NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2012-KA-1406**
VERSUS	*	
		COURT OF APPEAL
DARVIN M. HAWTHORNE	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 494-563, SECTION "J"
Honorable Darryl A. Derbigny, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

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JUNE 19, 2013

CONVICTION AND SENTENCE AFFIRMED

On February 5, 2010, Defendant, Darvin Hawthorne ("Defendant"), was charged by bill of information with simple burglary of a vehicle in violation of La. R.S.14:62(A).[1] Defendant appeared before the trial court for arraignment on February 10, 2010 and entered a plea of not guilty.

Subsequently, on February 10, 2010, Defendant filed several pretrial motions, including a motion for preliminary hearing and a motion for suppression of statements, evidence, and identification.[2] On April 16, 2010, the trial court found probable cause to substantiate the charge and denied the motion to suppress

[1] La. R.S. 14:62 provides:

> A. Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60.
>
> B. Whoever commits the crime of simple burglary shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than twelve years, or both.

[2] The motion requested that the statements made by Defendant be suppressed pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny under the state and federal constitutions, the Due Process Clause, the Sixth Amendment, the Fourth Amendment, and any other applicable constitutional statutory provisions; that the physical evidence obtained in violation of the Fourth Amendment be suppressed; and any out of court identifications be suppressed pursuant to the Due Process and *Manson v. Brathwaitte,* 432 U.S. 98 (1977).

the evidence. The trial court apparently did not address the motion to suppress the statements or the motion to suppress identification.[3]

The matter initially proceeded to trial on January 26, 2011, but resulted in a hung jury. The second time the case went to jury trial, on June 28, 2011, the jury found Defendant guilty as charged.

On August 8, 2011, Defendant filed a motion for new trial and a motion for post-verdict judgment of acquittal, both of which the trial court denied. The same date, the Defendant was sentenced to nine years in the Department of Correction, to run concurrently, with credit for time served. Subsequently, the State filed a multiple offender bill charging Defendant as a fourth felony offender. The multiple offender bill of information alleged that in addition to his 2011 conviction for simple burglary of a vehicle, Defendant previously pled guilty to possession of cocaine in violation of La. R.S. 40:967(C)(2) on July 29, 1993, in Case No. 364-628; on August 28, 1998, in Case No. 399-182; and on July 19, 2001, in Case No. 419-080.

Following a multiple bill hearing, on October 21, 2011, Defendant was adjudicated a fourth felony offender pursuant to La. R.S. 15:529.1.[4] Defendant objected to the trial court's ruling and moved for downward departure of the mandatory minimum sentence under *State v. Dorthey*,[5] 623 So.2d 1276 (La. 1993).[6] The trial court denied Defendant's request, vacated its previous sentence,

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[3] Although the motion also moved to suppress the statements and identification of Defendant, the trial court only addressed the suppression of the evidence at the April 16, 2010 hearing.

[4] The multiple bill hearing actually took place on October 20, 2011, but the trial court ruled on October 21, 2011.

[5] In *Dorthey,* 623 So.2d at 1280-1281, the Louisiana Supreme Court held that a trial court must reduce a defendant's sentence to one not constitutionally excessive if the trial court finds that the sentence mandated by the Habitual Offender Law "makes no measurable contribution to acceptable goals of punishment", or is nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime."

[6] At the hearing Defendant asked the trial court to consider a letter from his sister in regard to his *Dorthey* motion. The trial court refused to allow testimony on the issue, but allowed Defendant to admit it into the record.

and sentenced Defendant to twenty years at hard labor, with credit for time served. Defendant orally moved for reconsideration of sentence and filed a motion for appeal and designation of record. The trial court denied the motion for reconsideration, and granted the motion for appeal.

FACTS

At the June 28, 2011 trial, the only witnesses to testify were arresting officers, Detective Brandon Singleton and Officer Calcedonia Fiorella of the Second District of the New Orleans Parish Department, and the owner of the vehicle Defendant allegedly burglarized, Robert Lapeyre.[7]

Detective Brandon Singleton ("Det. Singleton") and Officer Calcedonia Fiorella ("Off. Fiorella") were working a paid detail for Tulane University in an unmarked police car the night of Defendant's arrest, December 8, 2009. Prior to the arrest, there had been a number of automobile burglaries in the surrounding areas of the university.

The officers testified on the night of the incident as they were driving on Freret Street in the downtown direction and as they approached Richmond Place, observed Defendant walking between the sidewalk and parked cars, pulling on door handles and looking into windows. The officers then observed Defendant take a right on Richmond Place, a one-way street. Due to the fact that there had been a number of automobile burglaries in the surrounding areas of the university, the officers elected to investigate further.

The officers continued down Freret Street, took a right on Nashville and on Loyola Street before taking another right on Richmond Place. The officers

[7] Shirley Taylor, the mother-in-law of Robert Lapeyre, testified at the first trial that resulted in a hung jury. However, Mrs. Taylor was not subpoenaed by the State or Defendant for the second trial.

proceeded on Richmond Place back towards Freret Street. At that point, the officers observed Defendant walk in and out of a driveway of a house. Both officers found this suspicious, but Off. Fiorella stated that because they had not yet observed an actual crime, they made the block again. This time, however, the officers parked on Loyola Street and proceeded to walk up Richmond Place. Both officers stated that street was dark and not very well lit. As they continued walking the officers noticed a "dome light" come on in a parked vehicle on the left side of the street. Det. Singleton estimated that the light was about fifty feet from where the officers were walking.

The vehicle, a white Honda Accord, was parked in front of 8 Richmond Place. As the officers approached the car, Det. Singleton observed Defendant in the passenger side of the Honda rifling through the glove box and the console. Off. Fiorella testified that he observed Defendant in the passenger side of the vehicle, but he could not see what Defendant was doing in the car.

Det. Singleton stated that he continued to observe Defendant for about ten to twenty seconds and saw Defendant take a "little pouch" out of the right cup holder of the console and stick it in his left jacket pocket. Thereafter, Det. Singleton opened the door, and got Defendant out of the car. He then asked Defendant if it was his car and whether he had permission to use the car. Defendant responded no to both of Det. Singleton's questions. Det. Singleton then asked Off. Fiorella to place Defendant in handcuffs. Off. Fiorella testified that he did not hear what words were exchanged between Defendant and Det. Singleton prior to handcuffing Defendant. He also stated that he handcuffed Defendant for officer safety because Defendant was wearing a "puffy jacket" and because they "didn't know if [Defendant] had a weapon or anything like that."

While Defendant was being detained by Det. Singleton, Off. Fiorella knocked on the door of the residence where the Honda was parked in front to investigate further. Off. Fiorella testified that Robert Lapeyre ("Lapeyre") answered the door, and when questioned by the officer stated that he owned the car; that he did not know Defendant; and that Defendant was not authorized to use the car. Lapeyre also relayed this information to Det. Singleton. Thereafter, Det. Singleton advised Defendant of his rights and arrested him. Det. Singleton testified that he recovered a coin purse from Defendant's left front pocket, but returned it to Lapeyre. He did not, however, recall if he placed the purse back in the car console or if he physically handed it to Lapeyre.

