NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0606

STATE OF LOUISIANA

VERSUS

FRANK ATKINS

DATE OF JUDGMENT: OCT 31 2016

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 11-12-0432, SECTION VIII, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TRUDY WHITE, JUDGE

* * * * * *

Hillar C. Moore, III District Attorney Baton Rouge, Louisiana	Counsel for Appellee State of Louisiana
Frederick Kroenke Baton Rouge, Louisiana	Counsel for Defendant-Appellant Frank Atkins
Frank Atkins Angola, Louisiana	In Proper Person

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BEFORE: HIGGINBOTHAM, THERIOT AND CHUTZ, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

CHUTZ, J.

The defendant, Frank D. Atkins, was charged by grand jury indictment with second degree murder of C.A.,[1] a violation of La. R.S. 14:30.1 (count one); and attempted second degree murder of Kayla Atkins, a violation of La. R.S. 14:30.1 and 14:27 (count two). He entered a plea of not guilty and, following a jury trial, was found guilty as charged on both counts. He was later sentenced on count one to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. On count two, the defendant was sentenced to fifty years at hard labor without the benefit of parole, probation, or suspension of sentence.[2] He now appeals,[3] alleging two counseled and five pro se assignments of error. For the following reasons, we affirm the defendant's convictions and sentences.

FACTS

The defendant and Kayla Atkins, one of the two victims, were married on September 19, 2011. On May 1, 2012, while Kayla was pregnant with the defendant's child, she drove to the defendant's grandmother's house at 2025 Bay Street in Baton Rouge, Louisiana, to retrieve a rental car from the defendant. When Kayla asked the defendant to give her the keys to the rental car, an argument ensued. The defendant entered his grandmother's house and exited with a gun. The defendant's grandmother intervened, and Kayla was able to run to the rental vehicle and leave.

On June 17, 2012, Kayla returned to the Bay Street house to drop off the defendant because the two were fighting. Kayla told the defendant that she no longer wanted to be in a relationship with him. When Kayla drove up to the house,

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[1] In accordance with La. R.S. 46:1844W, the minor victim herein is referenced only by her initials.

[2] The sentences are concurrent. See La. C.Cr.P. art. 883.

[3] The defendant was granted an out-of-time appeal. See ***State v. Counterman***, 475 So.2d 336 (La. 1985).

the defendant jumped across the seat and began choking her while the vehicle was still in "drive." She jumped out of the vehicle and ran to the front porch of the house. The defendant began choking her again and put her into a headlock until she lost consciousness. Two men were able to pull the defendant off of Kayla. The vehicle, which was still in "drive," crashed into another vehicle. When Kayla regained consciousness, she ran toward her vehicle and jumped on top of it. The defendant followed her. Kayla then jumped on top of the vehicle that her vehicle had run into. The defendant followed Kayla, but police officers arrived on the scene, and the defendant was arrested. The following day, June 18, 2012, Kayla filed for and was issued a restraining order against the defendant and purchased a gun. According to Kayla, the defendant told her that he would kill her if she ever tried to leave him.

On June 19, 2012, after the defendant had been released from parish prison, he asked Kayla whether he could go on vacation with her. She told him that he could not, and he asked her to return his grandmother's cellular telephone that he left in Kayla's vehicle. Kayla's cousin, Andrea Scott, drove her to the Bay Street house in Kayla's mother's vehicle to return the cellular telephone. Kayla sat in the front passenger seat, and Andrea's three-year-older daughter sat in the backseat. Upon arrival, Kayla sent a text message to the defendant asking him to come outside. The defendant walked toward the vehicle, and Kayla handed him the phone. The defendant asked, "'B,' you think I'm going to – I'm just going to let you leave [?]" He then shot at Kayla four or five times. After firing the shots, the defendant walked away from the vehicle. The shooting was recorded on a video surveillance camera at a bar across the street from the Bay Street house.

Kayla fell into Scott's lap, unable to move her body. Scott drove to a parking lot off of Scenic Highway and Choctaw Drive and contacted the police, who arrived approximately five minutes later. Kayla, who was four-months

pregnant with the defendant's child, was transported by ambulance to the Baton Rouge General Medical Center Mid-City campus. She suffered from gunshot wounds to the base of her head, back of her neck, right shoulder, and right shoulder blade, resulting in quadriplegia.

