that he had recently walked from the rear of the trailer park, which was where the victim's truck was located. The defendant allowed the officer to enter his trailer, and he showed him the clothes that he was wearing earlier in the evening. On a desk inside of the defendant's trailer was a muscle shirt and a cap, as well as a pocketknife. Officer Brown then read the defendant his **Miranda**[2] rights, placed him in handcuffs, and took him to the victim to be

[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

identified.

Officer Brown first shined his flashlight into the backseat of the police car where the defendant was sitting, but the victim was unable to identify him as the perpetrator. The defendant was taken out of the car to allow the victim to get a better look at him, and as soon as the defendant spoke, the victim recognized his voice and identified him as the man he found inside of his truck. After the identification, the defendant was arrested and booked for attempted simple burglary.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant challenges the sufficiency of the evidence, contending that the State failed to establish identity beyond a reasonable doubt. The defendant claims that the identification was based solely on his voice and that the victim was unable to identify him by physical characteristics or clothing. The defendant argues that the identification process used in this case was suggestive, noting that there was no voice lineup to test the voice identification. The defendant further argues that there was no corroborating evidence such as fingerprints to link him to the crime, or any indication that the victim was familiar with the defendant's voice. The defendant notes that when he spoke in court, the victim stated that he did not sound like the perpetrator. The defendant further notes that his attire at the time of the identification did not match the description given by the victim of the perpetrator's attire. Moreover, the defendant notes that the victim believed that the perpetrator's hair was sandy blond, while the defendant has dark hair. The defendant concludes that no rational trier of fact could have found that the State had proven that he was the person who attempted to burglarize the victim's truck.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The constitutional

standard for testing the sufficiency of the evidence, enunciated in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime charged and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. **State v. Jones**, 596 So.2d 1360, 1369 (La. App. 1st Cir.), writ denied, 598 So.2d 373 (La. 1992). See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660.

A conviction for attempted simple burglary requires proof that the defendant committed "an act for the purpose of and tending directly toward" the unauthorized entry of any dwelling, vehicle, or other structure "with the intent to commit a felony or any theft therein." La. R.S. 14:27(A); La. R.S. 14:62(A). Where the key issue is the defendant's identity as the perpetrator of the crime, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. **State v. Johnson**, 99-2114 (La. App. 1st Cir. 12/18/00), 800 So.2d 886, 888, writ denied, 2001-0197 (La. 12/7/01), 802 So.2d 641. Positive identification by only one witness may be sufficient to support a conviction. **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163. Moreover, it is the factfinder who weighs the respective credibilities of the witnesses, and this court generally will not second-guess those determinations. **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051.

An identification procedure is suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. However, even when suggestiveness of the identification process is proven by the defendant or presumed by the court, the defendant must also show that there was a substantial likelihood of misidentification as a result of the identification procedure. **State v. Thibodeaux**, 98-1673 (La. 9/8/99), 750 So.2d 916, 932, cert. denied, 529 U.S.

1112, 120 S.Ct. 1969, 146 L.Ed.2d 800 (2000). In determining the likelihood of misidentification of a suspect, a court must look to the "totality of the circumstances" as informed by the five factors set forth by the United States Supreme Court in **Neil v. Biggers**, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). These factors include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Any corrupting effect of a suggestive identification is to be weighed against these factors. **Manson v. Brathwaite**, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). 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. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. **State v. Johnson**, 2000-0680 (La. App. 1st Cir. 12/22/00), 775 So.2d 670, 677, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066; **State v. Reed**, 97-0812 (La. App. 1st Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98-1266 (La. 11/25/98), 729 So.2d 572. Despite the existence of a suggestive pre-trial identification, an in-court identification may be permissible if there is not a "very substantial likelihood of irreparable misidentification." **State v. Martin**, 595 So.2d 592, 595 (La. 1992) (quoting **Simmons v. United States**, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968)). See also **State v. Jones**, 94-1098 (La. App. 1st Cir. 6/23/95), 658 So.2d 307, 311, writ denied, 95-2280 (La. 1/12/96), 666 So.2d 320.