On cross-examination, both Det. Singleton and Off. Fiorella admitted that there was no sign of forced entry into the car and that it was likely unlocked. Det. Singleton also stated that he did not initially stop the Defendant when he observed him pulling on car door handles because he thought Defendant could have been a drunk college student. The officers testified that on the night of Defendant's arrest they were being paid to patrol the area as private detail security for Tulane University, the main objective of which is to protect and keep the students safe. Det. Singleton admitted that he did not log anything into evidence.

Lapeyre also testified at trial. He stated he was living at 8 Richmond Place on the night of December 9, 2009 and previously owned a white Honda Accord, but that the primary driver of the car was his mother-in-law, Shirley Taylor ("Taylor"). Lapeyre testified that Taylor lives in Ponchatoula, but visits frequently and was at his house on the night of the incident. He stated that at approximately 11:30 p.m. that evening, he opened the door to Off. Fiorella. Off. Fiorella asked if he owned the car, to which he replied yes, and if he gave permission for Defendant

to be in the car, to which he replied no. Lapeyre testified that earlier that evening, he retrieved some of Taylor's luggage from the car and did not think that he locked it.

On cross-examination, he stated that he never actually saw Defendant in his car and/or the Defendant in possession of anything from the car. Lapeyre testified that he was unable to tell the officers if anything was missing from the car because his mother-in-law usually drives it. He stated that the officers never spoke with Taylor about the coin purse because she was sleeping at the time. Lapeyre could not recall if the officers returned anything to him, nor did he recall ever seeing a gray pouch.

ERRORS PATENT

A review of the record for errors patent reveals two errors.

The first error patent is that the trial court failed to wait twenty-four hours after denying Defendant's motion for new trial to sentence Defendant as required by La. C.Cr.P. art. 873. The record provides that Defendant's motion for a new trial and post-verdict acquittal of judgment was denied on August 8, 2010, and the trial court sentenced him to nine years on that same date. The transcript also does not indicate that Defendant waived his right to the delay.

La. C.Cr.P. art. 873 provides:

> If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled. If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

A defendant may implicitly waive the twenty-four hour delay by announcing his readiness for sentencing. *State v. Pierre,* 99-3156, p. 7 (La. App. 4 Cir.

7/25/01), 792 So.2d 899, 903 (implicit waiver where defense counsel responds in the affirmative when trial court inquires if he is ready for sentencing); *State v. Robichaux,* 2000-1234, p. 7 (La. App. 4 Cir. 3/14/01), 788 So.2d 458, 464-465 (defense counsel announcing to judge that prior to sentencing he wished to file a motion for new trial operated as implicit waiver of twenty-four hour delay). Where a defendant does not challenge his sentence on appeal or raise the failure to observe the twenty-four hour delay as error, any error is harmless. *State v. Celestine,* 2000-2713, p. 5 (La. App. 4 Cir. 2/13/02), 811 So.2d 44, 47.

Generally, the failure of the trial court to observe the mandatory twenty-four hour delay after denial of a motion for new trial, where such delay is not waived, requires the sentence to be vacated and the case remanded for resentencing. *State v. Augustine,* 555 So.2d 1331, 1333 (La.1990), *superseded, in part, by statute as stated in State v. Martin,* 93-1915, pp. 2-3 (La. App. 4 Cir. 9/29/94), 643 So.2d 830, 832[8]; *State v. Brauner,* 99-1954, p. 14 (La. App. 4 Cir. 1/21/01), 782 So.2d 52, 63. However, Louisiana jurisprudence has recognized exceptions to this requirement in cases where the failure to observe the delay is considered harmless. *State v. Foster*, 2002-0910, p. 3 (La. App. 4 Cir. 12/11/02), 834 So.2d 1188, 1191. As this Court noted in *Foster*, 2002-0910, pp. 3-4, 834 So.2d at 1191-1192:

> [T]he Louisiana Supreme Court in *State v. Seals,* 95-0305 (La.11/25/96), 684 So.2d 368, held that the failure of the trial court to observe the mandatory twenty-four hour rule was harmless where the sentence imposed was mandatory in nature. *Id.* at p. 17, 684 So.2d at 380. Further, failure to observe the twenty-four hour period has been considered harmless where there is a sufficient delay between the date of conviction and the date of sentencing; there is no indication that the sentence is

[8] In *State v. Martin,* the court noted that *Augustine* is overruled to the extent that defendant fails to comply with La. C.Cr.P. art. 881.1. *Martin,* 93-1915 at p. 2, 643 So.2d at 832. Specifically, *Martin* states that defendant must file a motion to reconsider sentence within thirty days of the imposition of sentence: failure to do so precludes defendant from challenging his sentence on appeal.

> hurriedly imposed and; there is no argument or showing of actual prejudice by the failure to observe the twenty-four hour delay. *State v. Sam,* 1999-0300, p. 8 (La. App. 4 Cir. 4/19/00), 761 So.2d 72, 78 [ ](delay between conviction and sentencing just under one month); *State v. Dickerson,* 579 So.2d 472, 484 (La. App. 3 Cir.1991)[ ](delay between conviction and sentencing over one month). *But cf., State v. Brauner,* 99-1954 at p. 14, 782 So.2d at 63 (requiring that sentence be vacated notwithstanding over six months between conviction and sentencing).

In the instant case, Defendant does not raise as an assignment of error the failure of the trial court to wait twenty-four hours before initially sentencing him on August 8, 2011. He also does not challenge the excessiveness of that sentence as it was vacated in October 21, 2011, when the trial court adjudicated him a fourth felony offender and sentenced Defendant to twenty years. However, Defendant does assign as error that the twenty year sentence, the trial court imposed at the October 21, 2011 multiple bill hearing, is excessive.

This Court has previously held that any error in failing to observe the twenty-four hour delay in sentencing after the denial of a motion for new trial did not prejudice a defendant whose original sentence was vacated, and then found to be a habitual offender. *See*, *State v. Bentley*, 97–1552, p. 5 (La. App. 4 Cir. 10/21/98), 728 So.2d 405, 408. The transcript of the August 8, 2011 sentencing hearing provides:

> I will sentence Mr. Hawthorne on the case before, the conviction on the burglary. The Court will sentence defendant to a term of nine years in the Department of Corrections and that is to run concurrent with any and all time the defendant is presently required to serve the State of Louisiana, and Mr. Hawthorne, you are to be given credit for any and all time served towards the completion of this sentence.

The transcript does not indicate that Defendant expressly or implicitly waived his right to a twenty-four-hour delay between the denial of his motion for new trial and the imposition of the original sentence. It also does not provide that the trial court had even ruled on Defendant's motion for new trial and post-verdict acquittal of judgment. Additionally, although the minute entry contains the disposition of the trial court's denial of Defendant's motion, it does not provide any indication that Defendant waived his right for sentencing delay.

However, because Defendant was convicted on June 28, 2011, and over five weeks elapsed before sentencing on August 8, 2011, there appears to be sufficient delay to show that the sentence was not hurriedly imposed. As such, the trial court's failure to observe the twenty-four hour delay between denying his motion for new trial and sentencing Defendant was harmless. Accordingly, Defendant is not entitled to any relief as a result of this error.

