NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 KA 1970

STATE OF LOUISIANA

VERSUS

KEVIN MAYES

Judgment Rendered: September 20, 2006

* * * * * *

On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 382508

Honorable Donald M. Fendlason, Presiding

* * * * * *

Kathryn Landry Special Appeals Counsel Baton Rouge, La.	Counsel for Appellee State of Louisiana
Frederick Kroenke Louisiana Appellate Project Baton Rouge, La.	Counsel for Defendant/Appellant Kevin Mayes
Kevin Mayes Newellton, La.	Pro Se

* * * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

GUIDRY, J.

The defendant, Kevin Mayes, was charged by bill of information with possession of a Schedule I controlled dangerous substance with the intent to distribute (marijuana), a violation of La. R.S. 40:966(A)(1). The defendant, represented by counsel, pled not guilty. At a hearing on motions to suppress, the defendant sought to suppress the admission into evidence of the marijuana seized and of an incriminating statement the defendant made to one of the arresting officers. The motions were denied. The defendant objected to the trial court's rulings. Following a jury trial, the defendant was found guilty as charged. Several motions for new trial were filed, counseled and pro se, which were denied.

The defendant was adjudged a third felony habitual offender and sentenced to twenty-five (25) years imprisonment at hard labor without benefit of probation or suspension of sentence. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, asserting one counseled assignment of error and seven pro se assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On February 19, 2004, Detective James McIntosh with the St. Tammany Parish Sheriff's Office, Narcotics Task Force, along with other police officers from the Sheriff's Office and the Slidell Police Department, was executing a search warrant at a residence on Eden Street in Covington. Outside of the residence, Bennie Mayes, the brother of defendant, was found by the officers to be in possession of a marijuana cigarette. Bennie was arrested for possession of marijuana. Detective McIntosh knew that Bennie was on parole, so an attempt to contact Bennie's parole officer was made. Agent Scott Wilder, Bennie's parole officer, was out of town and could not respond to the scene. Agent Wilder asked Agent Mike Phelps, also a parole officer, to handle the situation. Agent Wilder

instructed Agent Phelps to drug screen Bennie and to conduct a residence check of Bennie's residence on Camellia Street, which was about three or four blocks away from Eden Street.

When Agent Phelps arrived at the scene on Eden Street, Bennie voluntarily submitted to a drug screen. Bennie tested positive for cocaine. Agent Phelps asked Bennie for permission to search his residence. Bennie consented to the search.

The Camellia Street neighborhood was dangerous and Agent Phelps did not want to conduct the search alone, so he asked several officers to accompany him. Agent Phelps, Detective Nick Powell, and Bennie rode in the lead vehicle, and Detective McIntosh, Detective Justice Gibson, and Detective Mark Liberto rode in the vehicle behind Agent Phelps.[1] As the officers were exiting their vehicles, they saw a man run into the residence. Agent Phelps and Detective McIntosh recognized the man as a parolee, who was later identified as Kenny Clark. Agent Phelps and Detective Powell chased Clark into Bennie's residence. They retrieved Clark from the bathroom, where the toilet had just been flushed. They escorted Clark outside. Agent Phelps went back inside, followed by Detectives McIntosh and Gibson, and asked Sonya Mayes, Bennie's sister, if anyone else was in the house. She responded there was not. Agent Phelps asked Sonya where Bennie's bedroom was, and he and Detective McIntosh went to search the bedroom.

At this time, Detectives Powell and Gibson performed a protective sweep of the residence. In the dimly lit house, they saw shadows moving in one of the rooms, where the door was slightly ajar. They opened the door and saw the defendant and a male teen-aged juvenile in the bedroom. Detective Gibson said, "Sheriff's Office, let me see your hands, show me your hands." The juvenile

[1] Detective Gibson testified at trial that both units were unmarked. However, Agent Phelps testified that the vehicle behind him was a marked unit.

complied, but the defendant spun around so that his back was facing the detectives. The defendant reached toward his waistband area with one of his hands. The officers could not identify what the defendant was reaching for. Detective Gibson drew his weapon and began shouting at the defendant to show his hands, but the defendant refused to show his hands or turn around. Alerted by the shouting, Agent Phelps and Detectives McIntosh and Liberto went to the bedroom where the defendant was. Still noncompliant, amidst the shouting of commands by the officers, the defendant reached for the window. Fearing the defendant could flee through the window, Detectives Powell and McIntosh grabbed the defendant. A violent struggle ensued. The defendant resisted and struck the officers. The defendant was finally subdued, handcuffed, and placed under arrest for battery of a police officer and resisting arrest. Detective McIntosh conducted a search incident to the arrest of the defendant's person and found eight bags of marijuana in the front pocket of his Starter jacket. The total amount of the marijuana weighed 21.13 grams.

COUNSELED ASSIGNMENT OF ERROR

In this assignment of error, the defendant argues that the trial court erred in denying his motions to suppress the evidence and statement. Specifically, the defendant contends that the warrantless search of parolee Bennie Mayes's residence was a subterfuge for criminal investigation.

A parolee has a reduced expectation of privacy, subjecting him to reasonable warrantless searches of his person and residence by his parole officer. The reduced expectation of privacy is a result of the parolee's conviction and agreement to report to a parole officer and to allow that officer to investigate his activities in order to confirm compliance with the provisions of his parole. A parole officer's powers, however, are not without some restraints. A parole officer may not use his authority as a subterfuge to help another police agency that desires to conduct a

search but lacks the necessary probable cause. The parole officer must believe that the search is necessary in the performance of his duties and reasonable in light of the total circumstances. In determining the reasonableness of a warrantless search of a parolee and his residence, the court must consider: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place it was conducted. State v. Hamilton, 2002-1344, pp. 3-4 (La. App. 1st Cir. 2/14/03), 845 So.2d 383, 387, writ denied, 2003-1095 (La. 4/30/04), 872 So.2d 480.

It is an appropriate function of a parole officer to conduct unannounced, random checks on parolees. A parolee agrees to submit to such unannounced visits from his parole officer as a condition of parole. While the decision to search must be based on something more than a mere hunch, probable cause is not required, and only a reasonable suspicion that criminal activity is occurring is necessary for a probation officer to conduct the warrantless search. The jurisprudence allows police officers to accompany parole officers in surprise searches. Hamilton, 2002-1344 at 4, & 6, 845 So.2d at 387-388.

One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search conducted pursuant to consent. When the state seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving the consent was given freely and voluntarily. State v. Owen, 453 So.2d 1202, 1206 (La. 1984). Consent is valid when it is freely and voluntarily given by a person who possesses common authority or other sufficient relationship to the premises or effects sought to be inspected. State v. Aucoin, 613 So.2d 206, 208 (La. App. 1st Cir. 1992). The determination of the voluntariness of the consent turns on the overall facts and circumstances of the particular case. The trial judge's factual determination on this issue is entitled to great weight on appellate review. State v. Franklin, 95-1876, p. 6 (La. 1/14/97), 686 So.2d 38, 41.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion.[2] State v. Long, 2003-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005). The trial court in the instant matter found that Bennie resided in a high crime area known for its drug activity when he tested positive for cocaine. Agent Phelps, who was working on behalf of Bennie's parole officer, obtained permission from Bennie to search his residence, which was a few blocks away, for other violations of his conditions of parole. Based on Bennie's parolee status, his consent to search his residence, and the fact that he was found to be in violation of his parole, the trial court found the subsequent search of his residence reasonable.

We agree with the trial court's ruling. We do not find the search of the residence to be a subterfuge for a police investigation. Nor do we find it unreasonable that Agent Phelps sought assistance from the Sheriff's Office or the Slidell Police Department given the dangers of confrontation. Agent Phelps's justification for initiating the search arose from the reasonable suspicion that Bennie was in further violation of his parole. This reasonable suspicion was based on the fact that Bennie had been caught by a police officer smoking marijuana and subsequently tested positive for cocaine. It was reasonable for Agent Phelps to conclude that more illegal drugs may be found at Bennie's residence. The search offends neither the Fourth Amendment of the United States Constitution nor La. Const. art. I, § 5. See Hamilton, 2002-1344 at pp. 6-7, 845 So.2d at 388-389.

