STATE OF LOUISIANA

VERSUS

AKANDO DUCKSWORTH

NO. 17-KA-35

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 15-6406, DIVISION "I"
HONORABLE NANCY A. MILLER, JUDGE PRESIDING

December 13, 2017

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Robert A. Chaisson

CONVICTION AND SENTENCE AFFIRMED; REMANDED FOR CORRECTION OF THE UNIFORM COMMITMENT ORDER

JGG
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GRAVOIS, J.

Defendant, Akando Ducksworth, appeals his conviction and sentence for attempted manslaughter, a violation of La. R.S. 14:27 and 14:31. On appeal, defendant argues that the evidence was insufficient to establish that he had specific intent to kill the victim, and that the appropriate verdict is aggravated battery. He also argues that his sentence of twelve years imprisonment at hard labor is unconstitutionally excessive. For the following reasons, we affirm defendant's conviction and sentence and remand the matter for correction of the Uniform Commitment Order, as noted herein.

PROCEDURAL HISTORY

On November 10, 2015, the Jefferson Parish District Attorney filed a bill of information charging defendant, Akando Ducksworth, with one count of attempted second degree murder of Joshua Hardin, in violation of La. R.S. 14:27 and 14:30.1. Defendant pleaded not guilty at his arraignment on December 11, 2015.

The matter proceeded to trial before a twelve-person jury on August 30, 2016. The following day, the jury returned a verdict of guilty of the responsive verdict of attempted manslaughter.

On September 6, 2016, the trial court denied defendant's motion for a new trial and post-verdict judgment of acquittal, and after a waiver of delays, sentenced defendant to twelve years imprisonment at hard labor. Immediately after sentencing, defendant filed a motion for an appeal, which the trial court granted that same date.[1] Defendant now appeals, arguing first that the evidence was insufficient to support his conviction of attempted manslaughter, but instead supports a verdict of aggravated battery, and second, that his sentence was excessive.

[1] At a restitution hearing held on January 5, 2017, the parties stipulated that restitution was owed to the victim, Joshua Hardin, in the amount of $166,488.76.

FACTS

At the time of trial, defendant was thirty-three years old, had a bachelor's degree from Mississippi State University and a master's degree in sports administration, and had served eight years in the Mississippi National Guard. In this matter, he was convicted of attacking Joshua Hardin with a machete in a bar fight. Defendant testified that as of August 11, 2015 (the date of the incident in question), he had been in a relationship with Michelle Marsh for two and one-half years. That night, after he had been drinking and watching football most of the day, Ms. Marsh suggested that they go out to JR's Sports Bar in Metairie and meet her friend, Amanda Golden, who was also friends with the victim, Joshua Hardin. The victim had been scheduled to work at JR's that evening, but when he arrived, he was informed that they were overstaffed; he was given the night off. While at JR's, the victim met up with Ms. Golden. Shortly thereafter, Ms. Marsh and defendant arrived at JR's and Ms. Marsh introduced the victim to defendant. Unbeknownst to defendant at that time, the victim and Ms. Marsh had been having a sexual relationship for three years, the entire length of time that Ms. Marsh had been dating defendant.[2]

After a few drinks, the four continued on to Daiquiris and Creams, a nearby bar on Veterans Boulevard. While there, defendant attempted to dance with Ms. Marsh, who became annoyed and "stormed off," leaving the bar. The victim then followed Ms. Marsh outside to inquire as to whether she was all right, with defendant following close behind.

Once outside, defendant asked "what's going on?" The victim testified that at this point, there was no arguing or yelling taking place. The men spoke for a few minutes before Ms. Golden pulled Ms. Marsh away from them, as things began to grow louder and more "heated." Defendant then told the victim "hell, no,

[2] The victim testified that he was unaware Ms. Marsh was in a relationship with defendant.

you're not going to talk to my girl." The victim responded by shoving defendant and telling him to "back up off" of him because it looked like "he was getting a lot more aggravated than what it was before."

Defendant remembered the conversation differently, however, recalling that when he went outside to check on Ms. Marsh, he told the victim that he was going to take Ms. Marsh and leave, at which time the victim told him that Ms. Marsh was going to stay at the bar with him. Defendant then told the victim that he could not tell his girlfriend where to go. According to defendant, the victim then pushed defendant, calling him a n****r and telling him he would "take his woman" if he wanted to.

Defendant then ran off around the corner of the bar, and the others went back inside. The victim believed the altercation had ended, but a minute or so later, defendant ran back into the bar—while the victim's back was turned—with a machete,[3] "swinging" at him with "full force." The victim testified that he ducked and put his hand up to grab the machete, at which time defendant swung it, severing his right thumb. The two men ended up in a "bear hug," as the victim feared that defendant would keep cutting him if there was any space between them, causing the victim to also suffer lacerations to his head and back.

Ms. Golden and Traci Parker, a friend of the victim, repeatedly hit defendant over the head before the machete was eventually seized from his control. Defendant then fled the scene. The bartender, Jeanine Daigle, placed the machete behind the bar and called the police. The victim testified that as a result of the incident, he lost the use of his thumb and has several scars.[4]

The incident was caught on the bar's video surveillance, which was played for the jury. The video corroborated the victim's account of the events, which

[3] A photograph of the machete was introduced into evidence. Defendant testified that he kept a machete in his car because Ms. Marsh had a stalker.

[4] The court permitted the victim to show his scars to the jury.

showed defendant and the victim outside of the bar engaged in a conversation when it appears things began to escalate, at which point the victim shoved defendant prompting him to run off towards the parking lot. After defendant ran off, the victim re-entered the bar, and a few seconds later, defendant appeared running inside the bar, swinging a machete from above his head, as if in a chopping motion, down towards the victim with what appears to be significant force. The altercation continued between the two men, in what appears to be a "bear hug," while other patrons in the bar hit defendant in an attempt to seize his weapon and neutralize the situation.

The 9-1-1 call placed by the bartender, Ms. Daigle, was also played for the jury. On the recording, a frantic Ms. Daigle recounts what she had just witnessed, explaining that two men were involved in a fight, one had a machete, and the other one was "all cut up." In the background, screams can be heard as she tells the dispatcher that defendant had fled and "there is blood everywhere," noting that the victim sustained a severed finger that had been put on ice. She further explained to the dispatcher that there were approximately thirty people in the bar at the time of the incident and that she had "never seen anything like this before," recalling that the machete was "huge" and as long as her arm.

Ms. Parker testified that at first the conversation between defendant and the victim, while outside, was not heated, but that it began to escalate. It was at that point that she went over to the victim in an attempt to defuse the situation when defendant ran off. Ms. Parker believed that defendant had left to get a gun, so she warned the victim that he ought to leave. Ms. Parker and the victim were walking back into the bar when defendant ran inside straight for the victim holding a machete in his hand. Ms. Parker testified that she tried to warn the victim, who then turned around to defend himself, putting defendant in a "bear hug," while she

attempted to break the fight up by punching defendant, from which she ultimately sustained a broken hand.

Deputy Cleo Bridges of the Jefferson Parish Sheriff's Office was dispatched to Daiquiris and Creams, and while en route, encountered defendant approximately a block and a half from the bar. Defendant had in his possession the sleeve for the machete. He advised the officers that he had been involved in an altercation at the bar down the street.[5] Defendant was then transported to the hospital for cuts he had sustained during the altercation.

Defendant admitted that he cut the victim once with the machete, but denied that he was trying to kill him; however, he stated that when he went to retrieve his machete, he was angry and desired to hurt the victim. Photographic evidence of the injuries the victim sustained to his hand, back, and head were introduced into evidence. The photographs depict a severed right thumb and extensive bleeding from the lacerations on the victim's back and head.