The second patent error is that the trial judge failed to specify that the twenty year sentence imposed, on October 21, 2011, pursuant to the habitual offender statute was without benefit of probation or suspension of sentence, as required by La. R.S. 15:529.1(G). However, when a criminal statute requires that all or portion of a sentence be served without the benefit of probation, parole, or suspension of sentence, or of any one of them, any combination thereof, La. R.S. 15:301.1 self-activates the correction and eliminates the need to remand for a ministerial correction. See *State v. Williams*, 2000-1725, pp. 11-12, 14 (La. 11/28/01), 800 So. 2d 790, 798-799, 801. Thus, no corrective action is necessary.

ASSIGNMENT OF ERROR NUMBER 1

As his first assignment of error, Defendant contends that the trial court erred in denying his motion to suppress statements because at the time he made the

statements he had not been advised of his *Miranda* rights. Defendant claims that he was under custodial interrogation when Det. Singleton asked him whether the car was his or if had permission to use it, and thus his responses were inadmissible.

However, the record provides that although Defendant filed a motion to suppress statements, evidence, and identification, the trial court only addressed the motion to suppress the evidence at the April 16, 2010 hearing.[9] The transcript of that hearing shows the trial court found probable cause and denied Defendant's motion to suppress the evidence. It does not, however, indicate that Defendant objected to the trial court's failure to rule or address the issue of the statements he allegedly made prior to being *Mirandized* by the officers.

A defendant cannot avail himself of an alleged error unless he made a contemporaneous objection at the time of the error. La. C.Cr.P. art. 841(A); *State v. Spain*, 99-1956, p. 11 (La. App. 4 Cir. 3/15/00), 757 So.2d 879, 886. Not only does an objection have to be made, but La.C.Cr.P. art. 841(A) requires that a defendant make known the grounds for his objection, and he is limited on appeal to those ground articulated at trial. *State v. Brooks*, 98-0693, p. 9 (La. App. 4 Cir. 7/21/99), 758 So.2d 814, 819; *State v. Buffington*, 97-2423, p. 9 (La. App. 4 Cir. 2/17/99), 731 So.2d 340, 346. By not objecting Defendant has failed to preserve this issue for review.

ASSIGNMENT OF ERROR NUMBER 2

As his second assignment of error, Defendant argues that there was insufficient evidence for the jury to convict him of simple burglary of a vehicle.

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[9] The motion requested that the statements made by Defendant be suppressed pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny under the state and federal constitutions, the Due Process Clause, the Sixth Amendment, the Fourth Amendment, and any other applicable constitutional statutory provisions; that the physical evidence obtained in violation of the Fourth Amendment be suppressed; and any out of court identifications be suppressed pursuant to the Due Process and *Manson v. Brathwaitte,* 432 U.S. 98 (1977).

This Court in *State v. McMillian,* 2010-0812, p. 5-8 (La. App. 4 Cir. 5/18/11), 65 So. 3d 801, 804-05, *reh'g denied* (7/13/11), set out the well-settled standard for reviewing convictions for sufficiency of the evidence:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, **an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt**. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green,* 588 So.2d 757 (La. App. 4[] Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall,* 523 So.2d 1305 (La. 1988). The reviewing court is not permitted to consider just the evidence most favorable to the prosecution but must consider the record as a whole since that is what a rational trier of fact would do. **If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted.** The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall,* 523 So.2d at 1309–1310. "**[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence**." *State v. Smith,* 600 So.2d 1319, 1324 (La.1992).
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> In addition, **when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience**. *State v. Shapiro,* 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from *Jackson v. Virginia,* but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright,* 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs,* 504 So.2d 817 (La.1987). **If a rational trier of fact reasonably rejects the**

> **defendant's hypothesis of innocence, that hypothesis falls; and, unless another one creates reasonable doubt, the defendant is guilty**. *State v. Captville,* 448 So.2d 676 (La.1984).
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> **A factfinder's credibility decision should not be disturbed unless it is clearly contrary to the evidence**. *State v. Huckabay,* 2000–1082 (La.App. 4 Cir 2/6/02), 809 So.2d 1093; *State v. Harris,* 99–3147 (La.App. 4 Cir. 5/31/00), 765 So.2d 432. **The determination of whether the requisite intent is present in a criminal case is for the trier of fact.** *State v. Huizar,* 414 So.2d 741 (La.1982); *State v. Butler,* 322 So.2d 189 (La.1975). In reviewing the correctness of such a determination, the court should review the evidence in a light most favorable to the prosecution and must determine if the evidence is sufficient to convince a reasonable trier of fact of the guilt of the defendant beyond a reasonable doubt as to every element of the offense. *Jackson v. Virginia; State v. Huizar.* [Emphasis added].

In this case, Defendant was convicted of simple burglary of a vehicle pursuant to La. R.S. 14:62(A), which defines simple burglary as "the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60 [aggravated burglary]." Therefore, a conviction for simple burglary requires proof that Defendant committed unauthorized entry of into the car with the intent to commit a felony or any theft therein. Theft is defined by La. R.S. 14:67(A) as follows:

> Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

The requisite intent required by La. R.S. 14:62 and La. R.S. 14:67 is specific intent. *State v. Brown*, 2012-0853, p. 3(La. App. 4 Cir. 2/6/13), 109 So. 3d 966,

968 (citing *State v. Smith*, 2002–1018, p. 7 (La. App. 5 Cir. 3/11/03), 844 So.2d 119, 125). Specific criminal intent is "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Specific intent may be inferred from the circumstances and actions of the defendant. *State v. Ennis*, 2011–0976, p. 7 (La. App. 4 Cir. 7/05/12), 97 So.3d 575, 580 (quoting *State v. Riley*, 2008–1102, p. 9 (La. App. 4 Cir. 4/24/09), 10 So.3d 1232, 1237). Defendant does not contest that he made unauthorized entry into the vehicle, as he claims that he was just looking "for a place to escape the cold on a freezing night in December."[10] Defendant does allege, however, that the State failed to prove that he had the specific intent to commit a theft because he had no tools; there was no damage to the vehicle; and there was nothing disturbed in the car.[11] Defendant cites *State v. Wright*, 36,635 (La. App. 2 Cir. 3/7/03), 840 So.2d 1271 and *State v. Jacobs*, 504 So.2d 817 (La. 1987) to support his argument.

In *Wright*, the defendant was observed crawling up some boards to the second level of a house that was being remodeled and entering the house through a door. When the police officers arrived at the scene, the defendant was seen running away from the house. The defendant later admitted to the officer he had been in the house. Testimony established that the defendant had not been given permission to enter the home and that although several doors were boarded and

[10] As noted above, Defendant claimed that the trial court should not have allowed Det. Singleton to testify about his admission that he did not own the car and did not have permission to use the car, but failed to preserve this issue for review. However, even without Det. Singleton's testimony, there is evidence from Lapyere, the car owner, that Defendant was not authorized to be in or use the car.