While the trial court was correct in its finding that the search of Bennie's residence by Agent Phelps was reasonable, we note that the defendant was

[2] In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. State v. Chopin, 372 So.2d 1222, 1223 n.2 (La. 1979).

discovered, not during a search for contraband or weapons pursuant to consent, but during a protective sweep for security reasons conducted by Detectives Powell and Gibson. It is the defendant's contention that Detectives Powell's and Gibson's search of the rest of the house beyond the search by Phelps consented to by Bennie was unreasonable because *only* Agent Phelps was given consent to search, not the other police officers who discovered the defendant in another room in the house. Thus, while we agree with the trial court's ruling that Agent Phelps had the right to enter Bennie's house and search his bedroom[3] pursuant to both his consent and his diminished expectation of privacy, as a parolee, we address separately the issue of the reasonableness of the protective sweep.

A protective sweep is a quick and limited search of a premises incident to an arrest and conducted to protect the safety of police officers and others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. Maryland v. Buie, 494 U.S. 325, 335-337, 110 S.Ct. 1093, 1099-1100, 108 L.Ed.2d 276 (1990).

In upholding a police officer's ability to conduct a protective sweep, the Louisiana Supreme Court in State v. Guiden, 399 So.2d 194, 199 (La. 1981), cert. denied, 454 U.S. 1150, 102 S.Ct. 1017, 71 L.Ed.2d 305 (1982), quoting United States v. Agapito, 620 F.2d 324, 336 (2nd Cir.), cert. denied, 449 U.S. 834, 101 S.Ct. 107, 66 L.Ed.2d 40 (1980), stated the following:

> The reasonableness of a security check is simple and straightforward. From the standpoint of the individual, the intrusion on his privacy is slight; the search is cursory in nature and is intended to uncover only "persons, not things." United States v. Bowdach, 561 F.2d 1160, 1168 (5 Cir. 1977). Once the security check has been completed and the premises secured, no further search - be it extended or limited - is

[3] Agent Phelps testified at the hearing on the motions to suppress and at the trial that he had consent to search Bennie's residence. Bennie testified at trial that he gave consent to search his bedroom. Whether Phelps had consent to search the entire house or only the bedroom does not change the analysis with respect to the protective sweep. A sweep is not a search for things, but for people, and it was Detective Gibson's testimony that he and Detective Powell conducted a sweep of the house for safety reasons. The detectives' protective sweep, or search for persons, therefore, was not a search for evidence of criminality.

> permitted until a warrant is obtained. From the standpoint of the public, its interest in a security check is weighty. The delay attendant upon obtaining a warrant could enable accomplices lurking in another room to destroy evidence. More important, the safety of the arresting officers or members of the public may be jeopardized. Weighing the public interest against the modest intrusion on the privacy of the individual, Pennsylvania v. Mimms, 434 U.S. 106, 108-09, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977); Terry v. Ohio, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968), a security check conducted under the circumstances stated above satisfies the reasonableness requirement of the Fourth Amendment.

An arrest is not always, or *per se*, an indispensable element of an in-home protective sweep. Although an arrest may be highly relevant, particularly as tending to show the requisite potential of danger to the officers, that danger may also be established by other circumstances. United States v. Gould, 364 F.3d 578, 584 (5th Cir.) (en banc), cert. denied, 543 U.S. 955, 125 S.Ct. 437, 160 L.Ed.2d 317 (2004). In fact, "the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected[.]" Michigan v. Long, 463 U.S. 1032, 1052, 103 S.Ct. 3469, 3482, 77 L.Ed.2d 1201 (1983).