During his trial testimony, the victim stated that while the offense occurred after eleven o'clock at night, he was able to see the defendant "pretty good" and was further able to hear the defendant's voice "[l]oud and clear." The victim identified the defendant in court as the person who he observed entering and

digging in the victim's truck on the night in question, though noting that the defendant looked different by the time of the trial. He further stated that the perpetrator was wearing a gray t-shirt or tank top, beige jogging shorts, and a dark camouflage hat. The victim noted that he was able to get a better look at the hat when the defendant was brought back to the scene by the police, and further identified the hat in court, stating that to the best of his knowledge, the hat in evidence was the same hat that the perpetrator was wearing. The victim confirmed that he was not immediately able to identify the defendant as the perpetrator when the officer brought him to the scene, noting that he thought that the perpetrator had lighter hair but reiterated that the perpetrator was wearing a ball cap during the entire confrontation. Once Officer Brown removed the defendant from the back of the police unit, the victim confronted him. The victim stated, "And when he opened his mouth, I knew it was who it was. I knew for a fact that was who I had been standing out there arguing with that evening." The victim clarified his statement regarding the defendant looking different at trial from the night of the offense, stating, "He looks like a clean, cut, respectable individual ... That ain't what he looked like that night." When asked if the defendant's face was the one he saw that night, the victim responded positively. After the defendant spoke in court, stating, "I work for the District Attorney's Office," the victim stated that he did not sound the same, noting that the situation was different. He reiterated that his communication with the perpetrator was in the midst of a heated verbal confrontation that involved yelling.

Officer Brown confirmed that the victim informed him on the night in question that he confronted the individual who he saw digging in his truck; that they had a verbal altercation; and that the perpetrator, a white male wearing beige shorts, a gray muscle shirt, and a dark baseball cap, pulled out a knife. When Officer Brown located the defendant, he was wearing beige shorts and no shirt. He

asked the defendant if he had recently walked from the rear of the trailer park, and the defendant responded positively. The defendant gave Officer Brown permission to enter his trailer to find the clothing that he was wearing earlier that night and Officer Brown located the muscle shirt and cap on a desk in the trailer. When the defendant picked up the cap, Officer Brown saw the pocketknife.

Herein, as stated, the defendant does not contest that the offense was committed. Rather, he denies that he was the person who was attempting to burglarize the victim's truck. The State presented testimony from the victim and the police officer who located and arrested the defendant. In addition, the State introduced into evidence the clothing that the defendant was wearing on the night of the attempted burglary. The defendant did not testify.

In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Davis**, 2000-2685 (La. App. 1st Cir. 11/9/01), 818 So. 2d 76, 80. In this case, the jury was informed of the method of identification to which they could attach whatever weight they deemed appropriate. Since the defendant's counsel urged the defense of misidentification to the jury, the question of reliability was presented to the jury for consideration. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. Thus, an appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. Further, the appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). The guilty verdict returned by the jury indicates that it accepted the State's evidence and rejected the defendant's theory of misidentification. See **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). A court of appeal impinges on a fact finder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law in accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder. See **State v. Mire**, 2014-2295 (La. 1/27/16), ___ So.3d ___, ___, 2016 WL 314814 (per curiam). The victim positively identified the defendant as the perpetrator at the scene shortly after the offense and again at trial. The defendant fit the description provided by the victim immediately after the offense. After careful review, we find that the evidence negates any reasonable probability of misidentification and supports the jury's finding of guilt. We are convinced that a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have concluded that the State proved beyond a reasonable doubt that the defendant was the person who attempted to burglarize the victim's truck. Thus, we find no merit in assignment of error number one.