[11] Defendant also relies on Mrs. Taylor's testimony from the first trial, in which the jury could not reach a verdict, in an attempt to prove there was insufficient evidence to convict him. As noted above, Mrs. Taylor was the primary user of the white Honda. Mrs. Taylor testified at the January 26, 2011 trial that she did not think she owned a gray coin purse, normally does not keep her coin purse in the car, and did not notice anything disturbed in the car. However, because the first trial did not result in a conviction and because Defendant failed to subpoena Mrs. Taylor to testify at the second trial, her testimony will not be considered.

locked, one was left open for work crews to come and go as necessary to complete the work. Additionally, there was no sign of forced entry. It was also established that at the time of the crime, the house contained several items of value, including some air conditioning units. However, there was no evidence that the defendant either caused any damage inside the house or disturbed any of the property in the house. The jury nevertheless convicted the defendant of simple burglary. The Second Circuit found that there was insufficient evidence to prove that the defendant had the specific intent to commit a felony or theft in the house and reversed the conviction. The *Wright* Court reasoned

> There were no signs of forced entry. See *State v. Rounds*, [476 So.2d 965 (La. App. 1 Cir.1985)].[12] Also, there was no displacement of the victim's possessions. See *State v. Vortisch*, [00-67 (La. App. 5 Cir. 5/30/00), 763 So.2d 765].[13] Furthermore, the defendant did not possess any burglary tools or weapons, and was not wearing a mask or gloves. Therefore, the evidence viewed in the light most favorable to the prosecution was insufficient to convict the defendant of simple burglary.

Wright, 36,635, pp. 11-12, 840 So.2d at 1279

In *Jacobs,* the police received an anonymous call a burglary was in progress in a residence. On arriving at the scene, the police observed a light from a flashlight on the premises and heard someone in the house shout to someone else in the house. The officers also observed the back screen door had been broken and a wooden door was open. The police found food in the kitchen and one defendant,

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[12] In *State v. Rounds*, 476 So.2d 965 (La. App. 1 Cir. 1985), the First Circuit reviewed the jurisprudence regarding the circumstantial evidence necessary to prove an intent to commit a felony or theft in simple burglary cases. It also noted that the Louisiana Supreme Court, in *State v. Ricks*, 428 So.2d 794 (La.1983), had previously found insufficient evidence to support a conviction for attempted simple burglary of an inhabited dwelling even though there was forced entry (screen door latch pulled loose) where the defendant was unarmed, carried no burglary tools, did not steal or attempt to steal anything, knew the victim and offered the explanation that he was dropping in for a social.

[13] In *State v. Vortisch*, the Fifth Circuit stated that "[d]isplacement of the victim's possessions may be indicative of the specific intent to commit a theft under La. R.S. 14:62. *Vortisch*, 00-67, p. 6 (La. App. 5 Cir. 5/30/00), 763 So.2d 765, 768 (citing *State v. Tran*, 97-640 (La. App. 5Cir. 3/11/98), 709 So.2d 311, 317; and *State v. Richardson*, 547 So.2d 749, 752 (La. App. 4 Cir. 1989)).

Jacobs, in the house hiding under a dining room table. The other defendant, Jacob's brother, was found hiding under a bed with a chisel and a screwdriver. Nothing was found missing from the residence. The state contended that Jacobs and his brother had not committed a theft because their presence was quickly detected and they were stopped before the theft could be consummated. Jacobs claimed that they were staying temporarily in the house (conceding an unauthorized entry) and that he was supplying his brother with food. The Supreme Court found that the evidence was insufficient to prove that the defendants intended to commit theft in the property. The *Jacobs* Court stated:

> In the present case, the circumstances relied on by the court of appeal as proving intent simply do not exclude every reasonable doubt as to the intent element of simple burglary. Whether the entry was through a locked or an open door is of no significance to the intent issue. The finding of tools customarily used for break-ins also bears primarily on the conceded issue of unauthorized entry. The fact that the intruders were hiding when apprehended inside the house merely indicates a consciousness of guilt of criminal trespass and does not necessarily indicate an intent to steal.
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> Finally, the intermediate court's observation that items belonging to Mrs. Vicks had been tampered with is an overstatement of the evidence
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> According to the testimony of the police officers, someone had apparently been sleeping in the bed and had eaten a meal recently in the house. The lessee, on the other hand, denied that she had ever eaten or slept there. Moreover, while one reasonable hypothesis as to the tools on the bedroom floor was that relator's brother had just used them to break into the house, another reasonable hypothesis consistent with the lessee's testimony was that the lessee's friend who reassembled the bed in the house used tools from the toolbox in the kitchen and left the tools in the bedroom. The overall evidence, both direct and circumstantial, even when viewed in the light most favorable to the prosecution,

> does not exclude every reasonable doubt that relator and his brother made an unauthorized entry into the house in order for the brother to live there temporarily. Thus, the evidence does not prove beyond a reasonable doubt that they made an unauthorized entry with the intent to commit a theft or felony inside the house.

Jacobs, 504 So. 2d at 820-821.

In the present case, like in *Wright*, there was no evidence of forced entry and no tools found on Defendant. However, this Court has recently recognized that the use of tools is not necessary to establish simple burglary. See*, State v. Nelson*, 2008-0584, p. (La. App. 4 Cir. 12/17/08), 3 So.3d 57, 60 (noting that "the use of tools is not a requirement of the crime of attempted simple burglary" and finding that the evidence was sufficient to support the jury's conviction of defendant for attempted simple burglary even though no tools were found on defendant and no crime lab was called to the scene, where two witnessed identified the defendant as the perpetrator of the crime minutes after it took place). Moreover, testimony from both officers and Lapyere indicates that no tools or force was needed to gain entry into the car. Lapyere testified that he was the last person in the car, before Defendant, and did not recall locking the car. Further, both officers stated that they had earlier observed Defendant peering and pulling on the car door handles, suggesting that Defendant was looking for unlocked vehicles.

Moreover, in contrast to *Wright* and *Jacob*, wherein there was no evidence indicating that the contents were displaced or taken from the properties, Det. Singleton testified at trial that he observed Defendant going through the vehicle's console and glove box and putting a gray coin purse in his left pocket of his jacket. Det. Singleton also stated that he recovered the coin purse from Defendant's person while conducting a search incident to his arrest. Although Lapyere testified

that he did not see the coin purse, could not testify if his mother-in-law left the purse in the car, and could not recall if the purse was returned to him by the police officer, a taking is not required to establish burglary; rather, all that is required is unauthorized entering of dwelling with intent to commit felony. *State v. Jones,* 97–2591, p. 8 (La. App. 4 Cir. 9/8/99), 744 So.2d 165, 169, (stating that "[t]he essence of burglary ... is an unauthorized entry with criminal intent; a taking is not required"). The jury could have reasonably inferred that Defendant had the specific intent to commit a theft in the car based on Det. Singleton's uncontroverted testimony that Defendant was rifling through the car's contents after he was observed peering and pulling on door handles. *State v. Richardson*, 547 So. 2d 749, 752 (La. App. 4 Cir. 1989) (specific criminal intent to commit theft or felony, required to sustain defendant's conviction of simple burglary of inhabited dwelling, was established by circumstantial evidence, including disarray of victim's personal possessions and movement of his leather coat from bedroom closet to kitchen). The jury believed Det. Singleton's testimony that he observed Defendant place an item from the car console in his jacket pocket. Thus, viewing the evidence in a light most favorable to the prosecution, we find the jury's decision to convict Defendant for simple burglary of the vehicle a rational one. Defendant's argument that there was insufficient evidence for a juror to conclude he had the intent to commit a theft at the time he made entry into the vehicle has no merit.

As part of his insufficient evidence claim, Defendant also argues that the trial court erred in refusing to include the offense of criminal trespass as a

responsive verdict.[14] The record provides that prior to selecting the jury, Defendant moved to include a responsive verdict of trespassing, and that the trial court denied this request.

La. C.Cr.P. art. 803 requires that the trial court charge the jury as to the law applicable to the charged offense and to any other offenses of which the accused could be found guilty under the provisions of La.C.Cr.P. arts. 814 or 815.[15] La.C.Cr.P. art. 814(A)(44) lists the legislatively approved responsive verdicts to simple burglary as guilty, guilty of attempted simple burglary, guilty of unauthorized entry of a place of business, and guilty of attempted unauthorized entry of a place of business, and not guilty.[16] Criminal trespass is not included as responsive verdict. *Id*.; *see also*, *State v. Major*, 597 So. 2d 108, 110 (La. App. 4 Cir. 1992) (citing *State v. Jones*, 426 So.2d 1323, 1327 (La.1983)); *State v. Hall*, 26,505 (La. App. 2 Cir. 12/7/94), 647 So.2d 453, 457; *State v. Merrell*, 442 So.2d 713, 715, fn. 3 (La. App. 1 Cir. 1983). When the crime of prosecution is one listed in La.C.Cr. P. art. 814, the trial court may "exclude" a responsive verdict, but

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[14] Defendant includes this argument in his assignment of error concerning the insufficient evidence.

[15] La. C.Cr.P. art. 814 provides particular responsive verdicts for fifty-nine specific offenses. For any offense not included in that list, La. C.Cr. P. art. 815 provides that the appropriate responsive verdicts are those of a "lesser and included grade" of the offense, even though the offense charged may be a felony and the proposed responsive charge a misdemeanor.

[16] The article provides, in relevant part:

> A. The only responsive verdicts which may be rendered when the indictment charges the following offenses are:
>
> ***
>
> 44.
>
> Simple Burglary:
>
> Guilty.
>
> Guilty of attempted simple burglary.
>
> Guilty of unauthorized entry of a place of business.
>
> Guilty of attempted unauthorized entry of a place of business.
>
> Not guilty.

La. C.Cr.P. art. 814(44). Pursuant to La.C.Cr.P. art. 815, in all cases not provided for in La.C.Cr.P. art 814, the responsive verdicts are (1) guilty; (2) guilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense a misdemeanor; or (3) not guilty.

cannot add to the number. *State v. Thomas*, 2011-1673, p. 4 (La. App. 4 Cir. 10/17/12), 102 So.3d 244, 246 (citing *State v. Papillion*, 2010–1317, p. 33 (La.App. 3 Cir. 5/4/11), 63 So.3d 414, 434, writ denied, 2011–1149 (La.11/18/11), 75 So.3d 447).

Defendant acknowledges that under La. C.Cr.P. art. 814 and established jurisprudence criminal trespass is not a responsive verdict to simple burglary, but argues it should nevertheless be considered as responsive verdict because trespass is a lesser included offense of all burglaries.

Defendant is correct that criminal trespass appears to qualify as a lesser included offense of simple burglary. As noted earlier, simple burglary is defined as the "unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein." La. R.S. 14:62(A). Criminal trespass is defined by La. R.S. 14:63, and provides, in pertinent part:

> A. No person shall enter any structure, watercraft, or movable owned by another without express, legal, or implied authorization.
>
> B. No person shall enter upon immovable property owned by another without express, legal, or implied authorization.
>
> C. No person shall remain in or upon property, movable or immovable, owned by another without express, legal, or implied authorization.

Criminal trespass is the unauthorized entry of any structure or movable, elements of which are also found in the crime of simply burglary. Criminal trespass therefore appears to be a lesser included offense to a charge of aggravated burglary, even though it is not provided as a responsive verdict under La. C.Cr. P. art. 814.

This fact was also acknowledged by the Louisiana Supreme Court in *Jones*, 426 So.2d 1323 (La. Jan. 21, 1983). In *Jones* the Court addressed whether there was sufficient evidence to convict a defendant of attempted simple burglary. The Court found that while the evidence was insufficient to establish simple burglary, there was sufficient proof of criminal trespass. The Louisiana Supreme Court then discussed whether it could enter a verdict of guilty as criminal trespass as a lesser included offense of simple burglary. However, the *Jones* Court found that it could not enter such a verdict because the crime of criminal trespass was not legislatively authorized as a responsive verdict of simple burglary under La. C.Cr.P. art. 814. The Court also noted that the redactors of La. C.Cr.P. art. 814 must have determined that criminal trespass was not closely enough associated with simple burglary because trespass does not involve an intent to commit an offense in the structure entered and because it is not limited to the entering of structures. The Louisiana Supreme Court stated in relevant part:

> In *State v. Byrd,* [385 So.2d 248, 252], this court allowed entry of a judgment of guilty to a lesser and included offense [attempted simple robbery] which was a legislatively authorized responsive verdict to the greater offense [attempted armed robbery] found by the jury. Even though criminal trespass is not a responsive verdict to simple burglary ([La.]C.Cr.P. 814[(A)(44)]), it would be possible to extend the rationale of *State v. Byrd,*supra to apply in this case because all of the elements of criminal trespass are included in the offense of simple burglary. However, the application of *State v. Byrd* ought not to be broadened, but ought to be limited to those responsive verdicts listed in [La] C.Cr.P. 814.
>
> The only legislatively authorized responsive verdicts for simple burglary are listed in C.Cr.P. 814A(41). These are "guilty," "guilty of attempted simple burglary," and "not guilty." Criminal trespass is not listed in [La.] C.Cr.P. 814[(A)(44)] as a responsive verdict.
>
> *State v. Byrd,* supra, offers possibilities for preventing a miscarriage of justice when the state proves beyond a

reasonable doubt that defendant is guilty of a lesser offense whose elements are included in the greater offense that defendant was charged with. Nevertheless, there are substantial risks in this departure from the traditional disposition of cases on appeal when the state fails to prove an essential element of the offense charged. See *State v. Byrd,* supra at 253 (Watson, J., dissenting); *State v. Goods,* 403 So.2d 1205, 1210 (Blanche, J., dissenting); Note, Appellate Review and the Lesser Included Offense Doctrine in Louisiana, 27 Loy.L.Rev. 284 (1981).

There are constitutional arguments against our extending the doctrine of *State v. Byrd* to embrace lesser and included offenses that are not listed in C.Cr.P. 814 as responsive verdicts. A defendant is entitled to be informed of the nature and cause of the accusations against him. La. Const.1974, Art. 1, § 13. He must be afforded notice of the charges against him so that he is given a reasonable opportunity to prepare for trial and to defend himself accordingly.

Responsive verdicts were originally permitted because it was determined that a defendant charged with the commission of a given crime would be put on notice by that charge to defend against a lesser and included offense of the same genus. *State in Interest of Batiste,* 367 So.2d 784 (La.1979). See, e.g., *State v. Cole,* 158 La. 799, 104 So. 720 (1925); Comment, The Responsive Verdict in Louisiana Criminal Procedure, 5 La. L. Rev. 603, 609 (1944).

