NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 0427

STATE OF LOUISIANA

VERSUS

KENDELL SHANNER CAGLER

Judgment rendered NOV 07 2018

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court No. 577420
Honorable Richard A. Swartz, Judge

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WARREN L. MONTGOMERY
DISTRICT ATTORNEY
MATTHEW CAPLAN
ASSISTANT DISTRICT ATTORNEY
COVINGTON, LA

ATTORNEYS FOR
STATE OF LOUISIANA

KATHERINE M. FRANKS
MADISONVILLE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
KENDELL S. CAGLER

KENDELL CAGLER
ANGOLA, LA

PRO SE

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

PETTIGREW, J.

The defendant, Kendell Shanner Cagler, was charged by an amended bill of information with one count of armed robbery with a firearm, a violation of Louisiana Revised Statutes 14:64 and 14:64.3 (count I), one count of possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1 (count II), and one count of aggravated second degree battery, a violation of La. R.S. 14:34.7 (count III). At arraignment, the defendant pled not guilty on all three counts but, following a jury trial, was found guilty as charged on counts I and II, and not guilty on count III. On count I, the defendant was sentenced to imprisonment at hard labor for sixty years, with an additional five-year imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, pursuant to La. R.S. 14:64.3, the firearm enhancement statute. On count II, he was sentenced to imprisonment for twenty years at hard labor. The defendant's sentences on both counts were ordered without benefit of parole, probation, or suspension of sentence, and he was given credit for time served.[1]

A habitual offender bill of information was filed by the State, alleging the defendant's status as a fourth-felony habitual offender.[2] Following a hearing, the defendant was adjudicated a fourth-felony habitual offender on count I. After vacating the sentence previously imposed on count I, the trial court then sentenced the defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence on count I, keeping intact the previously imposed sentence on count II.[3] The

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[1] While the minutes indicate the defendant was sentenced to imprisonment at hard labor for twenty years on count I, imprisonment at hard labor for sixty years on count II, and imprisonment at hard labor for five years on count III, it is well settled that in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[2] Predicate #1 was set forth as the defendant's September 7, 1999 guilty plea under 22nd Judicial District Court, Parish of St. Tammany, Docket No. 302272, to one count of possession with intent to distribute a Schedule II Controlled Dangerous Substance (cocaine). Predicate #2 was set forth as the defendant's October 20, 2000 guilty plea under 22nd Judicial District Court, Parish of St. Tammany, Docket No. 319249, to one count of possession with intent to distribute a Schedule II Controlled Dangerous Substance (cocaine). Predicate #3 was set forth as the defendant's February 20, 2008 guilty plea under 22nd Judicial District Court, Parish of St. Tammany, Docket No. 439887, to one count of possession of a Schedule II Controlled Dangerous Substance (cocaine) and one count of possession of a firearm by a convicted felon.

[3] We note that while La. R.S. 15:529.1(G) does not restrict parole eligibility, the conditions imposed on the sentence are those called for in the referenced statute. See **State v. Bruins**, 407 So.2d 685, 687 (La. 1981). As both La. R.S. 14:64(B) and 14:64.3(A) require the period of imprisonment imposed under these

defendant now appeals with four counseled, and two pro se, assignments of error. For the following reasons, we affirm the defendant's convictions, habitual offender adjudication, and sentences.

FACTS

On May 17, 2015, Rebecca "Becky" Doussan, Alva "Buggs" Thompson, Jr., and the defendant visited the victim, Shaunna Bickham's, house. The visitors remained at the house for the evening, drinking and using drugs. Sometime in the early morning hours, Bickham wanted the party to end and offered to bring everyone home. The group got into a Ford Crown Victoria, which belonged to Bickham's boyfriend, Brent Lewis, with Thompson in the front-passenger seat and Doussan and the defendant in the back. After Bickham dropped Doussan off at her home, the defendant moved to the rear-driver seat.

They had driven only a short distance when the defendant fired a shot into the vehicle's radio. When Bickham turned around, the defendant stated, "You think I'm playing with you? Drive this mother F-ing car back to the house." As Bickham began to drive, the vehicle stalled out, and the defendant subsequently "hit [her] in the back of the head with the gun," saying "b----, I mean business." Bickham testified that as a result of the hit, she was dizzy, nearly driving the vehicle into a ditch with the defendant stating "b----, I'll kill you. If you wreck this car, I'm going to kill you." Bickham drove until she was close to her house, then veered away, and the defendant fired a second shot through the vehicle's windshield. Bickham then resumed her course back to the house and, upon their arrival, the defendant fired a third shot into the driver's-side air conditioner vent. After firing a fourth shot, the defendant instructed Bickham to get out of the vehicle and run away. Bickham testified that as she ran, her shoes came off and she fell to the ground, "bust[ing] my arm, [and] my knees," and that the defendant tried to hit her with the car. Bickham was able to roll into a nearby grass area and, once the defendant left, she called 911. Bickham testified she was scared and believed she was going to die.

(Continued)
statutes to be served without benefit of parole, under **Bruins**, the defendant's enhanced sentence for armed robbery while using a firearm is to be served without benefit of parole.

Further, approximately $1,200.00 was located inside the vehicle, and the defendant took that as he drove away in her vehicle. At trial, Bickham positively identified the defendant as the person that stole her boyfriend's car, hit her in the head, and shot at her.

