NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2000-KA-2526
VERSUS	*	COURT OF APPEAL
DENISE E. BOLTON	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	
	*	

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 409-465, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr., and Judge Michael E. Kirby)

PLOTKIN, J. DISSENTING

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AFFIRMED; WRIT DENIED

STATEMENT OF CASE

On September 2, 1999, the defendant, Denise Bolton ("the defendant"), was charged by bill of information with one count of crime against nature, and she pled not guilty. On January 20, 2000, a twelve-person jury found her guilty as charged. On July 14, 2000, the defendant appeared for a multiple bill hearing and sentencing. The court found the defendant to be a quadruple offender. The defendant waived delays and was sentenced to twenty years at hard labor with credit for time served. Defense counsel filed a motion to reconsider sentence and a motion for a new trial. The court denied those motions. Defense counsel also filed a motion for appeal, which was granted.

On February 5, 2001, the defendant appeared before the trial court for a status hearing. The trial court vacated the defendant's sentence of twenty years, and re-sentenced the defendant to seven years with credit for time served. However, the multiple bill was not vacated. The record was lodged in this Court on November 21, 2000. Defense counsel filed its brief on December 8, 2000, and a supplemental brief on March 8, 2001. The State

filed a notice of intention to seek supervisory writs on February 6, 2001. The trial court gave the State until March 16, 2001 to file their writ application with this Court. The State's writ application was received in this court on March 13, 2001. Defense counsel filed a response to the State's writ application on May 15, 2001. The State's writ application has been consolidated with the defendant's appeal.

FACTS

On August 3, 1999, the defendant encountered undercover Officer Michael Lohman as she sat outside of a convenience store at the corner of Tulane Avenue and Broad Street. As Officer Lohman exited the store, entered his vehicle and began to drive away the defendant stopped the officer by hitting on the trunk of the vehicle. When Officer Lohman stopped, the defendant approached the driver side of the vehicle and asked the officer to give her a ride to Tulane Avenue and Carrollton Avenue. The officer testified that he then asked the defendant why she wanted to go there, and defendant's response was "I'll make it worth your while." The defendant then walked around to the passenger side of the vehicle and entered the front seat. Officer Lohman further testified that as he drove out of the parking lot, the defendant told him her name was Denise.

The defendant asked the officer if he was a police officer, and he responded by telling her no. Officer Lohman testified that the defendant pointed to his crotch and told him to "take it out and I'll make it worth your while, but you have got to take care of me." Officer Lohman agreed, and the defendant again requested that he "take it out." The officer testified that he then asked the defendant what was she going to do, and she responded by saying "I'm going to give you some lip service." The officer then feigned ignorance, and the defendant stated "Yeah. You know, some head." Officer Lohman further testified that the defendant asked about what he was going to give her in return, and he responded by asking her what she wanted. The defendant then stated that she usually gets twenty-five dollars. The defendant then instructed Officer Lohman to drive to Tulane and Carrollton Avenues. The officer told her "I know a better place we can park," and drove to the 2800 block of Perdido Street to Central Lockup. Once there, Officer Lohman identified himself as a police officer and advised the defendant that she was under arrest. Officer Lohman radioed Officer Nides and told him of his location. Officer Nides arrived on the scene and escorted the defendant into Central Lockup.

ERRORS PATENT

The errors patent checklist revealed that there might have been an error in the twenty-four hour delay required after the denial of a motion for new trial as required by La. C.Cr.P. art. 873. However, the transcript revealed that the defense counsel raised the motion after the defendant was originally sentenced. The trial court properly denied the motion for new trial as required by La.C.Cr.P. art. 853, which requires that a motion for new trial must be filed prior to sentencing.

LAW AND DISCUSSION

ASSIGNMENT OF ERROR NUMBER ONE

In this first assignment of error the defendant complains that the trial court erred in granting the State's challenge for cause as to a venire person who ultimately said he would follow the law, and in denying defense counsel's challenge for cause as to a venire person who knew the supervising officer of the arresting officer.

The purpose of voir dire is to determine the qualifications of the prospective jurors by testing their competency and impartiality. State v. Williams, 457 So.2d 610 (La. 1984). La. C.Cr.P. art. 797 provides:

> The state or the defendant may challenge a juror for cause on the ground that:
> (1) The juror lacks a qualification required by law;
> (2) The juror is not impartial, whatever the cause of his impartiality. An opinion or impression as to guilty or innocence of the defendant shall not of

> itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
>
> (3) The relationship, whether by blood, marriage, employment or friendship, or enmity between juror and 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;
>
> (4) The juror will not accept the law as given to him by the court; or
>
> (5) The juror served on the grand jury that found the indictment, or on a petit jury that once tried the defendant for the same or any other offense.

In cases wherein the defendant has exhausted his peremptory challenges, an erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. State v. Cross, 93-1189 (La.6/30/95); 658 So.2d 683, 686. Prejudice is presumed when a challenge for cause is erroneously denied, and all of the defendant's peremptory challenges are exhausted. Thus, the defendant need only show that the trial court erroneously denied a challenge for cause. No additional showing of prejudice is required. State v. Mathis, 95-0862 (La. App. 4 Cir. 6/5/96), 675 So.2d 1217, 120. Here, both the State and the defense used all of their peremptory challenges. A trial judge is vested with broad discretion in ruling on challenges for cause, and his ruling will be reversed only when review of the entire voir dire reveals that the judge

abused his discretion. State v. Robertson, 92-2660 (La.1/14/94), 630 So.2d 1278, 1281 citing State v. Knighton, 436 So.2d 1141, 1148 (La.1983).

The defendant argues that the statements made by juror #14, Edward Maxmillion, III, did not indicate an adequate basis for the State's challenge for cause because Mr. Maxmillion stated he would be impartial and follow the law. Mr. Maxmillion's voir dire statements were:

> Mr. Lemmon [Assistant D.A.]: …Would anybody force me to produce any photographs or any independent witnesses or any audio or videotapes in order to prove this or could you convict on the testimony only.
>
> Juror: I would ask that you present more than just words.
>
> Mr. Lemmon: Okay. So, if I put on the testimony of a credible witness that said that this happened and prove to you – and you judge their demeanor and you judge everything that they said on the witness stand and you believe them, you would still want something more?
>
> Juror: Yes. Cause the defendant could also be credible too.
>
> Mr. Lemmon: You understand that the defendant doesn't have to – she's met her burden. She's sitting right there right now. She doesn't have one thing to do.
>
> Juror: Yes.
>
> Mr. Lemmon: What you're saying is if the State does prove beyond a reasonable doubt, if I'm correct, if the State proves beyond a reasonable doubt each and every element that testimony alone isn't enough to come back with a guilty verdict, you would want something further?
>
> Juror: Yeah.
>
> Mr. Sauvic [Defense counsel]: State said a couple of times that this is a case

where words alone. [sic] Crime of words only is what they were articulating. Is there anybody that heard that when the law was read by either them the first time or me the second time or me the third time? The subsection that words alone was enough to convict? Was there another word "solicitation", is that the word everybody heard, "solicitation?" Let me ask you this, words alone versus solicitation, do those two words have different meanings to you?

Juror: Basically the same thing.

Mr. Sauvic: The word "solicitation" just saying something from your or towards you is that something different?

Juror: Saying something towards me and actually soliciting is two different things. Because you could be talking to me without soliciting.

Mr. Sauvic: …Are you able as a juror individually able to apply that word and the means [sic] of that word to what you hear in saying, well I heard words, but I didn't hear solicitation, is that something that you can draw a line between as a juror?

Juror: Yes.

Mr. Sauvic: And as the burdens and element prove that your hearing the State has to prove in a case merely getting somebody up there and saying words alone are not enough?

Juror: Yes.

Mr. Sauvic: And you'll hold them to a solicitation burden as the law you'll be charged with saying you not only have to just say something, you know, yelling out fire, doesn't mean anything. But if I say, hey, let's go commit a fire. Let's go cause a fire; those words are two different things?

Juror: Right.

Mr. Sauvic: And as a juror you'll hold them to the burden of solicitation as the law will hold?

Juror: Yes.

The defendant has characterized the statements of juror # 14 as fair and impartial. However, Mr. Maxmillion's voir dire statements appear to consistently suggest that he would require the State to put on more than mere testimony to convict the defendant. Therefore, it was not an abuse of the trial court's discretion to grant the State's challenge for cause.

The defendant also complains that the trial court erred by denying her challenge for cause as to a venire person who knew the supervising officer of the arresting officer. Specifically, the defendant argues that she was made to use one of her peremptory challenges unnecessarily when her challenge to juror # 2, Emile Sander, III, who knew one of the officers, was denied. Mr. Sander's voir dire statements, in part, were:

> Mr. Lemmon: The officers that are going to be involved in today's case are—potential officers are Detective Nides, Detective Timmy Bayard and Officer Michael Lohman. Do any of those names sound familiar to any of you ladies and gentlemen?
>
> Juror: Yes.
>
> Mr. Lemmon: Who is that?
>
> Juror: Bayard.
>
> Mr. Lemmon: You know Lieutenant Bayard?
>
> Juror: I worked with his mother and had a chance to meet him on a couple of occasions.
>
> Mr. Lemmon: Now, with that in mind, would you be able to sit here today in judgment of the defendant and give her a fair trial?
>
> Juror: Yes.
>
> Mr. Lemmon: And would you be able to give the state a fair trial?
>
> Juror: Yes.

