NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2010-KA-1026**
VERSUS	*	
		COURT OF APPEAL
TIMOTHY WASHINGTON	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 481-883, SECTION "K"
Honorable Arthur Hunter, Judge

* * * * * *

Judge Daniel L. Dysart

* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge Daniel L. Dysart)

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AFFIRMED

January 26, 2011

On November 14, 2008, the state filed a bill of information charging the defendant Timothy Washington with two counts of attempted second degree murder. He entered a not guilty plea, and the district court found probable cause and denied the motion to suppress the identification. Following a bench trial on August 18, 2009, Mr. Washington was found guilty as charged. He was sentenced on December 15, 2009 to serve thirty years at hard labor on each count, to run concurrently. Timothy Washington subsequently filed this appeal.

FACTS

On May 23, 2008 at approximately 4:30 a.m., Freddie Ross and his son Malcolm were returning home in the Algiers area of New Orleans. As they were driving along the 700 block of Thayer Street towards Malcolm's home, Freddie Ross observed a man standing in front of 732 Thayer Street whom he thought to be his neighbor, Timothy Washington standing approximately fifteen feet away from their car. Freddie Ross pulled over and asked the man whether the garbage truck had come by yet,to which the man responded that he did not know. Malcolm Ross then exited the car and checked the inside of the garbage can in front of the house

at 732 Thayer.. Just as Malcolm reentered the car, the man they saw in front of 732 Thayer started shooting at Freddie and Malcolm Ross.

Malcolm Ross testified that there were five gun shots. Though he and his father were ducking down in the car, Malcolm Ross suffered a gunshot wound to his left arm and was transported by EMS personnel to the hospital. Freddie Ross received an impact wound on his chest from one of the pellets and did not go to the hospital until after the police left.

In an attempt to flee from the shooter, Freddie Ross backed his car up towards the 800 block of Thayer Street, where the police found Freddie and his son. When New Orleans Police Officer Lauman arrived on the scene, he observed a white Lexus with several gunshot holes in it. Gunshot holes were apparent on two places alongside the windshield, on the rear passenger door, the center console, and through the headrest on the driver's seat of the car. Neither man saw where the shooter went after the shooting. Freddie testified that he would not have stopped to ask the man about the garbage unless it was not his neighbor, whom he knew was a trash collector. He testified further that man he spoke to in front of 732 Thayer seemed calm when he answered that he did not know whether the garbage had been picked up. Malcolm testified that the man was wearing dark clothing.

Freddie Ross told police that the man who fired the shots was someone he knew from around the neighborhood, and he informed the officer that the man lived at 732 Thayer Street.[1] As a result of the identification, Officer Lauman went

[1] Malcolm did not know appellant; he lived several blocks away from appellant. Though Freddie recognized appellant and knew he was a trash collector, he did not know appellant's name. Both men identified appellant in court.

to the Thayer Street address, where he met with Timothy Washington's girlfriend, Danielle Algere. Washington was not home at the time. However, Danielle provided Officer Lauman with a photograph of Washington, told the detective his name, and told him that he worked as a trash collector.

Using the photograph provided by Danielle, New Orleans Police Detective Cronk developed two photographic lineups that were shown individually to Freddie and Malcolm Ross. Both men immediately chose Timothy Washington as their assailant. The detective subsequently obtained an arrest warrant. The parties stipulated that on September 3, 2008, Timothy Washington was arrested at 732 Thayer Street by Detective Dobard after the detective received a tip that he was back at his residence. Washington was found in the attic by a K-9 unit.

Danielle Algere testified that she and Washington had been living together for approximately five years and that he was a sanitation worker. On the day of the shooting, May 23, 2008, she stated that he was wearing a lime green shirt and some denim cutoffs. Sometime later that same morning, the police came to Danielle's door and asked her who just ran through her house, and she told them no one. The police then searched her house. Washington was not found. At approximately 7:00 a.m. that morning Danielle went to her mother's house across the river. Washington was already there with his bicycle, and he was still wearing his work shirt and cutoffs. Danielle testified that she had never seen Timothy Washington with a gun.

Danielle's mother, Louella Harris, testified that Timothy Washington regularly came to her house after work. On the morning of May 23, 2008, he arrived early, saying that he had no work that day. He explained that he missed the

truck. She further testified that Washington was wearing his work shirt and cutoffs, and that Danielle arrived at the house around 6:30 a.m.