Corporal Ryan Hopkins, a patrol deputy with the St. Tammany Parish Sheriff's Office, responded to the 911 call and met with Bickham. Bickham reported to Corporal Hopkins that "Mo Parker" robbed her and "struck [her] with a firearm." As the two were talking, an older male, later identified as Gerald Casnave, approached and said he heard several shots in the area, and provided the name of "Marlow Parker" to Corporal Hopkins. At trial, Corporal Hopkins testified Bickham relayed the following information:

> She said that she, a female friend that she never identified to me, and a male subject she identified as Mo Parker were hanging out in the backyard of her ex-boyfriend, I believe it was, Brent Lewis' home, on Shirley's Sweet Shop. They – all three of them got in the vehicle, the black Crown Vic, to drop off the unidentified female at her home on Tag A Long Road. After the female was out of the vehicle, dropped off on Tag A Long Road, she said that Mo hit her in the back of the head with a firearm and said take me to your house, which she did. And she said this was done because Mo knows that she keeps a large sum of money in her home and he wanted the money. During that time, he fired a shot on Tag A Long Road – I don't recall where it went or where he shot at – what she said, just to say I'm serious, I'm serious about this, drive me there.
>
> Once they got onto Shirley[']s Sweet Shop, she said he fired three additional rounds and told her to go inside of her house, get the money. She refused to do so. He told her to get out the car and start running. That's when she said she fell and scraped her arms and knees, and then she was able to call the police after he fled.

With that information, Corporal Hopkins provided "Marlow Parker" to his dispatch supervisor, who then discovered a Marlow Parker was, in fact, incarcerated and present in the St. Tammany Parish Jail. Corporal Hopkins remained with Bickham until medical staff and major crimes unit investigators arrived.

Detective Sgt. Keith Cannizzaro of the St. Tammany Parish Sheriff's Office met with Bickham, who, after describing the events of her robbery, informed Detective Cannizzaro she had known the defendant for several years and that "[s]he was positive that this was the person that had committed this crime and she was – she knew him as Mo Parker," as he had dated her sister, Shalanda. After speaking with Bickham for several hours, Detective Cannizzaro offered to take her home, but Bickham responded that her sister,

Shalanda, was picking her up. When Shalanda arrived, she informed Detective Cannizzaro that she dated the defendant for a couple of months, but "everybody knew him as [Mo Parker]." Furthermore, Shalanda stated, upon being shown a picture, the "Marlow Parker" identified in the St. Tammany Parish Jail was not the man she dated. As the investigation continued, Detective Tim Crabtree identified a "Kendell Cagler" who strongly resembled the physical description provided by Bickham. Detective Cannizzaro showed a picture of Kendell Cagler to Shalanda at a second visit, and "[s]he immediately positively identified the person in the picture is in fact the person she dated and knew as Mo Parker." Later, using this picture, a photographic lineup was presented to Bickham, who also "immediately identified" the defendant as "Mo Parker" and the person who shot at her. The defendant was subsequently arrested pursuant to a warrant.

INSUFFICIENT EVIDENCE

In his first pro se assignment of error, the defendant asserts the State failed to meet its burden of proving his guilt beyond a reasonable doubt, arguing "[t]he inconsistencies between the initial interviews, police reports, statements, eyewitness accounts, and trial testimony [support his] argument that there was an excessive amount of internal contradiction, and therefore, a reasonable [jury] could not have convicted him." The defendant further avers that with the victim's "story constantly changing, including the day of her testimony [at] trial, reasonable jurists could not have found [him] guilty of the crimes for which he was charged."

When issues are raised on appeal, both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing the 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, 99 S.Ct. 2781, 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 proved 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 by the court of the trial error issues as to that crime would be pure dicta since those issues are moot.

On the other hand, when the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must then consider the assignments of trial error to determine whether the accused is entitled to a new trial. If the reviewing court determines 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 must receive a new trial, but is not entitled to an acquittal even though the admissible evidence, considered alone, was insufficient. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992). See also, **Lockhart v. Nelson**, 488 U.S. 33, 40-42, 109 S.Ct. 285, 290-92, 102 L.Ed.2d 265 (1988). Accordingly, we proceed first to determine whether the entirety of the evidence was sufficient to support the defendant's convictions.

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 standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime, and defendant's identity as the perpetrator of that crime, beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. at 319, 99 S.Ct. at 2789; **State v. Patton**, 2010-1841 (La. App. 1st Cir. 6/10/11), 68 So.3d 1209, 1224. In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test; i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; **State v. Millien**, 2002-1006, p. 2 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 508-09.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the

circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **State v. Wright**, 98-0601, p. 3 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 487, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 and 2000-0895 (La. 11/17/00), 773 So.2d 732.

Armed robbery is "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. R.S. 14:64(A). A *dangerous weapon* is defined, in part, as any "instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm." La. R.S. 14:2(A)(3). Armed robbery is a general intent crime. In general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts that have been declared criminal. **State v. Payne**, 540 So.2d 520, 523-24 (La. App. 1st Cir.), writ denied, 546 So.2d 169 (La. 1989).

To prove a violation of La. R.S. 14:95.1, the State must prove: (1) the defendant's status as a convicted felon; (2) that the defendant was in possession of a firearm; (3) absence of the ten-year period of limitation; and (4) general intent to commit the offense. **State v. Morris**, 99-3075, p. 13 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 918, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002). In his pro se brief, the defendant does not challenge the sufficiency of the evidence regarding the predicate offenses used to support his felon in possession of a firearm conviction.

Where the key issue is the defendant's identity as the perpetrator of the crime, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. **State v. Johnson**, 99-2114, p. 4 (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 even one witness may be sufficient to support a conviction. 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, p. 6 (La. App. 1st Cir. 11/9/01), 818 So.2d 76, 80. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. 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. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

A thorough review of the record indicates that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of armed robbery, felon in possession of a firearm, and the defendant's identity as the perpetrator of the crimes. The verdicts rendered in this case indicate the jury credited the testimony of Bickham and the other witnesses against the defendant and rejected his attempts to discredit those witnesses. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant, 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). No such hypothesis exists in the instant case. Bickham testified that the defendant, who was continually brandishing a firearm that evening, fired multiple shots inside the car, struck her on the back of her head with the firearm, threatened to kill her, stole her boyfriend's car and the money contained therein, and tried to run over her after she fell to the ground. Further, Bickham positively identified the defendant in

a photographic lineup as the individual who shot at her. Bickham testified she was scared and believed she was going to die.

After reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 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. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Therefore, this assignment of error is without merit.

DENIAL OF MOTION FOR MISTRIAL

In his first counseled assignment of error, the defendant argues the trial court "erred in commenting on the evidence and disparaging the line of questioning advanced by defense counsel, depriving [him] of his constitutional right to confront his accusers and his right to present a defense." He continues, averring "[t]he judge's sua sponte derogatory remarks regarding the relevancy of counsel's cross examination in the presence of the jury made it impossible for [him] to obtain a fair trial. A mistrial should have been granted. The trial judge clearly violated [La. Code Crim. P. art. 772]."

The particular line of questioning at issue arose during the testimony of Alva Thompson, Jr., who was the front-seat passenger in the vehicle driven by Bickham on the night in question. After the defendant robbed and fired shots at Bickham, Thompson fled the scene because there was an outstanding warrant for his arrest for failure to register as a sex offender, and he did not want to come into contact with law enforcement. After Thompson was subsequently apprehended and convicted, the district attorney's office located him in the custody of the Department of Corrections. Thompson's discussions with the district attorney's office about his activities on the night in question was a debated topic of cross-examination, resulting in the following exchange:

> [Defense counsel]: So about how long ago was the first time you met [the prosecutor] Mr. Alford?

[Thompson]: I want to say in June.

[Defense counsel]: June of this year or June of last year?

[Thompson]: June of this year.

[Defense counsel]: So that would have been a month ago or so?

[Thompson]: Well, no, it had to be June of last year then.

[Defense counsel]: How do you know it was the month of June?

[Thompson]: Because, if I'm not mistaken, I think he had – I came down here, to be honest with you – I came to the courthouse.

[Defense counsel]: Okay. You were transferred from –

[Thompson]: From Riverbend to the courthouse.

[Defense counsel]: And what did you do when you got to the courthouse?

[Thompson]: I had words with him.

[Defense counsel]: Who else was present when you spoke with him?

[Thompson]: The other DA right there, (Indicating).

[Defense counsel]: Both of these two gentlemen?

[Thompson]: Yes, sir.

[Defense counsel]: And you're certain of that?

[Thompson]: Yes, sir.

[Defense counsel]: And you say that happened June of last year?

[Thompson]: Yes, sir, I want to say last year.

[Defense counsel]: And it's kind of important. So have you had any contact with them more than once?

[Thompson]: (No response.)

[Defense counsel]: How many times did you speak with them?

[Thompson]: They only called me down one time. They called me down one time. And I had – I think I came and seen them here once, once more. I think there's two times I had words with them.

[Defense counsel]: When is the most recent time that you were brought over to talk with them?

[Thompson]: Most recent time. Um, Tuesday.

[Defense counsel]: Tuesday of this week?

[Thompson]: Yes, sir.

[Defense counsel]: Where did you speak to them?

[Thompson]: In the basement.

[Defense counsel]: In the basement of this building?

[Thompson]: Yes, sir.

[Defense counsel]: How long did you speak in the basement of this building?

[Thompson]: We didn't speak long.

[Defense counsel]: How long is not long?

[Thompson]: About five minutes.

[Defense counsel]: What did y'all talk about?

[Thompson]: Wanted to make sure that I was prepared to go over the case.

[Defense counsel]: So you went over the case in five minutes?

[Thompson]: Well, he just wanted to know did I, you know, did I know everything, what happened, and how it happened, and how did it occur. That's what he wanted to know.

[Defense counsel]: What did y'all talk about June of last year?

[Thompson]: He wanted – he wanted to know about the robbery things, all what happened, and how did I get involved, and was I involved with it.

[Defense counsel]: And how long did you talk back in June?

[Thompson]: How long did I talk?

[Defense counsel]: Yeah, how long did y'all visit together?

[Thompson]: It wasn't – it wasn't – I would say about 20, 30 minutes, if that.

[Defense counsel]: And they transported you from a DOC facility?

[Thompson]: Yes, sir.

[Defense counsel]: To his office?

[Thompson]: (No response.)

[Defense counsel]: Where did y'all speak?

[Thompson]: We spoke in one of these back areas, back here. We didn't even come in the courtroom.

[Defense counsel]: Do you know what part of the courthouse you were in?

[Thompson]: I tell you what, we – they let us park in the back. You know, where you go down the ramp at?

[Defense counsel]: Uh-huh (affirmative response.) The sally port?

[Thompson]: Not the sally port. Right next to it.

[Defense counsel]: The special gate that opens automatically?

[Thompson]: Yes, sir.

[Defense counsel]: Big old walls around the parking lot? So you got to come in through the Judge's parking area.

[Thompson]: If that's what you call it.

[Defense counsel]: And who was driving the vehicle when you got in?

[Thompson]: When I got –

[Defense counsel]: Yeah, when you came in that parking lot, who was driving that vehicle? Was that a regular transportation van?

[Thompson]: Yes, sir.

[Defense counsel]: Did somebody come out from this building and meet you? How did you get up to wherever it was –

[Thompson]: Somebody came and unlocked the gate, opened the gate up for us. I can't recall which officer it was that opened the gate.

[Defense counsel]: So an officer opened the gate. Did you exit the van?

[Thompson]: Uh-huh (affirmative response.)

[Defense counsel]: Did anybody from the DA's office – who came and escorted you to where it was you were going?

[Thompson]: An officer.

[Defense counsel]: A deputy?

[Thompson]: Uh-huh (affirmative response.)

[Defense counsel]: And then you did what? Went into the building?

[Thompson]: Uh-huh (affirmative response.)

[Defense counsel]: Did you get in an elevator?

[Thompson]: No, sir.

[Defense counsel]: You went in the building. How did you get to the back office that you talked about being interviewed in?

[Thompson]: The officer escorted me to the back office to one of these back offices. And that's where I met them at.

[Defense counsel]: Did you go up any flights of stairs or any elevators?

[Thompson]: No, sir.

