NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0361

STATE OF LOUISIANA

VERSUS

PHILIP L. MORIARTY

Judgment Rendered: JUN 2 7 2007

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On Appeal from the 21st Judicial District Court
In and For the Parish of Tangipahoa
Trial Court No. 503,090

Honorable Brenda Bedsole Ricks, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

The defendant, Philip Moriarty, was charged by bill of information with public intimidation, a violation of LSA-R.S. 14:122. He pled not guilty. Following a jury trial, the defendant was found guilty of the responsive offense of attempted public intimidation, a violation of LSA-R.S. 14:122 and 14:27. The defendant filed motions for post verdict judgment of acquittal and new trial, which were denied. The defendant was sentenced to fifteen (15) months imprisonment at hard labor. The defendant now appeals, designating five assignments of error. We affirm the conviction and sentence.

FACTS

On July 16, 2005, just past midnight, Sergeant Rueben Auter, with the Louisiana State Police, was traveling on U.S. Highway 51, south of Natalbany, Tangipahoa Parish, when he observed a pickup truck in front of him cross the right shoulder line and the center line. Sergeant Auter effected a traffic stop on the truck, which was being driven by the defendant. Upon smelling a strong odor of alcohol on the defendant's breath, Sergeant Auter requested that the defendant perform a field sobriety test. The defendant complied, failed the test, and was handcuffed and arrested for DWI. Sergeant Auter placed the defendant in the back of his police unit. The defendant had a passenger in his truck. Sergeant Auter waited at the scene until someone came to pick up the passenger. During this period of waiting, which was over an hour, the defendant continually ranted and threatened Sergeant Auter, who ignored or refused the defendant's requests to go home or to be let go. The defendant repeatedly told Sergeant Auter that he would pay for arresting him.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues the evidence was insufficient to support a conviction. Specifically, the defendant contends that the trial court erred in denying his motion for post verdict judgment of acquittal because the State did not prove that he had the requisite specific criminal intent to commit the crime of attempted public intimidation.[1]

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821(B). The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statute 14:122 provides in pertinent part:

> A. Public intimidation is the use of violence, force, or threats upon any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty:
>
> 1) Public officer or public employee.

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[1] In this first assignment of error, the defendant also argues that attempted public intimidation is a non-crime and that threatening a public official should have been included in the list of responsive verdicts. Both of these arguments, however, are addressed in the defendant's second and third assignments of error, respectively. We, therefore, confine our discussion in the first assignment of error to the issue of sufficiency of evidence.

Public intimidation is a specific intent crime. **State v. Hall**, 441 So.2d 429, 431 (La. App. 2 Cir. 1983). 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. LSA-R.S. 14:10(1). Specific intent is a state of mind and, as such, need not be proven as a fact but may be inferred from the circumstances and actions of the accused. The determination of whether the requisite intent is present in a criminal case is for the trier of fact. **State v. Meyers**, 94-231, pp. 4-5 (La. App. 5 Cir. 9/14/94), 643 So.2d 1275, 1278. An attempted offense is committed when a defendant, "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[.]" LSA-R.S. 14:27(A).

The trial testimony of Sergeant Auter established that the defendant repeatedly threatened Sergeant Auter after the arrest. At one point, according to Sergeant Auter, the defendant demanded that he be let go. The videotape containing the defendant's DWI arrest was introduced into evidence and played for the jury. Following his arrest, the defendant was placed in the back of Sergeant Auter's police unit. For about an hour as the defendant sat in the back seat, the defendant shouted, cursed, and threatened Sergeant Auter. During this time, Sergeant Auter was in and out of his police unit. Following are excerpts from the videotape when Sergeant Auter was in his unit with the defendant:

> [Defendant:] Do what you gotta do, but just remember this, it's gonna come back to you . . . some way . . . some how . . . you gonna pay . . . you gonna pay for f---ing with me, my family . . . and I will come back and you will get your just desserts . . . that ain't a threat, that's a promise. . . .
>
> * * *
>
> [Defendant:] Can I go home please?

> [Sergeant Auter:] No. . . .
>
> [Defendant:] All right, fine. Do what you gotta do . . . you will pay. Believe that. You will pay.
>
> * * *
>
> [Defendant:] You don't even know who you f--king with . . . . You think I ain't gonna forget about this . . . oh no, coming straight to you . . . . Could let me go home, but you're getting paid . . . . Do you or do you not think that me and my family are not gonna make you pay for this? . . . Do what the f--k you gotta do cuz this is f--king bullsh-t . . . . You got something coming to you, pal . . .

