STATE OF LOUISIANA	*	**NO. 2006-KA-1273**
VERSUS	*	**COURT OF APPEAL**
LARRY FORTUNE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 445-271, SECTION "H"
Honorable Camille Buras, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Max N. Tobias Jr.)

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AFFIRMED

Larry Fortune appeals his conviction for the crime of aggravated incest, and his sentence as a fourth felony offender. We Affirm.

The State charged Larry Fortune with one count of aggravated incest. The court heard his motions to suppress the evidence and statement, and denied the motion as to the statement but took the evidence motion under advisement. The matter was continued many times, and at the close of a three-day jury trial, the jury was unable to reach a verdict. Subsequently, Fortune waived his right to a jury and proceeded to trial before the court alone. At the conclusion of trial, the court found him guilty as charged, and ordered a presentence investigation and reset sentencing. The court sentenced Fortune to serve twenty years at hard labor, and denied his motion to reconsider sentence, but granted his motion for appeal. The State filed a multiple bill, and the court found him to be a quadruple offender. The court sentenced Fortune to life imprisonment without benefit of parole, probation, or suspension of sentence as a fourth offender. Again, the court denied his motion to reconsider sentence, but granted his motion for appeal. In response to a request by Fortune, this Court sent him a copy of the record

and directed him to file his *pro*

se brief within forty-five days of the order. His *pro se* brief was timely filed.

On November 28, 2003, Det. Theolonius Dukes of the N.O.P.D. Child Abuse Unit received a complaint concerning possible child molestation on M.S. The report came from the victim's mother. Det. Dukes testified at trial that around 8:30 that morning he went to the address given to him for the defendant, Larry Fortune, who was the victim's stepfather. Det. Dukes also had Fortune's cell telephone number, and while standing outside the residence he called the number. A man answered the phone and identified himself as Fortune. Det. Dukes identified himself and asked Fortune to come to the door so that he could speak with him. Fortune agreed and hung up, but no one came to the door. Det. Dukes testified that after waiting for a time, he went to the door and knocked. The door was answered by a man later identified as Larry Fortune's brother Rickey. Det. Dukes testified that Ricky allowed him to enter the residence and admitted that Larry was present. Det. Dukes eventually found Larry hiding in a closet in a back bedroom.

Det. Dukes testified that he took Larry Fortune to the Child Abuse office where he advised Fortune of his rights. Fortune indicated he understood his rights and agreed to give a statement. The statement was

audio and videotaped. The State then introduced the tape at trial, which the court had reviewed at least twice before trial. In this statement, Fortune admitted that he had had sex with the victim at least seventy times.

Det. Dukes testified that he learned that the victim was pregnant. He took buccal swabs from Fortune and the victim, and he later took one from her baby

once it was born. Det. Dukes testified that he obtained the swab from Fortune

while he was in jail pursuant to a motion filed by the district attorney's office and an order signed by a magistrate judge. The detective admitted he obtained no formal search warrant to seize the swab from Fortune. He also admitted that the buccal swabs were not analyzed for nearly a year after they were taken. He further admitted that the boxes on the waiver of rights were not checked, but he reiterated that on the videotape before giving his statement, Fortune acknowledged and waived his rights.

M.S. testified at trial that in November 2003, she was fifteen years old. She identified the defendant as her stepfather. She admitted having consensual sex with him more than thirty times while she, her mother, and Fortune lived together. She testified that she became pregnant and eventually had a son, J.S. She admitted she initially made up a story in order

to protect the defendant that she had become impregnated by another male. On cross-examination, she testified that she knew a blood relative of the defendant named Pee Wee, but she insisted that Pee Wee was not the person she initially named as the father of her baby.

Jennifer Schroeder, qualified as an expert in molecular biology and DNA analysis, testified at trial that she is a DNA analyst for the N.O.P.D. Crime Lab. She testified that she tested the buccal samples taken from the defendant, the victim, and her son. She testified that based upon this comparison, the defendant was 30,430 times more likely to be J.S.'s father than an unrelated random male of the Caucasian, African-American, or Hispanic populations. She admitted that the samples were taken in 2004, and she did not test them until 2005, but all three samples were sealed when she retrieved them for testing.

A review of the record reveals no patent errors.

