NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0535**
VERSUS	*	**COURT OF APPEAL**
JERMAINE LANDRY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 417-686, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge David S. Gorbaty)

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AFFIRMED

On October 27, 2000, the defendant, Jermaine Landry, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. The defendant pled not guilty at his arraignment on October 31, 2000. On November 3, 2000, the trial court denied defendant's motion to suppress the identification and statement. Defendant was found guilty as charged on November 16, 2000 at the close of a trial by twelve-member jury. The trial court sentenced defendant to ninety-nine years at hard labor on December 5, 2000. On that same date, the trial court adjudicated defendant a third-felony habitual offender, vacated the original sentence, and resentenced defendant to life imprisonment at hard labor, with credit for time served, without benefit of parole, probation or suspension of sentence. Defendant subsequently filed this appeal.

FACTS

New Orleans Police Detective Gregory Powell testified that on May 8, 2000, he investigated an armed robbery that occurred outside of a Church's Chicken fast food outlet located near the intersection of Downman and Morrison Roads in eastern New Orleans. Dana Jackson, the victim, reported

that an armed male forced her out of her rental car and absconded with it. Zeisha Thomas, who was in the car with her, recognized the defendant as Jermaine Landry, her sister-in-law's boyfriend. Powell was in the process of obtaining an arrest warrant for defendant when he received a telephone call from Ms. Jackson. She told him that she and Ms. Thomas had just seen the person who robbed them driving the stolen rental car, a dark blue Chrysler LHS, in or near the St. Thomas Housing Project. The two women followed it while unsuccessfully attempting to give their location to a 911 operator. Powell subsequently showed Ms. Jackson a photographic lineup to see if she could identify the person she had observed driving the stolen automobile. She identified the defendant. Det. Powell later learned that the defendant was at 3227 Louisa Street, his girlfriend's residence. A search of the residence revealed a silver-colored handgun and a shirt that his girlfriend said defendant had worn on the night of the robbery.

New Orleans Police Officer Leflore James Young, Sr., who assisted in the investigation, testified that he and his partner parked on Humanity Street, within sight of the Louisa Street residence. Defendant came out of the residence onto the porch. The officers exited their vehicle and identified themselves. Defendant returned inside, but soon reappeared. The officers approached defendant, patted him down, handcuffed him, and read him his

Miranda rights. Defendant indicated that he understood his rights, and admitted that he had been in the stolen vehicle near the St. Thomas Project, but denied the robbery.

Dana Jackson testified that on the night of the robbery, she was seated in the front passenger seat of her vehicle. Ms. Taylor and Ms. Taylor's niece were in the backseat of the car. Another friend was in the Church's Chicken store. Defendant entered the driver's side, pointed a silver-colored gun at her, and told them all to "get the f--- out." Ms. Jackson stated that the chrome handgun in evidence could have been the gun used in the robbery. When they exited the car, Ms. Thomas told her that the gunman was defendant Jermaine Landry, "Kim's" boyfriend. Later, after police had obtained information from them and dropped them off at the residence of Ms. Jackson's aunt, Ms. Thomas suggested that they pass by "Kim's" residence on Louisa Street to see if defendant was there. Ms. Jackson's rental car was parked in the driveway of the residence. When defendant drove off, they followed him to the St. Thomas project area, called the police on a cellular phone, and attempted to direct the police to him. Defendant parked the car and exited at a grocery store, and at that point, Ms. Jackson got a clear look at him. In court, she identified that person as the defendant. She also identified defendant's photo in a lineup shown to her by Det.

Powell. She further testified that she had not given defendant permission to take her car.

Theresa "Zeisha" Thomas' testimony mirrored that of Ms. Jackson. She added that she had known the defendant for five years and was able to identify him from a photograph shown to her by Det. Powell. She further stated that before the robbery, she had a good relationship with the defendant and bore him no ill will.

ERRORS PATENT

A review for errors patent on the fact of the record reveals none.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, defendant claims that his trial counsel was ineffective in failing to object to repeated leading questions posed to witnesses by the prosecutor, in failing to object to hearsay testimony, and in failing to effectively cross-examine the State's witnesses.

"As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." State v. Howard, 98-0064, p. 15 (La. 4/23/99), 751 So. 2d 783, 802.

However, where the record is sufficient, the claims may be addressed on appeal. State v. Wessinger, 98-1234, p. 43 (La. 5/28/99), 736 So. 2d 162, 183; State v. Bordes, 98-0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). State v. Brooks, 94-2438, p. 6 (La.10/16/95), 661 So. 2d 1333, 1337 (on rehearing); State v. Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So. 2d 736, 741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland at 686, 104 S.Ct. at 2064; State v. Ash, p. 9 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different: “[a] reasonable probability is a probability sufficient to undermine confidence in

the outcome." Strickland, at 693, 104 S.Ct. at 2068; State v. Guy, 97-1387, p. 7 (La. App. 4 Cir. 5/19/99), 737 So. 2d 231, 236.

This court has previously recognized that if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." State v. Bordes, 98-0086, p. 8 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147, quoting State v. Bienemy, 483 So. 2d 1105, 1107 (La. App. 4 Cir. 1986). Moreover, as "opinions may differ on the advisability of a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." Id., quoting State v. Brooks, 505 So. 2d 714, 724 (La. 1987).

The prosecutor's third question posed to the State's first witness, Det. Powell, was leading. Det. Powell testified that he was assigned to the Seventh District, and the prosecutor asked if that was New Orleans East, to which the detective responded in the affirmative. When Det. Powell later answered in the affirmative to the question of whether he had investigated an armed robbery on May 8 of that year, the prosecutor asked if the armed robbery took place at the Church's Chicken on Downman and Morrison Roads. These are examples of the innocuous leading questions posed by the prosecutor throughout the trial that drew no objections from defense counsel.

Most of the prosecutor's leading questions were of this variety. Had objections been raised, the prosecutor undoubtedly would have simply rephrased his questions, and elicited the same testimony. Counsel could have justifiably felt that it was not worth displaying a hypercritical attitude in front of the jury as to these questions for fear of alienating them, or of giving the impression that he was seeking to suppress the truth. This constitutes a valid defense strategy and does not support a claim of ineffective assistance of counsel. Even assuming some lapse on the part of defense counsel in failing to lodge objections, considering the strength of the State's case against defendant, he has failed to show that there is a reasonable probability that, but for any deficient performance by counsel in this regard, the result of the proceeding would have been different.

Defendant next contends that counsel demonstrated his lack of preparation by asking two questions of Det. Powell and one of Ms. Thomas that drew cautionary objections by the prosecutor. The prosecutor feared that the answers might include references to the fact that at one time defendant had been wanted on a number of armed robberies, that the gun found at his girlfriend's residence was stolen, and that he was of bad character. However, defense counsel rephrased his questions, and no objectionable evidence was elicited. In fact, Det. Powell answered one

question by stating that it was determined that the handgun did not belong to defendant; this testimony may have actually benefited the defendant. Regardless of defense counsel's skill or lack thereof in this respect, defendant suffered no prejudice.

Defendant next complains of defense counsel's failure to object to hearsay testimony from Det. Powell during direct examination and/or to the prosecutor's use of hearsay in questioning the detective. After Det. Powell testified that Ms. Thomas identified a photograph of the person who robbed her, the prosecutor asked if she had said that she knew him. The detective responded in the affirmative. Defense counsel could have made a tactical decision not to object to this question by the prosecutor, knowing that Ms. Thomas would later testify that she knew defendant. Det. Powell also testified that Ms. Jackson telephoned him and related the information about following defendant while he was driving the stolen car. However, both Ms. Jackson and Ms. Thomas testified to these facts in detail. Similarly, although Det. Powell testified that Ms. Thomas told him that the person who robbed her was her sister-in-law's boyfriend, Ms. Thomas also testified to that fact. Defense counsel, knowing that this information was going to come to light through other witnesses, could have refrained from objecting so as not to make it appear like he was attempting to suppress the truth.

Later, Det. Powell was asked what he found in the Louisa Street residence, and the detective responded that he found the gun and some clothes that defendant's girlfriend said defendant had worn on the date of the robbery. Defense counsel could have made a tactical decision not to object to this hearsay evidence and call attention to it, knowing that the clothing was not an issue. Det. Powell never said that either Ms. Thomas or Ms. Jackson described the clothing worn by the robber, and neither woman identified the clothing at trial.

Defendant also complains that the prosecutor referred to hearsay statements in his questions to Officer Young. The prosecutor asked the officer if the female at the Louisa Street residence had denied knowledge of the gun, and the officer responded in the affirmative. The prosecutor then asked, "She denied knowledge?" Det. Powell again responded in the affirmative. Even assuming defense counsel should have objected to one or both of these questions, considering the strength of the State's case, defendant has failed to show that there is a reasonable probability that, but for any deficient performance by counsel in this regard, the result of the proceeding would have been different.

Finally, defendant claims his defense counsel did not "challenge" Zeisha Thomas or any aspect of the State's case. The record does not

substantiate this allegation. Defendant has failed to show that there is a reasonable probability that, but for any deficient performance by his trial counsel, the result of the proceeding would have been different. There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, defendant claims that his sentence under the Habitual Offender Law was unconstitutionally excessive.

Even though a sentence under the Habitual Offender Law is the minimum provided by that statute, the sentence may still be unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993). However, the entire Habitual Offender Law has been held constitutional, and, thus, the minimum sentences it imposes upon habitual offenders are also presumed to be constitutional. Johnson, 97-1906 at pp. 5-6, 709 So. 2d at 675; see also State v. Young, 94-1636, p. 5 (La. App. 4 Cir. 10/26/95), 663 So. 2d 525, 527. There must be substantial evidence to rebut the

presumption of constitutionality. State v. Francis, 96-2389, p. 7 (La. App. 4 Cir. 4/15/98), 715 So. 2d 457, 461. A court may only depart from the minimum sentence if it finds by clear and convincing evidence that would rebut the presumption of constitutionality. State v. Lindsey, 99-3256, p. 5 (La. 10/17/00), 770 So. 2d 339, 343. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly show that he is exceptional, which in this context means that because of unusual circumstances he 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. Id.; Johnson, 97-1906 at p. 8, 709 So.2d at 677. "Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." Johnson, 97-1906 at p. 9, 709 So. 2d at 677.

Defendant was convicted of armed robbery and adjudicated a third-felony habitual offender. He was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence pursuant to La. R.S. 15:529.1(A)(b)(ii), which provides:

> If the third felony or either of the two prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or any other crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or

suspension of sentence.

In addition to the instant armed robbery conviction, one of defendant's two other felonies was a July 1997 conviction for armed robbery. Armed robbery is defined as a crime of violence under La. R.S. 14:2(13). Thus, two of defendant's three felonies were serious crimes of violence. His third habitual offender felony was a March 1994 conviction for possession of a stolen automobile valued at over five hundred dollars. The trial court cited these convictions in originally sentencing defendant, noting that defendant been sentenced to five years in prison on the armed robbery conviction in July 1997. The instant offense occurred in May 2000. The court noted that defendant, who was twenty-four years old at the time of sentencing, had a total of thirteen felony arrests, with the two prior convictions, and ten misdemeanor arrests with no convictions. The court noted the defendant's former employment at Piccadilly Cafeteria, but also observed that he was listed as unemployed at the time of his arrest in the instant case. After considering the aggravating and mitigating circumstances, as well as the facts of the case, the trial court found there was an undue risk that defendant would commit another crime during a period of suspended sentence, probation or parole. It deemed defendant to be in need of a correctional treatment that could be best provided by commitment to the

penitentiary. The court concluded that any lesser sentence than the one it imposed would deprecate the seriousness of defendant's crime, especially in light of his 1997 conviction for armed robbery. The court observed that the instant crime was a one of violence, committed with a handgun, involving the use or threatened use of physical force against a person under circumstances giving rise to a substantial risk that such force might have been used. The trial court then sentenced defendant to the maximum sentence for armed robbery, ninety-nine years at hard labor, without benefit of parole, probation or suspension of sentence.

Defendant avers that the sentence was excessive because no one was injured, and the stolen car was recovered in good condition. He suggests that these factors were not considered by the trial court. However, the trial court specifically stated that it considered the facts of the case in originally sentencing defendant, and reiterated those reasons in sentencing him as a habitual offender. Defendant has failed to rebut the presumption that the mandatory minimum sentence is constitutional, as he has not clearly shown that he is exceptional, i.e., that because of unusual circumstances he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to his culpability, the gravity of his offense, and the circumstances of his case. This assignment of error is without merit.

CONCLUSION

Accordingly, for the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED