STATE OF LOUISIANA	*	**NO. 2001-KA-1993**
VERSUS	*	**COURT OF APPEAL**
JOHNNY TAYLOR AND KENYATA CURTIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 414-426, SECTION "B"
Honorable Patrick G. Quinlan, Judge
* * * * * *

JOAN BERNARD ARMSTRONG

JUDGE

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray and Judge James F. McKay, III)

HARRY F. CONNICK, DISTRICT ATTORNEY
DONNA R. ANDRIEU, ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

LAURA PAVY
LOUISIANA APPELLATE PROJECT
P.O. BOX 750602
NEW ORLEANS, LA 70175-0602

COUNSEL FOR KENYATA CURTIS

SHERRY WATTERS
LOUISIANA APPELLATE PROJECT
P. O. BOX 58769
NEW ORLEANS, LA 70158-8769

COUNSEL FOR JOHNNY TAYLOR

AFFIRMED.

STATEMENT OF CASE

On May 12, 2000, co-defendants Kenyata Curtis and Johnny Taylor were charged by bill of information with two counts of armed robbery, a violation of La. R.S. 14:64, and one count of aggravated robbery, a violation of La. R.S. 14:34, and an additional count of armed robbery with which Curtis alone was charged. At their arraignment on May 18, 2000, both defendants pled not guilty. Following a jury trial on January 17, 2001, Kenyata Curtis was convicted of two counts of first degree robbery, one count of second degree battery, and in the count with which he was charged alone, Curtis was convicted of simply robbery.

Johnny Taylor was convicted of two counts of simple robbery and one count of simple battery.

On February 5, 2001, Kenyata Curtis was sentenced to concurrent sentences of thirty-five years at hard labor, without benefit of probation, parole, or suspension of sentence, on each first degree robbery conviction, to

a concurrent sentence of five years at hard labor on the second degree battery conviction, and to a consecutive sentence of five years at hard labor, with credit for time served, on the simply robbery conviction.

On February 22, 2001, Johnny Taylor was sentenced pursuant to La. R.S. 15:529.1 on count one to fourteen years at hard labor; to seven years at hard labor on count two and to six months in parish prison on count three. The court ordered the sentences on counts one and two to be served concurrently and the sentence on count three to be served consecutively.

The defendants' motions for reconsideration of sentence were denied; their motions for appeal were granted.

STATEMENT OF FACT

John Kechlar testified that he and his wife visited the city for the 2000 Mardi Gras celebration. On March 7, 2000, at about 3:30 a.m., as Mr. Kechlar walked through the French Quarter, three men jumped him, pushed him into a deserted doorway, and robbed him at gunpoint of $300.00. After his assailants fled, Mr. Kechlar returned to his hotel, and contacted the police. After Mr. Kechlar returned to his home in Ohio, he received a photographic lineup in the mail from Detective DeJean of the NOPD. Mr. Kechlar identified Kenyata Curtis in the photo line up, and in open court, as the man who robbed him at gunpoint.

NOPD Officer Edward Davis and Detective Dennis Dejean testified that they investigated the Kechlar armed robbery. They interviewed Mr. Kechlar at his hotel several hours after the robbery. Mr. Kechlar gave the officers physical descriptions of the three assailants and the weapon, and told the officers that he could identify the gunman, if he saw him again. Kechlar described the assailant that grabbed him around the neck as a black male, mid-twenties, about 5'5". He described the second subject as a black male about 6'to 6'2", weighing about two hundred pounds. Kechlar said the second subject produced a black steel semi-automatic weapon and pointed it as his forehead. The third subject was also a black male, who stood in the background, and acted as a lookout. Through follow-up investigation, Detective Dejean developed Kenyata Curtis as a suspect, and mailed a photographic line-up containing Curtis' picture to Mr. Kechlar in Ohio. Detective Dejean spoke with Mr. Kechlar by telephone as Kechlar viewed the line-up. Dejean testified that Kechlar positively identified Kenyata Curtis as the man who robbed him at gunpoint.

