NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1419

STATE OF LOUISIANA

VERSUS

THOMAS JOSEPH SCHMOLKE

Judgment rendered February 9, 2007.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 385084
Honorable William J. Burris, Judge

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THOMAS JOSEPH SCHMOLKE

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

PETTIGREW, J.

The defendant, Thomas J. Schmolke, was charged by bill of information with one count of theft (wherein the value of the property misappropriated or taken was over $500) (count I), a violation of La. R.S. 14:67; and one count of attempted theft (wherein the value of the property attempted to be misappropriated or taken was over $500) (count II), a violation of La. R.S. 14:27 and 14:67. He pled not guilty on both counts. Following a jury trial, he was found guilty as charged on both counts. He moved for a new trial and for a post-verdict judgment of acquittal, but the motions were denied. Thereafter, the State filed a habitual offender bill of information against the defendant alleging, in regard to count I, he was a fourth or subsequent felony habitual offender.[1] Following a hearing, in regard to count I, he was adjudged a fourth or subsequent felony habitual offender. On count I, he was sentenced to life imprisonment at hard labor without the benefit of probation or suspension of sentence.[2] On count II, he was sentenced to one year in the parish jail to be served concurrently with the sentence imposed on count I. He moved for reconsideration of the sentence imposed on count I, but the motion was denied. He now appeals, designating two counseled and two pro se assignments of error. We affirm the convictions, the habitual offender adjudication, and the sentences.

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[1] Predicate #1 was set forth as the defendant's June 15, 1994 guilty plea, under Twenty-second Judicial District Court Docket #226568, to simple burglary. Predicate #2 was set forth as the defendant's October 17, 1996 guilty plea, under Twenty-second Judicial District Court Docket #239250, to indecent behavior with a juvenile. Predicate #3 was set forth as the defendant's October 17, 1996 guilty plea, under Twenty-second Judicial District Court Docket #244317, to simple burglary. Predicate #4 was set forth as the defendant's October 17, 1996 guilty plea, under Twenty-second Judicial District Court Docket #260645, to simple burglary. Predicate #5 was set forth as the defendant's October 17, 1996 guilty plea, under Twenty-second Judicial District Court Docket #260647, to simple burglary. Predicate #6 was set forth as the defendant's March 3, 1997 guilty plea, under Twenty-second Judicial District Court Docket #260648, to simple burglary.

[2] The minutes of the habitual offender hearing indicate, on count I, the defendant was sentenced to "LIFE imprisonment with the Department of Public Safety and Corrections of the State of Louisiana without benefit of parole, probation, or suspension of sentence." The transcript of the habitual offender hearing, however, indicates, on count I, the defendant was sentenced to life imprisonment at hard labor without benefit of probation or suspension of sentence. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

ASSIGNMENTS OF ERROR

Counseled

1. The [defendant] was denied his constitutional right to conflict free counsel and the trial court failed in its duty to inquire into the conflict of interest and to safeguard the [defendant's] constitutional right to conflict free counsel.

2. The trial court erred in imposing a sentence herein which is unconstitutionally excessive.

Pro se

1. Defendant's trial counsel ... had a conflict of interest to represent both the defendant herein, and his co-defendant.

2. There was insufficient evidence at trial to sustain a conviction.

FACTS

Poole Lumber Company (Poole) operated with a sales area and a warehouse behind the sales area. In October 2003, Poole hired the defendant to work in the warehouse. At the time of the offenses, the system for returning purchased items to Poole involved the customer taking the materials to be returned to the warehouse portion of the business and obtaining a "return goods material slip." The return goods material slip indicated the type and quantity of goods returned and was signed by any of the three workers in the warehouse. The customer could present the signed return goods material slip at the sales area and receive a cash refund of up to $500.00. Refunds over $500.00 had to be mailed to customers.

Mike Manguno, Poole's General Manager, reviewed all documents concerning cash refunds given by Poole. He became suspicious of the relatively large number of refunds given to Katrina Currier. The inventory records did not support the alleged returns. Further, Manguno did not recognize the signature of the worker allegedly receiving materials back from Katrina. Also, on a May 6, 2004 refund, Manguno noticed Katrina's last name was different.