By his counsel's sole assignment of error, and in part of his *pro se* assignment of error, Fortune contends that the district court erred by refusing to suppress the buccal swab taken from him. Specifically, he argues that because the swab was taken without his consent, the police should have obtained a search warrant, supported by an affidavit presented to a magistrate. Instead, the swab was taken pursuant to an order issued by the

magistrate based upon a motion to obtain the swab.

The State argues that Fortune should be estopped from raising this issue on appeal because the trial went forward without a formal ruling by the district court on this issue. The transcript of the suppression hearing shows that the court took the matter under advisement to allow the defense time to file a formal motion to suppress and memorandum on the motion, and to allow the State to respond. There is no indication in the record that the defense ever filed the requested motion and memorandum, nor was there any indication that the court formally ruled on the oral motion to suppress the buccal swab. At trial, the buccal swab was first mentioned by the expert who analyzed the swab for DNA purposes. There was no objection to testimony concerning this swab. During the testimony of Det. Dukes, who took the swab, the court merely noted the continuing defense objection to Fortune's confession. On cross-examination, defense counsel questioned Det. Dukes about the procedure he used to take the buccal swab and on the lack of an affidavit for the magistrate. Again, there was no objection to testimony concerning the swab, and in fact the defense introduced as its exhibit the motion and order signed by the magistrate authorizing the taking of the swab. When the State introduced the DNA sample along with the rest of its exhibits, the defense merely stated: "The same standing objection,

Judge, that we've had since motions in connection with this case."

Thus, we conclude that the issue was not preserved for appeal. While there is the possibility that the district court may have made a formal ruling on any objection at the first trial, which ended in a mistrial when the jury could not reach a verdict, it is not clear from the minute entries of that trial that this exhibit was introduced, and it does not appear that there was any testimony at that trial concerning DNA evidence.

In Fortune's first *pro se* assignment of error, he attacks his conviction through a collection of somewhat unrelated arguments. In addition to the argument made by counsel, Fortune contends that his conviction was a product of a violation of his right against double jeopardy. He points out that his first trial, held before a jury, resulted in a mistrial, and at his retrial, the State used many of the same "elements" in order to convict him. However, the fact that the first trial ended in a mistrial because the jury could not reach a verdict would not preclude the State from trying him again for the same offense. As per La. C.Cr.P. art. 775A(2), a mistrial shall be declared whenever the jury cannot agree on a verdict. In addition, La. C.Cr.P. art. 591 provides that no double jeopardy attaches when a mistrial was "legally ordered under the provisions of Article 775." See State v. Nall, 439 So. 2d 420 (La. 1983); State v. White, 28,095 (La. App. 2 Cir. 5/8/96),

674 So. 2d 1018.

In connection with his double jeopardy claim, Fortune argues that the district court erred because it allowed the State to introduce additional evidence at the retrial, apparently the DNA evidence that was not introduced at the jury trial. Fortune cites no authority for his proposition that the State was limited to introducing at his second trial only the evidence introduced at the first trial. He further argues that this evidence could not be used to convict him because as per Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), the State was required to present this evidence to a jury. However, Fortune waived his right to a jury at his second trial and indicated he wanted to be tried by the court alone.

In this assignment of error, Fortune next contends that his conviction should be reversed because he was arrested without the issuance of an arrest warrant. As per La. C.Cr.P. art. 213, an officer may arrest a suspect without a warrant when the officer "has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer." Det. Dukes testified at the suppression hearing that before he arrested Fortune, he met with the fifteen-year-old victim and her mother and learned that Fortune, who was the victim's stepfather, had sexual intercourse with the victim on several occasions. Given these facts, Det. Dukes had

probable cause to believe Fortune had committed a crime and thus could arrest him without an arrest warrant. Fortune next argues that his arrest was tainted because he did not check any of the boxes on the waiver of rights form presented to him after he was arrested and advised of his rights. However, the form contained a question as to whether Fortune understood his rights, and the "Yes" box next to that question was checked. In addition, Fortune also signed the form indicating he understood and waived his rights. The boxes that are not checked refer to situations where the suspect signed but did not waive his rights, refused to sign, was undecided and was advised not to sign, preferred to speak to an attorney before making a decision as to whether to waive his rights, or "other."