Applying these principles to the instant matter, we find that the protective sweep conducted by Detectives Gibson and Powell satisfies the reasonableness requirement of the Fourth Amendment. The officers were in a high crime area. The area was well known by officers as a place involving drug activity and other criminality. Just prior to the search of his residence, Bennie, a parolee, was arrested for possession of marijuana and tested positive for cocaine. When Agent Phelps and the other officers drove up to Bennie's residence, it was about 8:00 p.m. As they were exiting their vehicles, they saw a man, recognized by some of the officers as a known parolee, and later identified as Kenny Clark, run into Bennie's residence. Agent Phelps and Detective Powell pursued Clark and when they found him, Clark was coming out of the bathroom after having just flushed the toilet. While Detective Powell took Clark, who was not arrested, outside, Agent Phelps asked Sonya, who also lived at the residence, where Bennie's room

was. Agent Phelps also asked Sonya if there was anyone else in the house, to which she replied there was not. As Agent Phelps began searching Bennie's room, Detectives Gibson and Powell conducted a protective sweep of the residence and found the defendant in another bedroom.

Under these circumstances, we feel the protective sweep was clearly reasonable. Given the nighttime search of a residence in a high crime area, the fact that the residence to be searched belonged to a parolee who had just violated his parole through drug use, and the furtive, suspicious behavior of Clark, Detectives Gibson and Powell could reasonably have believed that the areas they swept could have harbored an individual posing a danger to those on the arrest scene, or attempting to destroy evidence. See Buie, 494 U.S. at 337, 110 S.Ct. at 1100; Guiden, 399 So.2d at 199.

We find no abuse of discretion by the trial court in denying the defendant's motions to suppress.[4] The assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 1

In his first pro se assignment of error, the defendant argues the trial court erred because the "prosecution" refused to give jury instructions on entrapment.

Erroneous instructions or failure to give jury instructions are not errors patent, and absent an objection during the trial, a defendant may not complain on

[4] The trial court denied both a motion to suppress the evidence and a motion to suppress the defendant's statement. According to the testimony of Detective Liberto at the motion to suppress the statement, as Detective Liberto was transporting the defendant from the hospital (the defendant was injured in his altercation with the police) to the parish jail, the defendant told him, "I'm sorry for fighting you all, the reason I did, I was scared, because I had dope in my pocket." In his counseled brief, the defendant states in his assignment of error that the "trial court erred in not granting the motions to suppress the evidence and statements (sic)" of the defendant. However, the entirety of the defendant's argument is directed toward the motion to suppress the evidence. There is no argument made regarding the trial court's denial of the defendant's motion to suppress his statement that he made to a police officer. In the "Conclusion" of his counseled brief, the defendant states that the search by the other officers to locate drugs and persons "was unreasonable and the fruits of that unreasonable search should have been suppressed." Accepting this statement as the thinnest of arguments, so as to preclude our finding that the non-briefed issue is considered abandoned, we find that since the search was reasonable, all fruits of that search, including the statements by the defendant after being *Mirandized*, were not violative of the Fourth or Fifth Amendment and were, therefore, admissible as evidence.

appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. See State v. Tipton, 95-2483, p. 7 (La. App. 1 Cir. 12/29/97), 705 So.2d 1142, 1147; see also La. C.Cr.P. arts. 801(C), 841, & 920(2). In the present case, the record does not reflect that defendant made a contemporaneous objection to the jury charges on the basis of the alleged failures now asserted in this assignment of error. Accordingly, the issue raised in this assignment of error is not properly preserved for appellate review. State v. Dilosa, 2001-0024, p. 17 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 671, writ denied, 2003-1601 (La. 12/12/03), 860 So.2d 1153.[5]

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 2

In his second pro se assignment of error, the defendant argues the prosecution refused to disclose all favorable *Brady* material to him. Specifically, the defendant contends that several of the detectives at the arrest scene, as well as parole officers Agents Phelps and Wilder, have had numerous complaints filed against them for malicious and unprofessional conduct, and that the trial court knew of these internal investigations, but refused to present this favorable evidence to the defense.