Timothy Washington testified that he is employed by a sanitation company. On the morning of May 23rd, he left his residence at approximately 3:30 a.m., and rode his bicycle to the Stumpf Boulevard headquarters. When he arrived at headquarters, a work van took him and other trash collectors to their route in Slidell. Once he arrived in Slidell, he learned that there was no work. He then went back to Stumpf Boulevard and retrieved his bicycle. From there Washington caught the ferry to Ms. Harris' house across the river, where he met with Danielle.

Timothy Washington admitted that he had seen Freddie Ross before the shooting and had spoken to him. However, he denied shooting anyone in front of his house or that he owned a gun. He explained that he could not have a gun because he is a convicted felon. Washington stated that he did not go home on the night of the attempted murder because he was wanted, and did not return to the Thayer Street residence until September.

ERRORS PATENT

A review of the record for errors patent shows that the district court failed to restrict parole eligibility as required by La. R.S. 14:(27)30.1. As such, the sentence is illegally lenient. However, as per La. R.S. 15:301.1A and State v. Williams, 2000-1725 (La. 11/28/01), 800 So. 2d 790, the sentence is deemed to have been imposed with these restrictions of benefits, even in the absence of the trial court's failure to delineate them. Thus, there is no need for this court to correct the sentences. See State v. Phillips, 2003-0304 (La. App. 4 Cir. 7/23/03), 853 So. 2d 675.

No other errors patent were found.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, appellant argues that the state failed to prove that he was correctly identified as the perpetrator of the crime beyond a reasonable doubt. Specifically, he argues that the identification was based merely upon an assumption by Freddie Ross.

State v. Holmes, 2005-1248, pp. 8-9 (La. App. 4 Cir. 5/10/06), 931 So. 2d 1157, 1162, discussed the standard to be used when a defendant disputes his identity as the perpetrator of an offense:

> When a key issue at trial is whether the defendant was the perpetrator of the crime, the State is required to negate any reasonable probability of misidentification in order to carry its burden of proof beyond a reasonable doubt. State v. Bright, 1998-0398 (La. 4/11/00); 776 So.2d 1134, 1147. The fact-finder weighs the respective credibilities of the witnesses, and a reviewing court will generally not second-guess those determinations. State ex rel. Graffagnino v. King, 436 So.2d 559 (La. 1983). However, the touchstone of Jackson v. Virginia is rationality and that "irrational decisions to convict will be overturned, rational decisions to convict will be upheld, and the actual fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law." State v. Mussall, 523 So.2d 1305, 1310 (La. 1988). The trier of fact makes credibility determinations, and may, within the bounds of rationality, accept or reject the testimony of any witnesses. State v. Hampton, 98-0331 (La. 4/23/99); 750 So.2d 867, 880.

In support of his argument, appellant urges that Freddie Ross only assumed that the man standing near Timothy Washington's home was in fact Timothy Washington. He notes that the two men's description of the perpetrator was vague. Specifically, Freddie did not notice what type of clothing the perpetrator was wearing, and Malcolm testified that he was wearing dark clothing. Appellant also

notes that it was dark outside, and that both men had very little time to observe the shooter as both men were ducking down while backing away.

As the trial and motion hearing transcript establish, Freddie Ross had no doubt that the perpetrator was appellant, his neighbor. Appellant lived a block away from Freddie Ross, and Mr. Ross had seen him in the neighborhood on several occasions. The evidence establishes that the victims were only a few feet away from appellant and that the area was illuminated by a street light nearby. Both men could clearly see appellant. Also, both men immediately identified appellant when presented with a photographic lineup and in court. The trier of fact was privy to the lack of any detailed physical description of the perpetrator, yet chose to find the victims' testimony credible. This finding should not be disturbed as it is not clearly contrary to the evidence. State v. Huckabay, 2000-1082 (La. App. 4 Cir 2/6/02), 809 So. 2d 1093; State v. Harris, 99-3147 (La. App. 4 Cir. 5/31/00), 765 So. 2d 432. Appellant's first assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

Next, appellant argues that the evidence is insufficient to sustain his convictions for attempted second degree murder.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an 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, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing 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 (La. 1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court 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 (La.1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Appellant argues that the evidence is insufficient for two reasons: (1) the evidence did not eliminate beyond a reasonable doubt that he did not act in self-defense; and (2) it did not establish beyond a reasonable doubt that he had the requisite specific intent to kill.

