NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 2093

STATE OF LOUISIANA

VERSUS

PHIL COLEMAN

Judgment rendered May 6, 2011.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 09-06-0952
Honorable Trudy M. White, Judge

* * * * * *

HON. HILLAR C. MOORE, III DISTRICT ATTORNEY STACY WRIGHT ASSISTANT DISTRICT ATTORNEY BATON ROUGE, LA	ATTORNEYS FOR STATE OF LOUISIANA
FREDERICK KROENKE BATON ROUGE, LA	ATTORNEY FOR DEFENDANT-APPELLANT PHIL T. COLEMAN
PHIL T. COLEMAN WINNFIELD, LA	DEFENDANT-APPELLANT IN PROPER PERSON

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

KUHN, J AGREES IN PART & DISSENTS IN PART & ASSIGNS REASONS

PETTIGREW, J.

The defendant, Phil Coleman, was charged by bill of information with simple burglary, a violation of La. R.S. 14:62. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant entered a plea of not guilty to the habitual offender bill of information filed by the State. After a hearing, the defendant was adjudicated a fourth-felony habitual offender and sentenced to twenty-five years imprisonment at hard labor. The defendant now appeals, assigning error to the sufficiency of the evidence in a counseled and pro se brief. The defendant's pro se brief additionally assigns error to the admission of the confession and the admission of hearsay testimony. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On or about July 26, 2006, a reported burglary took place at approximately 2:00 p.m. at a mobile home located at 11525 Lovett Road in Central, Louisiana, East Baton Rouge Parish. Kim Miley was moving into the mobile home at the time and was bringing some packages there on the day in question. Miley's coworker, Peggy Bankhead, was assisting her with transporting the packages. When they arrived, they noticed a blue Mazda Millenia with an open door parked outside. Miley called her husband to see if anyone was supposed to be there at that time. She gave a description of the vehicle to her husband, including the license plate number. He informed her that no one was supposed to be there and contacted the police. Miley and Bankhead observed a male individual peer through the window blinds to look outside of the mobile home, and they noticed that the front door was unhinged. Miley and Bankhead waited outside for approximately five minutes before the individual exited the trailer and quickly approached the Mazda Millenia. Miley and Bankhead briefly pursued the individual when he drove off but lost him when they were delayed by a traffic light that the individual disregarded.

Detective Kenneth Jackson of the East Baton Rouge Parish Sheriff's Office was assigned to the case. Detective Jackson used the license plate number provided by the victim and determined that the vehicle in which the perpetrator left the scene was owned

by Tonya Coon. According to Coon, the defendant was borrowing her vehicle at the time of the offense. Coon was familiar with the defendant through a mutual friend, Michael Wallace, and would occasionally allow the defendant to borrow her vehicle. According to the police, upon his arrest, the defendant admitted to being present at the mobile home, but stated that he did not remove anything.

COUNSELED ASSIGNMENT OF ERROR AND
PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In the sole assignment of error in the counseled brief, the defendant argues that the State failed to prove the essential element of identity beyond a reasonable doubt. The defendant contends that the eyewitnesses, Bankhead and Miley, were unable to identify him and notes that neither eyewitness could identify his tattoos, despite the revealing attire (a tank-top shirt) provided in their description of the perpetrator to the police. Regarding his pretrial statement, the defendant notes that Detective Jackson stated that he could not remember the exact conversation or the exact wording of the statement or how long it took the defendant to make the statement. In this regard, the defendant further notes that Detective Jackson gave multiple excuses to explain his failure to record or put the statement in writing. The defendant additionally notes that there were no witnesses other than Detective Jackson to the statement and argues that Detective Jackson's inability to remember any other details outside of the known facts suggest that the evidence does not meet the requirements of La. R.S. 15:450 and is insufficient to support the conviction.[1] Finally, the counseled brief concludes that reasonable hypotheses of innocence remain.[2]

In the defendant's pro se brief, he notes that fingerprints lifted from the scene were not matched to him. He further notes that the eyewitnesses were unable to identify him in a lineup. The defendant further notes that Coon did not actually see him

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[1] The defendant did not raise at the trial court the argument that the confession does not meet the requirements of La. R.S. 15:450. Therefore, the defendant is precluded from raising this argument on appeal. See La Code Evid. art. 103 A(1); La. Code Crim. P. art. 841.

[2] Misidentification, i.e., that someone else committed the offense, is the only hypothesis of innocence developed in the brief.

drive off in her vehicle, and there was no evidence linked to the burglary in the vehicle. The defendant further argues that the tattoos on both of his arms were present at the time of his arrest, and are distinguishing characteristics that could not have been missed by the eyewitnesses if he had been the perpetrator.