Upon request, the prosecution must disclose any evidence favorable to the defendant, if such evidence is material to the issue of guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963). While the defendant claims the State failed to provide this alleged exculpatory

[5] We also note that the trial court, not the prosecutor, gives jury instructions. Furthermore, nothing in the facts of this case even resembles the affirmative defense of entrapment, which applies when a law enforcement official or an undercover agent acting in cooperation with such an official originates the idea of the crime and induces another person to engage in conduct constituting the crime, when the other person is not otherwise disposed to do so. See State v. Alpaugh, 568 So.2d 1379, 1386 (La. App. 1st Cir. 1990), writ denied, 572 So.2d 65 (La. 1991). A jury instruction of entrapment at trial of the matter would have been inappropriate.

evidence, he did not raise this issue at any time during the trial of the matter.[6] Thus, the existing record contains no facts or documentary evidence in support of the defendant's assertions. As an appellate court, this court has no authority to receive or review evidence not contained in the trial court record. See State v. Johnson, 529 So.2d 466, 474 n.4 (La. App. 1st Cir. 1988), writ denied, 536 So.2d 1233 (La. 1989). If the defendant seeks to prove his allegations that the State failed to provide him with exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, his proper remedy is by post-conviction relief, wherein an evidentiary hearing could be conducted if necessary.[7] See State v. Walter, 542 So.2d 586, 590 (La. App. 1st Cir.), writ denied, 546 So.2d 1222 (La. 1989). See also State v. Trahan, 93-1116, pp. 27-28 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 709.

This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR NO. 3

In his third pro se assignment of error, the defendant argues the trial court erred when, without objection by the prosecutor, it struck testimony during examination of Detective McIntosh after he was called back to the stand and examined, pro se, by the defendant.

The crux of the defendant's contention is that Detective McIntosh gave false testimony and the prosecutor should have objected to this testimony. The defendant contends that Detective McIntosh was "the mastermind behind covering the subterfuge about where he had found the marijuana." According to the defendant, Detective McIntosh testified that "he had found the marijuana on the

[6] Sentencing was May 13, 2005. Seven months after the guilty verdict, but prior to sentencing, the defendant filed a pro se motion for new trial, which raised the *Brady* material issue. At a hearing on April 21, 2005, the defendant, in arguing his motion for new trial, raised the issue of ineffective assistance of counsel, but did not raise the issue of *Brady* material. The trial court denied the motion.

[7] The defendant would have to satisfy the requirements of La. C.Cr.P. art. 924, et seq., in order to receive such a hearing.

floor," and that this testimony contradicted everything he had written in his police report. The trial court then abused its discretion when it "had stricken the testimony from the record after noticing the District Attorney would not object."

This assertion is baseless. During the defendant's cross-examination of Detective McIntosh, the defendant drew out a minor inconsistency between Detective McIntosh's testimony and his police report. Detective McIntosh had earlier testified that he retrieved the marijuana from the defendant while the defendant was on the floor. After reviewing his police report and refreshing his memory, Detective McIntosh corrected himself and testified that he retrieved the marijuana from the defendant after he stood up. Contrary to the defendant's assertion, the prosecutor was under no duty to object to any of this testimony.

Following the extensive, repetitive, irrelevant questioning of Detective McIntosh by the defendant, the trial court noted the following:

> I have listened very carefully to the questions put to those witnesses and there has been no new material or relevant evidence brought forth that was not brought forth on cross-examination by the defendant through his attorney on the State's case-in-chief.

The trial court then terminated any more questioning of law enforcement witnesses who were previously called.[8] The trial court asked the prosecutor if he needed to ask Detective McIntosh any questions on cross-examination. The prosecutor stated he did not.

We find no abuse of discretion in the trial court's ruling. The defendant was not denied the right of confrontation and effective cross-examination, as he was able to question the witness fully on what had transpired with regard to his arrest and the discovery of the marijuana on his person. The trial court limited cross-examination only when it became repetitious and of little probative value. See

[8] At no time did the trial court have testimony from the record stricken.