The redactors of [La.].C.Cr.P. 814 did not believe that a charge of simple burglary would adequately alert the defendant that he would also be required to defend against a charge of criminal trespass. Apparently, the redactors concluded that criminal trespass was not closely enough associated with simple burglary, even though it actually was a lesser and included offense. In order for the crimes to be of the same generic class, each verdict must relate "to the same ultimate, unlawful purpose or design," that of entering a dwelling or other structure intending to commit a felony or theft therein. R.S. 14:62; Comment, The Responsive Verdict in Louisiana Criminal Procedure, 5 La.L.Rev. 603, 606 (1944). The crime of criminal trespass does not involve an intent to commit a felony or theft within the structure that was entered without authorization; trespass, furthermore, is not limited to entering structures.

> Since criminal trespass is not a responsive verdict to simple burglary, the bill of information was insufficient to put defendant on notice that he would be required to defend against this charge. For offenses listed in C.Cr.P. 814, we will apply the doctrine of *State v. Byrd* only when the lesser included offense of which defendant might be found guilty by jury verdict is a statutory responsive verdict to the crime charged. By such a limitation of *State v. Byrd,* supra, we will not find defendant guilty of an offense which the jury was unable to consider as a responsive verdict to the crime charged.
>
> For the reasons assigned, defendant's conviction of attempted simple burglary and the sentence are reversed and set aside and the defendant is ordered discharged.

Id. at 1327-1328. Despite acknowledging that criminal trespass is a lesser included offense of simple burglary, *Jones* does not support Defendant's position that the trial court should have included it as an a responsive verdict in this case. *See, Thomas*, 2011-1673, p. 5, 102 So.3d at 246 (citing *Jones* and finding that criminal trespass was not a responsive verdict for an aggravated burglary charge, even though it is a lesser and included offense).

Defendant also relies on *State v. Simmons,* 2001–293 (La.5/14/02), 817 So.2d 16. In *Simmons*, the defendant was charged with unauthorized entry of an inhabited dwelling, but found guilty of attempted unauthorized entry of an inhabited dwelling. At trial, the defendant requested the trial court instruct the jury that criminal trespass was a responsive verdict. The trial court refused. The Supreme Court found that criminal trespass was a responsive verdict to the charge of unauthorized entry of an inhabited dwelling. However, prior to reaching this conclusion the *Simmons* Court noted that there were "no statutory responsive verdicts provided in Article 814 for unauthorized entry of an inhabited dwelling," thus Article 815 controlled the matter. *Simmons,* 2001–293 at p. 3, 817 So.2d at 19; *see also*, La. C.Cr.P. art. 815 (providing that in "all cases not provided for in

Article 814," the responsive verdicts are guilty, guilty of a lesser and included grade of the offense even though the offense charged is a felony and the lesser offense a misdemeanor, or not guilty). As a result, the Louisiana Supreme Court found that "when the defendant requests that the jury be instructed on the law applicable to an offense which is truly a lesser and included offense of the charged offense [under La. C.Cr.P. art. 815], the trial court has no discretion to refuse to give the requested instruction." *Id.* at p. 4, 817 So.2d at 19.

Here, however, unlike *Simmons*, La. C.Cr.P. art. 815 is not applicable because the responsive verdicts for simple burglary are listed in La. C.Cr.P. art. 814. Thus, because criminal trespass is not an enumerated by the article, the trial court did not err in denying Defendant's motion to include trespass as a responsive verdict to the crime of simple burglary.

ASSIGNMENT OF ERROR NUMBER 3

Defendant contends that the trial court erred in adjudicating him as a fourth felony offender and imposing an unconstitutionally excessive sentence.

Insufficient Proof – Habitual Offender

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. Neville,* 96-0137, p. 7 (La.App. 4 Cir. 5/21/97), 695 So.2d 534, 538-539; *State v. Payton*, 2000-2899, p. 6 (La. 3/15/02), 810 So. 2d 1127, 1130-1131. There are various methods available to prove that the defendant is the same person convicted of the prior felony offense, such as testimony from witnesses, expert opinion regarding the fingerprints of the defendant when compared with those in the prior record, or photographs in the duly authenticated record. *State v. Henry*, 96-1280, p. 7 (La. App. 4 Cir. 3/11/98), 709 So.2d 322,

326; *State v. Wolfe*, 99-0389, pp. 4-5 (La. App. 4 Cir. 4/19/00), 761 So.2d 596, 599-600.

Louisiana Supreme Court adopted a scheme for burdens of proof in habitual offender proceedings in *State v. Shelton*, 621 So.2d 769 (La.1993). *State v. Francois,* 2002-2056, p. 6 (La. App. 4 Cir. 9/14/04), 884 So. 2d 658, 663. That scheme has been summarized as follows:

> If the defendant denies the multiple offender allegations then the burden is on the State to prove (1) the existence of a prior guilty plea, and (2) that defendant was represented by counsel when the plea was taken. Once the State proves those two things, the burden then shifts to the defendant to produce affirmative evidence showing (1) an infringement of his rights, or (2) a procedural irregularity in the taking of the plea. Only if the defendant meets that burden of proof does the burden shift back to the State to prove the constitutionality of the guilty plea. In doing so, the State must produce either a "perfect" transcript of the *Boykin* colloquy between the defendant and the judge or any combination of (1) a guilty plea form, (2) a minute entry, or (3) an "imperfect" transcript. If anything less than a "perfect" transcript is presented, the trial court must weigh the evidence submitted by the defendant and the State to determine whether the State met its burden of proof that defendant's prior guilty plea was informed and voluntary.

Francois, 2002-2056, p. 6, 884 So.2d at 663 (citing *Shelton*, 621 So.2d at 779-780 (La. 1993); *State v. Winfrey*, 97-427, p. 30 (La. App. 5 Cir 10/28/97), 703 So.2d 63, 80; and quoting *State v. Conrad*, 94-232, pp. 3-4 (La. App. 5 Cir. 11/16/94), 646 So.2d 1062, 1064).

In the instant case, the State charged Defendant as a habitual offender based on guilty pleas he entered into for possession of cocaine in 1993, 1998, and 2001. To support the 1993 predicate conviction for possession cocaine, the State offered: the bill of information charging Defendant on July, 29, 1993 in Case No. 364-628; the guilty plea form executed by Defendant on July 29, 1993; the docket master

and two minute entries of the court proceedings. The plea form and the minute entry of December 6, 1993, provide that Defendant was represented by counsel and that Defendant waived his rights to a jury trial, against self-incrimination, and to confront his accusers.

To support the 1998 conviction the State introduced the following evidence: the bill of information charging Defendant on June 8, 1998 in Case No. 399-182; the guilty plea form executed by Defendant on August 21, 1998; and the docket master. Although the plea form indicates Defendant was advised of his *Boykin* rights and represented by an attorney, the docket master does not detail the colloquy. The entry of August 21, 1998 does provide, however, that the plea was made freely and voluntarily.

As for Defendant's 2001 felony conviction, the State offered: the bill of information in Case No. 419-080 charging Defendant with possession of cocaine on December 11, 2000, and the plea form and the docket master indicating that Defendant pled guilty to the charge on July 19, 2001. The plea form provides for a waiver of rights, but the docket master only states that Defendant entered into a guilty plea.