[Defense counsel]: So they brought you in through the back into a room. Was it a room like this?

[Thompson]: Huh-uh (negative response.)

[Defense counsel]: Did it look like a broom closet? What did it look like? What kind of room are we talking about?

[Thompson]: I really can't describe it, because that was my first time even seeing the back area of this – of this court place.

[Defense counsel]: Well, describe what you saw, though. I mean, you were there, so you ought to be able to describe what the – did it have a table in it?

[Thompson]: No, sir, not to my knowledge.

[Defense counsel]: So y'all stood there in an empty room with no table?

[Thompson]: Yeah.

[Defense counsel]: And talked for half an hour?

[Thompson]: Yes, sir.

[Defense counsel]: Did it have any chairs in the room?

[Thompson]: To be honest with you, I don't want to lie to you, I mean, it's – it's not to my knowledge. I don't recall. I know I recall being called down here to come talk to them.

At this point, the prosecutor interjected, stating "Judge, the State offers a stipulation that the District Attorney's Office met with Mr. Thompson in the jury room of the misdemeanor courtroom." Defense counsel replied, "I appreciate that offer, Your Honor, but I'm not inclined to agree to it at this point." The trial judge then instructed both attorneys to approach the bench. Defense counsel requested that the "jury be discharged so they don't hear our discussion." The trial judge responded, "They're not

going to hear it." Defense counsel disagreed, arguing "[t]hey can hear it right now." The trial judge asked defense counsel about the relevance of his line of questioning, to which he responded, "I believe the proof is in the pudding, in the details. And if [Thompson] had a long discussion, I think the jury ought to know what, how long did they talk, who did they converse about, who initiated the conversation, what the conversation consisted of. And I'm getting it one question at a time." The trial judge then responded, "But you're wasting everybody's time. Get to the point." Defense counsel then objected, stating, "Your Honor . . . your tone and [tenor] with me, I think, is giving an impression that you have some sort of opinion of the validity of what it is I'm doing and/or the guilt or innocence of my client." In response, the trial judge instructed the jury, stating:

> Ladies and gentlemen, the discussion I just had with counsel and the Court has nothing to do with the guilt or innocence of this defendant. The Court feels that [defense counsel] needs to move on and that the questions that he has just asked were not relevant to these proceedings, so we are going to move on. But they have nothing to do with the guilt or innocence of this defendant.

Defense counsel objected again and, after the jury was removed, moved for a mistrial. The district court denied the mistrial, stating:

> The Court is sustaining the objection to the relevancy of your question, and you are going to be allowed to question him about his discussion with the District Attorney. But all of these questions leading up to that particular question have established no facts that are relevant to these proceedings. And that's the Court's opinion."

The trial court then brought the jury back in, admonishing them once again:

> [T]he comments of the Court have no value as to your determination as the trier of the facts in this case. You determine the guilt or the innocence of this defendant, and you determine what evidence you wish to consider and what you believe is relevant. This Court has no opinion that you – as to the guilt or innocence of this defendant. That is your determination.

Under La. Code Crim. P. art. 772, the judge is prohibited, in the presence of the jury, from commenting upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted. This Article does not apply to the trial court's reasons for rulings on objections, provided the remarks are not unfair or prejudicial to defendant. See **State v. Knighton**, 436 So.2d 1141, 1148 (La. 1983),

cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984); **State v. Williams**, 500 So.2d 811, 815-16 (La. App. 1st Cir. 1986). Further, the trial court's comments on the evidence have been held to be harmless if those remarks do not imply an opinion as to the defendant's guilt or innocence. **State v. Styles**, 96-897, p. 18 (La. App. 5th Cir. 3/25/97), 692 So.2d 1222, 1231, writ denied, 97-1069 (La. 10/13/97), 703 So.2d 609. Moreover, the Louisiana Supreme Court recently addressed an argument that the district court's evidentiary rulings violate Article 772, stating: "[i]ndulging such a view would produce absurd results. To construe evidentiary rulings as judicial commentary on the merits of either party's theory is to disregard the trial court's fundamental role as a neutral arbiter. Necessarily encompassed in that role is the discretion to apply the law to govern the proceedings, including the application of the evidentiary rules." **State v. Bell**, 2016-0511, p. 9 (La. 4/24/17), 217 So.3d 330, 335, n.10, cert denied, ___ U.S. ___, 138 S.Ct. 318, 199 L.Ed.2d 208 (2017). Applying these principles in **State v. Bennett**, 2000-0282, p. 5 (La. App. 1st Cir. 11/8/00), 771 So.2d 296, 298-99, writ denied, 2000-3246 (La. 10/12/01), 799 So.2d 495, where the trial court sustained the prosecution's objection and noted defendant's closing argument relied upon facts not in evidence, this court found the judge's remark not in violation of Article 772 as the "remark was made to explain its ruling, [and] it did not constitute a comment on the evidence. Further, the remark was neither unfair nor prejudicial to defendant, nor did it imply an opinion as to the defendant's guilt or innocence."

Louisiana Code of Criminal Procedure Article 775 provides, in pertinent part, that a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771. La. Code Crim. P. art. 771 provides, in pertinent part:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:

> (1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770[.]
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> * * *
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> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

A mistrial under the provisions of La. Code Crim. P. art. 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. See **State v. Miles**, 98-2396, p. 4 (La. App. 1st Cir. 6/25/99), 739 So.2d 901, 904, writ denied, 99-2249 (La. 1/28/00), 753 So.2d 231. However, a mistrial is a drastic remedy which should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal without abuse of that discretion. **State v. Friday**, 2010-2309, pp. 29-30 (La. App. 1st Cir. 6/17/11), 73 So.3d 913, 933, writ denied, 2011-1456 (La. 4/20/12), 85 So.3d 1258.