Manguno indicated that on April 9, 2004, Katrina was refunded $145.20 for materials allegedly returned to Poole. The return goods material slip was initialed by "TS," and the defendant was working in the warehouse at the time of the alleged return. On April 17, 2004, Katrina was refunded $325.19 for materials allegedly returned to

Poole. The initials on the return goods material slip were illegible, but Manguno indicated the handwriting at the top of the receipt looked almost exactly like the other papers signed by the defendant. The defendant was working in the warehouse at the time of the alleged return. The customer telephone number provided by Katrina in regard to that return belonged to Cleve Allison. Manguno telephoned Allison and learned Allison had not returned any materials. On April 20, 2004, Katrina was refunded $113.54 for materials allegedly returned to Poole. The return goods material slip was initialed by "TS," and the defendant was working in the warehouse at the time of the alleged return. On April 27, 2004, Janet Beasley requested a refund of $651.85 for materials allegedly returned to Poole. When asked to provide a name and address for mailing of the refund, Beasley provided Poole with a name and address that did not exist. The defendant was working in the warehouse at the time of the alleged return. On May 6, 2004, "Katrina Maguteo" was refunded $164.68 for materials allegedly returned to Poole. The return goods material slip was signed by "Patt." A person named "Pat" did work at Poole, but he did not work in the warehouse and did not spell his name with a double "t." The defendant was working in the warehouse at the time of the alleged return.

By May 11, 2004, Manguno had alerted the sales clerks to inform him the next time Katrina came into the store or to write down the license plate number of her vehicle. On that date, Katrina made a purchase at Poole, and Manguno was provided with the license plate number of her vehicle. The defendant left for lunch on May 11, 2004, and never returned to Poole. Thereafter, Manguno checked the defendant's list of emergency contacts and saw that "Katrina Cariare" was listed on the form. Manguno alerted the police to the offenses.

St. Tammany Parish Sheriff's Office Detective Roy Chadwick Hartzog investigated the offenses at Poole. On June 14, 2004, he questioned the defendant concerning his involvement in the offenses. The defendant was nervous, but denied any participation in the offenses. After Detective Hartzog showed the defendant the documents provided by Manguno, the defendant confessed, orally and in writing, to participating in one of the fraudulent returns at Poole. After Detective Hartzog pointed out the similar signatures on

the return goods material slips and inconsistencies in the defendant's version of his involvement, the defendant confessed, orally and in writing, to participating in five fraudulent returns at Poole. In his written confession, the defendant stated:

> I did 5 returns at [P]oole[.] It was my idea to do it[.] I got some of the money and she kept the rest[.] [N]o one eles (sic) was involved exept (sic) me and Katrina[.] I'm very sorry for doing it and would like to repay the money.

On July 9, 2004, Detective Hartzog questioned Katrina concerning the offenses at Poole. Katrina confessed in writing to participating in the fraudulent returns involving $145.20 (4/9/04), $325.19 (4/17/04), $113.54 (4/20/04), and $164.68 (5/6/04) and indicated the "scam was thought out by Thomas."

On July 12, 2004, the defendant advised Detective Hartzog that the defendant's sister, Janet Beasley, had been involved in the failed attempt to obtain a fraudulent refund from Poole.

Katrina also testified at trial. In reference to the fraudulent returns of April 9, 2004, April 17, 2004, April 20, 2004, and May 6, 2004, she indicated the defendant had given her a ticket listing items that were supposedly returned and instructed her to take the ticket to the counter and to tell the person at the counter the number at the top of the ticket. Katrina indicated she gave the money she obtained from Poole either to the defendant or Amber, his girlfriend.

SUFFICIENCY OF THE EVIDENCE

In pro se assignment of error number two, the defendant argues: the State failed to produce expert testimony to establish that the defendant's handwriting appeared on the alleged fraudulent return tickets; except for illegally compelled statements, there was no proof of any kind that merchandise was not returned in exchange for refunds; and the State's whole case rested upon confessions that were coerced by the police.

Theft is the misappropriation or taking of anything of value that 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. La. R.S. 14:67(A).

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. La. R.S. 14:27(A).

Once the crime itself has been established, a confession alone may be used to identify the accused as the perpetrator. **State v. Carter**, 521 So.2d 553, 555 (La. App. 1 Cir. 1988).

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. La. Code Crim. P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 provides that, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." However, La. R.S. 15:438 does not establish a stricter standard of review on appeal than the rational trier of fact reasonable doubt standard. The statute serves as a guide for the trier of fact when considering circumstantial evidence. The **Jackson** standard of review is an objective standard for testing all the evidence, both direct and circumstantial, for reasonable doubt. The reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. It is not the function of an appellate court to assess credibility or reweigh the evidence. **State v. Bean**, 2004-1527, pp. 5-6 (La. App. 1 Cir. 3/24/05), 899 So.2d 702, 706, writ denied, 2005-1106 (La. 11/3/06), 940 So.2d 652.

Theft is a specific intent crime. Specific 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 of a transaction and from the actions of the accused. Further, specific intent is a legal conclusion to be resolved by the fact finder. **Bean**, 2004-1527 at 7, 899 So.2d at 707.