In support of his contention that he did not form the necessary specific intent to influence Sergeant Auter's conduct in relation to his position, employment, or duty, the defendant cites **State v. Love**, 602 So.2d 1014 (La. App. 3 Cir. 1992) and **State v. Burgess**, 2004-121 (La. App. 3 Cir. 6/16/04), 876 So.2d 263. Particularly in **Love**, 602 So.2d at 1019, the Third Circuit, in reversing the defendant's public intimidation conviction, noted, "Love [defendant] did not indicate in any way that the threats were intended to influence White's behavior. In other words, the threats were not made in an 'or else' fashion."

In the instant matter, the defendant repeatedly requested to go home or to be let go. When Sergeant Auter refused or ignored the defendant's requests, the defendant made threats of getting even with Sergeant Auter or with making him pay for arresting him. As such, the jury could have reasonably concluded that the defendant's threats were intended to influence Sergeant Auter's behavior in relation to his duty as an arresting officer, i.e., the threats were intended to induce Sergeant Auter to let him go. See **State v. Denham**, 2001-0400 (La. App. 1 Cir. 12/28/01), 804 So.2d 929, writ denied, 2002-0393 (La. 1/24/03), 836 So.2d 37; **State v. Mead**, 36,131 (La.

App. 2 Cir. 8/14/02), 823 So.2d 1045, writ denied, 2002-2384 (La. 3/14/03), 839 So.2d 34.

The defendant also contends that, similar to the defendants in both **Love** and **Burgess**, he was intoxicated, which precluded the formation of specific intent.[2] Other than this assertion, the defendant provides no argument in his brief to suggest that his intoxicated condition precluded the presence of a specific criminal intent. See LSA-R.S. 14:15(2). We note that at trial on direct examination, the defendant testified briefly about the level of his intoxication:

> Q. Did you intend to carry out any of these threats you were making?
>
> A. Absolutely not.
>
> Q. I mean, did you know at the time what you were doing?
>
> A. No.
>
> Q. And why is that?
>
> A. I was drunk, intoxicated heavily.
>
> * * *
>
> Q. Why don't you remember making these threats?
>
> A. Alcohol, drunk, drinking.

Sergeant Auter, however, testified on redirect examination as follows:

> Q. Sergeant Auter, you stated that the defendant was intoxicated, right?
>
> A. Yes, ma'am.
>
> Q. Was he so intoxicated that he couldn't speak?
>
> A. No.
>
> Q. Was he so intoxicated that he couldn't stand?

[2] The preclusion of specific intent because of intoxication was the defendant's only argument in his motion for post verdict judgment of acquittal (styled "Motion for Judgment of Acquittal" by defense counsel), which the trial court denied.

A. No, ma'am, he was not.

Q. Was he so intoxicated that he couldn't understand the instructions you gave him?

A. No, ma'am. I felt he understood the instructions fine.

The jury, thus, was presented with the defendant's testimony and Sergeant Auter's testimony regarding the level of the defendant's intoxication. It is clear from the guilty verdict that the jury chose to believe Sergeant Auter's testimony and rejected the notion that the defendant's level of intoxication precluded the presence of specific criminal intent.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261, pp. 5-6 (La. App. 1 Cir. 9/25/98), 721 So.2d 929, 932.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of attempted public intimidation.[3]

[3] Attempted public intimidation is a lesser grade of public intimidation. Such a conviction may be sustained though the public intimidation attempted was actually committed. Accordingly, a verdict of attempted public intimidation was proper. See LSA-R.S. 14:27(C); **State v. Sercovich**, 246 La. 503, 510, 165 So.2d 301, 303 (1964).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant argues that he was denied due process in being convicted of a non-crime. Specifically, the defendant contends that, since public intimidation encompasses the attempt, attempted public intimidation constitutes an "attempt to attempt," which is a non-offense.[4]

According to the defendant, the evidence at trial established that he did not use force or violence against Sergeant Auter, but only threatened him. The thrust of the defendant's argument is that a threat is a "statement of intent." Defendant contends that since "a threat is 'not completed incipient criminal activity,'" a threat is in the nature of an attempt. Therefore, the defendant argues that an attempt to threaten is tantamount to an attempt to attempt, which is a non-offense.[5] Accordingly, the defendant maintains that the trial court's inclusion of the responsive verdict of attempted public intimidation resulted in the conviction for a non-offense.

The defendant's argument is misplaced. In **Love**, the Third Circuit, in reliance on the Louisiana Supreme Court decision of **State v. Daniels**, 236 La. 998, 1005-1006, 109 So.2d 896, 898 (1958), overruled on other grounds, **State v. Gatlin**, 241 La. 321, 129 So.2d 4 (1961), overruled, **State v. Liggett**, 363 So.2d 1184 (La. 1978), explained that public intimidation,

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[4] Following the defendant's resting of his case and prior to the trial court's charging the jury, the defendant moved the trial court to not include in its jury instructions the responsive verdict of attempted public intimidation. The defendant contended that attempted public intimidation was not possible because, if the jury found that he had specific intent to use threats upon Sergeant Auter to influence his conduct in relation to his duties, then the offense of public intimidation was complete. The trial court denied the motion to delete the responsive verdict of attempt. In his motion for new trial, the defendant argued, *inter alia*, that the trial court erred in instructing the jury that attempted public intimidation was a responsive verdict to the crime charged. Prior to sentencing, the trial court denied the motion for new trial.