The State also called Officer Joseph Jackson, an expert in taking and analyzing fingerprints. Off. Jackson testified that the fingerprints contained in the arrest registers relating to all three prior possession of cocaine convictions matched the fingerprints he took of Defendant earlier that day.[17] The fingerprint card was admitted into evidence.

[17] Initially, Off. Jackson testified was unable to identify Defendant from the fingerprints on the back of 1998 bill of information. However, when presented with a copy of fingerprints taken when Defendant was booked for the 1998 cocaine possession charge in Case No. 399-182, he was able to successfully compare and match the fingerprints.

Defendant does not contest the 1993 and 1998 convictions on appeal; he only argues that the documentation in support of the 2001 conviction was deficient to show he was a fourth felony offender. Specifically, Defendant claims that the plea form and the docket master offered by the State as proof of his 2001 conviction for possession of cocaine was insufficient to establish that he knowingly and intelligently waived his *Boykin* rights.

Defendant is correct that the docket master from his July 19, 2001 plea only provides that Defendant entered "a plea of guilty under [La. C.Cr.P. art.] 930.8." The referenced article pertains to post conviction relief and does not relate to a waiver of rights. However, when the Defendant objects to a prior conviction, the State need only prove the existence of the prior convictions and that Defendant was represented by an attorney at the time he entered the plea. *See*, *Shelton*, 621 So.2d at 779-780; *Francois,* 2002-2056, p. 6, 884 So.2d at 663. Moreover, La. R.S. 15:599.1(D)(1)(b) provides:

> Except as otherwise provided in this Subsection, the district attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. **The presumption of regularity of judgment shall be sufficient to meet the original burden of proof**. If the person claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the prosecutor. **A person claiming that a conviction alleged in the information was obtained in violation of the constitutions of Louisiana or of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information**. **The person shall have the burden of proof, by a preponderance of the evidence, on any issue of fact raised by the response**. Any challenge to a previous conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence. [Emphasis added].

The State met its initial burden of proof with regard to the 2001 conviction as both the docket master and the guilty plea form demonstrate that Defendant was represented by an attorney and that he pled guilty to the charges. At that point, the burden shifted to Defendant to produce affirmative evidence of a defect in the proceedings or an infringement of his constitutional rights. *See*, *Shelton*, 621 So.2d at 779-780; La. R.S. 15:529.1(D)(1)(b) (providing that a defendant who has alleged a constitutional deficiency in one or more of his prior convictions "shall have the burden of proof, by a preponderance of the evidence, on any issue of fact raised by [his] response [to the State's habitual offender bill.]").

The record provides that Defendant filed a motion to quash the multiple offender bill generally alleging that documentation provided by the State in support of the multiple offender proceedings did not show sufficient facts to prove the elements of La. R.S. 15:529.1. Prior to being sentenced as a fourth felony offender Defendant also challenged the 2001 predicate conviction, arguing:

> [T]here's nothing in the record to indicate that [Defendant] knowingly and intelligently waived his rights and understood the *Boykin* procedure because there is no indication other than the plea form[,] that just has his initials on it, it does show that the judge went over than from with him. There is no indication he knew he was going at that time or understood what was going on.

These allegations and arguments made by Defendant, however, do not constitute affirmative evidence of a constitutional or procedural defect of his 2001 conviction. *See, State v. Clesi*, 2007-0564, p. 2 (La. 11/2/07), 967 So. 2d 488, 490 (finding that the defendant's objection at the hearing did not constitute "affirmative evidence" of a defect in any of his prior guilty pleas).

Moreover, a review of the 2001 guilty plea reveals that Defendant did in fact knowingly, intelligently, and voluntarily waive his right to jury trial, to confront

his accusers, and his right against self-incrimination as required by *Boykin*. The plea form provides that by pleading guilty to the possession of cocaine, Defendant gave up the right to "trial by judge or jury;" "force the District Attorney to call witnesses, who under oath, would have to testify against me a trial[;] and to have my attorney ask questions of each of those witnesses;" and "testify at trial, if I chose to do so; or remain silent if I could not to testify – and not have my silence held against me, or considered as evidence of my guilt." Defendant initialed each sentence, indicating a waiver of those rights. The form also states that Defendant was not "forced, coerced, or threatened to enter this plea of guilty;" and understood "all the possible legal consequences of pleading guilty." The form was signed by Defendant, his attorney, and the trial judge. The form also contained the following sentence before the trial judge's signature "[t]his plea of guilty is accepted by the Court as having been knowingly, intelligently, and voluntarily made by the defendant." The State thus presented sufficient evidence of Defendant's 2001 predicate conviction. Accordingly, it was not error for the trial court to adjudicate Defendant as a fourth felony offender.

Nevertheless, Defendant, citing on *State v. Age*, 417 So.2d 1183 (1982), argues that the 2001 plea form is insufficient to show that Defendant knowing and voluntarily waived his *Boykin* rights. Defendant's reliance on *Age* is misplaced as since the Louisiana Supreme Court's ruling in *Shelton*, and the subsequent amendment to the Habitual Offender Law, La. R.S. 15:529.1(D)(1)(b), a presumption of regularity is given to predicate convictions, and the defendant bears the burden of challenging a predicate conviction in multiple bill proceedings. The trial court was therefore entitled to assume from the guilty plea forms and minute entries that Defendant was properly advised of his *Boykin* rights. *See, Clesi*, 2007-

0564, pp. 2-3, 967 So.2d at 490 (the presumption of regularity means that the trial court could assume defendant received advice with respect to each of his *Boykin* rights until he proved otherwise); *State v. Buckley*, 2011-0369, p. 8 (La. App. 4 Cir. 12/27/11), 88 So.3d 482, 488 *writ denied*, 2012-0297 (La. 5/25/12), 90 So.3d 409 (stating that under the "presumption of regularity," the State need not specifically enumerate the rights waived in the absence of a contrary showing by the defendant). Further, the Fourth Circuit has held a docket master showing that the defendant was attended by counsel at the time his plea was entered, along with a properly executed waiver of rights/guilty plea form, is sufficient to carry the State's burden under La. R.S. 15:529.1. *State v. Weaver*, 1999-2177, p. 14 (La. App. 4 Cir. 12/6/00), 775 So.2d 613, 621. Defendant's argument in this regard has no merit.

Excessive Sentence

The Louisiana Supreme Court, in *State v. Smith,* 2001–2574, pp. 6–7 (La.1/14/03), 839 So.2d 1, 4, set forth the standard for evaluating a claim of excessive sentence:

> Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o *law* shall subject any person to ... *excessive* ... *punishment.*" (Emphasis added.) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. *State v. Sepulvado,* 367 So.2d 762, 767 (La.1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. *State v. Bonanno,* 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Cann,* 471 So.2d 701, 703 (La.1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad

> sentencing discretion**.** *State v. Walker,* 00–3200, p. 2 (La.10/12/01), 799 So.2d 461, 462, *cf. State v. Phillips,* 02–0737, p. 1 (La.11/15/02), 831 So.2d 905, 906.