In **State v. Feet**, 481 So.2d 667 (La. App. 1st Cir. 1985), writ denied, 484 So.2d 668 (La. 1986), this court considered a motion for mistrial based upon derogatory remarks by the trial court to defense counsel. Therein, defense counsel requested an instanter subpoena, with the trial court responding, "[t]hat's the last one Mr. Blaize. We're not going to instanter subpoena for the rest of the year. If you can't get your case prepared to come to court, we're going without it." Defense counsel moved for and was denied a mistrial. On appeal, this court noted "[w]hile we do not condone the judge's comments, we find that they do not constitute comments on the evidence intended to impress the jurors with the trial court's opinion as to the defendant's guilt or innocence. See La. C. Cr. P. art. 772. We further find that the comments of the court did not rise to so substantial a level as to adversely affect the availability of a fair and impartial trial." **Id.** at 677.

Herein, we find the trial court did not err in denying defendant's motion for mistrial. The trial court's comment about wasting time concerned the questions asked by defense counsel, rather than the probative value of the evidence itself. Moreover, questions regarding the size of the room where Thompson was interviewed and the method by which he arrived there are not relevant to the defendant's guilt or innocence, and any comment by the trial court regarding these particular questions does not constitute an impression regarding the defendant's guilt or innocence. We find the trial court properly denied the defendant's motion for mistrial, and therefore, this assignment of error lacks merit.

IMPROPER HABITUAL OFFENDER ADJUDICATION

In his third counseled assignment of error, the defendant generally argues the trial court erred "in adjudicating [him] to be a fourth felony [habitual] offender when the State did not offer any proof of convictions or identity at the habitual offender hearing." The defendant summarily asserts that such adjudication must be vacated as "nothing was formally introduced into evidence to demonstrate either the prior convictions or the facial validity of the pleas / convictions."

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. 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 shifts to the State. The State will meet its burden if it introduces a "perfect" transcript of the taking of the guilty plea, one that 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.[4] 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 the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary and made with an articulated waiver of the three **Boykin** rights. **State v. Shelton**, 621 So.2d 769, 779-80 (La. 1993); **State v. Underdonk**, 2011-1598, pp. 12-13 (La. App. 1st Cir. 3/23/12), 92 So.3d 369, 377, writ denied, 2012-0910 (La. 10/8/12), 98 So.3d 848. The purpose of the rule of **Shelton** is to demarcate sharply the differences between a 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, p. 4 (La. 7/2/04), 879 So.2d 689, 691 (per curiam).

Relevant herein, the defendant was charged with one count of a felon in possession of a firearm, with the underlying bill of information identifying the following predicate offenses in support thereof:

1. In the 22nd JDC, Parish of St. Tammany and State of Louisiana for the crime of R.S. 40:967A(1), possession with the intent to distribute a Schedule II controlled dangerous substance, to wit: Cocaine on September 7, 1999, under case number 302272;

2. In the 22nd JDC, Parish of St. Tammany and State of Louisiana for the crime of R.S. 40:967A(1), possession with the intent to distribute a Schedule II controlled dangerous substance, to wit: Cocaine on October 20, 2000, under case number 319249;

3. In the 22nd JDC, Parish of St. Tammany and State of Louisiana for the crime of (count 1) R.S. 40:967C, Possession of a Schedule II Controlled Dangerous Substance, to wit: Cocaine & (count 2) R.S. 14:95.1, Possession of a Firearm by a Person Convicted of a Felony on February 20, 2008, under case number 439887[.]

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[4] In **Boykin v. Alabama**, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), the United States Supreme Court emphasized three federal constitutional rights that are waived by a guilty plea: the privilege against self-incrimination, the right to a trial by jury, and the right to confront one's accusers. Because a plea of guilty waives these three fundamental rights of an accused, due process requires that the plea be a voluntary and intelligent waiver of these rights in order to be valid. See **State v. Galliano**, 396 So.2d 1288, 1290 (La. 1981).

During trial, the State presented the testimony of Sgt. Allison Champagne of the St. Tammany Parish Sheriff's Office Crime Lab, who was qualified as an expert in the field of latent fingerprint comparison. Sergeant Champagne testified that on the day of the trial, she personally took the defendant's fingerprints and compared them to those contained on the back of the certified bills of information from the above identified predicate convictions, finding the defendant's fingerprints matched in each predicate conviction. Thereafter, the predicate certified bills of information, guilty plea minute entries, and "perfect" plea colloquy transcripts between the defendant and the trial court (reflecting that the defendant was represented by counsel, discussed the pleas with counsel, was advised of and waived his **Boykin** rights, and was not under the influence of threats or duress while offering his pleas) were offered and introduced into the record without objection from the defendant. Moreover, the trial court specifically took judicial notice of the introduced criminal records.

Following the defendant's convictions, the State alleged him to be a fourth-felony habitual offender and sought enhancement of the sentence imposed relative to his armed robbery with a firearm conviction. In the habitual offender bill of information, the State advanced the same three predicate convictions used to support the felon in possession of a firearm conviction as identified above. During the habitual offender hearing, the State argued, as follows:

> During the trial of this matter, [Sgt.] Allison Champagne testified and was qualified as an expert by this Court and offered testimony as to all the predicates listed on the Bill of Information, specifically she compared the prints under St. Tammany Record Number 302272, 319249, and 439887. And she compared all the fingerprints on the Bills of Information in those court records to [the defendant's] fingerprints taken in court that day. She testified, her expert opinion, in front of Your Honor was he was one [and] the same individual.
>
> The State has filed that transcript into the record and will mark it as State's Exhibit 1 for the purposes of this Multiple Bill Hearing and will submit on [Sgt.] Champagne's prior testimony to prove that [the defendant] is, in fact, the same person that was convicted under this Docket Number 577420, as the same individual convicted under the three docket numbers listed under the Bill of Information.