The standard of review for sufficiency of the evidence to support 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 and defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See La. Code Crim. P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1 Cir. 1984). When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the trier of fact reasonably rejects a hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Simple burglary is the "unauthorized entering of any dwelling, ... with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60." La. R.S. 14:62A. When the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. **State v. Holts**, 525 So.2d 1241, 1244 (La. App. 1 Cir. 1988). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Andrews**, 94-0842, p. 7 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 453.

Coon testified that on the date in question, the defendant called her sometime between 9:00 a.m. and 1:00 p.m. and asked to borrow her vehicle; she agreed but did not recall personally giving him the keys. Coon left her car keys at her house for the

defendant and left home after her conversation with him. Coon further explained that she had two sets of keys; her "boyfriend," Wallace, kept one set and the other set was kept either on her table or underneath the seat of the car. Coon testified that certain individuals she would occasionally allow to borrow her vehicle were privy to that information. Coon further testified that her car was borrowed without her permission on an occasion, but she no longer allowed that to occur. By rule, those who were allowed to use her vehicle were required to ask for permission, and the defendant was the only person who asked to use her vehicle on the date in question. Coon testified that although she informed the police that the defendant used her vehicle on the date in question, she explained to them that she did not actually see him take the vehicle but assumed he had, since he asked to borrow it before she left home that day.

The weekend before the date in question, Miley and her husband brought other packages to the mobile home that included winter clothes and other items that they would not need before moving in. They left the items in boxes and stored them in spare bedrooms. When Miley and Bankhead arrived on the date in question, a group of items were propped up in front of the door in a manner that caused Miley to assume that it "was a robbery in progress." The Mileys testified that these specific items were not stacked or stored in this particular area prior to the incident. It also appeared someone had rummaged through and relocated several boxes. The Mileys also noted that a box of items was missing. The missing box included hunting equipment, bullets, and keepsakes. When the individual exited the mobile home and approached the Mazda Millenia, Bankhead questioned him and he stated, "Oh, I was just hauling some stuff out for Roy and them." She asked for his name and he responded, "Jonathan Finch" before abruptly driving away. Miley and Bankhead only saw the individual for an estimated seven seconds or less before he drove away, and he did not make any significant contact while responding to Bankhead's questioning. Miley and Bankhead further testified that the individual was weaving in and out of cars and ignored a red traffic light as they pursued him. After the individual evaded them, they returned to the mobile home and waited for the police to arrive. Miley and Bankhead advised the

responding officer, Officer Joseph Bush of the East Baton Rouge Parish Sheriff's Office, that the assailant was approximately five feet and nine or ten inches tall; was wearing a white t-shirt with shorts; was of a muscular build; and had tanned skin. They did not note the presence of any tattoos on the individual. Officer Bush also testified that items were stacked at the door as if someone had gathered them. The Mileys did not know the defendant and did not give him permission to enter the mobile home.

Detective Jackson testified during the trial that he contacted Coon, the registered owner of the Mazda Millenia, the next evening after the incident. Coon informed the detective that the defendant had borrowed her vehicle on the day of the burglary. Coon granted the police consent to search the vehicle but no evidence was recovered. On July 28, 2006, a photographic lineup that included a photograph of the defendant was presented to the witnesses but they did not make a positive identification. Detective Jackson estimated that Coon's residence in Denham Springs was about twenty-five minutes away from the crime scene. Detective Jackson testified that the physical description given by the witnesses of the person they saw leave the trailer on the day of the incident in question matched the defendant's physical characteristics. Based on the time that the defendant borrowed the vehicle and the description by the witnesses, Detective Jackson obtained a warrant for the defendant's arrest. He was arrested by the Denham Springs Police Department and taken to Livingston Parish Prison.

Detective Jackson travelled to Livingston Parish to interview the defendant in prison. After Detective Jackson informed the defendant of his rights, the defendant indicated that he understood his rights and informed the detective that Coon loaned him the vehicle, he kicked in the trailer door to gain entry, and before he could take anything, two ladies drove up. The defendant further stated that he was able to elude the ladies when he got back into the vehicle and drove away. The defendant did not testify or present any defense witnesses.

