NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 KA 1762

STATE OF LOUISIANA

VERSUS

SCOTTIE DWAYNE BOWIE

Judgment Rendered JUN 01 2018

Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Docket Number 725486

Honorable David W. Arceneaux, Judge Presiding

****

Joe Waitz
Amanda Mustin
Ellen Daigle Doskey
Houma, LA

Counsel for Appellee,
State of Louisiana

Holli Herrle-Castillo
Marrero, LA

Counsel for Defendant/Appellant
Scottie Dwayne Bowie

****

BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

WHIPPLE, C.J.

The defendant, Scottie Dwayne Bowie, was charged by bill of information with simple burglary, a violation of LSA-R.S. 14:62, and pled not guilty. After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The State filed a habitual offender bill of information, and the defendant pled not guilty to the allegations therein. The defendant was adjudicated a fourth or subsequent felony habitual offender and sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.[1] The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, assigning error to the trial court's denial of a defense challenge for cause of a prospective juror, to the sufficiency of the evidence, and to the constitutionality of the sentence. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On April 24, 2016, around midnight, a male subject (later identified as the defendant) approached the after-hours window at Plantation Inn, a motel located at 1381 West Tunnel Boulevard in Houma, Louisiana. The subject was yelling and cursing as he presented Joy Chaisson, the motel clerk, with his driver's license. Due to the subject's behavior, Chaisson refused to rent a room to him and told him he had to leave. The security guard on duty at the time, Kristie

[1]The defendant's status as a fourth or subsequent habitual offender is based on the following three predicate guilty pleas in East Baton Rouge Parish and Ascension Parish: simple burglary on October 23, 1996; simple burglary on July 29, 2003; and principal to theft of a motor vehicle on January 17, 2012. Based on the lack of documentation, the trial court granted, in part, the defendant's motion to quash the habitual offender bill of information in reference to two older predicate convictions, from 1991 and 1994, alleged in the habitual offender bill of information. Thus, the older two predicates were not used to determine the defendant's habitual offender status.

Bolden, exited the motel to assure that the subject was vacating the premises. Chaisson and Bolden continued to monitor the subject as he approached an unoccupied truck and attached boat parked in the motel parking lot and owned by Lawrence and Angela Samanie, motel tenants from out of town. The subject repeatedly knocked on the driver's side window of the truck. As Bolden instructed the subject to leave, he became argumentative, began calling her names, and, according to Bolden, lifted his shirt "as if he had something underneath his shirt," causing Bolden to retreat. Bolden used her radio to instruct Chaisson to call the police, and Chaisson and Bolden then observed the subject as he approached the passenger's side of the truck. Chaisson saw the subject throw an object at the window, and both Chaisson and Bolden heard glass shattering. They continued to monitor the subject as he reached into the vehicle before taking flight. Just as the subject was fleeing, the police arrived at the scene, and Bolden and Chaisson showed them the direction in which the subject ran. The defendant was apprehended and identified on the scene and in court at trial as the perpetrator.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number two, the defendant claims that his conviction is based solely on contradictory statements by two witnesses and substandard police work. He notes that while Chaisson testified that Bolden entered the motel after being threatened by the defendant, Bolden testified that she never went back into the motel after confronting the defendant. The defendant also contends that Chaisson fabricated her story and changed her earlier statement and version of the events she witnessed to bolster the State's case and exaggerate the importance of her role in the case. He argues that Bolden's identification of him as the perpetrator was inevitable because he was the only person handcuffed in the police car at the time. He notes that the incident in question was the only time that Bolden had seen the perpetrator, she was unable to see if the perpetrator had facial

hair, and her description of the perpetrator's attire did not match the defendant's attire at the time of his arrest. He further argues that Bolden needed the police to catch someone, due to her pride and job being in jeopardy.

