NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0990

STATE OF LOUISIANA

VERSUS

MARVIN DAVIS

Judgment Rendered: February 10, 2012

* * * * * * *

APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 462,090, DIVISION "J"

THE HONORABLE WILLIAM J. KNIGHT, JUDGE

* * * * * * *

Walter P. Reed
District Attorney
Covington, Louisiana
and
Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Attorneys for Appellees
State of Louisiana

Dwight Doskey
Covington, Louisiana

Attorney for Defendant/Appellant
Marvin Davis

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs with the result.

McDONALD, J.

The defendant, Marvin Davis, was charged by bill of information with one count of possession of hydrocodone (count I), a violation of La. R.S. 40:968(C); and one count of aggravated battery (count II), a violation of La. R.S. 14:34. He pled not guilty on both counts. The State proceeded to trial only on count II.[1] Following a jury trial, the defendant was found guilty as charged. Defense counsel requested that the jury be polled, which was done. The court, upon reviewing the results, found the verdict in order.

Davis was sentenced to nine years at hard labor. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging he was a fourth-or-subsequent-felony habitual offender.[2] Following a hearing, the defendant was adjudged a fourth-or-subsequent-felony habitual offender. The court vacated the previously-imposed sentence and sentenced the defendant to serve the remainder of his natural life at hard labor without benefit of parole, probation, or suspension of sentence.

The defendant now appeals, contending: (1) the evidence was insufficient to support the conviction; (2) trial counsel was ineffective for failing to object to the admission of the victim's out-of-court statements as substantive evidence; and (3) the mandatory sentence was constitutionally excessive. He also files a pro se brief, making numerous claims. For the following reasons, we affirm the conviction. We conditionally affirm the habitual offender adjudication and

---

[1] The record does not reflect the status of count I.

[2] Predicate #1 was set forth as the defendant's conviction, under Orleans Parish Judicial District Court Docket #421119, for felony carnal knowledge. Predicate #2 was set forth as the defendant's conviction, under Orleans Parish Judicial District Court Docket #377816, for possession of cocaine. Predicate #3 was set forth as the defendant's conviction, under Orleans Parish Judicial District Court Docket #364329, for felon in possession of a firearm. Predicate #4 was set forth as the defendant's conviction, under Orleans Parish Judicial District Court Docket #336375, for possession of cocaine. Predicate #5 was set forth as the defendant's conviction, under Orleans Parish Judicial District Court Docket #335656, for possession with intent to distribute cocaine.

sentence, and remand this case to the trial court with instructions.

FACTS

The victim, Ramona Smith, testified at trial. She and her three children were living with the defendant at the time of trial and on January 4, 2009. On January 4, 2009, at approximately 10:00 a.m., she telephoned the police and reported she had been struck with an unknown object. She told the first police officer responding to the call that the defendant had hit her with a cookie jar from her kitchen. She also completed a St. Tammany Parish Sheriff's Office Statement Report as follows:

> Came in house b/c he was looking for his phone. Pulled me in the room and started to punch me in my head (back and front). I got away, he went outside and then he came back into house and started hitting me in my head again. Then he started cursing me and pulled me back into the room and locked door and threw me on the bed and started hitting me w/ the container (metal.) Then he left.
>
> He = Marvin Davis
> Marvin Davis is the person who did this to me.
> Ramona Smith

Thereafter, on May 14, 2009, the victim signed an affidavit prepared by defense counsel, stating:

> 1. On or about January 4, 2009, there was an arguement [sic] between Ramona Smith and Marvin Davis.
>
> 2. In no way did Marvin Davis touch me without my consent, and he did not cause any injuries to me. All my injuries were self-inflicted.
>
> 3. Therefore, I, Ramona Smith, wish to drop the charges I filed against Marvin Davis for aggravated battery.

At trial, the victim claimed her January 4, 2009 account of the offense was false. She testified the defendant did not strike her. She claimed she was injured while holding onto the defendant's shirt to prevent him from leaving. She claimed she slipped on some new tile and hit her head on a chest at the bottom of her bed. She claimed three witnesses, Megan Burnett, Anthony Duplesis, and Alvin "Unc"

Johnson, were present in her kitchen during the incident, but conceded she failed to mention these witnesses to the police officers who responded to the scene.