His final argument in this assignment of error is that the district court lacked "subject matter jurisdiction" in his case because although he was charged with aggravated incest, he was arrested not for that but for carnal knowledge of a juvenile. The State, however, is not bound by the charge at arrest in deciding what charges to bring against a defendant.

This assignment of error has no merit.

By his second *pro se* assignment of error, Fortune contends that the district court erred by failing to charge the jury in his first trial that incest was a responsive verdict to aggravated incest, the crime with which he was

charged. It is unknown what jury instruction the court gave at that trial because that trial ended in a mistrial when the jury could not reach a verdict. Thus, any "error" which may have occurred during that trial has no bearing on his bench trial which resulted in his guilty verdict. He also argues that the prosecutor was "malicious" and "vindictive" because he chose to try him again after the first trial ended in a mistrial. However, as noted above, the State was not prohibited from trying Fortune again once the first trial ended in a mistrial. This assignment of error has no merit.

By his final assignment of error, Fortune attacks his adjudication and life sentence as a fourth offender. He acknowledges that no objections were made to most of his claims, but he insists that counsel was ineffective for failing to make these objections.

In State v. Mims, 97-1500 pp., 44-45 (La. App. 4 Cir. 6/21/00), 769 So. 2d 44, 72, this Court discussed the standard to be used to evaluate an effective assistance of counsel claim:

> The defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4 Cir.1992). Counsel's performance is not

> ineffective unless it can be shown that he or she made errors so serious that he or she was not functioning as the "counsel" guaranteed to the defendant by the 6th Amendment of the federal constitution. *Strickland, supra*, at 686, 2064. That is, counsel's deficient performance will only be considered to have prejudiced the defendant if the defendant shows that the errors were so serious that he was deprived of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693, 2068.

See also State v. Crawford, 2002-2048 (La. App. 4 Cir. 2/12/03), 848 So. 2d 615.

Here, Fortune first argues that his life sentence as a fourth offender is unconstitutional because it was based upon factors that were not presented to a jury in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). However, this claim was rejected in State v. Smith, 2005-0375, pp. 3-5 (La. App. 4 Cir. 7/20/05), 913 So. 2d 836, 839-840, where this Court stated:

> The defendant also argues that he was entitled to a jury trial on the issue of his multiple offender status. He suggests that the multiple offender statute violates the Fourteenth and the Sixth Amendments to the U.S. Constitution because the statute allows a sentence to be increased beyond the statutory maximum without requiring the fact of the prior convictions to be submitted to the jury and proved beyond a

reasonable doubt. The defendant relies upon the recent United States Supreme Court case of *Shepard v. U.S.*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), in which the Court held that a sentencing court cannot look to police reports in making "generic burglary" decisions under the Armed Career Criminal Act. In its opinion, the Court noted that the issue raised

> The concern underlying *Jones* and *Apprendi:* the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of a state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi,* to say that *Almendarez-Torres[v. U.S.,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)] clearly authorizes a [sic] to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality, see *Jones, supra,* at 239, 119 S.Ct. 1215, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor[v. U.S.,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)] constrained judicial findings about the generic implication of a jury's verdict.
>
> We hold that enquiry under the

> ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information. *Shepard,* 125 S.Ct. at 1262-1263.

The defendant contends that the *Shepard*, along with *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), require that there be a jury trial on the issues of identity, ten year lapse, whether the predicate offenses occurred before the present offense, and whether the predicate offense fit the enumerated aggravating convictions. In *Apprendi*, the U.S. Supreme Court stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435. This rule was recently reiterated by the U.S. Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and *U.S. v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). The United States Supreme Court clearly made an exception for prior convictions. Thus, under *Apprendi* the defendant's prior convictions were not required to be submitted to a jury. In addition, all the issues raised by the defendant concerning the predicate offenses can be determined by reviewing the documents

> submitted in support of the multiple bill of information. Defendant's argument is without merit.

See also State v. Dozier, 2006-0621 (La. App. 4 Cir. 12/20/06), 949 So. 2d 502. Because Apprendi specifically excluded multiple offender proceedings from its holding, this claim has no merit, and counsel was not ineffective for failing to object to the court's consideration of the prior convictions in sentencing the appellant to life imprisonment as a fourth offender.

Fortune's remaining arguments with respect to the multiple bill concern the proof of identity and proof of the prior convictions. With respect to the identity, he had three prior convictions: 410-171E, 341-229G, and 360-035H. He points out that there were fingerprints on two of the bills of information that were unsuitable for comparison, while there were no fingerprints on the earliest bill of information.