Jimmy Lamarie and Patricia Farnsworth testified they were robbed at gunpoint as they sat in Mr. Lamarie's vehicle in the Beach Corner Bar's parking lot on Canal Street at approximately 1:00 a.m. on March 7, 2000. The couple stated that two men, later identified as Kenyata Curtis and

Johnny Taylor, approached them, walking quickly, from around the corner of the building. Kenyata Curtis shoved a gun in Mr. Lamarie's face and demanded money. Curtis then went to the passenger side of the Lamarie vehicle, where he pointed the gun at Ms. Farnsworth and demanded her money and jewelry. As Johnny Taylor rifled through Mr. Lamarie's pockets, confiscating about $200.00 from him, Curtis repeatedly pushed the gun into Ms. Farnsworth's head, screaming at her to give him her purse. Mr. Lamarie pleaded with Curtis, "Don't hurt anybody . . . [j]ust don't hurt anybody." Curtis hit Ms. Farnsworth in the head with the gun, knocking her unconscious, and then took her purse and jewelry. After the attack, Mr. Lamarie drove Ms. Farnsworth to Mercy Hospital, where she received several stitches to close her head wound. In a later meeting with NOPD officers, Mr. Lamarie supplied physical descriptions of the two attackers. Ms. Farnsworth, however, was unable to identify either of the attackers.

NOPD Detectives Justin Crespo and Cyril Davillier investigated the Lamarie/Farnsworth armed robbery. On March 14, 2000, Crespo and Davillier presented a photographic lineup, which included a picture of Johnny Taylor, to Mr. Lamarie. Lamarie immediately identified Taylor as one of the robbers. The detectives prepared an arrest warrant for Taylor and a search warrant for the Taylor residence. When Crespo and Davillier

arrived at the Taylor residence, Taylor's mother told them her son was with Kenyata Curtis. After searching the Taylor house, which did not result in the recovery of any weapon or stolen property, the detectives canvassed the Taylor neighborhood. Crespo and Davillier observed Johnny Taylor seated in the passenger seat of a car driven by Kenyata Curtis. Following a high-speed traffic chase, the officers pulled the pair over, and arrested them. On March 17, 2000, Detective Crespo presented a second photo lineup to Mr. Lamarie from which he identified Kenyata Curtis as the man who held a gun to his head.

ERRORS PATENT

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

CURTIS' COUNSEL ASSIGNMENT OF ERROR NUMBER 1; TAYLOR'S COUNSEL ASSIGNMENT OF ERROR NUMBER 1; TAYLOR'S PRO SE ASSIGNMENTS OF ERROR NUMBER 2 AND 3

By these assignments of error, the defendants argue that the evidence is insufficient to support their convictions. They contend there is no physical evidence linking them to the crimes, only the identification made by the victims, which the defendants maintain were unreliable because the victims had been drinking immediately prior to the assaults and/or their view of their attackers was obscured. In addition, defendant Taylor argues the state failed to produce evidence sufficient to prove him guilty as a principal

to simple battery.

The Due Process Clause of the Fourteenth Amendment protects a person accused of a crime from being convicted unless the State proves every element of the offense charged beyond a reasonable doubt. This constitutional protection is the basis of a reviewing court's duty to determine the sufficiency of the evidence used to convict a defendant. State v. Monds, 91-0589 (La. App. 4 Cir. 1/14/94), 631 So.2d 536. In deciding whether evidence is constitutionally sufficient to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979); State v. Jacobs, 504 So.2d 817 (La.1987).

The appellate court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305, 1311 (La.1988); State v. Monds, supra. at p. 4, 631 So.2d at 539. If the reviewing court finds that no rational trier-of-fact, viewing all the evidence from a rational pro-prosecution viewpoint, could have found the defendant guilty beyond a reasonable doubt, the conviction cannot stand constitutional muster. Mussall, supra. When identity is disputed, the State must negate any

reasonable probability of misidentification in order to satisfy its burden to establish every element of the crime charged beyond a reasonable doubt. Jackson v. Virginia, supra; State v. Smith, 430 So.2d 31, 45 (La.1983).