[5] In his brief, the defendant states, "There can be no attempt to threaten since before the words are spoken there is merely the threatening thought which cannot form the basis for a criminal charge."

which is a specific criminal intent crime, is "not the intentional use of force or threats upon a public employee, but *rather* the use of force or threats upon him with the specific intent to influence his conduct in relation to his duties." **Love**, 602 So.2d at 1018. In other words, the gravamen of public intimidation is the influencing of conduct in relation to position, employment, or duty. Violence, force, or threats are simply the means by which the influencing is accomplished. Thus, under the facts of the instant matter, attempted public intimidation would involve, not attempted threats upon Sergeant Auter to influence his conduct in relation to his duty, but rather the attempt to influence Sergeant Auter's conduct in relation to his duty by way of threats. Accordingly, attempted public intimidation is a proper responsive verdict to the charged crime of public intimidation. See **Hall**, 441 So.2d at 432.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, the defendant argues that he was denied due process when the trial court failed to instruct the jury that the offense of threatening a public official, a misdemeanor, was a responsive verdict.[6] The defendant also argues the trial court erred in denying the motion for new trial, which addressed the issue.[7]

Louisiana Revised Statute 14:122 provides in pertinent part:

> A. Public intimidation is the use of violence, force, or threats upon any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty:

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[6] When a count in an indictment sets out an offense that includes other offenses of which the accused could be found guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense. LSA-C.Cr.P. art. 803.

[7] At trial, the defendant neither requested this jury charge nor objected to the trial court's alleged failure to include the charge in the jury instructions. In his motion for new trial, which the trial court denied, the defendant argued, *inter alia*, that the trial court's jury instruction regarding responsive verdicts omitted threatening a public official, a lesser and included offense.

(1) Public officer or public employee.

(2) Grand or petit juror.

(3) Witness, or person about to be called as a witness upon a trial or other proceeding before any court, board or officer authorized to hear evidence or to take testimony.

(4) Voter or election official at any general, primary, or special election.

(5) School bus operator.

Louisiana Revised Statute 14:122.2 provides in pertinent part:

A. (1) Threatening a public official is engaging in any verbal or written communication which threatens serious bodily injury or death to a public official.

* * *

C. For the purpose of this Section, "public official" is defined as any executive, ministerial, administrative, judicial, or legislative officer of the state of Louisiana.

Under LSA-C.Cr.P. art. 814, there are no statutorily listed responsive verdicts to public intimidation. The issue, thus, is whether under LSA-C.Cr.P. art. 815(2) threatening a public official is a lesser and included offense of public intimidation. As articulated by the Louisiana Supreme Court in **State v. Simmons**, 422 So.2d 138, 142 (La. 1982), the test for determining if a crime is a lesser and included offense of the offense charged is "whether the definition of the greater offense necessarily includes all the elements of the lesser. Stated in another way for practical application, this merely means that, if any reasonable state of facts can be imagined wherein the greater offense is committed without perpetration of the lesser offense, a verdict for the lesser cannot be responsive." (Italics deleted; citation omitted.)

Initially, we note that the definition of public intimidation does not include the element of "serious bodily injury or death" found in threatening a public official. Moreover, we find from our reading of the two statutes that there are circumstances wherein acts proscribed by LSA-R.S. 14:122

could be committed without committing acts proscribed by LSA-R.S. 14:122.2. See **State v. Guffey**, 94-797, p. 5 (La. App. 3 Cir. 2/1/95), 649 So.2d 1169, 1172, writ denied, 95-0973 (La. 9/22/95), 660 So.2d 469

Since the greater offense of public intimidation could possibly be committed without the perpetration of the lesser offense of threatening a public official, threatening a public official is not a lesser and included offense of public intimidation. Thus, LSA-R.S. 14:122.2 is nonresponsive to LSA-R.S. 14:122. The trial court was not required to charge the jury on threatening a public official under LSA-C.Cr.P. art. 803. See **Simmons**, 422 So.2d at 143. Accordingly, the trial court did not err in denying the motion for new trial.

This assignment of error is without merit.