After a thorough review of the record, we are convinced the evidence presented herein, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of count I and count II and the defendant's identity as a perpetrator of those offenses. The defendant's confessions established his identity as a perpetrator of the offenses independently of any testimony concerning his handwriting. The defendant's confessions, Katrina's confession and testimony, and Manguno's testimony all established that merchandise was not returned in exchange for the refunds. Additionally, the defendant's confessions were corroborated by the confession and testimony of Katrina, as well as by circumstantial evidence concerning the defendant's initials or handwriting appearing on many of the return goods material slips, the defendant's presence at the warehouse at the time of the alleged fraudulent returns, the defendant having listed Katrina as one of his emergency contacts, and the defendant failing to return to Poole without explanation after employees of Poole wrote down Katrina's vehicle license plate number. In regard to the defendant's claim that his confessions were coerced, we note the defendant's motion to suppress his confessions was denied following a hearing, and he has not challenged that ruling on appeal. This assignment of error is without merit.

ATTORNEY CONFLICT OF INTEREST

In counseled and pro se assignment of error number one, the defendant argues that the same counsel who represented Katrina also represented him, and an actual conflict of interest adversely affected the performance of that counsel. The defendant claims effective representation would have involved placing the blame for the thefts on Katrina and arguing the defendant was innocent. The defendant also argues the trial court failed in its duty to advise Katrina and the defendant of the conflict of interest and to provide the defendant with the opportunity to receive conflict-free counsel.

In **Holloway v. Arkansas**, 435 U.S. 475, 476-77, 98 S.Ct. 1173, 1175, 55 L.Ed.2d 426 (1978), prior to trial, defense counsel moved for the appointment of separate counsel for each of the three defendants on the basis of conflict of interest. Following a hearing, the motion was denied. **Holloway**, 435 U.S. at 477, 98 S.Ct. at 1175. Prior to the empanelling of the jury, the motion was renewed, but was again denied. **Holloway**, 435 U.S. at 478, 98 S.Ct. at 1175. At trial, the court refused to permit defense counsel to cross-examine any of the defendants on behalf of the other defendants. **Holloway**, 435 U.S. at 479, 98 S.Ct. at 1176. The United States Supreme Court in **Holloway** reversed the defendants' convictions, holding, "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." **Holloway**, 435 U.S. at 488, 98 S.Ct. at 1181. **Holloway** creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. **Mickens v. Taylor**, 535 U.S. 162, 168, 122 S.Ct. 1237, 1241-42, 152 L.Ed.2d 291 (2002).

In **Cuyler v. Sullivan**, 446 U.S. 335, 337-38, 100 S.Ct. 1708, 1712-13, 64 L.Ed.2d 333 (1980), no objection was made against multiple representation of three defendants until post-conviction. The defendants were tried separately, represented by the same attorneys. **Cuyler**, 446 U.S. at 337-38, 100 S.Ct. at 1712-13. Sullivan was tried first and convicted without his defense presenting any evidence. **Cuyler**, 446 U.S. at 338, 100 S.Ct at 1712. The other defendants were acquitted in their trials. **Cuyler**, 446 U.S. at 338, 100 S.Ct. at 1713. In a post-conviction hearing, one of the defense attorneys testified he remembered he had been concerned about exposing defense witnesses for the other trials. **Cuyler**, 446 U.S. at 338-39, 100 S.Ct. at 1713.

The Third Circuit Court of Appeal reversed Sullivan's conviction, holding a defendant was entitled to reversal of his conviction whenever he makes some showing of a possible conflict of interest or prejudice, however remote. **United States ex rel. Sullivan v. Cuyler**, 593 F.2d 512, 519-20 (3d Cir. 1979).

Thereafter, the United States Supreme Court vacated the decision of the Third Circuit, holding, "the possibility of conflict is insufficient to impugn a criminal conviction.

In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." **Cuyler**, 446 U.S. at 350, 100 S.Ct. at 1719.

The court in **Cuyler** additionally held that unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry into the propriety of a multiple representation. **Cuyler**, 446 U.S. at 347, 100 S.Ct. at 1717. Even where an actual conflict of interest exists and the trial judge fails to make a **Cuyler/Sullivan** inquiry, reversal is not automatic absent a showing that the conflict adversely affected the adequacy of counsel's performance. See **Mickens**, 535 U.S. at 171-74, 122 S.Ct. at 1243-45.