The reviewing court, however, is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. State v. Smith, 600 So.2d 1319, 1324 (La.1992); Mussall, supra. As noted by the Supreme Court, "the court is not to substitute its judgment of what the verdict should be for that of the jury, but at the same time the jury cannot be permitted to speculate if the evidence is such that reasonable jurors must have a reasonable doubt." Mussall, supra., citing 2 Charles Allen Wright, Federal Practice & Procedure, Criminal 2d, Sec. 467, at 660-661 & n. 23 (2d ed.1982). Although a conviction based solely on the identification testimony of one witness may withstand a sufficiency of the evidence test, it will do so only "[i]n the absence of internal contradiction or irreconcilable conflict with the physical evidence…." State v. Gipson, 26,433, p. 2 (La. App. 2 Cir. 10/26/94), 645 So.2d 1198, 1200.

The defendants correctly note that the State's case rested solely on the identification of the defendants by victims John Kechlar and Jimmy Lamarie. No physical evidence or other corroborating evidence was submitted to establish defendants' guilt.

In Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243 (1977), the Supreme Court set forth a five-factor test to determine whether an identification was reliable: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the assailant; (4) the level of certainty demonstrated by the witness; and, (5) the length of time between the crime and the confrontation. See also Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); State v. McNeal, 99-1265 (La. App. 4 Cir. 6/14/00) 765 So.2d 1113, 1117, writ den., 2000-2134 (La. 9/28/01), 797 So.2d 684.

Regarding John Kechlar's opportunity to view his assailant, although the crime occurred at night in a darkened doorway, Kechlar testified that he noticed the perpetrators following him for several blocks before the actual assault. Furthermore, Kechlar had an unobstructed view of the perpetrator and looked the perpetrator in the eye as the perpetrator held a gun to his forehead. Kechlar testified that he clearly saw all three of his assailants. Although Kechlar admitted to having two drinks that night, he testified that he drank earlier in the night and ate as well, more than several hours before the assault.

As for Jimmy Lamarie's identification, he testified that he had no

alcoholic beverages the night of his robbery. Like Kechlar, Lamarie also had an unobstructed view of his assailants. Lemarie testified that the lighting in the Beach Corner Bar parking lot was good. Lamarie looked at Kenyata Curtis' face for about five to ten seconds as Curtis pointed the gun at him. Moreover, Lamarie got a good look at Johnny Taylor as Taylor rifled through Lamarie's pockets and took his money.

As for degree of attention, both Kechlar and Lamarie testified they were frightened during the assaults; however, each victim said he paid close attention to his assailant's orders, as neither victim wanted to do anything to antagonize his assailant.

The third factor to be considered is the accuracy of the witness' prior description of the offender. Kechlar initially described Curtis as a black male, 6' tall and weighing 200 pounds. On the day of his arrest, Curtis stood 6'1" and weighed 165 lbs. Kechlar described Johnny Taylor as heavier set and shorter than Curtis. At the motion to suppress the identification hearing, Lamarie described Taylor as "heavy set, round face".

As to the level of certainty displayed at the confrontation, neither Kechlar nor Lamarie expressed any reservation when they identified Curtis and Taylor in the photographic lineups or in open court.

Finally, the period of time between the crimes and the initial

identifications was only a couple of weeks. Given the circumstances of this case, it appears the State negated any possibility of misidentification. These assignments of error are without merit.

Turning to Taylor's claim the State failed to produce evidence sufficient to convict him of simple battery, to support a conviction for simple battery, the state must prove that the defendant intentionally used force or violence upon the person of another. La. R.S. 14:35. A simple battery conviction requires proof of only general intent or a showing that the defendant in the ordinary course of human experience must have adverted to the prescribed criminal consequences as reasonably certain to result from the defendant's act or failure to act. State v. Comeaux, 192 So.2d 122 (La. 1966); La. R.S. 14:10; La. R.S. 14:35.

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals. La. R.S. 14:30.1(A)(1). Persons who knowingly participate in the planning or execution of a crime are principals to the crime. State v. Pierre, 93-0893 (La. 2/3/94); 631 So.2d 427. To convict an offender of being a principal to a crime, the State must prove beyond a reasonable doubt that the offender "was concerned in the

commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly, counsel or procure another to commit the crime." La. R.S. 14:24. Imposition of criminal liability upon one who aids and abets in a crime is founded upon the principle that inchoate offenses are directed at persons who knowingly participate in planning or execution of the crime. State v. Knowles, 392 So.2d 651 (La. 1980). An individual may be convicted as a principal for those crimes for which he personally has the requisite mental state. State v. Marshall, 94-1282 (La. App. 4 Cir. 6/29/95), 657 So.2d 1106.

In this case, the State proved beyond a reasonable doubt that Johnny Taylor was a principal to the crime of simple battery. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that Taylor was involved in the battery of Ms. Farnsworth and that he knowingly participated in its planning and execution.

The State proved that Taylor and Curtis planned and perpetrated the crimes against Mr. Lamarie and Ms. Farnsworth as a team. The evidence proved that Taylor and Curtis planned and executed the robberies together, and that they carried a gun, which they used to intimidate and batter their victims, if necessary, into relinquishing their property.

Taylor and Curtis approached the two victims together. From the onset of the crime, from the time they approached the victims from around the corner of the building, Curtis carried a gun. Taylor and Curtis used the gun first to intimidate and subdue Mr. Lamarie. They both "got in his face" and demanded his money. Once satisfied that Mr. Lamarie would cooperate with their demands, Curtis moved to Ms. Farnsworth, whom he beat with the gun because she did not relinquish her purse and jewelry fast enough for the offenders.

Although Taylor did not commit the actual battery of Ms. Farnsworth, the State proved beyond a reasonable doubt that Taylor was a principal to that crime. The State proved that Taylor and Curtis planned and executed the robbery of their victims. Part of the defendants' scheme was to use the gun, which Curtis carried from the onset of the crime, to batter the victims into submission. Viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that Taylor was a principal to the crime of simply battery. This assignment is without merit.

CURTIS' COUNSEL ASSIGNMENT OF ERROR NUMBER 2

In this assignment, the defendant Curtis charges error in the trial court's denial of his motion for mistrial premised upon the State's reference to inadmissible other crimes evidence.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence due to the substantial risk of grave prejudice to the defendant. To avoid the unfair inference that a defendant committed the crime charged simply because he is a person of bad character, other crimes evidence is inadmissible unless it has an independent relevancy besides merely showing a criminal disposition. La. C.E. art. 404 B; State v. Hills, 99-1750, (La. 5/16/00), 761 So.2d 516, 520.

During the State's case in chief, defense counsel objected to the prosecutor eliciting testimony from Officer Dennis Dejean concerning his follow up investigation of the Kechlar armed robbery, which included compiling a photographic line-up containing Curtis' picture. The allegedly improper exchange was:

Q. Okay, how were you able to develop a suspect in this case?

A. There was a pattern of armed robberies . . .

At that point, defense counsel moved for a mistrial, which was denied. However, the trial judge admonished the jury to disregard the statement.

A mistrial is warranted under La. C.Cr.P. art. 770 when certain remarks are considered so prejudicial and potentially damaging to a defendant's rights that even a jury admonition cannot provide a cure. State v. Johnson, 94-1379 (La. 11/27/95); 664 So.2d 94. Potentially damaging

remarks include direct or indirect references to another crime committed or alleged to have been committed by the defendant, unless that evidence is otherwise admissible. La. C.Cr.P. art. 770(2). The comment must be within earshot of the jury and must be made by a judge, district attorney, or other court official. Id. Comments must be viewed in light of the context in which they are made; and, the comment must not "arguably" point to a prior crime, it must unmistakably point to evidence of another crime. State v. Edwards, 97-1797, p. 20 (La. 7/2/99); 750 So.2d 893, 906. In addition, the imputation must unambiguously point to the defendant; and, the defendant bears the burden of proving that a mistrial is warranted. Id. If the elements of Article 770 have not been satisfied, the decision on the motion for mistrial is governed by La. C.Cr.P. art. 771; and, whether a mistrial is warranted under the circumstances is within the sound discretion of the trial judge. Id. A police officer is not considered a court official under Article 770; and, absent a showing of a pattern of unresponsive answers or improper intent by the prosecutor, a mistrial is not warranted. State v. Nicholson, 96-2110, p. 12 (La. App. 4 Cir. 11/26/97); 703 So.2d 173, 179.

As a general rule, and as the defendant concedes, because a State's witness is not a "court official" within the meaning of La.C.Cr.P. art. 770, the provisions of La.C.Cr.P. art. 771, rather than La.C.Cr.P. art. 770, would

apply. Nevertheless, Curtis cites State v. Girod, 96-660 (La. App. 5 Cir. 11/25/97), 703 So.2d 771 for the proposition that an impermissible reference to another crime deliberately elicited by the prosecutor would be imputable to the State and would therefore trigger the provisions of La. C.E. art. 770.

In State v. Girod, supra, the defendant was convicted of possession of a stolen lawn mower. The prosecution was allowed to elicit information from a witness regarding a trailer that was stolen along with the lawn mower. The defendant's request for a mistrial was denied. On appeal, the Fifth Circuit found that the testimony at issue was admissible as an integral part of the crime charged, because it established how the defendant came into possession of the stolen lawn mower.

In this case, after defense counsel objected to Officer Dejean's remark, the line of questioning continued:

> Q. Did you become aware of an armed robbery that occurred in the Third District at the Beach Corner?
>
> A. Yes, I learned through communications with my fellow detectives in my unit that the robberies had occurred in the Third District. And upon comparison of the individuals, who committed this robbery, I'm certain that there were similarities between the arrested subject, the defendant, and the subjects who committed the robbery on St. Philip Street and the robberies which had occurred in the Third District.

Arguably, Officer Dejean's testimony was not offered to paint defendant as a "bad person," but rather to show why the officer took the

actions he did. However, when the State followed up with the question concerning the Canal Street robbery, the jury could have interpreted "pattern of armed robberies" to mean the two involved in this trial. Although Officer Dejean does not directly say the defendant committed the "pattern of robberies", he clearly implicates the defendant in those "other crimes".

The decision on whether to grant a mistrial or to give an admonition is within the sound discretion of the trial court. State v. Johnson, 587 So.2d 64, 66 (La. App. 4 Cir.1991). See also La. C.Cr.P. art. 775. A mistrial is a drastic remedy. Except in cases where it is mandatory, a mistrial is warranted only if substantial prejudice will result which would deprive the defendant of a fair trial. Id., at 66-67. The trial court's ruling on whether to grant a mistrial for a comment by a police officer referring to other crimes evidence should not be disturbed absent a clear abuse of discretion. State v. Manuel, 94-0087, 94-0088, p. 4 (La. App. 4 Cir. 11/30/94), 646 So.2d 489, 491. Errors are harmless unless the reviewing court is thoroughly convinced that the remarks inflamed the jury and contributed to the verdict. Id.

In State v. Snyder, 98-1078 (La. 4/14/99), 750 So.2d 832, 845, the Supreme Court set forth the harmless error standard:

> To determine whether an error is harmless, the proper analysis is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the

> guilty verdict actually rendered in this trial was surely unattributable to the error." State v. Bourque, 622 So.2d 198, 241 n. 20 (quoting Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).

There was overwhelming evidence of Curtis' guilt. He suffered no prejudice from the implication that he was the person involved in the "pattern of armed robberies." The jury heard the direct, uncontroverted testimony from two eyewitnesses to the crimes with which Curtis was charged, and who identified him. The guilty verdict in this case was unattributable to any trial court error. This assignment is without merit.

CURTIS' COUNSEL ASSIGNMENT OF ERROR NUMBER 3

In a final assignment of error, Curtis argues his sentence is unconstitutionally excessive.

La. Const. art. I, § 20 explicitly prohibits excessive sentences. State v. Baxley, 94-2982, (La. 5/22/95), 656 So.2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Francis, 96-2389 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2982 at p. 10, 656 So.2d at 979, citing State v. Ryans, 513 So.2d 386, 387 (La. App. 4 Cir.1987). A sentence is constitutionally excessive if it makes no measurable contribution to

acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, 677. 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. Baxley, 656 So.2d at 979.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La.C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427 (La. App. 4 Cir. 9/15/99), 744 So.2d 181, 189. If adequate compliance with La.C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Bonicard, 98-0665 (La. App. 4 Cir. 8/4/99), 752 So.2d 184, 185.

However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So.2d 813, this Court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual

> basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

708 So.2d at 819.

In State v. Soraparu, 97-1027 (La. 10/13/97), 703 So.2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is "'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.'" State v. Cook, 95-2784, p. 3 (La.5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear [s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id.

In sentencing the defendant in this case, the trial judge acknowledged that Curtis had no prior criminal record and considered the crime in light of C.Cr.P. art. 894.1. The judge also noted:

The Court is aware of the fact that these are Mr. Curtis' first convictions. The Court is also aware of the fact that he's started off his criminal career with a real bang. It's this Court's belief [that this] is the third most serious offense that an individual can commit against other individuals. . . This is the type of thing you hear two people who live in this city were out enjoying themselves at a local establishment and walked out and get robbed. The woman was pistol-whipped. Gets her skull crushed and needs stitches in her head. . . The Court would also note that Mr. Curtis has been convicted by the jury in the same case for the crime of simple robbery of none other than a tourist who came to New Orleans spending his own money with his wife. He came to enjoy the French Quarter and instead got robbed in the middle of the Quarter in the middle of the night. The jury found Mr. Curtis guilty of that, also. That also is the type of thing that, crime that just kills this city.

So the Court's specifically looking at this under the provisions of Article 894.1. The Court believes that what he did was extremely, as I said, serious. The third most serious offense anybody can commit, and committed it in a very cruel and heinous manner. The facts show that one of the victims, the gentlemen had gotten out of the car, had begged Mr. Curtis, who had a gun, to just take everything they had and leave us alone. Just don't hurt anybody. Please don't hurt the woman. . . . The woman's giving up a three-karat diamond ring off of her finger, but not doing it quick enough for Mr. Curtis. So then he pistol whips her and crushes her skull, and ultimately takes the three karat diamond ring that she had gotten from her grandmother.

Mr. Curtis showed absolutely no compassion for his victims in committing this crime. The Court sees no reason that it should show him any compassion other than the fact that this is his first conviction. That being the fact, the Court is not going to give him the maximum sentence because those are reserved for the more historically career criminals. This Court believes because of the seriousness of the offenses he committed, the Court's going to give him a substantial sentence. . .

The sentencing range for first degree robbery is three to forty years at

hard labor, without benefit of parole, probation or suspension of sentence. The defendant in this case received concurrent sentences of thirty-five years at hard labor, without benefit of probation, parole or suspension of sentence on each first-degree robbery conviction.

The sentencing range for second degree battery is a fine of not more than two thousand dollars or imprisonment, with or without hard labor, for not more than five years, or both. The defendant received a concurrent sentence of five years at hard labor on the second-degree battery conviction. This circuit and others have affirmed five-year sentences for convictions of second degree battery. See State v. Spain, 99-1956 (La. App. 4 Cir. 3/15/00), 757 So.2d 879; State v. Winnon, 28,654 (La. App. 2 Cir. 9/25/98), 681 So.2d 463 and State v. Wegmann, 98-1368 (La. App. 5 Cir. 5/19/99), 734 So.2d 973.

As for the simple robbery conviction, the sentencing range for that offense is a fine of not more than three thousand dollars, imprisonment with or without hard labor for not more than seven years, or both. The defendant received a consecutive sentence of five years at hard labor, with credit for time served. In State v. White, 35,235 (La. App. 2 Cir. 10/31/01), 799 So.2d 1165, the Second Circuit affirmed a seven year sentence for the simple robbery conviction of a first offender.

Other than asserting that the trial court in this case took no steps to fashion a sentence particularly suited to him, the defendant has not proved, and the record does not show, that under the facts of this case the trial court abused its discretion in sentencing the defendant in the aforementioned manner. This assignment of error is without merit.

TAYLOR'S COUNSEL ASSIGNMENT OF ERROR NUMBER 2

In this assignment, defendant Taylor contends the trial court erred in ordering that his sentence for simple battery be served consecutively to his other sentences.

The law concerning consecutive sentences, La. C.Cr.P. art. 883, provides:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently.

In State v. Camese, 2000-1943, p.6 (La. App. 4 Cir. 7/11/01), 791 So.2d 173, 178 this Court stated:

> The Louisiana Felony Sentencing Guidelines continued the statutory suggestion that concurrent sentences should be imposed if two or more criminal acts constitute parts of a common scheme. La. S.G. § 215(A)2. While the word "should" was not mandatory, the guidelines clearly suggested that a trial court specifically consider several aggravating

factors which may warrant imposition of consecutive sentences. State v. Norrell, 614 So.2d 755 (La. App. 2d Cir.1993). Concurrent sentences arising out of a single cause of conduct are not mandatory and consecutive sentences under those circumstances are not necessarily excessive. State v. Pickett, 628 So.2d 1333 (La. App. 2d Cir.1993); State v. Nelson, 467 So.2d 1159 (La. App. 2d Cir.1985); State v. Ortego, 382 So.2d 921 (La.1980), cert. denied, 449 U.S. 848, 101 S.Ct. 135, 66 L.Ed.2d 58 (1980); State v. Williams, 445 So.2d 1171 (La.1984); State v. Mills, 505 So.2d 933 (La. App. 2d Cir.), writ denied, 508 So.2d 65 (1987). It is within a trial court's discretion to order sentences to run consecutively rather than concurrently. State v. Derry, 516 So.2d 1284 (La. App. 2d Cir.1987), writ denied, 521 So.2d 1168 (La.1988); State v. McCray, 28,531 (La. App. 2d Cir. 8/21/96), 679 So.2d 543. All factors in the case are to be considered in choosing whether to impose consecutive or concurrent sentences. State v. Ortego, supra.; State v. Derry, supra; and State v. Beverly, 448 So.2d 792 (La. App. 2d Cir.), writ denied, 450 So.2d 951 (1984). Among the factors to be considered are the defendant's criminal history, the gravity or dangerousness of the offense, the viciousness of the crimes, the harm done to the victims, whether the defendant constitutes an unusual risk of danger to the public, defendant's apparent disregard for the property of others, the potential for defendant's rehabilitation, and whether defendant has received a benefit from a plea bargain. State v. Wilson, 28,403 (La.App.2d Cir.8/21/96), 679 So.2d 963; State v. Smith, 26,661 (La. App.2d Cir.3/1/95), 651 So.2d 890, writs denied, 95-0918 (La. 9/15/95), 660 So.2d 458; 95-0995 (La.1/29/97), 687 So.2d 378; 95-1598 (La. 2/7/97), 688 So.2d 493.

A judgment directing that sentences arising from a single course of conduct be served consecutively requires particular justification from the evidence of record. State v. Strother, 606 So.2d 891 (La. App. 2d Cir.1992), writ denied, 612 So.2d 55 (La.1993); State v. Mims, 550 So.2d 760 (La. App. 2d Cir.1989), appeal after remand, 566 So.2d 661 (La. App. 2d Cir.), writ denied, 569 So.2d 970 (1990); State v. Thompson, 543 So.2d 1077 (La. App. 2d Cir.), writ denied, 551 So.2d 1335 (1989); State v. Lighten, 516 So.2d 1266 (La. App. 2d

> Cir.1987). When consecutive sentences are imposed, the court shall state the factors considered and its reasons for the consecutive terms. State v. Green, 614 So.2d 758 (La. App. 2d Cir.1993).

In this case, the trial court fully articulated the factors it considered in imposing the consecutive sentences. The court considered Taylor's criminal history and noted for the record that in 1997 he pled guilty to three counts of armed robbery. The court further noted that the defendant had been recently released from prison when he committed the instant offenses. The court considered whether the defendant constituted an unusual risk of danger to the public, and concluded that he did pose a risk to the public.

The court also recognized the gravity or dangerousness of the offenses, the viciousness of the crimes, the harm done to the victims, and Taylor's disregard for the property of his victims, and noted:

> . . . The Court would note that the instance offense, the robbery was an extremely brutal one. While Mr. Taylor did not personally commit the acts which caused the physical injuries to one of the victims, he was a principal to them. Mr. Taylor obviously is a very violent person who has no place on the streets of the City of New Orleans. . .
>
> * * *
>
> . . . the male victim immediately offered up his wallet, his property. Stating, "You can have everything we've got. Just please don't hurt us. Don't hurt anybody. You can have everything we've got." The other defendant went to Ms. Farnsworth, the other victim in the case. He was trying to get a three karat heirloom diamond ring off of her finger. He wasn't

> satisfied that she was going fast enough and then he pistol whipped her, cracking her skull and causing her to have a number of stitches in her head. The Court would note that this battery was committed in addition to the armed robbery. She was attempting to give up all of the property, but she just wasn't going fast enough for these defendants.

In light of these factors, the imposition of the consecutive sentence was justified by the evidence in the record and was within the trial court's discretion. This assignment is without merit.

TAYLOR'S PRO SE ASSIGNMENT OF ERROR NUMBER 1

By this assignment, the defendant complains he was denied effective assistance because his attorney failed to impugn the victims' credibility by impeaching their trial testimony with prior inconsistent statements to the police that "both assailants" were armed.

The defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See State v. Fuller, 454 So.2d 119 (La.1984). The defendant must show that counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. State v. Sparrow, 612 So.2d 191, 199 (La. App. 4 Cir. 1992). Counsel's performance is not ineffective unless it can be shown that he or

she made errors so serious that he or she was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment of the federal constitution. Strickland, supra, at 686, 104 S.Ct. at 2064. That is, counsel's deficient performance will only be considered to have prejudiced the defendant if the defendant shows that the errors were so serious that he was deprived of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, 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." Id. at 693, 104 S.Ct. at 2068. It is not enough for an accused to make allegations of ineffectiveness; the accused must couple these allegations with a specific showing of prejudice. State v. Brogan, 453 So.2d 325 (La. App. 3 Cir. 7/25/84), writ denied, 457 So.2d 1200 (La. 1984).

The defendant correctly notes that defense counsel did not impeach either Mr. Lamarie or Ms. Farnsworth at trial concerning their earlier statements to the police that both of their assailants were armed. However, on direct examination, Mr. Lamarie clearly testified that Johnny Taylor was not armed during the robbery, that only Kenyata Curtis brandished a weapon. It is also worth noting that the jury obviously accepted Mr. Lamarie's testimony because the jury convicted Johnny Taylor of simple

robbery and simple battery, crimes which do not involve use of a weapon.

As to credibility, the appellate court is not to second-guess the jury on credibility of witnesses. The jury heard the witnesses' uncontroverted testimony that the defendant robbed them. Moreover, since the crimes Taylor was convicted of did not involve use of a weapon, defense counsel's making issue of prior inconsistent statements would have had no effect on that issue. This assignment is without merit.

For the foregoing reasons, we affirm the defendants' convictions and sentences.

AFFIRMED.