ASSIGNMENT OF ERROR NUMBER TWO

In assignment of error number two, the defendant argues that the trial court erred in finding him to be a fourth-felony offender. He notes that while the habitual offender bill of information sets forth three prior felony offenses, the State's prayer only asked that he be adjudicated a third-felony offender and sentenced as such, a sentence that would not exceed twice the maximum sentence for the underlying felony. The defendant further notes that while the State informed the trial court at the hearing on the habitual offender bill of information that it sought adjudication as a fourth-felony offender, the State did not seek to amend the bill of information to reflect the request. The defendant argues that he should be given the benefit of "unclear documentation" in this case. In that regard, he contends that his defense counsel believed that his two predicate burglary guilty pleas entered on the same date, February 5, 2007, could not be used separately to enhance a sentence. The defendant further contends that it appears from the 2007 minute entry that only one sentence was imposed for the two 2007 burglary convictions, and that one of the bills of information was filed the same day as the plea proceeding. The defendant concludes that if he was never clearly informed that the State was seeking a fourth-felony offender adjudication, then the sentence should be vacated and the case remanded for a new habitual offender proceeding or a finding of third offender status.

If the defendant denies the allegations of the habitual offender 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 the pleas were taken. **State v. Shelton**, 621 So.2d 769, 779 (La. 1993). If the State meets this 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 the 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. *Id.* at 779-80.

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, voluntary, and made with an articulated waiver of the three **Boykin** rights. *Id.* at 780; **State v. Bickham**, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 889-90 (quoting **Shelton**, *supra*). 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**, 2004-1401 (La. 7/2/04), 879 So.2d 689, 691 (per curiam).

In **State v. Johnson**, 2003-2993 (La. 10/19/04), 884 So.2d 568, the supreme court expressly overruled **State ex rel. Mims v. Butler**, 601 So.2d 649 (La. 1992) (on reh'g), which held that the amended habitual offender statute did not eliminate the sequencing requirement necessary for enhancement of sentencing under the Habitual Offender Law. In **Johnson**, the supreme court determined that under the habitual offender statute, multiple convictions obtained on the same date based on unrelated conduct can be counted separately for sentence enhancement, thus, expressly overruling **Mims**. The supreme court held that Johnson was a fourth-

felony offender, reasoning that "[t]here is no statutory bar to applying the law in sentencing for more than one conviction obtained on the same date based on unrelated conduct. The statute simply does not contain a sequential conviction requirement." **Johnson**, 884 So.2d at 578.

As the defendant concedes on appeal, herein the habitual offender bill of information alleged that the defendant had four felony convictions: the instant attempted burglary, two simple burglaries, and illegal possession of stolen things. The defendant pled guilty to the two predicate burglaries, which had separate docket numbers, on the same day, February 5, 2007. However, despite listing three prior felonies, in the prayer of the habitual offender bill of information the State prayed only for the court to adjudge the defendant a third-felony offender. The State contends that this request was merely a typographical error and that the body of the bill itself alleges four separate felonies in four separate numbered paragraphs. In addition, the State points out that during the habitual offender hearing the defendant admitted that he committed and pled guilty to the offenses.

At the beginning of the habitual offender hearing, the State articulated the predicate convictions and informed the trial court that it was seeking to prove the defendant was a fourth-felony offender. The State then presented testimony, from a fingerprint expert and the defendant's probation officer, addressing the three prior felony convictions and the instant conviction. In addition, early on and at the conclusion of the hearing, the State asked the trial court to find the defendant a fourth-felony offender and to sentence him to life imprisonment. While the defendant pled guilty to the two burglary offenses on the same day in 2007, the separate bills of information show that the distinct offenses were committed on different dates, June 28, 2006, and January 17, 2007, and involved differing locations and victims. Defense counsel noted that he was the same attorney who represented the defendant when he pled guilty to the two burglary offenses on the

same day in 2007, and argued that they were "meant to be one plea." He further stated that he did not believe that accountability for two separate felony convictions was appropriate under the applicable law or the "spirit of our agreement." Defense counsel argued that the convictions should be counted as one conviction rather than two, and, on that basis alone, asked that the trial court find that the defendant was only a third-felony offender. As noted, on remand, the parties stipulated that the evidence presented at the prior habitual offender hearing would be the same evidence if reintroduced at that time.