The time at which a concern over the effects of multiple representation was raised determines whether the rule of **Holloway** or the rule of **Sullivan** applies. When a defendant raises a *pre-trial* objection because of a possible conflict of interest, **Holloway** requires the trial court to appoint separate counsel or take adequate steps to determine if the claimed risk is too remote. Failure to take either action warrants automatic reversal, even in the absence of specific prejudice. However, should the objection to multiple representation be made *after* trial, **Sullivan** is controlling and the defendant must show actual prejudice in support of his claim. **State v. Marshall**, 414 So.2d 684, 687-88 (La.), cert. denied, 459 U.S. 1048, 103 S.Ct. 468, 74 L.Ed.2d 617 (1982).

The instant assignment of error is the first objection against multiple representation in this case. Thus, the defendant must show actual prejudice in support of his claim.

Louisiana Code of Criminal Procedure article 517 provides:

> A. Whenever two or more defendants have been jointly charged in a single indictment or have moved to consolidate their indictments for a joint trial, and are represented by the same retained or appointed counsel or by retained or appointed counsel who are associated in the practice of law, the court shall inquire with respect to such joint representation and shall advise each defendant on the record of his right to separate representation.

> B. Unless it appears that there is good cause to believe that no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Article 517 is a procedural vehicle to lessen the possibility that after conviction a jointly represented defendant will assert a claim that his counsel was not conflict-free and thus was ineffective. Accordingly, the failure of the trial court to inquire into the joint representation on the record does not rise to the level of a denial of a constitutional right and is subject to a harmless error review. **State v. Miller**, 2000-0218, p. 14 (La. App. 4 Cir. 7/25/01), 792 So.2d 104, 114-15, writ denied, 2001-2420 (La. 6/21/02), 818 So.2d 791.

In the instant case, the record indicates no actual conflict of interest by counsel. Defense counsel's representation of Katrina was completed prior to the trial of the defendant. At the time of the defendant's trial, no charges under the bill charging the defendant were pending against Katrina, and she had been sentenced for her part in the offenses. She indicated her guilty plea was not connected to any agreement to testify against the defendant.

Further, Katrina's testimony was not the strongest evidence of the defendant's guilt. The State presented the defendant's handwritten confessions to the offenses, as well as Detective Hartzog's testimony concerning the defendant's oral confessions. Additionally, many of the return goods material slips had the defendant's initials on them.

In any event, the defendant fails to show actual prejudice from the alleged conflict of interest. He fails to suggest any plausible alternative defense he might have employed with separate counsel. These assignments of error are without merit.

EXCESSIVE SENTENCE

In counseled assignment of error number two, the defendant argues the sentence imposed on count I was excessive because he is not the worst criminal to violate the "simple theft" statute, and the offenses were not the worst incidents of "simple theft." The defendant does not challenge the sentence imposed on count II.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court

need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Hurst**, 99-2868, p. 10 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition 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 is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **Hurst**, 99-2868 at 10-11, 797 So.2d at 83.

The statutory sentencing range applicable on count I was a determinate term not less than twenty years and not more than natural life without the benefit of probation or suspension of sentence. La. R.S. 15:529.1(A)(1)(c)(i) & 15:529.1(G). The defendant was sentenced to life imprisonment at hard labor without the benefit of probation or suspension of sentence.

At sentencing, the trial court indicated the presentence investigation report (PSI) reflected the defendant had been engaged in a life of crime from a very early age. Further, the defendant had unsuccessfully completed supervision as a juvenile and had

unsuccessfully completed probation as an adult. He had been arrested numerous times and convicted numerous times.[3]

The court found: there was an undue risk that during the period of a suspended sentence or probation, the defendant would commit another crime; the defendant was in need of correctional treatment and a custodial environment that could be provided most effectively by his commitment to an institution; and a lesser sentence than the sentence to be imposed would deprecate the seriousness of the defendant's crime.

The court also found: the defendant had been persistently involved in similar offenses which went above and beyond the criminal history set forth in the multiple offender adjudication; and, other than the fact that the defendant was relatively young, having been born in 1976, there were no mitigating circumstances whatsoever in the case. The court found no reason to deviate from the maximum sentence set forth in the law.

A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentence on count I. See La. Code Crim. P. art. 894.1(A)(1), (A)(2), (A)(3), (B)(12), & (B)(33). Further, the sentence imposed on count I was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive.

Additionally, a maximum sentence on count I was warranted in this matter. Maximum sentences may be imposed for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040, p. 4 (La. App. 1 Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. The defendant poses an unusual risk to the public safety due to his past conduct of repeated criminality.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.

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[3] The PSI indicated the defendant had at least twenty felony convictions and "[a]ny sentence less than the maximum would allow Schmolke to continue his criminal behavior and cause the citizens of St. Tammany Parish substantial future loss."