ASSIGNMENTS OF ERROR NUMBERS FOUR AND FIVE

We address these interrelated assignments of error together. In his fourth assignment of error, the defendant argues that the sentence was excessive and that the trial court failed to order an expansion of the presentence investigation report. In his fifth assignment of error, the defendant argues that defense counsel was ineffective for failing to request a jury charge on the responsive verdict of threatening a public official, failing to challenge the statutorily incomplete presentence investigation report, and for failing to object to the sentence or file a motion to reconsider sentence.[8]

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

[8] In the third assignment of error, we addressed the issue and determined that threatening a public official is not a responsive verdict. Defense counsel was, therefore, not ineffective in failing to request such a jury charge.

> serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1 Cir. 1985) (citing **Strickland v. Washington**, 466 U.S. at 688, 104 S.Ct. at 2065). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-1039 (La. App. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337, p. 10 (La. App. 1 Cir. 11/8/96), 684 So.2d 432, 438.

Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. **State v. Felder**, 2000-2887, p. 11 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173

(citing **State v. Pendelton**, 96-367, p. 30 (La. App. 5 Cir. 5/28/97), 696 So.2d 144, 159, writ denied, 97-1714 (La. 12/19/97), 706 So.2d 450).

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 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 done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1 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. 1 Cir. 1988).

The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge 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 granted the defendant the opportunity to address the court. The defendant apologized for his actions and informed the court that he was attending a substance abuse clinic and receiving counseling. He also stated he was enrolled at Louisiana Technical College to start the practical nursing program. Following this, defense counsel offered that the defendant had passed all of his alcohol and drug screens.

The trial court also reviewed the presentence investigation report, which indicated that, for over ten years, the defendant has been involved in criminal behavior. In 1994, the defendant was charged with battery, disorderly conduct, and resisting arrest. He pled guilty to the battery and a *nolle prosequi* was entered on the other charges. In 1995, he was charged with refusing a chemical test, for which his license was suspended. In 1996, he was charged with battery, resisting arrest, and theft. He pled guilty to the theft and received three years probation. In 2001, the defendant was charged and pled guilty to driving under the influence. In 2006, a Pennsylvania fugitive warrant on the defendant was issued for "FTA for DWI."[9]

The defendant contends that the presentence investigation was inadequate because the presentence investigation report contained no investigation of his background, personal information, work history, or education level. See LSA-C.Cr.P. art. 875. According to the defendant, "There was no attempt made to prepare a full, fair and unbiased investigative report, only a very thinly disguised prop for the district attorney's case." The defendant asserts there was ineffective assistance of counsel because

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[9] We presume this means the defendant failed to appear in court for a DWI charge.

defense counsel did not file any motion in traversal or object to the "biased and incomplete nature" of the presentence investigation report.

At sentencing, through statements given by the defendant and defense counsel, and through the presentence investigation report, the trial court was able to consider both mitigating and aggravating circumstances. Reviewing the entirety of the record, we are unable to conclude that the defendant suffered prejudice because of any alleged inadequate information in the presentence investigation report.[10] The maximum sentence pursuant to LSA-R.S. 14:122(C) and 14:27(D)(3) is two and one-half years imprisonment. The defendant was sentenced to only fifteen months, or one-half of the possible maximum sentence. While the presentence investigation report contained no personal information or "any mitigatory information" about the defendant, given the circumstances surrounding the present conviction wherein the defendant continually threatened a law enforcement officer, along with the defendant's criminal propensities, we find that the record clearly establishes the fifteen-month sentence is not unconstitutionally excessive. See **State ex rel. Graffagnino v. King**, 436 So.2d 559, 566-567 (La. 1983); **State v. James**, 95-962, pp. 8-10 (La. App. 3 Cir. 2/14/96), 670 So.2d 461, 466-467.

Because we find the sentence is not excessive, defense counsel's failure to file or make a motion to reconsider sentence, even if constituting deficient performance, did not prejudice the defendant. See **State v. Wilkinson**, 99-0803, p. 3 (La. App. 1 Cir. 2/18/00), 754 So.2d 301, 303,

[10] The presentence investigation report contains little more than the defendant's criminal history. According to a notation on the last page of the presentence investigation report, the defendant's previous crimes were obtained from his Federal rap sheet. All of the defendant's prior charges or convictions discussed in these assignments of error occurred in Maryland or Pennsylvania. It would appear, thus, that the defendant lived in one or both of these states when he was prosecuted for these previous crimes. Accordingly, it may have been difficult, if not impossible, for the officer assigned to prepare the presentence investigation report to investigate the defendant's family situation and background, or personal habits. See LSA-C.Cr.P. art. 875(A)(1).

writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631. Similarly, because the sentence is not excessive, defense counsel's failure to traverse the presentence investigation report, even if constituting deficient performance, did not prejudice the defendant. The defendant's claims of ineffective assistance of counsel, therefore, must fall.

These assignments of error are without merit.

CONVICTION AND SENTENCE AFFIRMED.