Approximately one month later, on July 25, 2012, Kayla's child, C.A., was born prematurely. Dr. Michael Fontenot, a maternal fetus medicine expert, treated Kayla and testified that C.A.'s pre-term delivery was a result of Kayla's quadriplegic state, as it appeared to be a result of persistent prolonged systemic inflammation due to traumatic injury. Less than one hour after C.A. was born, she was pronounced dead. Dr. Cameron Snider, East Baton Rouge Parish Chief Forensic Pathologist, determined C.A.'s gestation period to be twenty-three weeks and testified that C.A. died from respiratory failure due to the prematurity. Dr. Snider classified C.A.'s death as a homicide. According to Dr. Snider, C.A.'s normal growth was interrupted because of complications resulting from Kayla's gunshot wounds, and otherwise, C.A. would have developed normally.

SUFFICIENCY OF THE EVIDENCE

In his first pro se assignment of error, the defendant contends that there was insufficient evidence to support his charge of second degree murder (count one). Specifically, the defendant argues that the State produced no evidence that he caused C.A.'s death or that there was any injury or harm to C.A. as a result of the shooting.

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, a 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. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); ***State v. Patton***, 2010-1841 (La. App. 1st

Cir. 6/10/11), 68 So.3d 1209, 1224. In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; ***State v. Millien***, 2002-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 508-09.

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. ***State v. Wright***, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 487, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1A(1). The purpose of the statute is to prevent the intentional killing of human beings. The statute accomplishes this purpose without requiring the State to prove that the defendant specifically intended the death of the person who was actually killed. See ***State v. Henderson***, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 750-51, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235. The doctrine of transferred intent provides that when a person shoots at an intended victim with the specific intent to kill or inflict great bodily harm and accidentally kills or inflicts great bodily harm upon another person, if the killing or inflicting of great bodily harm would have been unlawful against the intended victim actually intended to be shot, then it would be unlawful against the person actually shot, even though that person was not the intended victim. ***Id.***

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." La. R.S. 14:10(1). Such state of mind can be formed in an instant. ***State v. Cousan***, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. ***Henderson***, 762 So.2d at 751.

Testimony was presented at trial establishing that C.A.'s death was caused by the shooting. Less than one hour after C.A. was born, she was pronounced dead. Dr. Fontenot testified that C.A.'s preterm delivery was a result of Kayla's quadriplegic state because it appeared to be the result of persistent prolonged systemic inflammation due to traumatic injury. Dr. Snider classified C.A.'s death as a homicide and testified that she died from respiratory failure due to the prematurity. He explained that C.A.'s normal growth was interrupted because of complications resulting from Kayla's gunshot wounds, and otherwise, C.A. would have developed normally.

After a thorough review of the record, we find 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 second degree murder, including the defendant's specific intent to kill C.A. and that her death was a result of the shooting. The testimony established that the defendant pointed a gun directly at Kayla and shot her multiple times, fully aware

that she was pregnant with his child. The testimony further established that C.A.'s death was a direct result of the gunshot wounds inflicted upon Kayla. 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.

The verdict returned in this case indicates that the jury rejected the defendant's theory that he did not cause any harm to C.A. after her birth and because she was not yet born at the time of the shooting, any intent to kill Kayla could not be transferred to C.A. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that 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, 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. 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. See ***State v. Mire***, 2014-2295 (La. 1/27/16), --- So.3d ----, 2016 WL 314814 (per curiam); see also ***State v. Calloway***, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Accordingly, this assignment of error is without merit.

IMPROPER COMMENTS DURING VOIR DIRE

In his second pro se assignment of error, the defendant argues that the State violated his rights to a fair trial and due process by "placing jurors in a 'life-like' scenario" during voir dire. He specifically takes issue with the prosecutor's statements explaining the doctrines of transferred intent and attempt. The defendant argues that his counsel should have objected to the prosecutor's statements as "argumentative" because she was "setting the stage for 'domestic violence' and 'use of a gun[.]'"

After defining the doctrine of transferred intent during voir dire, the prosecutor stated, "Think about it this way, I go to a party and I'm intended [sic] to kill my ex-boyfriend but I'm a terrible shot. So, I walk in to that party and there are people dancing up a storm, moving back and forth and everything, and I go up and I fire and I end up killing [potential juror Barnett] instead. ... Mr. Barnett, you're not my ex-boyfriend are you?" After the potential juror responded negatively, the prosecutor went on, "But I still had the specific intent to kill or inflict great bodily harm against someone, right? And, unfortunately, Mr. Barnett, he was caught in the cross fire. Does that make sense?"

The defendant also takes issue with the prosecutor's explanation of attempt. In an example revolving around throwing a baseball at her ex-boyfriend, the prosecutor stated, "The immateriality or the fact that I probably am not going to hit him doesn't matter in this situation. If I bring that ball in and I throw it at Mr. Barnett, I'm guilty of hitting Mr. Barnett, and I'm also guilty of attempting to hit my ex-boyfriend, right? I did an act trying to – that was in furtherance of committing a crime. Does that make sense?"

"The court, the [S]tate, and the defendant shall have the right to examine prospective jurors. The scope of the examination shall be within the discretion of the court." La. C.Cr.P. art. 786. The purpose of voir dire examination is to

determine the qualifications of prospective jurors by testing their competency and impartiality and discovering bases for the intelligent exercise of causal and peremptory challenges. Parties must be afforded wide latitude in the conduction of voir dire. ***State v. Straughter***, 406 So.2d 221, 223-24 (La. 1981). Voir dire does not encompass unlimited inquiry by the defendant into all possible prejudices of prospective jurors, including their opinions on evidence, or its weight, hypothetical questions, or questions of law that call for any prejudgment of supposed facts in the case. Louisiana law clearly establishes that a party interviewing a prospective juror may not ask a question or pose a hypothetical which would demand a commitment or pre-judgment from the juror or which would pry into the juror's opinions about issues to be resolved in the case. It is not proper for counsel to interrogate prospective jurors concerning their reaction to evidence which might be received at trial. ***State v. Taylor***, 2003-1834 (La. 5/25/04), 875 So.2d 58, 64.

It is clear that the sole purpose behind the hypothetical scenarios presented to the prospective jurors by the prosecutor in the instant case was to fully explain the doctrines of transferred intent and attempt. Nothing about the use of the hypothetical scenarios was prejudicial to the defendant, nor was he was deprived of a fair trial or due process based on the prosecutor's use of the hypothetical scenarios. Accordingly, this assignment of error has no merit.

COMPETENCY RULING

In his third pro se assignment of error, the defendant argues that the district court abused its discretion by failing to rule on the issue of his competency. According to the defendant, prior to trial, his counsel, the prosecutor, and the district court judge met "to discuss stipulations on [his] competency" outside of his presence. He claims that the stipulations were read into the record, but complains that the "actual findings" of the review panel were not read into or made part of the record.

Contrary to the defendant's assertions, he was present with counsel in open court for a hearing on his motion to quash when the court noted that the preliminary matter of the defendant's competency to proceed needed to be addressed. Defense counsel informed the court that a sanity commission had submitted reports and concluded that the defendant was competent to proceed. The State confirmed defense counsel's statements and offered and introduced the reports from the sanity commission into evidence. Defense counsel noted that he had no objection to the reports being introduced into evidence. The court allowed the reports into evidence. The prosecutor then stated, "And I believe there's a stipulation that he is competent?" Defense counsel responded, "That's correct. We will submit to the reports, to the findings of the doctors' reports." The State noted that the stipulation was both to the defendant's competency to proceed as well as his competency at the time of the offense. The court then stated, "Okay. Competent to proceed and competent at the time of the incident." The parties then moved on to address other preliminary matters. Defense counsel clearly stipulated as to the defendant's competency at the hearing, and the reports prepared by the sanity commission were introduced into evidence. After the stipulation, the court clearly stated that it found the defendant competent to proceed and competent at the time of the offense. As such, this assignment of error has no merit.

DEFENDANT'S RIGHT TO TESTIFY

In his fourth pro se assignment of error, the defendant argues that his constitutional rights were violated when his counsel refused to allow him to take the stand. According to the defendant, he was told by his counsel that he "was not going to take the stand for any reason." He further claims that his counsel "never once informed him that it was his right to determine if he would testify."

The record contradicts the defendant's assertions and establishes that he was informed of his right to testify. In response to the prosecutor's statement that it

was her understanding that the defendant did not plan to testify, defense counsel stated that he "had that conversation" with the defendant, and the defendant indicated, "no." The following colloquy then occurred:

> [The court]: Now, Mr. Atkins, you have a right to testify. That's your decision. Is this something that you want to do?
>
> [The defendant]: Yes, ma'am.
>
> [The court]: You want to testify?
>
> [The defendant]: Oh, no, ma'am.
>
> [The court]: You do not want to testify?
>
> [The defendant]: No, ma'am.
>
> * * *
>
> [The court]: Okay. But you've been advised by your attorney that you do have the right? Has your attorney spoken with you about that?
>
> [The defendant]: Yes, ma'am.
>
> [The court]: So, is anyone forcing you or threatening you to not testify?
>
> [The defendant]: No, ma'am.
>
> [The court]: You're choosing to not testify of your own free will?
>
> [The defendant]: Yes, ma'am.

Based on the above colloquy, it is clear that the defendant was advised of his right to testify and chose not to testify. Defense counsel stated that he addressed the defendant's right to testify with him, and the defendant himself confirmed that his counsel addressed his right to testify. The defendant clearly stated that he did not intend to testify and that his decision was made on his own free will. Therefore, this assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In his last pro se assignment of error, the defendant argues that he was denied effective assistance of appellate counsel. Specifically, the defendant

contends that his appellate counsel failed to perform a thorough review of the record for assignments of error. He claims that in addition to the two counseled assignments of error argued in appellate counsel's brief, he had "more viable issues, [such] as [those raised in his pro se brief]."

A claim of ineffective assistance of counsel is analyzed under a 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 counsel was ineffective, a defendant must first show that counsel's performance was deficient, which requires a showing that he made errors so serious that he did not function 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 show 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 counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. It is unnecessary to address the issues of both counsel's performance and the prejudice to him if the defendant makes an inadequate showing on one of the components. ***State v. Harper***, 2007-0299 (La. App. 1st Cir. 9/5/07), 970 So.2d 592, 602-03, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173.

Having found no merit in any of the pro se assignments of error raised by the defendant, we conclude that the defendant's claim of ineffective assistance of appellate counsel for failure to raise those claims is also without merit. See ***State ex rel. Roper v. Cain***, 99-2173 (La. App. 1st Cir. 10/26/99), 763 So.2d 1, 5 (per curiam), writ denied, 2000-0975 (La. 11/17/00), 773 So.2d 733 ("If the substantive issue an attorney failed to raise has no merit, then the claim that the attorney was

ineffective for failing to raise the issue also has no merit."). Even if the defendant could show that his appellate counsel's performance was somehow deficient, this claim would necessarily fail because the defendant can show no prejudice. Therefore, the record discloses evidence sufficient to dispose of the defendant's ineffective assistance of appellate counsel claim. This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL/EXCESSIVE SENTENCE

In two related counseled assignments of error, the defendant argues that the district court erred in imposing excessive sentences and that his trial counsel was ineffective for failing to file a motion to reconsider sentence.

The defendant correctly notes that the record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1E provides that the failure to file or make a motion to reconsider sentence precludes a defendant from raising an excessive sentence argument on appeal. Ordinarily, pursuant to the provisions of this article and the decision of ***State v. Duncan***, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam), we would not consider an excessive sentence argument. However, in the interest of judicial economy, we will consider the defendant's argument that his sentence is excessive, even in the absence of a motion to reconsider sentence, in order to address his claim of ineffective assistance of counsel. See ***State v. Wilkinson***, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631. Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. Nevertheless, 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. See ***State v. Felder***, 2000-2887 (La.

App. 1st Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. ***State v. Sepulvado***, 367 So.2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. ***State v. Hogan***, 480 So.2d 288, 291 (La. 1985). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. See ***State v. Hurst***, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. A district court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. ***State v. Lobato***, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the district court before imposing sentence. See La. C.Cr.P. art. 894.1. The district court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. ***State v. Herrin***, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the district court's stated reasons and factual basis for its sentencing decision. ***State v. Watkins***, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988).

In the instant case, for the defendant's conviction for second degree murder of C.A. (count one), he was sentenced to the statutory mandatory term of life

imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. See La. R.S. 14:30.1B. For his conviction for attempted second-degree murder of Kayla (count two), the defendant was sentenced to the statutory maximum term of fifty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. See La. R.S. 14:30.1B & 14:27D(1)(a).

The defendant argues that his life sentence is a result of C.A. having been born prematurely due to Kayla's injuries. According to the defendant, there is no evidence that he intended to kill C.A. The defendant claims that the "specific intent required for second degree murder [was] only reached by the [S]tate through the doctrine of transferred intent and the fact that [C.A.] was born alive and is thus a human being" should have been considered by the district court. He further claims that his sentences are grossly disproportionate to the seriousness of the offenses and nothing more than a purposeless and needless infliction of pain and suffering.

As noted above, the life sentence imposed on count one is the mandatory sentence for the offense of second degree murder. See La. R.S. 14:30.1B. Even though a sentence is the mandatory minimum sentence, it may still be excessive if it makes no "measurable contribution to acceptable goals of punishment" or amounts to nothing more than the "purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime." ***State v. Dorthey***, 623 So.2d 1276, 1280-81 (La. 1993). In order for a defendant to rebut the presumption that a mandatory minimum sentence is constitutional, he must "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, 676. Departures downward from the minimum sentence should only occur in rare situations. See ***Johnson***, 709 So.2d at 677.

Based on our review of the record, we cannot say that the district court erred or abused its discretion in imposing the defendant's sentences. Prior to the sentencing hearing, the district court judge requested a presentence investigation report. According to the report, the defendant had a history of criminality dating back to at least 2006. In 2006, he was arrested for armed robbery. However, information was unavailable as to the disposition of that charge. In 2009, he was arrested for attempted first degree murder and armed robbery, but the charges were dismissed because the victim was unable to be located. In 2011, in addition to the instant incident, the defendant was arrested for second degree murder, but the matter was passed without date. In 2006, the defendant pled guilty to simple battery on an original charge of aggravated second degree battery. In 2007, he pled guilty to resisting an officer on an original charge of unauthorized entry of an inhabited dwelling and resisting an officer. In 2012, he pled guilty to domestic abuse battery by strangulation. The division of probation and parole recommended a term of life imprisonment on count one and fifty years on count two and noted that it felt that the defendant "is a danger to society and should never be allowed out of prison."

At his sentencing hearing, the defendant did not attempt to make any clear and convincing showing to the district court that he was exceptional and a victim of the legislature's failure to assign a sentence that was meaningfully tailored to his culpability, to the gravity of the offenses, and to the circumstances of the case. Roslyn Scott, Kayla's mother, and Kayla made statements prior to sentencing. According to Roslyn, prior to the incident, her daughter was full of life and a very active parent who worked and did everything she could to support her family, but

since the incident, Kayla has to be cared for twenty-four hours a day. Roslyn also pointed out that Kayla was not even able to attend the funeral of C.A., her innocent child. Kayla explained that she spends her days lying in a hospital bed or sitting in a wheelchair. She is unable to interact with her two children, who were four and six-years-old at the time of sentencing. The defendant did not address the court, but his counsel noted the tragic nature of the instant offenses and stated that he wanted to "reiterate . . . [the defense's] objection to the charge of second degree murder and preserve that objection for appeal."

On these facts, the district court had no reason to deviate downward from the mandatory sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence on count one. As to count two, the maximum sentence was warranted in this matter. Maximum sentences may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. ***State v. Parker***, 2012-1550 (La. App. 1st Cir. 4/26/13), 116 So.3d 744, 754, writ denied, 2013-1200 (La. 11/22/13), 126 So.3d 478. Count two was a most serious offense because the defendant repeatedly shot Kayla at pointblank range to prevent her from leaving him, resulting in devastating consequences for Kayla and her family. The defendant was a worst offender due to the manner in which he baited Kayla so he could shoot her and also due to his long history of criminal activity. Additionally, the defendant's commission of the instant offense and his violent criminal history establish that he poses an unusual risk to the public safety. We also note that remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. Accordingly, even if trial counsel's failure to file a motion to reconsider sentence constituted deficient performance, the defendant clearly suffered no prejudice since the sentences imposed were not excessive and were fully supported by the record. Thus, the

defendant's ineffective assistance of counsel claim must fall. See ***Harper***, 970 So.2d at 602-03.

Accordingly, these assignments of error are without merit.

DECREE

For these reasons, we affirm the convictions and sentences of the defendant, Frank D. Atkins.

CONVICTIONS AND SENTENCES AFFIRMED.