The defendant further claims that there was no physical evidence to link him to the crime. He contends that there was no attempt to check for DNA or fingerprint evidence or to obtain surveillance footage in this case. He further contends that while the police recovered certain items and returned them to the owners, the items were not photographed or presented to the jury. The defendant also claims that there are discrepancies as to where he was located during the incident and notes that no one saw him discard the items that were found. He claims that it is possible that he was in the wrong place at the wrong time, while someone else committed the burglary.

When issues are raised on appeal contesting the sufficiency of the evidence and alleging one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under Hudson v. Louisiana, 450 U.S. 40, 43, 101 S. Ct. 970, 972, 67 L. Ed. 2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the essential elements of the offense have been proven beyond a reasonable doubt. When the entirety of the evidence is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion of trial error issues as to that crime would be pure dicta since those issues are moot. However, when the entirety of the evidence is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the other assignments of error to determine whether the accused is entitled to a new trial. If the reviewing court

determines that there has been trial error (which was not harmless) in cases in which the entirety of the evidence was sufficient to support the conviction, then the accused will be granted a new trial, but is not entitled to an acquittal. State v. Hearold, 603 So. 2d 731, 734 (La. 1992).

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The constitutional standard for testing the sufficiency of the evidence, as enunciated in Jackson v. Virginia, 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 beyond a reasonable doubt. See LSA-C.Cr.P. art. 821(B); State v. Ordodi, 2006–0207 (La. 11/29/06), 946 So. 2d 654, 660. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. See LSA-R.S. 15:438. State v. Wright, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157 & 2000-0895 (La. 11/17/00), 773 So. 2d 732. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126 (La. 1987).

To be guilty of simple burglary, a defendant must have the specific intent to commit a felony or theft therein at the time of his unauthorized entry. State v. Godbolt, 2006–0609 (La. App. 1st Cir. 11/3/06), 950 So. 2d 727, 730. Specific intent is defined as the state of mind, which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow

his act or failure to act. LSA-R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Thus, specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. State v. Buchanon, 95-0625 (La. App. 1st Cir. 5/10/96), 673 So. 2d 663, 665, writ denied, 96-1411 (La. 12/6/96), 684 So. 2d 923.

The State bears the burden of proving the elements of the offense, along with the burden to prove the identity of the defendant as the perpetrator. State v. Draughn, 2005--1825 (La. 1/17/07), 950 So. 2d 583, 593, cert. denied, 552 U.S. 1012, 128 S. Ct. 537, 169 L. Ed. 2d 377 (2007). When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. A positive identification by only one witness is sufficient to support a conviction. State v. Weary, 2003–3067 (La. 4/24/06), 931 So. 2d 297, 311, cert. denied, 549 U.S. 1062, 127 S. Ct. 682, 166 L. Ed. 2d 531 (2006), (quoting State v. Neal, 2000--0674 (La. 6/29/01), 796 So. 2d 649, 658, cert. denied, 535 U.S. 940, 122 S. Ct. 1323, 152 L. Ed. 2d 231 (2002)).

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," giving consideration to the five factors set forth by 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. Cockerham, 2017-0535 (La. App. 1st Cir. 9/21/17), 231 So. 3d 698, 703-04; 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. 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)); Cockerham, 231 So. 3d at 704.

During her trial testimony, Chaisson, the desk clerk and night audit clerk at Plantation Inn, indicated that she watched the perpetrator closely. She testified that the subject was wearing blue jeans and a white T-shirt, and eyeglasses at the window. Specifically, she stated that she was afraid at the time and uncertain as to what actions the individual might take and, therefore, made an effort to keep him in view. When he gave her his identification, she looked at it before making a copy of it and giving it back to him. Chaisson testified that the perpetrator had a

"brown bag of alcohol" in his possession as he approached the motel. She recalled that the truck approached by the perpetrator was in a well-lit area. Chaisson testified that after Bolden approached the perpetrator, the perpetrator lifted his shirt, and Bolden ran back to the motel door. Chaisson further noted that it appeared as though the perpetrator grabbed something out of the vehicle after breaking the window. Chaisson initially testified that the police arrived within two minutes of the subject fleeing. She thereafter specified that the perpetrator was walking away, began running just as the police pulled into the parking lot, and was in front of a fence when she and Bolden pointed him out to the police. Chaisson had no doubt as to her identification of the defendant as the perpetrator.

Bolden, the security guard at the motel, first noticed the subject as he approached the building. She pointed him toward the after-hours window, as the door was kept locked overnight. Bolden also looked at the subject's identification before it was copied and returned by Chaisson. She stated that she was able to get a good look at him before going outside and also noted that he was holding a bag. Bolden stated that she was certain that he was the person who approached the truck and started knocking on the truck window. She recalled that the perpetrator was wearing jeans and a T-shirt and that he had a bald head, but denied that he was wearing eyeglasses at the time. Bolden stated that the truck and boat were located in a well-lit area underneath the Plantation Inn sign. When she went outside, she instructed the subject to leave, and an argument ensued. She described the individual as irate, noted that he was calling her names, and observed him as he lifted his shirt. According to Bolden, after she retreated to an area by the motel door, Bolden heard the glass shatter and saw the interior truck light illuminate. She further saw the subject while he was inside of the vehicle. She saw him take something out of the vehicle before he exited the passenger's side and fled, as the police came speeding into the parking lot. She stated that the perpetrator was

unable to get far, as she pointed him out to the first police car that arrived. She testified that the police immediately brought the individual back to the parking lot to be identified.

At approximately 12:32 a.m., Deputy Mitchel Fitch of the Terrebonne Parish Sheriff's Office (TPSO) was dispatched to the Plantation Inn and arrived at the scene within one or two minutes of the dispatch. He immediately made contact with Bolden and Chaisson upon pulling into the parking lot. Bolden pointed to an area, indicating that the subject had fled in that direction. TPSO Deputy Robert Taylor also responded to the scene and testified that the suspect was attempting to crawl under the fence when he arrived. The police apprehended the suspect, the defendant, on the opposite side of a baseball field and brought him to the Plantation Inn. Bolden and Chaisson positively identified the defendant as the perpetrator, and Deputy Fitch noted that he viewed the defendant's identification and further confirmed receiving a copy of the defendant's identification at the Plantation Inn that night.[2] Deputy Fitch returned to the scene to photograph the vehicle, taking photographs of the damage to the window and a rock that was inside of the vehicle.

Lawrence Samanie testified that he was notified of the burglary by the front desk clerk at Plantation Inn. He confirmed that, at the time of the offense, his truck, a 2013 Dodge Ram, was parked underneath the Plantation Inn sign with an attached boat. He further confirmed that the photograph in evidence was his truck and that the damage depicted in the photograph was accurate. He testified that his wife's purse was missing from the vehicle along with a bluetooth speaker and a bag or little bottle of coins. The items were recovered (found along the fence line)

---

[2]The copy of the defendant's identification was not entered into evidence. Deputy Fitch testified that he was concerned with apprehending the defendant when the copy was given to him and that he was uncertain as to what happened to the copy of the identification.

and returned by the police. Samanie did not give the defendant permission to enter his vehicle.

Treina Johnson, the defendant's fiancée, testified that she was at work at the time of the incident and was not present at the scene. She further testified that the defendant went to a wedding reception that night. As she had to work, Johnson did not attend the wedding reception or see the defendant there. While testifying that she had one or more telephone conversations with the defendant that night, Johnson could not recall the time that any conversation took place and conceded that she did not see the defendant that night. She testified that she and the defendant had a joint bank account and had sufficient funds at the time of the offense. The defendant did not testify at the trial.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. State v. Richardson, 459 So. 2d 31, 38 (La. App. 1st Cir. 1984). Unless there is internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness, if believed by the fact finder, is sufficient to support a factual conclusion. State v. Marshall, 2004–3139 (La. 11/29/06), 943 So. 2d 362, 369, cert. denied, 552 U.S. 905, 128 S. Ct. 239, 169 L. Ed. 2d 179 (2007). 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. Robins, 2004-1953 (La. App. 1st Cir. 5/6/05), 915 So. 2d 896, 899. It is not the function of an appellate court to assess credibility or reweigh the evidence. Appellate review for minimal constitutional sufficiency of evidence is a limited one restricted by the standard developed in Jackson. State v. Rosiere, 488 So. 2d 965, 968 (La. 1986); Godbolt, 950 So. 2d at 730.

In this case, the jury was informed of the method of identification to which the jurors could attach whatever weight they deemed appropriate. Further, the jury

rejected the defense of misidentification urged by the defendant. While Chaisson's estimation as to the timing of the arrival of the police on the scene and the perpetrator fleeing somewhat varied, considering her testimony as a whole, she indicated that the police arrived just as the perpetrator was attempting to flee. Chaisson had no doubt that the defendant was the perpetrator. Bolden had even more interaction with the perpetrator and was equally as certain of her identification of the defendant. The defendant was apprehended within the immediate vicinity of the motel parking lot within minutes of the offense. Bolden and Chaisson testified that the area was well-lit that night, that they had ample opportunity to observe the perpetrator within a close range, and that they were certain of their on-the-scene and in-court identifications. Considering the totality of the circumstances, there was no substantial likelihood of misidentification in this case.

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 fact finder 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). After a thorough review of the record, we are convinced that a rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the State proved beyond a reasonable doubt, and to the exclusion of every

reasonable hypothesis of innocence, all of the elements of simple burglary and the defendant's identity as a perpetrator. Accordingly, assignment of error number two lacks merit.

CHALLENGE FOR CAUSE

In assignment of error number one, the defendant argues that he is entitled to a reversal of his conviction because the trial court erroneously denied his challenge for cause to strike Barry Lyons as a prospective juror. The defendant notes that he utilized all six of his peremptory challenges during voir dire. As the defendant further notes, Lyons indicated that he was related to Jason Lyons, an assistant district attorney from the same office which was prosecuting the case. The defendant contends that the trial court denied his challenge for cause despite having no knowledge as to the nature of relationship between the prospective juror and assistant district attorney. The defendant argues that the trial court abused its discretion in denying the challenge for cause, further noting that Lyons was the final juror seated on the jury as the defendant had already utilized all six of his peremptory challenges and was unable to excuse him. The defendant contends that the trial court had a duty to explore the relationship to assure that the juror could be fair and impartial despite being related to an assistant district attorney.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. LSA-Const. art. I, § 17(A); see also LSA-C.Cr.P. arts. 786 & 799. The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. State v. Burton, 464 So. 2d 421, 425 (La. App. 1st Cir.), writ denied, 468 So. 2d 570 (La. 1985). Pursuant to LSA-C.Cr.P. art. 797(2), a prospective juror may be challenged for cause on the ground that the juror is not impartial, whatever the cause of his partiality. Further, the State or the

defendant may challenge a juror for cause on the ground that the relationship, whether by blood, marriage, employment, friendship, or enmity, between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict. LSA-C.Cr.P. art. 797(3). When addressing whether a challenge for cause should be granted, the district court judge must look at the juror's responses during his or her entire testimony, not just isolated answers. State v. Sparks, 88–0017 (La. 5/11/11), 68 So. 3d 435, 461, cert. denied sub nom., El-Mumit v. Louisiana, 566 U.S. 908, 132 S. Ct. 1794, 182 L. Ed. 2d 621 (2012).

In order for a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant has exhausted his peremptory challenges. State v. Robertson, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280; State v. Ross, 623 So. 2d 643, 644 (La. 1993). An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. However, a trial court is vested with broad discretion in ruling on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. State v. Martin, 558 So. 2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So. 2d 318 (La. 1990).

Based on the entirety of the responses of the prospective juror at issue, Barry Lyons, there was no indication that he was unable to be fair and impartial. After learning that Lyons was related to an assistant district attorney, who was not

handling the instant case, the defense attorney did not ask any follow-up questions in regards to the relationship.[3] The challenge for cause was based solely on the existence of an unspecified relationship. As the State noted after the challenge by the defense attorney, Lyons did not specify whether he was closely or distantly related to the assistant district attorney. In denying the challenge for cause, the trial court found that there was no basis to reasonably conclude that Lyons could not be fair and impartial.

The law in Louisiana is clear that a relationship between a prospective juror and a district attorney does not automatically disqualify the prospective juror from service. The existence of a relationship, even one of blood or marriage, is not sufficient to disqualify a juror unless the facts reveal that the nature of the relationship is such that it is reasonable to conclude it would influence the juror in arriving at a verdict. LSA-C.Cr.P. art. 797(3). The law does not require that a jury be composed of individuals who are totally unacquainted with the defendant, the person injured by the offense, the district attorney, or defense counsel. It requires that jurors be fair and unbiased. State v. Juniors, 2003-2425 (La. 6/29/05), 915 So. 2d 291, 306, cert. denied, 547 U.S. 1115, 126 S. Ct. 1940, 164 L. Ed. 2d 669 (2006). Thus, the mere existence of a relationship is not alone grounds for a challenge for cause. Rather, the question presented is whether the prospective juror could assess the credibility of each witness independent of his relationship with the assistant district attorney. See State v. Morris, 96-1008 (La. App. 1st Cir. 3/27/97), 691 So. 2d 792, 800, writ denied, 97-1077 (La. 10/13/97), 703 So. 2d 609. Considering the foregoing, the trial court had no grounds to grant the

[3]By contrast, the defense deemed it necessary to ask follow-up questions as to a prospective juror who responded that she knew the district attorney, when the jurors were asked if they knew family members or friends of the defendant or his attorney. The prospective juror indicated that she did not think she should be on the jury, stating that she was "a little partial." She further indicated that her property had been burglarized in the past. Notably, the trial court granted the defendant's challenge for cause of that prospective juror.

challenge for cause at issue in this case. We find no merit in assignment of error number one.

EXCESSIVE SENTENCE

In assignment of error number three, the defendant argues that a life sentence, while mandated by the habitual offender law, is excessive in this case. He notes that the crime involved the breaking of a window of an unoccupied vehicle and the taking of a purse, bluetooth speaker, and some coins from inside of the vehicle. He further notes that the items were recovered and returned to the victims, and that the cost to repair the window was two hundred dollars. Conceding that it is not a defense to the crime, he also notes that the perpetrator was likely intoxicated at the time of the offense. The defendant further notes his criminal record shows the possibility of a history of drug abuse and argues that he likely needs alcohol and/or drug rehabilitation as opposed to imprisonment for life. He argues that his prior criminal activity is more of a nuisance as opposed to a violent threat to the public. The defendant also contends that although recent legislative revisions that would no longer mandate a life sentence in this case are not applicable in determining the sentences, the changes to the law should be considered when assessing his life sentence for excessiveness. He contends that the facts of the case and his prior criminal behavior do not support a life sentence. He concludes that a life sentence in this case makes no measurable contribution to acceptable goals of punishment, and is grossly out of proportion to the severity of the crime.

Both the United States and Louisiana constitutions prohibit the imposition of excessive or cruel punishment. U.S. Const. amend. VIII; LSA-Const. art. I, § 20. A sentence is generally considered excessive if it is grossly disproportionate to the offense or imposes needless and purposeless pain and suffering. State v. Lobato, 603 So. 2d 739, 751 (La. 1992). If the trial judge finds that an enhanced

punishment mandated by the Habitual Offender Law, LSA-R.S. 15:529.1, makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounts to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," the trial judge has the option and duty to reduce such sentence to one that would not be constitutionally excessive. State v. Dorthey, 623 So. 2d 1276, 1280–81 (La. 1993). To determine whether a penalty is excessive, we must determine whether the penalty is so grossly disproportionate to the severity of the crime as to shock our sense of justice. State v. Bonanno, 384 So. 2d 355, 358 (La. 1980).