In response, the trial court noted, in pertinent part, as follows:

> The Court notes that the Multiple Offender Bill of Information is concerning the one charge, armed robbery with a firearm, violation of

> Revised Statute[s] 14:64.3. The Court further notes that the three predicates listed in the Multiple Offender Bill of Information all arise out of St. Tammany Parish, the Twenty-Second JDC. And it's Docket Numbers 302272, 319249, and 439887. All of those records contain Bills of Information which contain the fingerprints of [the defendant] as testified during the course of these proceedings at the trial by, I believe it's Sergeant Champagne, who compared the records during the course of the trial with [the defendant's] fingerprints that [were] taken the day of the trial, and found that [the defendant] was, in fact, the same person that was convicted in all of those three records.
>
> So the Court finds that the evidence submitted in connection with this matter is sufficient; that the State has proven the allegations in the Multiple Offender Bill of Information, specifically that the defendant is one [and] the same as was previously convicted as alleged in the Multiple Offender Bill of Information.
>
> The Court further notes that [the defendant] has been arraigned on this Multiple Offender Bill of Information, was adequately advised of his rights, and has denied these allegations.
>
> The Court further finds that less than ten years has elapsed between expiration of [the] defendant's supervision by the Department of Corrections and the commission of this offense.

To prove that a defendant is a habitual offender pursuant to La. R.S. 15:529.1, the State need only establish by competent evidence that there is a prior felony conviction and that the defendant is the same person who was convicted of the prior felony. **State v. Chaney**, 423 So.2d 1092, 1103 (La. 1982). Moreover, the Louisiana Supreme Court has stated that a trial judge may take judicial notice of the record at an earlier proceeding before him in the same case, pursuant to La. C.E. arts. 201(A) and (B)(2). See **State v. Valentine**, 397 So.2d 1299, 1300 (La. 1981) and **State v. O'Conner**, 2011-1696, p. 7 (La. App. 1st Cir. 9/21/12), 2012 WL 4335425 (unpublished), writ denied, 2012-2163 (La. 4/1/13), 110 So.3d 138. Therefore, as established during the State's case-in-chief regarding the defendant's felon in possession of a firearm charge, we find the State in the instant matter carried its burden of proving the existence of the defendant's three predicate guilty pleas, that they were freely and voluntarily given, and that the defendant was represented by counsel. The defendant offered no evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. As the State proved the defendant's predicate convictions, and the ten-year cleansing period is not elapsed between the

defendant's predicate and instant convictions, the trial court correctly adjudicated the defendant a fourth-felony habitual offender. This assignment of error lacks merit.

RIGHT TO CONFRONTATION

In his second counseled assignment of error, the defendant argues the trial court erred in not allowing confrontation of Sgt. Allison Champagne at his habitual offender hearing. Quoting **State v. McAllister**, 366 So.2d 1340, 1345 (La. 1978), the defendant argues that he is "not denied the right to confrontation by R.S. 15:529.1 because he is entitled to question the accuracy of any documents and cross examine any witness presented by the state at the proceedings."

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This right provides two types of protections for a criminal defendant: the right to physically face those who testify against him and the right to conduct cross-examination. **Coy v. Iowa**, 487 U.S. 1012, 1017, 108 S.Ct. 2798, 2801, 101 L.Ed.2d 857 (1988). However, Louisiana's Habitual Offender statute is simply an enhancement of punishment provision. It does not punish status and does not, on its face, impose cruel and unusual punishment. Additionally, because the hearing is not a trial, legal principles such as res judicata, double jeopardy, the right to a jury trial, and the like do not apply. **State v. Dorthey**, 623 So.2d 1276, 1279 (La. 1993). Further, a defendant has no constitutional right to an adversarial sentencing proceeding in which he could cross-examine persons who had supplied such information to the court. See **Williams v. People of State of New York**, 337 U.S. 241, 250-52, 69 S.Ct. 1079, 1084-85, 93 L.Ed. 1337 (1949). Nevertheless, a defendant does have a due process right to rebut prejudicially false or misleading information which may affect the sentencing determination. See **State v. Myles**, 94-0217 (La. 6/3/94), 638 So.2d 218, 219.

In **State v. Hayes**, 412 So.2d 1323, 1326 (La. 1982), the defendant, charged with and convicted of possession of heroin and felon in possession of a firearm, was later adjudicated a fourth-felony habitual offender. The three predicate guilty pleas in

support of the habitual offender adjudication were challenged by counsel through motions to quash, rather than a formal habitual offender hearing. At the hearings on these motions, counsel was permitted to present testimony and argument, and had the opportunity to offer other evidence, though further hearing or opportunity to present evidence was not requested. As such, on appeal, the Louisiana Supreme Court upheld the defendant's habitual offender adjudication even though a formal hearing did not occur. **Id.**

As discussed above, Sgt. Allison Champagne testified during the State's case-in-chief and was subject to cross-examination by defense counsel thereafter regarding her opinion and analysis of the defendant's fingerprints relative to his predicate felony convictions, though no such questions were asked. Additionally, the State filed the habitual offender bill of information on August 9, 2017, and the hearing was not held until February 28, 2018, thus providing the defendant more than six months to prepare a defense to the habitual offender bill of information, especially in light of Sgt. Champagne's testimony at the trial and the fact that defense counsel was present during Sgt. Champagne's trial testimony. Accordingly, while criminal defendants are entitled to some due process protections in habitual offender sentencing proceedings, we find those limited rights were not violated herein and, as such, this assignment of error lacks merit.

ILLEGAL SENTENCE

In his fourth counseled assignment of error, the defendant argues the trial court erred by sentencing him using an incorrect version of La. R.S. 15:529.1 et seq. He does not expressly challenge the excessiveness of his enhanced sentence, other than to argue that it is illegally excessive in light of the 2017 legislative amendments to La. R.S. 15:529.1. Moreover, he does not challenge the excessiveness of his sentence with regards to count II.