This Court in State v. Bacchus, 455 So.2d 1257, 1259, (La. App. 4 Cir. 1984), citing State v. Smith, 430 So.2d 31 (La. 1983), stated that a relationship to a law enforcement officer is not, in and of itself, grounds for removal for cause. Rather, it must be determined whether it can reasonably be concluded that this relationship would influence the juror in arriving at a verdict. The trial judge has broad discretion in determining the impartiality of jurors, and his ruling will not be disturbed absent a showing of abuse of discretion. Bacchus, supra.

The juror in the instant case hardly knew Officer Bayard; he had only seen him socially on a couple of occasions. And Officer Bayard did not testify in the case. Therefore, it was not reasonable to conclude that the "relationship" would cause the juror to be partial. The trial court did not abuse its discretion, and this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In this assignment of error, the defendant claims the trial court erred in instructing the jury in voir dire and in disallowing the defendant's expert testimony on the mistaken basis that the State did not have to prove that oral sex was "unnatural," as it was a matter of law and jurisprudence.

Specifically, the defendant argues that the trial judge erred by reading case law to the jury and instructing them that oral sex was unnatural as a matter of law and by refusing any definitions or discussions of unnatural carnal copulation.

The scope of voir dire examination is within the sound discretion of the trial judge and his ruling will not be disturbed on appeal in the absence of clear abuse of discretion. State v. Williams, 457 So.2d 610 (La. 1984), citing State v. Jackson, 358 So.2d 1263 (La. 1978). During voir dire discussion in chambers the trial judge stated:

> The court: Let me state on the record that last Friday when I showed the reference to counsel, State versus Richland, a Fifth Circuit case decided in March 1998 in assignment of error number one examination, the Circuit goes through an explanation of unnatural carnal copulation. It cites that quote, "oral sex is considered unnatural carnal copulation for the purposes of the statute" citing State versus Grubbs, a Fourth Circuit opinion from October 1994. Let me further clarify that what defense is seeking to do in front of the jury was get into definitions of natural and unnatural carnal copulation. I told counsel he could question the jurors as to whether or not they accepted the law and believe in the law and could follow the law or did not. He chose to not do that. At the bench he decided not to do that. So, any inquiry was not afforded by this court. But I was not going allow definitions that are not provided for statutorily in the code to be given to the jury.
>
> Mr. Sauvic: And specifically, I chose not to pursue that because that was not the questions I wanted to ask the jury. The questions I wanted to

> ask the jury was what I started with on the first jury, which invoked a response which lead [sic] to an objection which lead [sic] to the bench conference. Specifically, I wanted that juror to each and everyone of the jurors to articulate to me, one, that they would hold the State to the burden of proof proving in fact the act of oral sex was natural or unnatural. That's the question that I desired to voir dire about. That is the question is which addressed in State versus Pruitt. That is a question the State has to prove beyond a reasonable doubt. And is clearly an issue, that's clearly in the mind of the jurors—
>
> The court: I agree. They have to prove it. They have to prove it. But what you were attempting to do was start defining it.

The Louisiana Supreme Court in State v. Lee, 281 So.2d 123 (La. 1973), citing State v. Claustre, 264 So.2d 595 (1972), found the reading of the statute defining the crime of which the defendant was charged during voir dire by the prosecutor to be within the discretion of the trial judge. The trial judge in the instant case agreed that whether oral sex was natural or unnatural was an element of the crime to be proven by the State. However, it did not appear to be an abuse of her discretion to read from case law; nor did it appear to be an abuse of her discretion to refuse to allow definitions not found in the statute to be given to the jury.

The defendant also complains the trial court erred in not allowing expert testimony on the issue of whether oral sex is a natural or unnatural act

between a man and a woman. La. C.E. art. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidenced or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise.