The victim claimed she decided not to pursue charges against the defendant after she calmed down on January 4, 2009. She conceded, however, she repeated her initial account of the incident to another police officer on January 6, 2009. When asked about the dents in the metal cookie canister taken into evidence as the dangerous weapon used by the defendant against her, the victim claimed she had dropped the canister the night before the incident. Deputy Steinert testified at trial that she denied she was intimidated into coming to court and recanting her initial account of the incident.

St. Tammany Parish Sheriff's Office Deputy Bryan Steinert responded to the victim's call for help on the day of the incident. She had blood "all over her clothing, blood coming from her head, marks on her, and ... blood in and around her face." She was crying, shaking, and "extremely scared." She had a laceration "straight down the middle" on the top of her head. A cookie canister with a dented metal lid was lying by the driveway-gate. The victim stated, "Here's the container he hit me with." In Deputy Steinert's opinion, the victim could not have staged the incident.

Megan Burnett claimed she was present at the victim's house on January 4, 2009, and saw the victim pulling on the back of the defendant's shirt as he was trying to leave. She claimed the victim's bedroom door was open and she (Burnett) did not see the defendant strike the victim with his fist or an object. Burnett indicated she was the victim's cousin.

Anthony Duplesis claimed he was present in the victim's home on January 4, 2009, and saw the victim pulling the defendant back while he was trying to leave. He claimed he did not see the defendant strike the victim or hit her with any object.

He indicated the victim wanted the case against the defendant dismissed because they were now engaged.

SUFFICIENCY OF THE EVIDENCE

In counseled assignment of error number one, the defendant argues the evidence was insufficient to support the verdict because the jury should have placed more weight on the testimony by the victim at trial, which was given under oath, rather than her statements on January 4, 2009.

The standard of review for 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 the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," in order to convict, every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 730 So.2d at 487.

Battery, in pertinent part, is "the intentional use of force or violence upon the person of another … ." La. R.S. 14:33. Aggravated battery is a battery committed

with a dangerous weapon. La. R.S. 14:34. A dangerous weapon includes "any ... substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm." La. R.S. 14:2(A)(3).

A thorough review of the record convinces us that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of aggravated battery and the defendant's identity as the perpetrator of that offense against the victim. The verdict rendered against the defendant indicates the jury rejected the defense theory that the victim's injuries were the result of an accidental fall, rather than the defendant striking her with the cookie canister. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, those hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case.

Further, the verdict also indicates the jury credited the victim's statements at the time of the offense and did not find her later recantation credible. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may 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. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the

facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 662. At the time of the incident, the victim indicated the defendant had caused her injuries and expressed her fear of him. The jury was not irrational in concluding her recantation was the result of intimidation by the defendant. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In counseled assignment of error number two, the defendant argues the State relied on the victim's January 4, 2009 statements in order to convict him, and although those statements were admissible under La. Code Evid. art. 801(D)(1)(a), trial counsel was ineffective for failing to argue to the trial court that it should act as a "gatekeeper" and only allow the January 4, 2009 statements into evidence as impeachment, rather than substantive, evidence.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so

serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Initially, we note the defendant alleges ineffective assistance of counsel on the basis of trial counsel's failure to pursue a particular strategy. The investigation of strategy decisions requires an evidentiary hearing[3] and, therefore, cannot possibly be reviewed on appeal. **State v. Allen**, 94-1941 (La. App. 1st Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rests with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of trial defense counsel did not perform deficiently in failing to argue that the January 4, 2009 statements were admissible only as impeachment, rather than substantive, evidence. Evidence admissible under La. Code Evid. art. 801(D)(1)(a)[4] is not

---

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

[4] La. Code Evid. art 801, in pertinent part, provides:

hearsay and thus, is admissible not only to impeach, but also as substantive proof of the offense. See **State v. Harper**, 2007-0299 (La. App. 1st Cir. 9/5/07), 970 So.2d 592, 601, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173.

This assignment of error is without merit or otherwise not subject to review at this time.

EXCESSIVE SENTENCE

In counseled assignment of error number three, the defendant argues the sentence imposed under La. R.S. 15:529.1(A)(1)(c)(ii) (prior to amendment by 2010 La. Acts Nos. 911, § 1 and 973, § 2) was unconstitutionally excessive because he was offered a five-year sentence in exchange for a guilty plea prior to trial and the habitual offender proceedings.

La. Code Crim. P. art. 881.1, in pertinent part, provides:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
>
> . . .
>
> B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.
>
> . . .
>
> E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.