A. LEGALITY OF SENTENCES

Herein, the defendant was adjudicated and sentenced as a fourth-felony habitual offender under La. R.S. 15:529.1(A)(4)(b) which, at the time he committed the underlying offenses, provided as follows:

> A. Any person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
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> * * *
>
> 4. If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:
>
> * * *
>
> b. If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(B) . . . or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

The defendant's three predicate offenses of possession with intent to distribute a Schedule II Controlled Dangerous Substance (cocaine), are violations of the Uniform Controlled Dangerous Substances Law, punishable for ten years or more, and his predicate conviction of possession of a firearm by a convicted felon is punishable for twelve years or more. See La. R.S. 14:95.1(B) and 40:967(B)(4)(b). Additionally, the underlying offense sought to be enhanced by the State – armed robbery with a firearm – is a crime of violence. See La. R.S. 14:2(B)(34). Thus, in accordance with La. R.S. 15:529.1(A)(4)(b) (2015), 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.

Pertinent herein, by 2017 La. Acts, Nos. 257, §1 and 282, §1, the Louisiana Legislature amended La. R.S. 15:529.1(A)(4) (2015) to provide, in part:

> If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then the following sentences apply:
>
> . . .
>
> (b) [i]f the fourth felony and no prior felony is defined as a crime of violence under R.S. 14:2(B) or as a sex offense under R.S. 15:541, the person shall be imprisoned for not less than twenty years nor more than twice the longest possible sentence prescribed for a first conviction. If twice the possible sentence prescribed for a first conviction is less than twenty years, the person shall be imprisoned for twenty years.

Section 2 of both Acts 257 and Act 283 states that "[t]his Act shall become effective November 1, 2017, and shall have prospective application only to offenders whose convictions became final on or after November 1, 2017."

While the penalty for a fourth-felony habitual offender was revised after the defendant's offenses, it is well-settled that "[a] defendant is not convicted of being a habitual offender. Rather, a defendant is adjudicated a habitual offender as a result of prior felony convictions. The sentence to be imposed following a habitual offender adjudication is simply an enhanced penalty for the underlying conviction." **State v. Parker**, 2003-0924, p. 15 (La. 4/14/04), 871 So.2d 317, 325-26. As such, the Louisiana Supreme Court held that a defendant "should be sentenced in accord with the version of La. R.S. 15:529.1 in effect at the time of the commission of the charged offense." **Parker**, 2003-0924 at p. 16, 871 So.2d at 326. Moreover, Act 542 of the 2018 Regular Legislative Session adds a new subsection to La. R.S. 15:529.1, which reads, "(K)(1) Except as provided in Paragraph (2)[5] of this Subsection, notwithstanding any provision of law to the contrary, the court shall apply the provisions of this Section that were in effect on the date that the defendant's instant offense was committed."[6]

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[5] Louisiana Revised Statutes 15:529.1(K)(2) states, "The provisions of Subsection C of this Section as amended by Act Nos. 257 and 282 of the 2017 Regular Session of the Legislature, which provides for the amount of time that must elapse between the current and prior offense for the provisions of this Section to apply, shall apply to any bill of information filed pursuant to the provisions of this Section on or after November 1, 2017, accusing the person of a previous conviction."

[6] La. R.S. 15:529.1 was amended in 2017, in pertinent part, to no longer allow consideration of "any other crimes punishable by imprisonment for twelve years or more." See La. Acts, No. 257, §1 & 2017 La Acts, No. 282, §1. In enacting the amendments, the Legislature provided: "This Act shall become effective November 1, 2017, and shall have prospective application only to offenders whose convictions became final on or after November 1, 2017." 2017 La. Acts, No. 257, §2 & 2017 La. Acts, No. 282, §2. We are aware of **State v. Williams**, 2017-1753 (La. 6/15/18), 245 So.3d 1042 (per curiam) and **State v. Purvis**, 2017-1013

Therefore, as the defendant committed the instant offenses on May 18, 2015, and the habitual offender bill of information was filed on August 9, 2017, the trial court did not err in sentencing the defendant under the previous version of La. R.S. 15:529.1(A)(4)(b). See **State v. Bowie**, 2017-1762, p. 17 (La. App. 1st Cir. 6/1/18), 2018 WL 2453480 (unpublished); **State v. Johnson**, 2017-1347 (La. App. 1st Cir. 3/13/18), 2018 WL 1312575 (unpublished).

B. EXCESSIVENESS OF SENTENCES

Moreover, the defendant's sentences are not unconstitutionally excessive. The Eighth Amendment to the United States Constitution and Article I, §20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

(Continued)
(La. App. 3rd Cir. 4/18/18), 244 So.3d 496, which gave limited retroactive application to the 2017 amendments. However, we consider those decisions effectively abrogated by the 2018 enactment of La. R.S. 15:529.1(K)(1). See **State v. Floyd**, 52,183, p. 7 (La. App. 2nd Cir. 8/15/18), ___ So.3d ____, 2018 WL 3862983.

The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

In **Dorthey**, the Louisiana Supreme Court opined that if a trial court judge were to find that the punishment mandated by La. R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he has the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive. **Dorthey**, 623 So.2d at 1280-81. In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676-77, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. While both **Dorthey** and **Johnson** involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in **Dorthey** are not restricted in application to the penalties provided by La. R.S. 15:529.1. See **State v. Collins**, 2009-1617, p. 7 (La. App. 1st Cir. 2/12/10), 35 So.3d 1103, 1108, writ denied, 2010-0606 (La. 10/8/10), 46 So.3d 1265, citing **State v. Fobbs**, 99-1024 (La. 9/24/99), 744 So.2d 1274, 1275 (per curiam).

There is no need for the trial court to justify a sentence under Article 894.1 when it is legally required to impose that sentence. As such, the failure to articulate reasons as set forth in Article 894.1 when imposing a mandatory life sentence is not an error;

articulating such reasons or factors would be an exercise in futility since the court has no discretion. **State v. Felder**, 2000-2887, p. 13 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 371, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. See **State v. Ditcharo**, 98-1374, pp. 23-28 (La. App. 5th Cir. 7/27/99), 739 So.2d 957, 970-72, writ denied, 99-2551 (La. 2/18/00), 754 So.2d 964; **State v. Jones**, 31,613, p. 28 (La. App. 2nd Cir. 4/1/99), 733 So.2d 127, 146, writ denied, 99-1185 (La. 10/1/99), 748 So.2d 434; **State v. Williams**, 445 So.2d 1264, 1269 (La. App. 3rd Cir.), writ denied, 449 So.2d 1346 (La. 1984).

Mandatory sentences have been repeatedly upheld as constitutional and consistent with the federal and state constitutional provisions prohibiting cruel, unusual, or excessive punishment. See **State v. Jones**, 46,758-59, p. 23 (La. App. 2nd Cir. 12/14/11), 81 So.3d 236, 249, writ denied, 2012-0147 (La. 5/4/12), 88 So.3d 462. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which 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. **Johnson**, 709 So.2d at 676.

Under La. R.S. 15:529.1(A)(4)(b), 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. The record before us clearly establishes an adequate factual basis for the sentences imposed. The defendant has not proven by clear and convincing evidence that he is exceptional such that a mandatory life sentence would not be meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See **Johnson**, 709 So.2d at 676. Accordingly, no downward departure from the presumptively constitutional mandatory life sentence was warranted. The enhanced sentence imposed is not grossly disproportionate to the severity of the offenses and, therefore, is not unconstitutionally excessive.

NON-UNANIMOUS JURY VERDICT

In his second pro se assignment of error, the defendant argues that Louisiana Constitution Article I, §17A, which allows for non-unanimous jury verdicts, violates the right to a jury trial and the right to equal protection of the laws guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.[7] Specifically, the defendant argues that the enactment of its source provision in the Louisiana Constitution of 1898 was motivated by an express and overt desire to discriminate on the basis of race.

The punishment for armed robbery is imprisonment at hard labor for not less than ten years and not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. La. R.S. 14:64(B). When the dangerous weapon used in the commission of an armed robbery is a firearm, the offender shall be imprisoned at hard labor for an additional period of five years without benefit of probation, parole, or suspension of sentence. La. R.S. 14:64.3(A). The punishment for possession of a firearm by a convicted felon is imprisonment at hard labor for not less than ten years nor more than twenty years without the benefit of probation, parole, or suspension of sentence. La. R.S. 14:95.1(B).[8] Article I, §17A of the Louisiana Constitution and La. Code Crim. P. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by less than a unanimous jury does not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 406, 92 S.Ct. 1628, 1630, 32 L.Ed.2d 184 (1972);

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[7] We question whether the defendant properly raised the issue in the court below, reserving it for appellate review, as he did not file any pretrial motions to declare the complained-of provision to be unconstitutional. Nevertheless, because the issue was raised in the trial court in the defendant's supplemental motion for new trial, we will address its merit.

[8] Louisiana Revised Statutes 14:95.1(B) was subsequently amended by 2017 La. Acts, No. 281 §1. As amended, it provides for a mandatory minimum sentence of five years.

State v. Belgard, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

This court and the Louisiana Supreme Court have previously rejected the argument raised in defendant's assignments of error. See **State v. Bertrand**, 2008-2215, pp. 6-8 (La. 3/17/09), 6 So.3d 738, 742-43; **State v. Smith**, 2006-0820, pp. 23-24 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352. In **Bertrand**, the Louisiana Supreme Court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments.[9] Moreover, the **Bertrand** court rejected the argument that non-unanimous jury verdicts have an insidious racial component and pointed out that a majority of the United States Supreme Court also rejected that argument in **Apodaca**.[10] Although **Apodaca** was a plurality rather than a majority decision, the United States Supreme Court has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. **Bertrand**, 2008-2215 at pp. 6-8, 6 So.3d at 742-743. Thus, Louisiana Constitution article I, §17(A) and La. Code Crim. P. art. 782(A) are not unconstitutional and, therefore, not in violation of the defendant's federal constitutional rights. Accordingly, this assignment of error is without merit. See also **State v. Hammond**, 2012-1559, pp. 3-4 (La. App. 1st Cir. 3/25/13), 115 So.3d 513, 515, writ denied, 2013-0887 (La. 11/8/13), 125 So.3d 442, cert. denied, 572 U.S. 1090, 134 S.Ct. 1939, 188 L.Ed.2d 965 (2014).

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[9] In **Bertrand**, the court only considered Article 782, while the defendant in the instant case attacks both Article 782 and Article I, §17(A) of the Louisiana Constitution. We find this approach to be a distinction without a difference because Article 782 closely tracks the language of Article I, §17A.

[10] **Apodaca** involved a challenge to the non-unanimous jury verdict provision of Oregon's state constitution. **Apodaca**, 406 U.S. at 406, n.1, 92 S.Ct. at 1630. **Johnson v. Louisiana**, 406 U.S. 356, 360, 92 S.Ct. 1620, 1623-1624, 32 L.Ed.2d 152 (1972), decided with **Apodaca**, also upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

REVIEW FOR ERROR

Pursuant to La. Code Crim. P. art. 920(2), this court routinely conducts a review for error discoverable by mere inspection of the pleadings and proceedings and without inspection of the evidence. After a careful review of the record, we have found a sentencing error.

Upon conviction for being a convicted felon in possession of a firearm, La. R.S. 14:95.1(B) mandates imposition of a fine of not less than $1,000.00 nor more than $5,000.00. The trial court did not impose a fine. Although the failure to impose the fine is an error under La. Code Crim. P. art. 920(2), it is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the State, we are not required to take any action. As such, we decline to correct the illegally lenient sentence imposed on count II. See **State v. Price**, 2005-2514, pp. 18-22 (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; see also **State v. Zeno**, 2015-0763, p. 6 (La. App. 1st Cir. 11/9/15), 2015 WL 6951581 (unpublished), writ denied, 2015-2233 (La. 12/16/16), 212 So.3d 1175.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.