The State is not limited to proving identity solely by matching fingerprints. In State v. Henry, 96-1280, p. 7 (La. App. 4 Cir. 3/11/98), 709 So. 2d 322, 325, this Court discussed various methods for establishing identity:

> To obtain a multiple offender conviction, the State is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. *State v. Hawthorne*, 580 So. 2d 1131 (La. App. 4th Cir. 1991). Various methods are available to prove that the defendant on trial is the same person convicted

> of the prior felony offense, such as by testimony of witnesses, by expert opinion as to the fingerprints of the accused when compared with those of the person previously convicted, by photographs contained in a duly authenticated record, or by evidence of identical driver's license number, sex, race and date of birth. *State v. Westbrook*, 392 So. 2d 1043 (La. 1980); *State v. Curtis*, 338 So. 2d 662 (La. 1976); *State v. Pitre*, 532 So. 2d 424 (La. App. 1st Cir. 1988), *writ den*. 538 So. 2d 590 (La. 1989); *State v. Savoy*, 487 So. 2d 485 (La. App. 3rd Cir. 1986). The mere fact that the defendant on trial and the person previously convicted have the same name does not constitute sufficient evidence of identity. *Curtis*, 338 So. 2d at 664. In *State v. Westbrook*, 392 So. 2d 1043 (1980), the supreme court found that along with defendant's name, his driver's license number, sex, race, and date of birth were sufficient evidence for the State to carry its burden of proving that this defendant was the same person previously convicted of another felony.

See also State v. Chairs, 99-2908 (La. App. 4 Cir. 2/7/01), 780 So. 2d 1088; State v. Davis, 98-0731 (La. App. 4 Cir. 10/20/99), 745 So. 2d 136. Indeed, in State v. Cosey, 2004-2220 (La. App. 4 Cir. 7/13/05), 913 So. 2d 150, this Court noted that matching a defendant's fingerprints to an arrest register which then was matched to other documents concerning the prior offense was sufficient to establish identity. See also State v. Neville, 96-0137 (La. App. 4 Cir. 5/21/97), 695 So. 2d 534, where this Court found sufficient proof of identity when the State linked the defendant's biological information to the arrest register and the court documents from the prior

conviction.

Here, with respect to cases 410-171E and 341-229G, the State presented arrest registers for each case which contained fingerprints that matched those taken from Fortune, as well as documents from both of those cases which contained some fingerprints that matched those taken from Fortune. With respect to the remaining case, 360-035H, the State presented an arrest register that contained fingerprints that matched those taken from Fortune. There were only faint fingerprints contained in the court documents for that case, and they were not suitable for comparison. Nonetheless, the expert linked the arrest register to the court documents, noting that they contained the same name of the offender, the same date of birth, the same B. of I. number of the offender, the same Social Security number, and the same arrest number. Thus, the State's witness linked the arrest register containing the prints that matched those of Fortune to the court documents from the prior conviction. Therefore, the State adequately proved Fortune's identity as the person who pled guilty to the three prior offenses.

Finally, Fortune argues that the State failed to prove that he knowingly and voluntarily pled guilty in the three prior convictions. Specifically, he argues that the State failed to introduce the transcripts of the

guilty pleas to show that he was adequately advised of his rights as required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), nor did the State present minute entries which showed that he was advised of his right to a jury trial, as mandated by Boykin. However, the State complied with the requirements set forth in State v. Shelton, 621 So. 2d 769, 779-780 (La. 1993), which discussed the burdens of proof in multiple bill proceedings:

> 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. [footnote omitted] 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 a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* [*v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709 (1969)] rights.

Here, the State introduced the arrest registers and the certified copies of the court documents (including minute entries and plea forms) concerning the three prior guilty pleas listed in the multiple bill. At that point, the burden shifted to the defense to present some evidence that the appellant's constitutional rights had been infringed or that a procedural irregularity had occurred. The defense presented no such evidence. As such, the State met its burden of proof. This third assignment of error has no merit.

DECREE

None of the assignments of error raised by Fortune's counsel nor by Fortune *pro se*, has merit. Accordingly, the conviction and sentence of Larry Fortune are Affirmed.

AFFIRMED