The verdict rendered against the defendant indicates the jury accepted the testimony offered against the defendant and rejected any hypothesis of innocence. As

the trier of fact, the jury was free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-0385, p. 9 (La. App. 1 Cir. 11/5/99), 745 So.2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. **State v. Glynn**, 94-0332, p. 32 (La. App. 1 Cir. 4/7/95), 653 So.2d 1288, 1310, writ denied, 95-1153 (La. 10/6/95), 661 So.2d 464. 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, p. 5 (La. App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207, pp. 14-15 (La. 11/29/06), 946 So.2d 654, 662. 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, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Coon testified that she gave the defendant sole permission to use her vehicle on the date in question. Her vehicle was at the scene at the time of the offense. The entry of the mobile home was forced. The defendant confessed to entering the mobile home, and he did not have the authority to do so. Items were missing from the mobile home and others were stacked in a manner suggesting their removal was imminent before Miley and Bankhead's arrival. It is clear that the defendant entered the mobile home without authority, and with the intent to commit a felony or any theft therein. After a thorough review of the record, we are convinced that a 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 any reasonable hypothesis of innocence, all of

the elements of simple burglary and the defendant's identity as the perpetrator of that offense. The sole counseled and first pro se assignments of error are without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In the second pro se assignment of error, the defendant argues that the State failed to prove that a voluntary confession existed. The defendant notes that a waiver of rights form was not executed and contends that Detective Jackson could not remember how he advised the defendant of his **Miranda** rights. The defendant further notes that he never wrote or signed a confession and a confession was not recorded. The defendant argues that a consideration of the totality of the circumstances leads to the conclusion that the State failed to affirmatively show that he provided a statement. The defendant further argues that while Detective Jackson's testimony at the motion to suppress hearing was vague, he added additional and/or inconsistent details regarding the statement when he testified during the trial.[3] The defendant contends that he was prejudicially denied the benefit of the explanatory and exculpatory details of the original purported confession.

The law is clear that before a confession can be introduced into evidence, the State has the burden of affirmatively proving that it was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La. Code Crim. P. art. 703D; La. R.S. 15:451. The State also bears the burden of proving that an accused who makes an inculpatory statement or confession during custodial interrogation was first advised of his constitutional rights and made an intelligent waiver of those rights. **State v. Davis**, 94-2332 (La. App. 1 Cir. 12/15/95), 666 So.2d 400, 406, writ denied, 96-0127 (La. 4/19/96), 671 So.2d 925. In **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court promulgated a set of safeguards to protect therein delineated constitutional rights of persons subject to custodial police interrogation. The warnings must inform the person

[3] Although the hearing is referred to and treated as a motion to suppress hearing, the record before us reflects that the hearing took place as a result of the State's motion to admit the confession and the defendant's opposition thereto.

in custody that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612.

The trial court must consider the totality of the circumstances in determining whether a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983). Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Maten**, 2004-1718, p. 12 (La. App. 1 Cir. 3/24/05), 899 So.2d 711, 721, writ denied, 2005-1570 (La. 1/27/06), 922 So.2d 544. In determining whether the ruling on 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). A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because that court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 2001-0908, p. 4 (La. App. 1 Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Correspondingly, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-281. However, a trial court's legal findings are subject to a de novo standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

At the motion to suppress hearing, Detective Jackson testified that he spoke to the defendant on or about August 19, 2006, subsequent to the defendant's arrest. Detective Jackson further testified that he read the defendant his **Miranda** rights, specifying as follows:

> You have the right to remain silent. Anything you say can and will be used against you in the court of law. You have the right to an attorney to assist you prior to questioning. If you can't afford an attorney, one will be appointed to you at no cost to you. If you decide to answer questions

> now, you will still have the right to stop answering questions in order to get the advise [sic] of an attorney for any reason you might have.

According to Detective Jackson, the defendant indicated that he understood and wished to waive those rights. Detective Jackson further testified that the defendant then informed him that he broke into the trailer but did not take anything. The defendant further stated that he was interrupted when two females arrived and was able to evade them when they pursued him by vehicle. Detective Jackson stated that he could not remember exactly how the defendant said that he broke into the trailer, but added that he thought the defendant stated that he kicked the door to gain entry.

During cross-examination, Detective Jackson testified that he did not bring a waiver of rights form or recorder with him to the interview, and he also did not attempt to obtain a form or recording. Detective Jackson took notes during the interview but did not ask the defendant to reduce his statement to writing. Detective Jackson confirmed that the defendant was very cooperative. Detective Jackson further testified that he did not routinely ask suspects for a written statement but would normally have a digital recorder present although he did not have one for the interview in question.

