NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 0099

STATE OF LOUISIANA

VERSUS

BENJAMIN SANCHEZ

Judgment Rendered: OCT 18 2018

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On Appeal from
The 17th Judicial District Court,
Parish of Lafourche, State of Louisiana
Trial Court No. 549930
The Honorable Steven Miller, Judge Presiding

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Kristine Russell District Attorney Joseph S. Soignet Assistant District Attorney Thibodaux, Louisiana	Attorneys for Plaintiff/Appellee, State of Louisiana
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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE

Crain J. dissents - part of assigns reasons

HOLDRIDGE, J.

A jury found the defendant, Benjamin Sanchez, guilty of attempted second degree murder (count one) and possession of a firearm by a convicted felon (count two). *See* La. R.S. 14:27, 14:30.1, 14:95.1. The trial court sentenced him to forty years at hard labor on count one and twenty years at hard labor on count two, to be served concurrently and without benefit of probation, parole, or suspension of sentence. For the following reasons, we affirm the defendant's convictions and sentences.

FACTS

The defendant admitted at trial he shot the victim, Eddie Trosclair, after Trosclair intervened in a dispute between the defendant and his former girlfriend. The altercation began with an argument on the telephone that prompted the defendant to get a gun and drive to Trosclair's neighborhood, where the two men confronted each other on the street. When Trosclair approached within a few feet, the defendant shot him in the upper abdomen. Trosclair sustained life-threatening injuries but survived.

DISCUSSION

Excessive Sentence

The defendant contends his sentences are excessive, arguing he is a "youthful offender" who acted under provocation.[1]

Both the United States and Louisiana constitutions prohibit the imposition of excessive or cruel punishment. U.S. Const. amend. VIII; La. Const. art. I, §20. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate

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[1] Citing the defendant's failure to file a motion to reconsider the sentence, the state asserts this issue was not preserved for appeal. *See* La. Code Crim. Pro. art. 881.1E. At sentencing, defense counsel specifically objected to the sentences as excessive. That objection is sufficient to preserve the issue for appellate review. *See State v. Caldwell*, 620 So.2d 859 (La. 1993); *State v. Mims*, 619 So.2d 1059 (La. 1993) (per curiam).

review. *State v. Sepulvado,* 367 So.2d 762, 767 (La. 1979). A sentence is unconstitutionally 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. Shaikh*, 16-0750 (La. 10/18/17), 236 So.3d 1206, 1209 (per curiam). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks one's sense of justice. *State v. Weaver*, 01-0467 (La. 1/15/02), 805 So.2d 166, 174. The sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion to sentence within statutory limits. *State v. Fruge*, 14-1172 (La. 10/14/15), 179 So.3d 579, 584.

Louisiana Code of Criminal Procedure article 894.1 sets forth what must be considered before imposing a sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect the guidelines were adequately considered. A review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for the sentencing decision. Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. *State v. Dunn*, 15-1972 (La. App. 1 Cir. 12/22/16), 208 So.3d 954, 961-62, *writ denied*, 17-0297 (La. 10/27/17), 228 So.3d 1222.

For his conviction on count one, attempted second degree murder, the defendant was exposed to a sentencing range of ten to fifty years at hard labor without benefit of parole, probation, or suspension of sentence. *See* La. R.S. 14:30.1B; La. R.S. 14:27D(1)(a). The defendant was sentenced to forty years at hard labor without benefit of parole, probation, or suspension of sentence. For his conviction on count two, convicted felon in possession of a firearm, the defendant was exposed to a sentencing range of ten to twenty years at hard labor without benefit of parole, probation, or suspension of sentence as well as a fine. *See* La.

R.S. 14:95.1 (prior to revision by 2017 La. Acts, No. 281 §1).[2] The defendant was sentenced to twenty years at hard labor without benefit of parole, probation, or suspension of sentence.

At the sentencing hearing, the state noted the defendant never showed remorse, never apologized, and "blame[d] everyone but himself." The state also pointed out the defendant failed to turn himself in and "ran" for six months after the incident. Defense counsel argued the defendant acted under strong provocation and his conduct was the result of circumstances unlikely to reoccur. Addressing the trial court, the defendant said he felt sorry for Trosclair, but "did what [he] had to do." He expressed regret for "bring[ing] a gun" to the altercation but claimed he did so out of fear.

The trial court found the incident "completely avoidable" and unnecessary. The trial court noted the extensive injuries inflicted by the gun shot, which necessitated the surgical removal of Trosclair's kidney and parts of his pancreas, spleen, and liver. The defendant's criminal history, which includes convictions for simple burglary, possession of marijuana, and driving while intoxicated, was also taken into consideration. Reviewing the sentencing guidelines in Article 894.1, the trial court found the defendant used threats of or actual violence in the commission of the offense, the offense resulted in a significant permanent injury to the victim, the defendant used a dangerous weapon in the commission of the offense, and the defendant endangered human life by discharging a firearm. *See* La. Code Crim. Pro. art. 894.1B(6), (9), (10), (18).

As to the defendant's claim of provocation, the trial court noted the defendant retrieved a gun, drove to Trosclair's street, and waited. Any provocation affecting the defendant, according to the trial court, "was his own." The trial court

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[2] The defendant was convicted and sentenced before the effective date of Act 281. *Compare State v. Harrison*, 17-1566, 2018WL2041414 (La. App. 1 Cir. 5/1/18).

found no substantial grounds to excuse or justify the defendant's criminal conduct and no evidence Trosclair induced the conduct. *See* La. Code Crim. P. art. 894.1B(24), (25), (26). Their previous encounters did not suggest the defendant needed to bring a gun. The only mitigating factor recognized by the trial court was the defendant's age, twenty-three at the time of the offense. The court noted the defendant was "still young, but he's also prolific. This is – he['s] had two prior felonies, he received time in jail, yet he could not avoid any compulsions he felt to pick up a gun and shoot the victim."

The defendant's sentences are within the statutory parameters. They are not grossly disproportionate to the severity of the offenses or shocking to one's sense of justice. The sentences are not excessive and do not constitute manifest abuse of the trial court's wide discretion. This assignment of error is without merit.

Ineffective Assistance of Counsel

In his *pro se* assignment of error, the defendant argues his trial counsel was ineffective for failing to challenge a juror who was a family friend of the trial court's bailiff. The defendant, purportedly fearing the bailiff would influence the juror to "side with" the prosecution, asserts he told his counsel to challenge the juror but he refused. The defendant also claims he was deprived of a bond reduction hearing due to counsel's neglect.

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). To establish his trial attorney was ineffective, the defendant must show the attorney's performance was deficient, which requires a showing that counsel made errors so serious he was not functioning as the counsel guaranteed by the Sixth Amendment. The defendant must also prove the deficient performance prejudiced his defense. Failure to make the showing of either deficient performance or sufficient prejudice defeats the

ineffectiveness claim. *State v. McCasland*, 16-1178 (La. App. 1 Cir. 4/18/17), 218 So.3d 1119, 1129.

In evaluating the performance of counsel, the "inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. The defendant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

During *voir dire*, the trial court asked if any potential jurors had friends or relatives employed in law enforcement or by a district attorney's office. The subject juror stated the court's bailiff was a "friend of the family." After explaining the bailiff was employed by the sheriff's office and would not be testifying, the trial court asked if the bailiff's presence would affect the juror's ability to be fair and impartial. The juror responded, "No, sir."

Generally, a juror's disclosure that she knows or is related to a witness or the victim is not sufficient to disqualify a juror unless it is shown the relationship is sufficient to preclude the juror from arriving at a fair verdict. The connection must be such that one must reasonably conclude that it would influence the juror in arriving at a verdict. *See State v. Magee*, 04-1887 (La. App. 1 Cir. 5/6/05), 916 So.2d 191, 195, *writ denied*, 06-0028 (La. 6/16/06), 929 So.2d 1277. Here, the juror described the trial court's bailiff as a family friend but confirmed she could be fair and impartial. Apparently satisfied with the veracity of that response, defense counsel did not move to strike the juror, and she was placed on the jury. Despite the defendant's purported concerns, there is no indication the juror was influenced by the bailiff during the trial, or otherwise held bias against the

defendant. The defendant did not establish that counsel's failure to challenge the juror was error or prejudiced his defense.

We reach the same conclusion relative to the bond reduction hearing. Defense counsel filed a motion for bond reduction on January 15, 2016. The trial court denied the motion at the defendant's arraignment; however, at defense counsel's request, the trial court then said it would continue the motion to the pretrial date. Although the motion was apparently not heard prior to trial, the defendant has not identified any information indicating the trial court, after initially denying the motion, would have granted it at a subsequent hearing. More pertinently, the defendant did not establish that, but for counsel's alleged failure to insist on another hearing on the motion, the result of the trial would have been different. The record is devoid of anything suggesting a lower bond, if granted, would have changed the outcome of the trial. The defendant's *pro se* assignment of error is without merit.[3]

Sentencing Error

Pursuant to La. Code Crim. Pro. art. 920, this court routinely conducts a review for error discoverable by mere inspection of the pleadings and proceedings and without inspection of the evidence. After a careful review of the record, we have found a sentencing error.

Upon conviction for being a convicted felon in possession of firearm, La. R.S. 14:95.1B mandates imposition of a fine of not less than $1,000 nor more than $5,000. At the sentencing hearing, the trial court failed to impose the mandatory fine. Accordingly, the defendant's sentence is illegally lenient. However, since the sentencing error is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to

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[3] We further note the defendant's conviction mooted the request for bond reduction. *See State v. Jones*, 332 So.2d 267, 269 (La. 1976); *State v. Miller*, 12-126 (La. App. 5 Cir. 10/16/12), 102 So.3d 956, 960, *writ denied*, 12-2487 (La. 5/31/13), 118 So.3d 388.

correct the error. See **State v. Price**, 2005-2514 (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.

CONCLUSION

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.

STATE OF LOUISIANA

VERSUS

BENJAMIN SANCHEZ

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 0099

CRAIN, J., dissenting in part.

I agree with affirming the defendant's convictions, but I respectfully dissent from the majority's decision to not correct the illegally lenient sentence for count two. The defendant has no constitutional or statutory right to an illegally lenient sentence. *See State v. Williams*, 00-1725 (La. 11/28/01), 800 So. 2d 790, 797; *see also State v. Kondylis*, 14-0196 (La. 10/3/14), 149 So. 3d 1210, 1211. This court is authorized to correct an illegal sentence that involves no more than the ministerial correction of a sentencing error. *See* La. Code Crim. Pro. art. 882A; *State v. Haynes*, 04-1893 (La. 12/10/04), 889 So. 2d 224 (*per curiam*). Exercising that authority, we have corrected illegally lenient sentences that omitted Louisiana Revised Statute 14:95.1's mandatory fine by amending the sentence to include the mandatory minimum fine. *See State v. Carter*, 16-1078 (La. App. 1 Cir. 12/22/16), 210 So. 3d 306, 309; *State v. Robertson,* 14-0252, 2014WL4668685 (La. App. 1 Cir. 9/19/14). Accordingly, I would amend the defendant's sentence for his conviction under count two to include a fine in the minimum amount of $1,000.