Appellant raises the argument that he acted in self-defense for the first time on appeal. At trial, he testified that he was on the way to work and that he was not the person who shot at Freddie and Malcolm Ross. The only defense presented at trial was one of misidentification. In State v. Juluke, 98-0341 (La. 1/8/99) 725 So.2d 1291, the Louisiana Supreme Court wrote:

> The *Jackson* standard does not provide a defendant with a means of splitting alternative and inconsistent defenses in different forums, raising one defense before the jury and when that fails, a second defense presupposing a different set of facts in an appellate court conducting sufficiency of review under *Jackson* and La. C.Cr.P. art. 821(E).

98-0341 at p. 4-5, 725 So.2d at 1293.

Accordingly, the first argument presented by appellant in this assignment of error appears to be procedurally barred from review by this court. In any event, the discussion on appellant's second argument, that he lacked specific intent to kill, will not only show that the evidence was sufficient, it will also show that he did not act in self-defense.

Appellant was charged with and convicted of two counts of attempted second degree murder. A conviction for attempted second degree murder requires proof that the offender had the specific intent to kill. State v. Sullivan, 97-1037, p. 20 (La. App. 4 Cir. 2/24/99), 729 So. 2d 1101, 1111; State v. Hongo, 96-2060, pp. 2-3 (La. 12/2/97), 706 So. 2d 419, 420. 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). Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant. La. R.S. 14:10(1); State v. Bishop, 2001-2548 (La. 1/14/03), 835 So.2d 434.

Appellant argues specifically that the state failed to show that he had the requisite intent to kill because he simply reacted to the approach of Freddie and Malcolm Ross at 4:30 a.m. and to the banging of the trash lid as it was closed by Malcolm. Appellant urges that the approach and banging caused him to fire his

gun randomly in self-defense, and he notes that Malcolm and Freddie suffered only minor injuries.

Because appellant's defense was one of misidentification, nothing was presented at trial that showed that he was startled by the approach of the victims or that he thought that an assault was imminent. In fact, Freddie testified that appellant seemed calm when he asked about the garbage, and no evidence was presented that Malcolm made excessive noise when he checked the garbage can. On the other hand, the evidence establishes that appellant did not begin firing at Freddie and Malcolm until Malcolm retreated back to the vehicle. Thus, any perceived threat had ended at that point. Appellant fired five shots towards the vehicle even though Freddie identified himself as a neighbor, and both men received gunshot wounds that required medical attention. The shots were fired from approximately fifteen feet away, and one of the shots even went through the headrest of the driver's side of the vehicle and only missed Freddie because he was ducking down. Finally, neither Freddie nor Malcolm was armed.

In State v. Guy, 95-0899 (La. App. 4 Cir. 1/31/96), 669 So. 2d 517, this court found that specific intent to kill could be inferred from the firing of three shots at the rear of an occupied vehicle. Guy fired the shots because the driver honked at him. As in Guy, specific intent to kill can be inferred from the firing of five shots from close range at the vehicle occupied by Freddie and Malcolm Ross. Nothing presented at trial shows that appellant acted in self-defense. Thus, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to support the convictions. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In his final assignment of error, appellant asserts that the district court erred in imposing an excessive sentence. The court imposed a mid-range sentence of thirty years on each count. The sentencing range under La. R.S. 14:(27)30.1 is between ten and fifty years at hard labor without benefit of parole.

As the record reflects, counsel did not object to the length of the sentence or file a motion to reconsider sentence. This court has held that the failure to file a motion to reconsider sentence or to object to the sentence at the time it is imposed precludes a defendant from raising a claim about his sentence on appeal. State v. Rodriguez, 2000-0519 (La. App. 4 Cir. 2/14/01), 781 So. 2d 640; State v. Tyler, 98-1667 (La. App. 4 Cir. 11/24/99), 749 So. 2d 767. However, appellant has additionally argued that counsel was ineffective for failing to file a motion to reconsider sentence.

In State v. Mims, 97-1500 pp. 44-45 (La. App. 4 Cir. 6/21/00), 769 So. 2d 44, 72, this court discussed the standard to be used to evaluate an effective assistance of counsel claim:

> 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 (1984). *See State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove 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 6th Amendment of the federal constitution. *Strickland, supra*, at 686, 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, 2068.

See also State v. Crawford, 2002-2048 (La. App. 4 Cir. 2/12/03), 848 So. 2d 615.

Here, appellant can show prejudice only by proving that he would have been entitled to relief had counsel taken steps to preserve the issue on appeal. Thus, in order to determine if the ineffective assistance of counsel claim has merit, we must determine if his excessive sentence claim has merit.

In State v. Smith, 2001-2574, p. 7 (La. 1/14/03), 839 So. 2d 1, 4, the Court set forth the standard for evaluating a claim of excessive sentence:

> Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o *law* shall subject any person to ··· *excessive*··· *punishment.*" (Emphasis added.) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. *State v. Sepulvado,* 367 So.2d 762, 767 (La.1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. *State v. Bonanno,* 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Cann,* 471 So.2d 701, 703 (La.1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. *State v. Walker,* 00-3200, p. 2 (La.10/12/01), 799 So.2d 461, 462; *cf. State v. Phillips,* 02-0737, p. 1 (La.11/15/02), 831 So.2d 905, 906.

See also State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672; State v. Baxley, 94-2982 (La. 5/22/96), 656 So. 2d 973; State v. Landry, 2003-1671 (La. App. 4 Cir. 3/31/04), 871 So. 2d 1235.

An appellate court reviewing a claim of excessive sentence must determine whether the trial court adequately complied with the statutory guidelines in La. C.Cr.P. art. 894.1, as well as whether the facts of the case warrant the sentence imposed. State v. Landry, supra; State v. Trepagnier, 97-2427 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181. However, as noted in State v. Major, 96-1214, p. 10 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, 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).

In the instant case, the district court did not give any reasons for the sentence it imposed except to note that appellant was to be sentenced on two counts of attempted second degree murder. As mitigating factors, appellant indicates that he has been a sanitation worker for twenty years, a factor presented to the court during sentencing by counsel. He also notes that neither victim was seriously injured.

Although appellant urges that he should receive the minimum sentence under the circumstances, the imposition of the thirty-year sentences is supported by the case law. For example, in State v. Armant, 97-1256, (La. App. 5 Cir. 5/27/98), 719 So. 2d 510, the defendant, a first-time offender, was sentenced to forty years for attempted second degree murder after stabbing his wife and inflicting injury to her eye, and the sentence was not found to be excessive

In State v. Nix, 2007-1431 (La. App. 4 Cir. 6/18/08), 987 So. 2d 855, this court affirmed maximum sentences of forty years at hard labor for manslaughter

where the defendant stabbed a victim in his left eye, penetrating his brain, and fifty years at hard labor for attempted second degree murder where he stabbed another victim above his eye, in his right arm, and chest.

In State v. Davis, 93-0663 (La. App. 4 Cir. 2/25/94), 633 So.2d 822, the defendant was convicted of two counts of attempted second degree murder and one count of attempted armed robbery. The trial court sentenced the defendant to serve forty-nine and one half years at hard labor on the attempted armed robbery conviction and fifty years at hard labor on each of the attempted second degree murder convictions In Davis, the defendant attempted to rob three people and shot at them. He pointed a gun at the head of one of the victims and injured at least one of the victims. The appellate court found that the sentences imposed were not excessive.

In State v. Pyke, 95-919 (La. App. 3. Cir. 3/6/96), 670 So.2d 713, the Third Circuit affirmed the defendant's sentence of fifty years at hard labor on his conviction for attempted second degree murder. The defendant shot the victim in the back without provocation. The court noted the defendant had one prior conviction for possession of a controlled substance in Texas.

Here, the trial court did not state the factors it considered in imposing the thirty-year sentences, but there is justification in the record. Appellant fired five shots at the vehicle occupied by the victims without any apparent provocation. Fortuitously, neither victim suffered life threatening injuries. Nonetheless, both victims received gunshot wounds that required medical attention. Thus, based on the seriousness of appellant's actions, the mid-range sentences of thirty years were warranted. Also, appellant admitted to having numerous prior convictions. Under the circumstances, the trial court did not abuse its discretion in imposing the

sentences. Appellant's claim of excessive sentence is without merit. As such, counsel should not be deemed ineffective for failing to file a motion to reconsider sentence.

CONCLUSION

Accordingly, for the foregoing reasons, the convictions and sentences are affirmed.

AFFIRMED