Following the imposition of sentence herein, the defense stated, "Note our

---

D. **Statements which are not hearsay**. A statement is not hearsay if:

(1) **Prior statement by witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(a) In a criminal case, inconsistent with his testimony, provided that the proponent has first fairly directed the witness' attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate

objection, Your Honor." Thereafter, the defense stated, "And we would seek to add that to the appeal, Your Honor." The defense did not file a motion to reconsider sentence.

The defendant failed to comply with Article 881.1(A)(1). He neither orally moved for reconsideration of sentence at sentencing, nor filed a written motion thereafter, setting forth a specific ground for reconsideration of sentence. Accordingly, review of the instant assignment of error is procedurally barred. See La. Code Crim. P. art. 881.1(E); **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

PRO SE BRIEF

In his pro se brief, the defendant argues trial defense counsel James Mecca was ineffective because he "failed to investigate or make known to the 22nd Judicial [District] [C]ourt certain and specific facts, which if he had investigated same prior to his misrepresentations before six all white jurors." The defendant claims Mecca was ineffective because he did not move for forensic testing of the "glass cookie jar." He also argues the evidence was insufficient to support the conviction because there was no forensic evidence to link him to the alleged weapon. Additionally, he argues he was denied a fair jury because he was tried before an "all white jury." Lastly, he argues "a deal was in the offing" due to his cooperation in a state murder case.

Initially we note, decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. **State v. Lockhart**, 629 So.2d 1195, 1208 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. Further, whether or not defense counsel Mecca felt it necessary to move for forensic testing of the cookie canister was a strategic decision. See **Allen**, 664

---

the matter asserted by the prior inconsistent statement[.]

So.2d at 1271, discussed supra. Defense counsel Mecca presented a defense which attacked the State's strongest evidence at trial, i.e., the victim's initial claims against the defendant. Mecca presented testimony from the victim indicating she was injured accidentally by slipping on a tile floor while trying to stop the defendant from leaving her. In response to Mecca's questioning, the victim stated she called the police and claimed the defendant had hit her because she was angry with him for ignoring her. Additionally, the defense also presented testimony from the victim that she had lied in her written statement against the defendant.

In regard to the defendant's claim that the evidence was insufficient due to a lack of forensic evidence linking him to the cookie canister, we note the State was under no obligation to present forensic evidence in this matter.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), held an equal protection violation occurs if a party exercises a peremptory challenge to exclude a prospective juror on the basis of a person's race. See also La. Code Crim. P. art. 795(C)-(E). If the defendant makes a prima facie showing of discriminatory strikes, the burden shifts to the State to offer racially-neutral explanations for the challenged members. The neutral explanation must be one which is clear, reasonable, specific, legitimate and related to the particular case at bar. If the race-neutral explanation is tendered, the trial court must decide, in step three of the **Batson** analysis, whether the defendant has proven purposeful discrimination. A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **State v. Elie**, 2005-1569 (La. 7/10/06), 936 So.2d 791, 795.

The **Batson** explanation does not need to be persuasive, and unless a discriminatory intent is inherent in the explanation, the reason offered will be

deemed race-neutral. The ultimate burden of persuasion remains on the party raising the challenge to prove purposeful discrimination. **Elie**, 936 So.2d at 795-96.

In order to satisfy **Batson's** first step, a moving party need only produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. **Elie**, 936 So.2d at 796. **Batson's** admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of panel members who expressed similar views or shared similar circumstances in their backgrounds. The one relevant circumstance for a trial judge to consider is whether the State articulated "verifiable and legitimate" explanations for striking other minority jurors. **Id**. The failure of one or more of the State's articulated reasons for striking a prospective juror does not compel a trial judge to find that the State's remaining articulated race-neutral reasons necessarily cloaked discriminatory intent. **Id**.

In regard to the defendant's claim that he was denied a fair jury because he was tried before an "all white jury," we note the defendant alleges defense counsel Mecca failed to move the court for a voir dire hearing. The minutes of June 16, 2010, however, indicate a voir dire hearing was held in this matter, in the presence of the defendant, with a jury being selected after the exercise of peremptory challenges by both the State and the defense. The record does not contain any information concerning the race of the jurors in this matter. Only matters contained in the record can be reviewed on appeal. **State v. Vampran**, 491 So.2d 1356, 1364 (La. App. 1st Cir.), writ denied, 496 So.2d 347 (La. 1986). Moreover, we note the defendant argues his rights under **Batson** were violated solely because he was tried before "an all white jury." He makes no argument that the State exercised peremptory challenges to exclude minority jurors.

In regard to the defendant's claim that "a deal was in the offing," the record indicates at the beginning of the habitual offender hearing, defense counsel Dwight Doskey advised the court there had been an attempt to communicate between the district attorney's office and Leon Cannizzaro, "calling for Mr. Walter Reed ... to request some intervention." Defense counsel Doskey conceded the trial court had already continued the matter for three weeks "for that accommodation to be made," but argued, "Cannizzaro apparently didn't see fit to make any phone calls until this morning." The court advised defense counsel Doskey it was not privy to discussions between the various district attorneys' offices, it had allowed time for discussions to take place, but it was now time to move forward in the case. There was no abuse of discretion in the court's action.

The claims made in the pro se brief are without merit or otherwise not subject to review at this time.

REVIEW FOR ERROR

Initially, we note our review for error is pursuant to La. Code Crim. P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. Code Crim. P. art. 920(2).

Following conviction, but prior to sentencing, the defense (a different attorney than trial counsel) moved to continue sentencing, alleging:

> In support of such motion, counsel avers (1) that he has previously been acquainted with the defendant, and both then and now has doubts as to the defendant's competency to proceed, which must be evaluated with further talks with the defendant, (2) that he has requested the defendant's medical records from the Social Security Administration, (3) that he is unfamiliar with the actual testimony given in the case (as opposed to various conflicting versions given by participants and spectators at the trial), and is therefore ordering a transcript of the trial, which was fairly brief, and (4) that he desires to gather further facts as to the defendant's background to present to the

court to allow the fashioning of an appropriate sentence.

Thereafter, still prior to sentencing, the defense moved for appointment of a sanity commission, alleging the defendant believed he would be freed on the current charge because: "(1) the deputy who testified on the stand was not the actual investigating officer, but rather a 'ringer[,]' (2) that such ringers may be used because the officer(s) who investigated the matter has (have) been fired for misconduct in relation to this investigation, and (3) that comparison of his jury list with the membership of other juries will show that the District Attorney's Office maintains a 'special jury' upstairs (separate and apart from the normal pool) which is called upon when convictions are needed." At the original date scheduled for sentencing, the trial court granted the motion to continue sentencing and the motion to appoint a sanity commission, and set sentencing and the sanity hearing for August 12, 2010. Thereafter, the trial court appointed Dr. Rafael Salcedo and Dr. Michelle Garriga to examine the defendant and report to the court. On August 12, 2010, "[c]ourt having been advised the defendant has not been evaluated by [either] Dr. Michelle Garriga or Dr. Rafael Salcedo," the court continued the matter to September 15, 2010. On September 16, 2010, the court held a competency hearing and Dr. Michelle Garriga testified. The court held the matter open pending receipt of the report of Dr. Rafael Salcedo, and reset the matter for September 23, 2010. On September 23, 2010, the defense stated:

> Your Honor, Dwight Doskey, on behalf of Marvin Davis, who is present. Your Honor, I notice that Dr. Salcedo, he is not here. But I have spoken to Mr. Davis; I have obtained his medical records. I didn't file any further motions because, having obtained his medical records, it looks like they just did, unfortunately, what lots of medical staffs do – "Were you on these medications before? Well, here, have some more of them."
>
> At this time, Your Honor, we would withdraw the Motion for a Competency Hearing because, by all accounts on the written report that we have received, Mr. Davis is competent to proceed, and there is nothing in the prison medical records that indicate that he did

> anything specific in jail that made them think that he was incompetent. They decided to put him back on the same medications. So we're ready to proceed, Your Honor, with sentencing.

Thereafter, the defendant was sentenced to nine years at hard labor.

A defendant does not have an absolute right to the appointment of a sanity commission simply upon request. A trial judge is only required to order a mental examination of a defendant when there are reasonable grounds to doubt the defendant's mental capacity to proceed. La. Code Crim. P. art. 643. It is well established that "reasonable grounds" exist where one should reasonably doubt the defendant's capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. To determine a defendant's capacity, we are first guided by La. Code Crim. P. arts. 642, 643, and 647. **State ex rel. Seals v. State**, 2000-2738 (La. 10/25/02), 831 So.2d 828, 832.