State v. Parker, 536 So.2d 459, 462 (La. App. 1st Cir. 1988), writ denied, 584 So.2d 670 (La. 1991).

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 4

In his fourth pro se assignment of error, the defendant argues the trial court erred in not allowing him to cross-examine, pro se, Agent Wilder, his parole officer. Specifically, the defendant contends that alleged statements made by Agent Wilder "were a total contradiction" to what Agent Phelps had testified to.

Agent Wilder did not testify at the motion to suppress or the trial, nor was he present at the scene during the defendant's arrest. According to the defendant, Agent Wilder told Bennie that he did not inquire with Agent Phelps about the drug screening or the residence check. Also, Agent Wilder allegedly stated that Agent Phelps and the police officers "took it among themselves to commit such a horrendous intrusion of Bennie [Mayes's] home with all those little children in there."

These assertions by the defendant are raised for the first time on appeal. When the defendant informed the trial court during the trial that he wished to call about nineteen witnesses, most of whom were never subpoenaed, the trial court made a ruling on each witness, determining whether certain testimony would be allowed. When the defendant wanted to call Agent Wilder, the trial court asked the defendant what the essence of his testimony would be. The defendant stated:

> Well, he said that he is my parole officer, he stated on the record that I am, that's the reason I have a hold on me, but Mike Phelps said yesterday that I am off parole. So, I would like to know, where is he at, I haven't met this guy and he is supposed to be my parole officer.

In ruling against the testimony being allowed, the trial court stated:

> The Court for the reasons previously set forth in Articles (sic) 104 and Article 401 determines that witness's testimony would be (sic) bring nothing to this matter that would be relevant and would be, in

> fact, grossly irrelevant. Whether you are on probation or not, sir, has no bearing on the elements of the offense to which you stand being tried for here today.

A witness may be cross-examined on any matter relevant to any issue in the case. La. C.E. art. 611(B). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." La. C.E. art. 401. All relevant evidence is generally admissible. La. C.E. art. 402. The trial court has considerable discretion in determining the relevancy of evidence. The ruling will not be disturbed absent an abuse of discretion.

Upon reviewing the record, we find the trial court did not abuse its discretion in ruling that Agent Wilder's testimony would have been irrelevant, and therefore inadmissible. The defendant has failed to show how any alleged statements made by Agent Wilder would have, in any way, affected the place or manner of his arrest. Even if we were to find error in the trial court's ruling as to the admissibility of this testimony, it is clear that the impact of the excluded testimony would have been minimal and that exclusion of the evidence was harmless beyond a reasonable doubt. See State v. James, 2002-2079, pp. 12-13 (La. App. 1st Cir. 5/9/03), 849 So.2d 574, 584; see also La. C.Cr.P. art. 921.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 5

In his fifth pro se assignment of error, the defendant argues the trial court erred in not allowing him to examine, pro se, certain witnesses, namely Lieutenant Wayne Wicker, Deputy Donald Burris, Gaynell Perry, Diane Penn, and Sean Harrell.

As discussed in the fourth pro se assignment of error, defendant informed the trial court during the trial that he wished to call about nineteen witnesses, most

of whom were never subpoenaed. These four witnesses were part of that list.[9] The trial court made a ruling on each witness, determining whether certain testimony would be allowed.

The defendant informed the trial court that Perry would testify that she was at the scene when the defendant was being placed on the stretcher. Relying on La. C.E. arts. 104, 401, and 402, the trial court found that testimony regarding the defendant's physical condition following the altercation would be irrelevant and cumulative, as his condition was adequately testified to by both his sisters and by police officers.

The defendant informed the trial court that Penn "took pictures of the condition and everything that took place." Based on its previous ruling with regard to Perry, the trial court found that this testimony would be irrelevant.