During the trial of this matter, Detective Jackson's account of the rights given to the defendant prior to questioning was virtually verbatim to his testimony at the suppression hearing. Detective Jackson confirmed that the defendant indicated that he understood his rights, did not request an attorney at any point in time, and did not give any indication that he wished to discontinue the interview. Detective Jackson testified that the defendant said he borrowed the vehicle from Coon, kicked the door of the trailer to enter it, that two ladies drove up "before he could take anything," and that he was able to elude them by driving away in Coon's vehicle. Detective Jackson acknowledged that he could not recite the statement "word for word" but indicated that his testimony basically constituted the defendant's statement. When asked about the defendant's demeanor, Detective Jackson stated that the defendant was very remorseful and stated that he did not take anything from the house. Detective Jackson could not remember exactly how long it took him to get the statement from the

defendant or why the interview was not recorded, but presumed that it took "probably a few minutes." When asked if he recorded the defendant's statement, Detective Jackson stated: "I normally take a recording device. For some reason, I didn't record it. It could have been I didn't have it with me or I didn't have batteries." When further questioned, Detective Jackson explained that waiting for recording equipment could jeopardize his opportunity to retrieve a statement specifically stating, "If an individual sits in jail too long, they get the advice of a jailhouse lawyer. They could get tight-lipped and they don't want to say anything." Detective Jackson stated that he had no doubts as to the content of the defendant's statement.

In the instant case, the defendant did not introduce any evidence at the hearing on the motion to suppress the statements and has not made any specific allegations of police misconduct. The trial court believed the defendant gave a statement to Detective Jackson, and further believed the defendant made a knowing and intelligent waiver of his constitutional rights. The admissibility of a confession is a question for the trial court, whose conclusions on the credibility and weight of testimony relating to the voluntariness of a confession for the purpose of admissibility should not be overturned on appeal unless they are not supported by the evidence. **State v. Jackson**, 381 So.2d 485, 487 (La. 1980). We find no abuse of discretion as the trial court's conclusions are supported by the evidence and, thus, will not be overturned. See **State v. Patterson**, 572 So.2d 1144, 1150 (La. App. 1 Cir. 1990), writ denied, 577 So.2d 11 (La. 1991). Accordingly, we find no merit in pro se assignment of error number two.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In defendant's third pro se assignment of error, he contends that inadmissible hearsay testimony was allowed during the trial. Specifically, the defendant contests Detective Jackson's testimony regarding purported statements by Tonya Coon as to whether she actually saw the defendant in her vehicle on the date in question. The defendant notes that Coon testified and was released prior to the testimony in question by Detective Jackson and argues that he was denied the opportunity to cross-examine

Coon in regard to the accuracy of these statements. The defendant asserts that during the trial, the State did not question Coon about her statement to the police. The defendant concedes that his trial counsel did not object to the portion of Detective Jackson's testimony at issue, but notes that the jurisprudence carves out an exception to the contemporaneous objection rule where such alleged trial error raises overriding due process considerations. The defendant argues that the admission of the testimony in question was not harmless, contending that there was an absence of corroborating testimony, that there was contradictory testimony, and that the State had no case without the testimony in question. In the event that this court finds that the issue is not reviewable for lack of a contemporaneous objection, the defendant argues that his trial counsel was ineffective in this regard. The defendant specifically argues that his trial counsel's deficient performance in failing to contemporaneously object to the testimony in question was prejudicial because the jury was exposed to damaging hearsay testimony that denied him a fair trial.

Notably, it was defense counsel who elicited the testimony that the defendant now argues was inadmissible hearsay testimony. The defendant specifically makes reference to testimony elicited from Detective Jackson by the defense attorney as follows:

> Q. Did she [Ms. Coon] indicate that she actually saw Mr. Coleman drive off in that vehicle?
>
> A. I don't know if she actually said that. She just said she loaned the car to Phil Coleman.
>
> Q. Did she indicate that there were other individuals who possibly would have had access to that vehicle?
>
> A. She didn't say.
>
> Q. Did you ask?
>
> A. No, ma'am.
>
> . . . .
>
> Q. Did Ms. Coon indicate to you at what point -- that she ever saw Mr. Coleman in the vehicle?

A. She made a statement that he returned home that day, picked up Mr. Wallace somewhere near the interstate and then later, eventually brought the car back. Something like that. He brought Michael -- she's saying Phil had picked up Michael off the interstate, and I think brought him home. Phil left again and later returned with the vehicle, is how it went.

Q. She told you that she saw Mr. Coleman in the vehicle?

A. She said that Phil and Michael -- Phil picked up Michael off of I-12 in Livingston -- I-12 and 448 exit and brought him -- I think brought him home and then left again in the vehicle and then later brought the vehicle back, is what she told me. That's exactly how it was written in the report, I believe.

Although the defendant argues that during the trial the State did not question Coon about her statements to the police, and that he was denied the opportunity to cross-examine Coon in regard to the accuracy of these statements, the record clearly reflects otherwise. During direct examination specifically regarding her statements to the police, Coon confirmed telling the police that the defendant borrowed her car but when specifically asked if the defendant used her vehicle, she added the following:

I guess. I mean, I cannot sit here and say that he used it, because I did not physically see him in it. He did call and ask if he could borrow it, but I did not see him in it so I can't sit here and say that I gave him the keys cause I didn't. He asked if he could borrow it, I said yes he could. I never saw him leave in it, I never saw him come back in it.

When asked if she relayed this information to the police, she stated, "I told them the same thing I'm telling you. I told them that he borrowed my car. Now, going back to physically see him take my car, no I didn't." During cross-examination, Coon reiterated that she did not actually see the defendant use her vehicle on the day in question. After redirect examination, the State indicated that it had no further questions for Coon, noting that her release was at the defense attorney's discretion. The defense attorney specifically stated, "Defense will excuse Ms. Coon."

Not only is the defendant incorrect in his assertion that Coon was not questioned regarding her statements to Detective Jackson, as noted above, the defense elicited Detective Jackson's testimony regarding Coon's statements. The defendant cannot claim reversible error on the basis of evidence that he elicited. See **State v. Tribbet**, 415 So.2d 182, 184 (La. 1982); **State v. Kimble**, 375 So.2d 924, 928 (La. 1979);

State v. Sensley, 460 So.2d 692, 701 (La. App. 1 Cir. 1984), writ denied, 464 So.2d 1374 (La. 1985). Moreover, a defense attorney's examination of witnesses falls within the ambit of trial strategy for purposes of evaluating an ineffectiveness claim. **State v. Eames**, 97-0767, p. 8 (La. App. 1 Cir. 5/15/98), 714 So.2d 210, 216, writ denied, 98-1640 (La. 11/6/98), 726 So.2d 922. It is well settled that allegations of ineffectiveness of counsel relating to decisions involving investigation, preparation, and strategy cannot possibly be reviewed on appeal. See **State v. Martin**, 607 So.2d 775, 788 (La. App. 1 Cir. 1992). Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond that contained in the instant record, could this allegation be sufficiently investigated.[4] Accordingly, this allegation is not subject to appellate review. See **State v. Albert**, 96-1991, p. 11 (La. App. 1 Cir. 6/20/97), 697 So.2d 1355, 1363-1364. Pro se assignment of error number three lacks merit.

SENTENCING ERROR

Under La. Code Crim. P. art. 920(2), we routinely review the record for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we note the following sentencing error. As previously noted herein, the defendant was adjudicated a fourth-felony habitual offender and sentenced to twenty-five years imprisonment at hard labor. The habitual offender statute, La. R.S. 15:529.1A(1)(c)(ii) (as denoted prior to its 2010 revisions), provided, in pertinent part:

> Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> . . . .
>
> If the fourth felony and two of the prior felonies are felonies defined ... as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, *or of any other crime punishable by imprisonment for twelve years or more*, or any combination of such crimes, the person shall be imprisoned for the

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

> remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

(emphasis added). In this case, 2004, 2000, and 1999 guilty plea simple burglary convictions were considered in the adjudication of defendant as a fourth-felony habitual offender as to the enhancement of the instant conviction. Simple burglary offenses are punishable by imprisonment of twelve years. See La. R.S. 14:62B. Thus, in accordance with former La. R.S. 15:529.1A(1)(c)(ii), the defendant was subject to a mandatory life imprisonment sentence upon enhancement. An illegal sentence may be corrected at any time by the court that imposed the sentence, or by an appellate court on review. La. Code Crim. P. art. 882A. The trial court did not articulate a basis for departing downward from the minimum sentence under the Habitual Offender Law, as required by **State v. Johnson**, 97-1906, pp. 8-9 (La. 3/4/98), 709 So.2d 672, 676-77 and incorrectly stated that there was a sentencing range of twenty years to life imprisonment. Nevertheless, although the trial court apparently erred in imposing an illegally lenient sentence, this court will not correct the sentence as the error is not inherently prejudicial, but in the defendant's favor, and the State has not appealed the illegal sentence. **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

VERSUS

PHIL COLEMAN

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2010 KA 2039

KUHN, J., dissenting in part.

Because the trial court was statutorily directed to impose a mandatory life sentence, I believe this court should correct the sentence despite the State's failure to appeal that issue. Accordingly, I dissent.