Since the Habitual Offender Law in its entirety has been deemed to be constitutional, the minimum sentences it imposes upon multiple offenders are also presumed to be constitutional. State v. Johnson, 97–1906 (La. 3/4/98), 709 So. 2d 672, 675. A trial judge may not rely solely upon the non-violent nature of the instant crime or of past crimes as evidence which justifies rebutting the presumption of constitutionality. Instead, to rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Id. at 676 (quoting State v. Young, 94–1636 (La. App. 4th Cir. 10/26/95), 663 So. 2d 525, 531 (Plotkin, J., concurring), writ denied, 95-3010 (La. 3/22/96), 669 So. 2d 1223). The Louisiana Supreme Court has cautioned that downward departures from mandatory minimum sentences should only be made in rare cases. State v. Lindsey, 99–3256, 99–3302 (La. 10/17/00), 770 So. 2d 339, 343, cert. denied, 532 U.S. 1010, 121 S. Ct. 1739, 149 L. Ed. 2d 663 (2001); Johnson, 709 So. 2d at 676–77.

Herein, the defendant was sentenced as a fourth-felony offender under LSA-R.S. 15:529.1(A)(4)(b) (prior to amendment by 2017 La. Acts Nos. 257, § 1 & 282, § 1). The applicable version of that statutory provision states, in pertinent part, "[i]f the fourth felony and two of the prior felonies are felonies ... punishable by imprisonment ... for twelve years or more ... the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence." Two of the defendant's prior felonies, the simple burglary conviction of October 23, 1996 and the simple burglary conviction of July 29, 2003, were punishable for twelve years. The underlying offense, also simple burglary, is punishable for twelve years. See LSA-R.S. 14:62(B). Thus, upon adjudication as a fourth-felony habitual offender, the defendant was subject to a mandatory life sentence without benefit of parole, probation, or suspension of sentence and was sentenced accordingly.

While the penalty was revised after the defendant's offenses, we note that the Louisiana Supreme Court has held that a defendant should be sentenced pursuant to the version of LSA-R.S. 15:529.1 in effect at the time of the commission of the charged offense. State v. Parker, 2003-0924 (La. 4/14/04), 871 So. 2d 317, 326; see also State v. Johnson, 2017-1347 (La. App. 1st Cir. 3/13/18), 2018 WL 1312575 at *3 (unpublished). Thus, we find that the defendant in this case has failed to meet his burden of rebutting the presumption of constitutionality.

While the defendant cites the non-violent aspect of his offense, we note that both Bolden and Chaisson testified that the defendant was belligerent during the offense and lifted his shirt during the confrontation with Bolden. Bolden testified that she felt threatened by the defendant's actions, and both of them were afraid at the time. Moreover, while most of the items taken from the vehicle were recovered, the defendant did not voluntarily return any of the stolen property. Further, the defendant has an extensive criminal history. When determining

whether the defendant has met his burden of proof by rebutting the presumption that the mandatory minimum sentence is constitutional, the trial judge must keep in mind the goals of the Habitual Offender Law. Clearly, the major reasons the Legislature passed the Habitual Offender Law were to deter and punish recidivism. Under this statute, a defendant with multiple felony convictions is treated as a recidivist who is to be punished for the instant crime in light of his continuing disregard for the laws of our state. Johnson, 709 So.2d at 677.

Herein, the record is devoid of any evidence that the defendant is the type of offender contemplated by the Louisiana Supreme Court in Dorthey, warranting a downward deviation from the mandatory sentence. Thus, the defendant has not demonstrated that a reduction from the mandatory sentence was warranted in this case. Accordingly, the mandatory life sentence as a fourth-felony offender was not excessive. This assignment of error lacks merit.

CONCLUSION

For the above reasons, the defendant's conviction, habitual offender adjudication, and sentence are hereby affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.