The defendant did not file a motion to quash the habitual offender bill of information prior to his habitual offender hearing. Further, the defendant did not object to the State's request in any other respect, and at no time did the defendant raise the issue of the language in the habitual offender bill. Moreover, the defendant did not argue that there was an irregularity in sentencing as to the predicate guilty plea convictions. An irregularity cannot be availed of after the verdict unless it was objected to at the time of the occurrence. La. Code Crim. P. art. 841(A). Further, in **State v. Pelas**, 99-0150 (La. App. 1st Cir. 11/5/99), 745 So.2d 1215, 1217, this court held that the defendant was precluded from raising a new basis for his motion to quash on appeal. See also **State v. Dahlem**, 2013-0577 (La. App. 1st Cir. 6/18/14), 148 So.3d 591, 598-99, writ granted, 2014-1555 (La. 3/27/15), 161 So. 3d 646, and aff'd, 2014-1555 (La. 3/15/16), 197 So. 3d 676. Thus, to preserve an issue for appellate review, a party must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for the error. See **State v. Smith**, 381 So.2d 825, 826 (La. 1980) (per curiam); La. Code Crim. P. art. 841(A). The contemporaneous objection rule has two purposes: to put the trial judge on notice of the alleged irregularity so that he may cure the problem, and to prevent the defendant from gambling on a favorable verdict and then resorting to appeal on errors that might easily have been corrected by an

objection. See **State v. Potter**, 591 So.2d 1166, 1169 n.6 (La. 1991). Accordingly, the defendant did not properly preserve for appellate review the arguments raised herein regarding the habitual offender adjudication.

Moreover, even if this issue was properly preserved for our review, we do not find that the trial court erred in adjudicating the defendant a fourth-felony offender. The defendant has failed to show that he was unfairly misled or suffered any prejudice as a result of the State's prayer in the bill of information. The habitual offender bill of information sets forth the defendant's four felony convictions, thus adequately alerting the trial court and the defendant of the State's intent to prove the defendant was a fourth-felony offender. In addition, during the hearing, the State clearly stated that it sought to prove the defendant was a fourth-felony offender and the trial court stated its understanding of the same. Under these circumstances, we do not find that the multiple offender bill was defective or that it either unfairly misled or prejudiced the defendant, or that the trial court erred in finding the defendant a fourth-felony offender. See e.g. **State v. Banks**, 612 So.2d 822, 825-26 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1254 (La. 1993). Further, according to **Johnson**, *supra*, the 2007 predicate convictions can be counted separately for sentence enhancement as there is no specific sequence requirement.

A review of the documentation introduced by the State in support of the use of the predicates to establish the defendant's habitual offender status convinces us that the State met its initial burden under **Shelton**, *supra*. The State proved the existence of the convictions, and that the defendant was represented by counsel when the pleas were taken, by introducing certified true copies of the bills of information and actual minutes for the guilty plea convictions. Thereafter, the defendant failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. Thus, the State had

no further burden to prove the constitutionality of the predicates at issue by "perfect" transcript or otherwise. Assignment of error number two lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

In assignment of error number three, the defendant contends that sentencing him to twenty years at hard labor for breaking into the victim's truck was grossly out of proportion to the severity of the crime. While contending that the trial court is to be commended for imposing the minimum sentence under the habitual offender law, the defendant argues that the circumstances in this case call for a deviation below the mandatory minimum. The defendant contends that he has an addiction to alcohol which fuels his criminal behavior, a non-violent history, and a lack of convictions for major crimes. He argues that requiring him to spend twenty years in prison is a needless imposition of pain and suffering considering the minimal degree of harm that he has caused to society and the fact that he has two young daughters who will be left to grow up without the love and support of their father. The defendant contends that he needs substance abuse treatment as opposed to incarceration. In providing additional factors that he argues should warrant a downward departure, he notes that his maximum sentencing exposure as a third-felony offender would have been twelve years, and that one of the underlying offenses, possession of stolen property in excess of $100 but less than $500, was a misdemeanor at the time of the habitual offender hearing. He concludes that the twenty-year sentence should be set aside and the case should be remanded for resentencing.

The record does not reflect that the defendant ever submitted a motion to reconsider sentence. We note that the defendant did not object after the imposition of the original six-year sentence or the enhanced sentence. Further, the defendant did not object to the resentencing on remand other than to reiterate his argument that he should be considered a third as opposed to a fourth-felony offender. La.

Code Crim. P. art. 881.1(E), in pertinent part, states that "[f]ailure to make or file a motion to reconsider sentence ... 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." Herein, the defendant failed to comply with Article 881.1 because he did not make an oral or written motion to reconsider sentence. Accordingly, in this case the defendant is procedurally barred from having his challenge to the sentence reviewed by this court on appeal. See **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). See **State v. Felder**, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Failure to urge a claim of excessiveness or any other specific ground for reconsideration of the sentence by oral or written motion at the trial court level precludes an appellate court's review of a defendant's claim of sentence excessiveness. **Bickham**, 739 So.2d at 891. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In assignment of error number four, briefed before the transcript of the proceedings on remand was obtained, the defendant contends that the trial court may have illegally restricted parole and resentenced the defendant without observing the twenty-four hour sentencing delay after denying the motion for new trial. The defendant notes that the parole restriction is not statutorily warranted by the underlying offense or the habitual offender law. He notes that the sentence imposed, but later vacated by this court after the fourth-felony habitual offender adjudication, was twenty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. He concedes that the minutes on remand indicate that the sentence was imposed at hard labor without a parole restriction. He further notes that the minutes reflect that he was immediately sentenced on remand upon the trial court's denial of the motion for new trial, that

the minutes do not reflect a waiver of the delay, and that the sentence is being challenged on appeal.

This court has reviewed the transcript for the proceedings on remand. Consistent with the minutes, the transcript reflects that the trial court did not restrict parole in resentencing the defendant on remand. Further, while the trial court did not wait twenty-four hours after denial of defendant's motion for new trial before resentencing (see La. Code Crim. P. art. 873), the defendant announced his readiness for sentencing, through counsel, prior to the denial of the motion. Specifically, in addition to arguing the grounds for the motion for new trial, counsel below stated:

> I would ask the Court to make a ruling on my motion for new trial. If we get a new trial, you know, we get -- if we don't, I'd ask the Court to consider what [the assistant district attorney] and I have both agreed on, that it's in the interest of -- and to be candid with the Court, my obligation to my, I'm not here to obstruct justice, but I'm not willing to put the efficiency of the system of the Court before the concerns of my client. ... But, I think it's in the best interest of my client, as well as judicial economy, that we do the habitual offender hearing today and agree that we certainly had notice a long time ago and the facts wouldn't change any and I'd ask the Court to ... stay with the twenty year sentence, if that's the case.

The trial court then heard further argument on the motion for new trial, and denied the motion just before offering to have a presentence investigation report made, stating, "I will certainly take that into consideration. Would y'all like to resolve this or --." At that point, defense counsel interrupted the trial court, stating, "We'd like to resolve this." Defense counsel objected to the trial court's ruling on the motion for new trial before reiterating and noting that he was grateful for the agreement with the State to stipulate as to the evidence presented at the original habitual offender hearing, noting that the defendant received the minimum of twenty years while facing a maximum of life imprisonment. The trial court then imposed the twenty-year sentence.

We find that by virtue of the above summarized statements, the defendant announced his readiness for sentencing, which implicitly waived the waiting period. See **State v. Jones**, 97-2521 (La. App. 1st Cir. 9/25/98), 720 So.2d 52, 53; **State v. Steward**, 95-1693 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1019. Moreover, the defendant has not cited any prejudice resulting from the court's failure to delay sentencing, nor have we found any indication that he was prejudiced. Thus, any error which occurred is not reversible. See **Steward**, 681 So.2d at 1019. Considering the foregoing, we find no merit in assignment of error number four.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.