Defendant was originally convicted of simple burglary, which, according to La .R.S. 14:62(B), is punishable by a maximum of twelve years imprisonment. However, based on the sentencing provisions in La. R.S. 15:529.1(A)(1)(c)(i), Defendant faced an enhanced sentencing exposure of twenty years to life imprisonment.[18] The twenty year sentence Defendant received was thus within the statutory range. Nevertheless, Defendant claims that the sentence is unconstitutionally excessive considering the fact that no damage was done to the vehicle; he is forty-seven years old; and his prior convictions were non-violent drug offenses, the last of which occurred seven years from the instant offense.

The standard for review of a claim that a mandatory sentence imposed under La. R.S. 15:529.1 is excessive is well-settled. Recently, this Court in *State v. Landfair*, 2010-1693, p. 17-18 (La. App. 4 Cir. 7/20/11), 70 So.3d 1061, 1072, outlined the reviewed the nature of the habitual felony offender sentencing scheme and the standard for departing from it:

> Even though a sentence under the Habitual Offender Law is the minimum provided by that statute, the sentence may still be unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime. *State v. Johnson*, 97–1906, pp. 6–7 (La.3/4/98), 709 So.2d 672, 677*; State*

[18] At the time Defendant committed the crime, La. R.S. 15:529.1(A)(1)(c)(i) set forth the applicable sentence for fourth felony offenders, as follows:

> (c) 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:
>
> (i) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life[.]

> *v. Dorthey,* 623 So.2d 1276, 1280–81 (La.1993). However, the entire Habitual Offender Law has been held constitutional, and, thus, the minimum sentences it imposes upon habitual offenders are also presumed to be constitutional. *Johnson*, 97–1906, pp. 5–6, 709 So.2d at 675; *see also State v. Young*, 94–1636, p. 5 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 527. There must be substantial evidence to rebut the presumption of constitutionality. *State v. Francis*, 96–2389, p. 7 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must show by clear and convincing evidence that he is exceptional, which in this context means that because of unusual circumstances he 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. *State v. Lindsey*, 99–3256, p. 5 (La.10/17/00), 770 So.2d 339, 343; *Johnson*, 97–1906, p. 8, 709 So.2d at 677. "Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." *Id*.

Id. (quoting *State v. Phillips*, 2010–0582, pp. 6-7 (La. App. 4 Cir. 2/17/11), 61 So.3d 130, 134-135 and *State v. Rice*, 2001–0215, p. 5–6, (La. App. 4 Cir. 1/16/02), 807 So.2d 350, 354).

In the present case, Defendant urged a downward deviation under *Dorthey* at the time of sentencing and argues on appeal that the twenty year sentence is unconstitutional. However, the record shows an adequate factual basis for the sentence imposed.

At the multiple bill hearing, the trial court heard arguments from the Defendant and the State. Defendant alleged that downward deviation of the statutory minimum was necessary because Defendant never had any violent offenses and the fact that his prior convictions were for simple possession of cocaine show that Defendant has an addiction and thus is not a violent person in nature. He also noted that he had already served a considerable amount of time

from his prior convictions[19] and since his original sentence of nine years was imposed in the instant case. Defendant further requested the trial court to consider a letter written from his sister at the hearing in attempt to show that the statutory minimum sentence of twenty years was unconstitutionally excessive as applied to him. The trial court allowed Defendant to place the letter into the record, but refused to read the letter or allow "testimony with regard to the *Dorthey* issue." Defendant includes the trial court's refusal to consider the letter as part of the trial court's error in imposing an excessive sentence. The State argued at the hearing, however, that sentencing Defendant pursuant to the habitual offender statute was warranted because in addition to the three prior convictions (1993, 1998, and 2001), he also had a fourth conviction for possession of cocaine in 1991, as well as thirty-one felony misdemeanor arrests in his criminal history. The trial court, apparently in its vast discretion, found that mitigating factors presented by Defendant, concerning his lack violence and drug addiction, were outweighed by Defendant's prior criminal conduct.

The record supports the trial court's sentence as Defendant has not shown by clear and convincing evidence that he is exceptional such that the trial court is required to deviate from sentencing standards set forth in La. R.S. 15:529.1. In addition to the prior convictions and numerous arrests noted by the State, the record shows that when Defendant was convicted in 1993, he was also adjudicated a second felony offender and that in the 2001 court proceedings Defendant could have been subject to yet another multiple offender status, but that the State elected not to file a multiple bill. Moreover, the record provides that Defendant was given

[19] The record provides that when Defendant pled guilty to possession of cocaine in 1993, he received two and a half years at hard labor, with credit for time served. For his 1998 conviction, Defendant was sentenced to fifteen months

drug treatment in lieu of imprisonment when he pled guilty to the possession charge in 2001, but it apparently failed to deter him from further criminal acts, such as the instant offense. Even taking the letter the trial court refused to consider into account, Defendant has not established exceptional circumstances to justify a downward departure from the mandatory minimum sentence. The letter presents the much of the same mitigating factors that the Defendant argued at the hearing. The letter states that Defendant is not a violent offender, but a drug addict and is now clean. The letter further provides that Defendant mild mannered and frequently takes care of his elderly mother. The letter also requests the trial court to sentence him to a drug rehabilitation center to get treatment for his addiction. However, the fact that Defendant's predicate convictions were drug related and non-violent is not sufficient to rebut the presumption of constitutionally. *State v. Lindsey*, 99–3256 (La.10/17/00), 770 So.2d 339 (the lack of violence cannot be the only reason, or even the main reason, for declaring such a sentence excessive); *State v. Harbor*, 01-1261, p. 7 (La. App. 5 Cir. 4/10/02), 817 So.2d 223, 227 (the mere allegation of being a non-violent habitual offender and a drug addict is not sufficient to find the mandatory minimum sentence excessive). This is because a repeat offender's propensity for violence is already factored into the sentencing scheme of the multiple offender statute. *State v. Dorsey*, 07-67, pp. 5-6 (La. App. 5 Cir. 5/29/07), 960 So.2d 1127, 1131 (citing *Lindsey*, 99-3302, p. 5, 770 So.2d at 343).

Although the underlying offense is arguably minor, Defendant is not receiving a twenty year sentence for simple burglary; he is being sentenced as a

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with credit for time served. The record also provides that when Defendant pled guilty to possession of cocaine, he was given credit for time served and enrolled in drug treatment program.

multiple offender and thus "the sentence in this case is to punish him for being a repeat offender." *State v. Jason*, 99–2551, p. 7 (La. App. 4 Cir. 12/6/00), 779 So.2d 865, 870; see also, *State v. Johnson*, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 677 (noting that the goals of the habitual offender statute are "to deter and punish recidivism"). Further, because the twenty year sentence is within the range statutorily provided by La. R.S. 15:529.1 for a fourth felony offender, it is not shocking to the sense of justice. Accordingly, the trial court did not abuse its broad discretion in imposing the mandatory minimum sentence of twenty years as fourth felony offender.

A review of the record indicates that there is sufficient evidence for a rational juror to conclude that Defendant committed simple burglary of a vehicle. Moreover, because the twenty year sentence is the mandatory minimum provided for in the habitual offender statute and because Defendant failed to show that he is an exception such that it would warrant a downward departure, the sentence imposed by the trial court is not unconstitutionally excessive. Accordingly, we hereby affirm Defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED