NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1926

STATE OF LOUISIANA

VERSUS

JAMES THOMAS

Judgment Rendered: AUG 10 2011

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APPEALED FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LAFOURCHE
STATE OF LOUISIANA
DOCKET NUMBER 413,898 DIVISION "D"

THE HONORABLE ASHLEY BRUCE SIMPSON, JUDGE

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In Proper Person

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

The defendant, James Thomas, was charged by bill of information with one count of vehicular homicide (count I), a violation of La. R.S. 14:32.1; and one count of fourth or subsequent offense driving while intoxicated (count II), a violation of La. R.S. 14:98, and pled not guilty on both counts. The charges were severed, and following a jury trial on count I, he was found guilty as charged.[1] Thereafter, the State filed a habitual offender bill of information against the defendant, alleging he was a fourth-felony habitual offender.[2] He was originally sentenced to twenty years at hard labor, with the first year without the benefit of parole. Thereafter, he was adjudicated a fourth-felony habitual offender, and the trial court vacated the previously imposed sentence and sentenced the defendant to forty years at hard labor.

Upon appeal to this court, we found the State failed to prove the ten-year "cleansing period" had not lapsed in regard to predicate #1, and thus, we affirmed the conviction, reversed the habitual offender adjudication, vacated the habitual offender sentence, reinstated the sentence on vehicular homicide, and remanded for further proceedings on the habitual offender bill. See **State v. Thomas**, 2005-2210 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 177, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683. Upon remand, the State abandoned its allegations in regard to predicate #1, the defendant was adjudicated a third-felony habitual offender, and the trial court vacated the

[1]Count II was nol-prossed by the State.

[2]Predicate #1 was set forth as the defendant's August 16, 1979 conviction, under Twenty-fourth Judicial District Court Docket #78-1302, for simple burglary. Predicate #2 was set forth as the defendant's January 13, 1994 conviction, under 54th Judicial District Court (Texas) Docket #93-489-C, for theft by check over $750. However, the State abandoned this allegation prior to the court's decision on the habitual offender status of the defendant. Predicate #3 was set forth as the defendant's November 26, 1996 commission of criminal mischief over $1,500 and under $20,000 in the 54th Judicial District Court (Texas) Docket #05-57356 CR296-664-C. Predicate #4 was set forth as the defendant's August 26, 2002 guilty plea, under Ascension Parish Docket #14749, to third-offense driving while intoxicated.

original sentence and sentenced the defendant to thirty-five years at hard labor. The defendant now appeals, contending there is error under La. Code Crim. P. art. 920(2) because the State's evidence of predicate #3 failed to comply with the authentication requirements of 28 USC § 1738 and La. Code Evid. art. 902(4), and contending, in a pro se assignment of error, the trial court erred in finding the defendant's conviction under predicate #3 would be a felony in Louisiana. For the following reasons, we affirm the habitual offender adjudication, vacate the sentence, and remand for resentencing.

FACTS

The facts were set forth in our original decision in this matter. See **Thomas**, 938 So.2d at 171.

PRO SE ASSIGNMENT OF ERROR

In his sole pro se assignment of error, the defendant argues the trial court erred in finding that predicate #3 would be a felony in Louisiana because he presented evidence showing the damage was only $400. Following the filing of the habitual offender bill, the defendant filed objections to the habitual offender proceedings, including the objection that predicate #3 would not be a felony in Louisiana, and thus could not be considered under the habitual offender law. See La. R.S. 15:529.1(A)(1) (prior to amendment by 2010 La. Acts Nos. 911, § 1 and 973, § 2) ("or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime, which, if committed in this state would be a felony[.]"). In connection with its proof of predicate #3, the State introduced into evidence a judicial confession, signed by the defendant with benefit of counsel, stating:

> With full understanding of the consequences, and having fully waived my Federal and State Constitutional rights against self-incrimination, under Oath I agree and stipulate that the following facts constitute evidence in this case. I, JAMES THOMAS, SR., am pleading GUILTY because I am GUILTY of and JUDICIALLY

> CONFESS to the offense of CRIMINAL MISCHIEF OVER $1,500, in violation of §28.03, a State Jail Felony, and all lesser included offenses thereof, exactly as alleged in the INFORMATION, or any modifications or amendments thereto. I stipulate that this offense was committed in McLennan County, Texas on SEPTEMBER 22, 1995. I stipulate that I did then and there intentionally and knowingly damage and destroy tangible property, to-wit: furniture, without the effective consent of LEONARD FRAZIER, the owner of said property, and did thereby cause pecuniary loss of fifteen hundred dollars ($1,500.00) or more, but less than twenty thousand dollars ($20,000.00) to the said owner, Against the Peace and Dignity of the State.

The trial court rejected the defendant's claim that predicate #3 would not be a felony in Louisiana, finding the judicial confession proved the defendant intentionally and knowingly damaged and destroyed furniture without the consent of the owner, causing a loss of $1,500 or more, and that if the offense would have been committed in Louisiana, the defendant would have committed the felony offense of simple criminal damage to property where the damage amounts to $500, but less than $50,000. See La. R.S. 14:56(B)(2).

Upon remand, the defense introduced evidence indicating that in connection with predicate #3, the defendant had been sentenced to a year in a state jail facility, two years suspended, a $500 fine, and $400 in full restitution. The defense argued the pecuniary loss was only $400, and thus, below the felony-grade level in Louisiana. The State argued the defendant had pled guilty to predicate #3, which indicated the damage was over $1,500, and the level of restitution could be less than the damage for various reasons, including prior partial payments of restitution, a lesser demand of damages by the victim, or negotiation. The court held its prior finding that predicate #3, if committed in Louisiana, would be a felony was correct, and other reasons could explain why restitution was only $400, including: the victim may not have requested restitution; the whereabouts of the victim may have been unknown; the defendant may have been indigent, and thus, unable to pay restitution; or the

defendant may have had codefendants who had been sentenced to pay a prorated amount of restitution.

There was no error. The judicial confession established that predicate #3 would be a felony if committed in Louisiana. A judicial confession is a party's explicit admission in a judicial proceeding of an adverse factual element and has the effect of either waiving evidence as to the subject of the admission or withdrawing the matter from issue. **Compensation Specialties, L.L.C. v. New England Mutual Life Insurance Company**, 2008-1549R (La. App. 1st Cir. 2/13/09), 6 So.3d 275, 281, writ denied, 2009-0575 (La. 4/24/09), 7 So.3d 1200. A judicial confession constitutes full proof against the party who made it, is indivisible, and may be revoked only on ground of error of fact. La. Civ. Code art. 1853; **Id.**

This assignment of error is without merit.

REVIEW FOR ERROR

In his sole counseled assignment of error, the defendant argues error occurred under La. Code Crim. P. art. 920(2) in this matter because the State's evidence of predicate #3 failed to comply with the authentication requirements of 28 USC § 1738 and La. Code Evid. art. 902(4). Initially, we note that 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 "[a]n 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). See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

The defendant challenges the admissibility of the State's evidence of predicate #3 for failure to comply with the authentication requirements of 28

USC § 1738 and La. Code Evid. art. 902(4). Review of this claim is impossible without inspection of the evidence. Thus, the defendant's claim cannot be considered under La. Code Crim. P. art. 920(2).

The defendant also designates the alleged error under La. Code Crim. P. art. 920(2) as an assignment of error. The record, however, indicates he failed to object in the trial court to the State's evidence of predicate #3 for failure to comply with the authentication requirements of 28 USC §1738 and La. Code Evid. art. 902(4). Accordingly, he failed to preserve any error on that basis for review. See La. Code Evid. art. 103(A)(1) ("Error may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... a timely objection ... appears of record, stating the specific ground of objection;") La. Code Crim. P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.").

After a careful review of the record in these proceedings, we have, however, found sentencing error. The term of the sentence imposed on the defendant was within the range provided by the habitual offender law, but the trial court failed to impose the sentence in conformity with the reference statute. The conditions imposed on the sentence are those mandated in the reference statute. See **State v. Bruins**, 407 So2d 685, 687 (La. 1981). Whoever commits the crime of vehicular homicide shall be subject to the following penalties: to a fine of not less than two thousand dollars nor more than fifteen thousand dollars; at least one year of the sentence of imprisonment shall be imposed

without benefit of probation, parole,[3] or suspension of sentence; and the court shall require the offender to participate in a court-approved substance abuse program or a court-approved driver improvement program, or both; all driver improvement courses required under La. R.S. 14:32.1 shall include instruction on railroad grade crossing safety. See La. R.S. 14:32.1(B) (prior to amendment by 2006 La. Acts No. 294, § 1, 2004 La. Acts No. 750, § 1 & 2004 La. Acts No. 381, § 1). If the trial court had been aware of the conditions required by the reference statute, it may have imposed a different term in this matter. When the amendment of a defendant's sentence entails more than a ministerial correction of a sentencing error, the decision in **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, does not sanction sua sponte correction by the court of appeal on the defendant's appeal of his conviction and sentence. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Thus, we must vacate the sentence and remand for resentencing.

HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE VACATED, REMANDED WITH INSTRUCTIONS.

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[3]We note that the defendant was sentenced to 35 years at hard labor and had three prior felony convictions. Louisiana Revised Statutues 15:574.4A.(1) provides that "[a] person convicted of a third or subsequent felony offense shall not be eligible for parole." Thus, the defendant was not independently eligible for parole. However, Louisiana Revised Statutes 15:574.4(A)(3) (prior to redesignation by the Louisiana State Law Institute of (A)(4) as (A)(3) in 2009; prior to amendment by 2008 La. Acts No. 624, § 1; and prior to redesignation by the Louisiana State Law Institute of (A)(3) as (A)(2) in 2008) provided:

> Notwithstanding the provisions of Paragraph (A)(1) or any other law to the contrary, unless eligible for parole at an earlier date, a person committed to the Department of Public Safety and Corrections for a term or terms of imprisonment with or without benefit of parole for thirty years or more shall be eligible for parole consideration upon serving at least twenty years of the term or terms of imprisonment in actual custody and upon reaching the age of forty-five.

The defendant was born on April 24, 1960; he was 45 years old in 2005. Thus, the portion of the sentence that is imposed without benefit of parole will determine when the defendant becomes parole eligible. Any sentence of thirty years or more (i.e. the originally imposed sentence of thirty five years) will result in parole eligibility after twenty years; a sentence of less than 30 years will not.