Pursuant to this provision, the question of the competence of an expert is a fact question within the sound discretion of the trial judge. His rulings on the qualifications of expert witnesses will not be overturned absent manifest error. Longman v. Allstate, 93-0352 (La. App. 4 Cir. 3/29/94), 635 So.2d 343, 354. The defendant bases her argument that expert testimony on the issue should have been allowed on State v. Pruitt, 449 So.2d 154, 156, (La. App. 4 Cir. 1984). In Pruitt this court stated:

> The term unnatural carnal copulation has been given meaning by judicial interpretation rather than legislative. It is this jurisprudential definition of the term, which has enabled R.S. 14:89 to withstand constitutional attacks based on vagueness. However, a review of reported cases dealing with the scope of the offense of crime against nature has revealed that none have dealt with the factual situation presented by the present case. Indeed it appears that all previously reported cases dealing with this crime involve homosexual encounters. Thus any statement in prior cases, which purported to include heterosexual oral sex in the definition of unnatural carnal copulation, would be dicta and not controlling in this case. We have concluded that fairness to the defendant requires that he be given the opportunity to present expert testimony concerning whether or not oral

> sex between a man and a woman is unnatural. The expert testimony of Dr. Swann would have been both relevant and material. By denying defendant the opportunity to present this testimony he has been effectively denied his right to present a defense.

The trial court stated that it had the highest esteem for Dr. Salcedo's qualifications. However, he would be testifying as to or in the nature of sexual disorders, mental disorders, or the lack of sexual disorders or mental disorders as it pertains to unnatural carnal copulation. The trial court further stated that because the legislature has not defined unnatural carnal copulation, it has been left up to the courts to define. The cases the trial court considered show that oral sex is considered unnatural carnal copulation. Therefore, any expert testimony on sexual disorders or mental disorders was not appropriate for this question of fact. The court found the issue was one for the jury to decide and allowing expert testimony would confuse and cloud the issue.

In the instant case, we find that the trial court did not abuse its discretion by refusing to allow this expert testimony. The trial court did not find that any expert testimony on the issue would be inappropriate. Rather, the trial court found that expert testimony on sexual disorders and mental disorders as they relate to unnatural carnal copulation was not appropriate. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In this assignment of error, the defendant complains that the trial court erred in finding her a quadruple offender based on deficiencies in the predicate guilty pleas, and in finding a New Orleans Police officer to be an expert in fingerprint identification.

Specifically, the defendant argues that there was no waiver of counsel in the pleas. One of the pleas was to an enhanced misdemeanor. The waiver of rights form for one plea was missing initials, and the minute entry does not include a recitation of the rights advised by the judge or a finding that the plea was knowingly and voluntarily made.

In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), the United States Supreme Court emphasized three federal constitutional rights which are waived by a guilty plea: the privilege against self-incrimination; the right to trial by jury; and the right to confront one's accusers. The purpose of the Boykin rule is to ensure that the defendant had adequate information to plead guilty intelligently and voluntarily.

In State v. Alexander, 98-1377, pp. 5-6 (La. App. 4 Cir. 2/16/00), 753 So.2d 933, 937, this Court set forth the standard of proof in multiple bill hearings: La. R.S. 15:529.1 D (1)(b) states that the district attorney has the

burden of proving beyond a reasonable doubt any issue of fact and that the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. In State v. Shelton, 621 So.2d 769, 779-780 (La. 1993), the Supreme Court stated:

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they 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 of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than the "perfect" transcript, for example, a guilty plea form, a minute entry, and "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. (footnotes omitted).

In State ex rel. Le Blanc v. Henderson, 261 La. 315, 259 So. 2d 557 (1972), the Court held that a determination of voluntariness of a guilty plea

is not limited by Boykin to the verbatim entry made at the time of the plea, but rather is determined from the entire record, which can include evidence taken at a reconstruction of the plea proceedings at a hearing when the plea is later attacked. In State v. Bland, 419 So.2d 127, 1232 (La. 1982), the Louisiana Supreme Court stated that the State may affirmatively prove that defendant was fully Boykinized by either the transcript of the plea of guilty for by the minute entry. "Most importantly, for our purposes, we have also held the state has met its burden of proving a prior guilty plea in a habitual offender hearing where it submitted a very general minute entry, and a well executed plea of guilty form." State v. Tucker, 405 So.2d 506, 509 (La. 1981).

In the instant case, as in Tucker, the minute entries do not specifically mention the Boykin rights, but they are accompanied by a well executed plea of guilty forms. The minute entries, the docket master, and the guilty plea forms all reveal that the defendant was represented by counsel when the pleas were made. The defense counsel argues that the guilty plea forms are missing the defendant's initials, but examination reveals that the defendant initialed each form and each right being waived. The forms spell out the rights being waived, and they are signed by the defendant, her counsel and the judge. In addition, there is no prohibition on the use of an "enhanced

misdemeanor" as the predicate of a multiple bill because the "enhanced misdemeanor" is a felony.

The defendant also complains that the trial court erred in finding Officer Terry Bunch, of the New Orleans Police Department, to be an expert in fingerprint identification. However, the transcript reveals that the defense counsel failed to object to Officer Bunch's qualifications when he was proffered by the State as an expert in fingerprint examination and comparison. Therefore, this objection cannot be raised on appeal because it was not properly preserved at trial. This assignment of error has no merit.

STATE'S ASSIGNMENT OF ERROR

In this assignment of error the State of Louisiana avers that the trial court erred in amending the defendant's, twenty-year sentence to seven years after she had begun to serve the sentence.

The defendant filed a pro-se motion to reconsider her sentence on July 16, 2000, within the thirty days of the original sentence on July 14, 2000 at the multiple bill hearing, as required by La. C.Cr.P. art. 881.1. The minute entries and docket master reveal that there was difficulty in getting the

defendant before the trial court, and the status hearing had to be continued several times between July 2000 and February 2001, when the hearing was finally held. Therefore, the only question remains is if the trial court abused its discretion when it lowered the minimum twenty-year sentence to seven years.

In State v. Dorthey, 623 So.2s 1276, 1280 (La. 1993), the Louisiana Supreme Court, citing State v. Sepulvado, 367 So.2d 762 (La. 1979), stated that the 1974 Louisiana Constitution, Article I, section 20 gives the courts, in the exercise of their judicial power, a basis for determining that sentences, whether fine, imprisonment or otherwise, though not cruel or unusual, are too severe as punishment for certain conduct and thus unconstitutional.

A punishment is constitutionally excessive if it make no measurable contribution to acceptable goals of punishment and is nothing more than the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. Dorthey, id, citing State v. Lobato, 603 So.2d 739, 751 (La. 1992). If the trial court were to find that the punishment mandated by R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeless 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, id.

This Court in State v. Young, 94-1636 (La. App. 4 Cir. 10.26/95), 663 So.2d 525, 527, stated that the trial court may not depart from the legislatively mandated minimum simply because of some subjective impression or feeling about the defendant. The Louisiana Supreme Court in State v. Johnson, 99-1906 (La.3/4/989), 709 So.2d 672, 676, further clarified it's holding in Dorthey. The Legislature has sole authority under the Louisiana Constitution to define conduct as criminal and provide penalties for such conduct. Acting pursuant to this authority the Legislature passed the Habitual Offender Law. Since the Habitual Offender Law in its entirety is constitutional, the minimum sentences it imposes upon multiple offenders are also presumed to be constitutional. Johnson, supra. A sentencing judge must always start with the presumption that a mandatory minimum sentence under the habitual offender law is constitutional. A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it, which would rebut this presumption of constitutionality. Id. To rebut the presumption 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, citing State v. Young, supra.

In the instant case, the trial court in the status hearing stated that it understood that it was not the role of the sentencing court to question the wisdom of the legislature in requiring enhanced punishment for multiple offenders. Instead, the sentencing court is only allowed to determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates our Constitution. The trial court further stated if it finds clear and convincing evidence that justifies reduction of the minimum enhanced sentence, it must articulate reasons why the sentence imposed is the longest sentence not constitutionally excessive. The trial court then stated that the following factors made the defendant exceptional: the legislature failed to assign a sentence tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case.

The court considered the uncertainty surrounding La. R.S. 14:89, the crime against nature statute, and whether or not the penalty for crime against nature exceeds that of its counterpart, prostitution. The court then considered the predicate offenses used by the state in its multiple bill. The

first offense was an enhanced theft conviction with a dollar amount of thirty dollars and four cents. The other conviction was a 1994 cocaine conviction that stemmed from possession of a crack pipe. The crime was originally booked as a misdemeanor but prosecuted as a felony. The trial court also considered, from the defendant's rap sheet, that there were no victims or violence in the crimes committed by the defendant. With all of those factors working in the defendant's case, the trial court truly felt that a twenty-year sentence was not merited in the case. It does not appear that the trial court only considered the non-violent nature of the defendant's crimes, as the State claims. Nor does it appear that the non-violent nature of defendant's crimes was the main reason for the trial court's reduction of the defendant's sentence. It appears the trial court did not abuse its discretion. Therefore, this assignment of error is without merit.

CONCLUSION

For the foregoing reasons the defendant's appeal is hereby affirmed, and the State's writ application is hereby denied.

AFFIRMED; WRIT DENIED