Defense counsel informed the trial court that Deputy Burris would testify that the defendant was in pain and that the police officers at the scene would not call the ambulance and that he (Deputy Burris) was the one who called the ambulance. Defense counsel further informed the trial court that Lieutenant Wicker was, according to the defendant, at the house during the arrest and with the defendant when he was booked. Also, Lieutenant Wicker "had handed papers about Mr. Mayes to Captain Mogino (phonetic) of the Sheriff's Office at the jail." Defense counsel informed the trial court that these names were in the defendant's civil lawsuit. The trial court ruled that the requests to examine these witnesses, having never been given to defense counsel by the defendant so that they could be subpoenaed for the present criminal trial, was a dilatory tactic by the defendant. The trial court denied the requests.

---

[9] While Harrell is listed in the defendant's brief, he was not mentioned to the trial court as a witness who the defendant wanted to call and examine. There was no ruling, therefore, by the trial court as to the admissibility of the testimony of Harrell. Since no objection was made to preserve the issue for appellate review, the issue is not properly before us. See La. C.Cr.P. art. 841; La. C.E. art. 103(A)(2).

Louisiana Code of Evidence article 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Furthermore, all relevant evidence is admissible unless otherwise constitutionally prohibited. Evidence which is not relevant is not admissible. La. C.E. art. 402. The trial court has considerable discretion in determining the relevancy of evidence. The ruling will not be disturbed absent an abuse of discretion. James, 2002-2079 at 13, 849 So.2d at 584.

After a thorough review of the record, we find no reason to disturb the trial court's rulings regarding the relevancy of the testimony of these witnesses. Moreover, even if we were to find error in the trial court's rulings as to the admissibility of this testimony, it is clear that the impact of the excluded testimony would have been minimal and that exclusion of the evidence was harmless beyond a reasonable doubt. See James, 2002-2079 at 13, 849 So.2d at 584; see also La. C.Cr.P. art. 921.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 6

In his sixth pro se assignment of error, the defendant argues that the trial court erred in not hearing, and ultimately denying, his application for mandatory release. Specifically, the defendant contends that he was not afforded a hearing for a probable cause determination, and he was not brought before the court for appointment of counsel following his arrest pursuant to La. C.Cr.P. art. 230.1.

A conviction renders the question of probable cause moot in the absence of specific prejudice, which has not been shown by the defendant. See State v. Washington, 363 So.2d 509, 510 (La. 1978). The defendant's argument regarding appointment of counsel is also baseless. Subsection D of La. C.Cr.P. art. 230.1 states, "[t]he failure of the sheriff or law enforcement officer to comply with the

requirements herein shall have no effect whatsoever upon the validity of the proceedings thereafter against the defendant." See State v. Guzman, 362 So.2d 744, 750 (La. 1978), cert. denied, 443 U.S. 912, 99 S.Ct. 3103, 61 L.Ed.2d 876 (1979).

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 7

In his seventh pro se assignment of error, the defendant avers the trial court erred in imposing an excessive sentence.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing a sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. Although a sentence falls within statutory limits, it may be excessive. State v. Sepulvado, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. State v. Andrews, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See State v. Holts, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). The trial court should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. State v. Jones, 398 So.2d 1049, 1051-1052 (La. 1981).

At sentencing, the trial court considered the provisions under Article 894.1 and found that the defendant's record indicated that, under a suspended sentence, he would likely commit another crime, a lesser sentence would deprecate the seriousness of the defendant's crime, and the defendant was in need of correctional treatment.

The defendant, having been adjudicated a third felony habitual offender, faced a sentencing range of twenty to sixty years. See La. R.S. 15:529.1(A)(1)(b)(i); 40:966(B)(3). The trial court sentenced the defendant to twenty-five years at hard labor. Thus, the twenty-five-year sentence imposed by the trial court was not only well within the statutory sentencing range, but was at the much lower end of a range that allowed for a sixty-year sentence.

In view of its careful consideration of the circumstances of the offense and the defendant's criminal history, we find no manifest abuse of discretion by the court in imposing a twenty-five-year sentence. The sentence is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.