As a general matter, La. Code Crim. P. art. 642 allows "[t]he defendant's mental incapacity to proceed [to] be raised at any time by the defense, the district attorney, or the court." The Article additionally requires that "[w]hen the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution ... until the defendant is found to have the mental capacity to proceed." La. Code Crim. P. art. 642. Next, La. Code Crim. P. art. 643, provides, in pertinent part, "The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed." Last, if a defendant's mental incapacity has been properly raised, the proceedings can only continue after the court holds a contradictory hearing and decides the issue of the defendant's mental capacity to proceed. See La. Code Crim. P. art. 647. **State ex rel. Seals,** 831 So.2d at 831-32.

Questions regarding a defendant's capacity must be deemed by the court to be *bona fide* and in good faith before a court will consider if there are "reasonable

grounds" to doubt capacity. Where there is a *bona fide* question raised regarding a defendant's capacity, the failure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. At this point, the failure to resolve the issue of a defendant's capacity to proceed may result in nullification of the conviction and sentence under **State v. Nomey**, 613 So.2d 157, 161-62 (La. 1993), or a nunc pro tunc hearing to determine competency retrospectively under **State v. Snyder**, 98-1078 (La. 4/14/99), 750 So.2d 832, opinion after remand; **State ex rel. Seals,** 831 So.2d at 833.

In certain instances, a nunc pro tunc hearing on the issue of competency is appropriate "if a meaningful inquiry into the defendant's competency" may still be had. In such cases, the trial court is again vested with the discretion of making this decision as it "is in the best position" to do so. This determination must be decided on a case-by-case basis, under the guidance of **Nomey**, **Snyder**, and their progeny. The State bears the burden in the nunc pro tunc hearing to provide sufficient evidence for the court to make a rational decision. **State ex rel. Seals,** 831 So.2d at 833.

The issue of the defendant's mental incapacity was properly raised in this matter. And although defense counsel withdrew the request for a sanity hearing, once invoked, a defendant cannot simply withdraw the request, but the trial court must make an independent assessment of defendant's capacity to proceed to trial. See **State v. Carr**, 629 So.2d 378 (La. 1993) (per curiam) (wherein the Louisiana Supreme Court granted the defendant's writ application, in part, to remand the case to the district court for the purpose of "entering a formal ruling as to the defendant's competency."); see also **State v. Carr**, 618 So.2d 1098, 1103 (La. App. 1st Cir. 1993) (wherein this court had previously rejected the defendant's

contention that the district court had erred in failing to redetermine the defendant's competency because the record showed that the defendant had withdrawn the request for a sanity hearing). Thus, the trial court erred in allowing the matter to proceed to sentencing without holding a contradictory hearing and deciding the issue of the defendant's mental capacity to proceed. See La. Code Crim. P. art. 647; **State ex rel. Seals**, 831 So.2d at 831-32.

Accordingly, we remand this matter to the trial court for the purpose of determining whether a nunc pro tunc competency hearing may be possible. If the trial court believes that it is still possible to determine the defendant's competency at the time of sentencing, the trial court is directed to hold an evidentiary hearing. If the defendant was competent, no new sentencing is required. If the defendant is found to have been incompetent at the time of sentencing, or if the inquiry into competency is found to be impossible, the defendant is entitled to a new sentencing hearing. Defendant's right to appeal is reserved. See **Snyder**, 750 So.2d at 855-56 & 863; **State v. Mathews**, 2000-2115 (La. App. 1st Cir. 9/28/01), 809 So.2d 1002, 1016, writs denied, 2001-2873 (La. 9/13/02), 824 So.2d 1191 & 2001-2907 (La. 10/14/02), 827 So.2d 412.

CONCLUSION

Based on our review of the proceedings and evidence presented, we find no error in the trial court's rulings on the various motions urged by the defendant. Accordingly, we affirm the conviction. We conditionally affirm the habitual offender adjudication and sentence, and remand this case to the trial court for a nunc pro tunc competency hearing. If the trial court finds that a retrospective determination of the defendant's competency is not possible or finds that the defendant was not competent at sentencing, the defendant should be granted a new habitual offender and sentencing hearing.

CONVICTION AFFIRMED. HABITUAL OFFENDER ADJUDICATION AND SENTENCE CONDITIONALLY AFFIRMED; CASE REMANDED WITH INSTRUCTIONS.