ASSIGNMENT OF ERROR NUMBER ONE

Sufficiency of the evidence

In his first assignment of error, defendant argues that the trial court erred in denying his motion for post-verdict judgment of acquittal. He maintains that his motion should have been granted because the State failed to prove that he had the specific intent to kill, and thus, could not establish the elements necessary to sustain an attempted manslaughter conviction, and likewise, to establish the charged offense of attempted second degree murder. Defendant also contends the State presented no evidence that he acted in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his

[5] Defendant told Deputy Daniel Whamond of the Jefferson Parish Sheriff's Office that he and Ms. Marsh had gone on a double date with the victim and Ms. Golden. They first went to JR's Sports Bar and then relocated to Daiquiris and Creams on Veterans Boulevard. While there, Ms. March became upset with defendant and went outside on the patio where she was joined by the victim. Defendant followed the two outside where an altercation with the victim ensued. Once the victim had gone back inside, defendant went to his vehicle and retrieved his machete, ran back into the bar, approached the victim, and swung at him with his machete.

self-control and cool reflection that would have warranted an attempted manslaughter conviction. Thus, defendant concludes, because the State only proved the elements of an aggravated battery offense, the trial court should have modified the verdict.

The proper procedural vehicle for raising the issue of sufficiency of the evidence is a motion for post-verdict judgment of acquittal. La. C.Cr.P. art. 821; *State v. Lande*, 06-24 (La. App. 5 Cir. 6/28/06), 934 So.2d 280, 288, n.18, *writ denied*, 06-1894 (La. 4/20/07), 954 So.2d 154 (citing *State v. Allen*, 440 So.2d 1330, 1332 (La. 1983)). Here, defendant raises the same sufficiency grounds on appeal as he did for the basis of his motion for post-verdict judgment of acquittal denied by the trial court.

The appropriate standard of review for determining sufficiency of the evidence was established in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). According to *Jackson*, the reviewing court must decide, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*, 443 U.S. at 319. *See also State v. Ortiz*, 96-1609 (La. 10/21/97), 701 So.2d 922, 930, *cert. denied*, 524 U.S. 943, 118 S.Ct. 2352, 141 L.Ed.2d 722 (1998); *State v. Holmes*, 98-490 (La. App. 5 Cir. 3/10/99), 735 So.2d 687, 690.

Evidence may be either direct or circumstantial. Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact can be inferred according to reason and common experience. *State v. Williams*, 05-59 (La. App. 5 Cir. 5/31/05), 904 So.2d 830, 833. When circumstantial evidence is used to prove the commission of an offense, La. R.S. 15:438 provides that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." *State v. Wooten*, 99-181 (La. App. 5 Cir. 6/1/99), 738 So.2d 672, 675,

writ denied, 99-2057 (La. 1/14/00), 753 So.2d 208. This is not a separate test from the *Jackson* standard, but rather provides a helpful basis for determining the existence of reasonable doubt. *Id.* All evidence, both direct and circumstantial, must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. *Wooten*, 738 So.2d at 675.

In reviewing a denial of a motion for post-verdict judgment of acquittal, an appellate court in Louisiana is controlled by the standards enunciated in *Jackson*, *supra*, for reviewing sufficiency of the evidence to support a conviction. *State v. Trice*, 14-636 (La. App. 5 Cir. 12/16/14), 167 So.3d 89, 92.

Defendant was charged with attempted second degree murder, in violation of La. R.S. 14:27 and 14:30.1, and was convicted of the lesser offense of attempted manslaughter, in violation of La. R.S. 14:27 and 14:31.

In order to convict a defendant of attempted second degree murder, the State must prove beyond a reasonable doubt that the defendant had the specific intent to kill. *State v. Bishop*, 01-2548 (La. 1/14/03), 835 So.2d 434, 437; *State v. Logan*, 45,136 (La. App. 2 Cir. 4/14/10), 34 So.3d 528, 535, *writ denied*, 10-1099 (La. 11/5/10), 50 So.3d 812. Proof of specific intent to inflict great bodily harm is insufficient. *Logan*, *supra*.

The offense of manslaughter is defined as a homicide that would be first or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. La. R.S. 14:31. Although specific intent to kill is not necessary for a conviction of manslaughter, a specific intent to kill is required for a conviction of attempted manslaughter. *Logan, supra*. To support a conviction for attempted manslaughter, the State must prove that the defendant specifically intended to kill the victim and committed an overt act in furtherance of

that goal. *State v. Glover*, 47,311 (La. App. 2 Cir. 10/10/12), 106 So.3d 129, 135, *writ denied*, 12-2667 (La. 5/24/13), 116 So.3d 659.

Specific intent is that state of mind which exists when the circumstances indicate the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1); *Glover, supra*. Specific intent need not be proven as a fact, but may be inferred from the circumstances and actions of the accused. *State v. Trim*, 12-115 (La. App. 5 Cir. 10/16/12), 107 So.3d 656, 660, *writ denied*, 12-2488 (La. 4/19/13), 111 So.3d 1030 (citing *State v. Girod*, 94-853 (La. App. 5 Cir. 3/15/95), 653 So.2d 664, 668). Specific intent to kill can be inferred from the intentional use of a deadly weapon such as a knife or a gun. *Trim*, 107 So.3d at 660 (citing *State v. Knight*, 09-359 (La. App. 5 Cir. 2/9/10), 34 So.3d 307, 317, *writ denied*, 10-2444 (La. 10/21/11), 73 So.3d 376); *State v. Pittman*, 11-741 (La. App. 4 Cir. 2/29/12), 85 So.3d 782, 785, *writ denied*, 12-680 (La. 9/14/12), 97 So.3d 1016. Specific intent to kill may also be inferred from the extent and severity of the victim's injuries. *State v. Lewis*, 97-160 (La. App. 5 Cir. 7/29/97), 698 So.2d 456, 459, *writ denied*, 97-2381 (La. 3/27/98), 716 So.2d 881.

Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended, and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. La. R.S. 14:27(A). Mere preparation to commit a crime shall not be sufficient to constitute an attempt, but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended. La. R.S. 14:27(B)(1).

Whether a defendant possessed the requisite intent in a criminal case is a question for the trier-of-fact, and a review of the correctness of this determination is guided by the *Jackson* standard. *Trim*, 107 So.3d at 660 (citing *State v. Gonzalez*, 07-449 (La. App. 5 Cir. 12/27/07), 975 So.2d 3, 8, *writ denied*, 08-0228 (La. 9/19/08), 992 So.2d 949).

Defendant does not dispute that he committed a criminal offense by striking the victim with a machete, but he argues that the State failed to prove he had the specific intent to kill the victim and disputes that the offense he committed (which he claims to be an aggravated battery) was done in sudden passion or heat of blood caused by sufficient provocation to deprive an average person of his self-control and cool reflection.

If there is sufficient evidence to convict a defendant of a greater offense which includes the offense for which defendant was convicted, the evidence will necessarily and automatically, because of our statutory system of responsive verdicts, support the conviction for the lesser offense, as long as the defendant did not object to the inclusion of this lesser included offense. *State v. Schrader*, 518 So.2d 1024, 1034 (La. 1988); *State ex rel. Elaire v. Blackburn*, 424 So.2d 246 (La. 1982); *State v. Cooley*, 257 So.2d 400 (La. 1972).

In the present case, defendant did not object to the inclusion of attempted manslaughter as a lesser included offense; thus, because as shown below the evidence adduced at trial establishes defendant's specific intent to kill the victim, the evidence was sufficient to convict defendant of the greater offense of attempted second degree murder and is therefore supportive of the lesser included offense of attempted manslaughter.

In *State v. Dean*, 528 So.2d 679 (La. App. 2 Cir. 1988), the defendant was charged with attempted second degree murder and found guilty by a jury of attempted manslaughter. From the evidence introduced at trial, it was established

that the victim and two friends were walking home from school when they were approached by the defendant who asked the victim if he (the victim) remembered him (the defendant). The victim answered in the affirmative and no other words were spoken, but the two "faced off" momentarily. The victim and his friends resumed their walk home and had gone approximately fifty yards when the victim heard the defendant approaching from behind and began to turn. Before the victim could complete the turn, the defendant stabbed him in the upper back and ran away. One of the victim's friends removed the knife from the victim's back and called the police. It was later learned that the night before the stabbing incident, the defendant and the victim had gotten into an altercation during which the victim struck the defendant with a stick. On appeal, the defendant argued that the evidence was insufficient to convince reasonable jurors beyond a reasonable doubt of his specific intent to kill the victim. The court of appeal in *Dean* found that evidence of the instrumentality used and the severity of the injury inflicted on the victim could lead a reasonable juror to conclude that the defendant had the specific intent to kill when he approached the victim from behind and plunged a knife into his back. *Id.* at 682-83.

Also, in *State v. Cortez*, 48,319 (La. App. 2 Cir. 8/7/13), 122 So.3d 588, the defendant was involved in a barroom confrontation with Bo Ballard, one of several victims. The two men took their dispute outside where, after punching the defendant, Ballard went back inside the bar. Approximately fifteen to twenty minutes later, the defendant returned to the bar armed with a knife. Four patrons in the bar were stabbed and/or cut as they tried to disarm the defendant. The melee finally ended when Ballard approached the defendant from behind and knocked him unconscious. The defendant was charged in an amended bill of information with attempted second degree murder of Ballard and several other counts for the crimes committed on the other bar patrons. Ultimately, the charge of attempted

second degree murder of Ballard resulted in a conviction for attempted manslaughter. On appeal, the defendant argued that the evidence was insufficient to convict him of attempted manslaughter because the State failed to prove that he had the requisite specific intent to kill Ballard.

In *Cortez*, while Ballard did not testify at trial, the court of appeal considered evidence from witnesses who testified that after the altercation between the defendant and Ballard outside the bar, the defendant told Ballard twice, "[y]ou wait right here. I'll be right back." The evidence further established that the defendant returned with a knife looking for Ballard as he "relentlessly fought his way through the men who tried to stop and disarm him." The bar's surveillance video further corroborated the witnesses' testimony, making it "readily apparent from his movements that he was looking about the bar for someone during the free-for-all that followed." The court further noted that instead of retreating and fleeing after encountering resistance in his path toward Ballard, the defendant continued to fight and stab at the men thwarting his efforts to get within striking distance of Ballard.

In finding the evidence presented at trial sufficient to prove the defendant had the specific intent to kill Ballard and in finding he committed an overt act in furtherance of that goal, the *Cortez* court noted that the overwhelming consensus among the witnesses was that the defendant's intended target was Ballard. Thus, the court of appeal maintained that while the defendant's actions against his other victims constituted crimes in and of themselves, the sheer ferocity of his conduct against the people in his path was also highly indicative of the deadly intent he harbored toward Ballard, the actual object of his aggression. *Id.* at 593-94.

In the instant matter, at trial, evidence showed that defendant and the victim were having a heated conversation over Ms. Marsh which ultimately resulted in the victim forcefully shoving defendant. Defendant, after being shoved by the victim, ran off towards the parking lot and retrieved a machete from his car. These facts

could lead a reasonable juror to conclude that the act that followed was one committed with the specific intent to kill.

With machete in hand, defendant ran back into the bar directly towards the victim, whose back was partially turned, and began swinging his machete at the victim with such force that it severed the victim's thumb. While attempting to defend himself, the victim also suffered lacerations to his head and back as he placed defendant in a "bear hug" for fear that defendant would "keep cutting" him. The chaos of the scene was recorded on video surveillance and on the 9-1-1 phone call made by the bartender, Ms. Daigle, who advised the dispatcher of the alarming size of the machete and that there was "blood everywhere." Defendant, who was relentless in his advances towards the victim despite being struck on the head numerous times by bar patrons attempting to thwart the attack, some sustaining injuries themselves, eventually fled the scene only once his machete was seized from his possession. Photographs from the night in question also depicted the severity of the attack from which the victim sustained lacerations resulting in scarring and the loss of the use of his thumb.

Although the State did not offer any testimony regarding statements made before the attack that defendant intended to kill the victim, the foregoing evidence shows that a reasonable trier of fact could have concluded that defendant had the specific intent to kill the victim when he ran towards the victim from behind, forcefully swinging a large machete. Accordingly, after considering the evidence presented at trial in the light most favorable to the prosecution, we find that the jury could have reasonably concluded that the State proved that defendant had the specific intent to kill the victim and that he committed an overt act in furtherance of that goal, thereby supporting his conviction for attempted manslaughter. We

further conclude that the trial court did not err in denying defendant's motion for post-verdict judgment of acquittal.[6] This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

Excessiveness of sentence

In his second assigned error, defendant contends that his twelve-year sentence is unconstitutionally excessive. He asserts that based on his personal background, lack of criminal history, the circumstances of the "battery," and the sentences imposed for other defendants convicted of the same crime, the twelve-year sentence is too severe and out of proportion to the offense.

Prior to defendant's sentencing on September 6, 2016, the court reviewed a victim impact statement supplied by the State and several letters from family members and friends written on behalf of defendant. Within the victim's letter, he explained that because of the attack, he now suffers from anxiety, a sleep disorder, depression, and post-traumatic stress disorder ("PTSD.") He further wrote that despite physical therapy, his physicians have informed him that he will never be able to open his hand or bend his thumb again. This disability, he explained, has had a significant impact on his personal and professional life, as he can no longer do the activities he once could. After reading the letters, the court also listened to a statement made by defendant during which he took full responsibility for his actions, apologized, and asked for forgiveness. The court then sentenced defendant, stating as follows:

> Let the Court start by saying, as I have previously said, I've read the statement of Josh Hardin, the victim, in this case. I've heard Mr. Ducksworth's testimony and reviewed the letters from Lenora Williams, Dorothy Thomas, Michelle Marsh, Jessica Marsh, Greg Bray, and that's it. In addition to that, I'm going to put those in the record.
>
> The Court has also reviewed the sentencing guidelines of Louisiana Code of Criminal Procedure, Article, 894.1. While there

[6] It is further noted that aggravated battery was included on the jury verdict form as a responsive verdict. The jury was instructed regarding aggravated battery, and apparently rejected it as a responsive verdict.

> are a number of factors to be taken into consideration and mitigation of this crime, particularly the defendant's young age, the defendant's success from an educational point of view, and the defendant's military history, and while those are considered in mitigation, they are also frustrating to this Court because someone who has accomplished so much of their life to have come to the person that I viewed on the video, not one, not two, but three strikes going for more to Mr. Hardin. The Court finds it very difficult to wrap my head around the fact that those are one in the same persons.
>
> The Court has also reviewed Article 894.1, as I said, for mitigation, and also in attempt to confect an appropriate sentence.
>
> Based on everything I have reviewed, especially the trial testimony of the defendant and the victim and the videotape, the Court is going to impose 12 years at hard labor in the Department of Corrections.

Defendant now contests his twelve-year sentence, alleging it to be unconstitutionally excessive and maintains that the trial court failed to properly consider the nature of the case and his background in imposing the sentence.

Failure to make or file a motion to reconsider sentence, or to state the specific grounds upon which the motion is based, limits a defendant to a review of the sentence for unconstitutional excessiveness only. *State v. Bolden*, 04-1000 (La. App. 5 Cir. 3/1/05), 901 So.2d 445, 447, *writ denied*, 05-2030 (La. 4/28/06), 927 So.2d 279. *See also* La. C.Cr.P. art. 881.1(E). In this case, defendant did not orally object to his sentence as excessive or file a motion to reconsider sentence. Accordingly, the issue for our review is limited to whether defendant's sentence is unconstitutionally excessive. *See State v. Alvarez*, 11-223 (La. App. 5 Cir. 11/15/11), 78 So.3d 265, 268, *writ denied*, 11-2767 (La. 4/13/12), 85 So.3d 1245.

The Eighth Amendment to the U.S. Constitution and Article I, § 20 of the Louisiana Constitution prohibit the imposition of excessive punishment. *State v. Nguyen*, 06-969 (La. App. 5 Cir. 4/24/07), 958 So.2d 61, 64, *writ denied*, 07-1161 (La. 12/7/07), 969 So.2d 628. A sentence is considered excessive, even if it is within the statutory limits, if it is grossly disproportionate to the severity of the offense or imposes needless and purposeless pain and suffering. *Nguyen*, 958

So.2d at 64. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock the sense of justice. *State v. Taylor*, 06-839 (La. App. 5 Cir. 3/13/07), 956 So.2d 25, 27, *writ denied*, 06-0859 (La. 6/15/07), 958 So.2d 1179 (citing *State v. Lobato*, 603 So.2d 739, 751 (La. 1992); *State v. Pearson*, 07-332 (La. App. 5 Cir. 12/27/07), 975 So.2d 646, 655-56).

According to La. C.Cr.P. art. 881.4(D), the appellate court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. In reviewing a sentence for excessiveness, the reviewing court shall consider the crime and the punishment in light of the harm to society and gauge whether the penalty is so disproportionate as to shock the court's sense of justice, while recognizing the trial court's wide discretion. *Nguyen*, 958 So.2d at 64. In reviewing a trial court's sentencing discretion, three factors are considered: 1) the nature of the crime; 2) the nature and background of the offender; and 3) the sentence imposed for similar crimes by the same court and other courts. *State v. Allen*, 03-1205 (La. App. 5 Cir. 2/23/04), 868 So.2d 877, 880. However, there is no requirement that specific matters be given any particular weight at sentencing. *State v. Tracy*, 02-0227 (La. App. 5 Cir. 10/29/02), 831 So.2d 503, 516, *writ denied*, 02-2900 (La. 4/4/03), 840 So.2d 1213.

At the time of the charged offense, the penalty for attempted manslaughter under La. R.S. 14:27 and 14:31 was not more than twenty years imprisonment. Thus, defendant's mid-range twelve-year sentence falls well below the maximum penalty the trial court could have imposed.

The review of sentences under La. Const. art. 1, § 20 does not provide an appellate court with a vehicle for substituting its judgment for that of a trial judge as to what punishment is most appropriate in a given case. *State v. Williams*, 07-

1111 (La. 12/7/07), 969 So.2d 1251, 1252 (*per curiam*). Further, when an appellate court is reviewing 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 (La. 10/12/01), 799 So.2d 461, 462 (*per curiam*).

In the instant case, the trial court took into consideration the nature and background of this thirty-three-year-old defendant. The court read numerous letters from family and friends touting his accomplishments and admirable qualities. The court further listened to testimony regarding defendant's educational success and military background, as well as his lack of a criminal record. In fact, such mitigating factors were "frustrating" to the court when viewed in light of defendant's criminal conduct witnessed by the trial court on the video surveillance from the night of the crime, depicting the force by which the brutal attack was committed.

The trial court also sat through the trial of this matter in which witness testimony established that after a heated argument outside of a bar, defendant ran to retrieve a machete, as long as the length of an arm, from his car to "hurt" the victim. Defendant then entered the bar, and while the victim's back was turned, ran towards the victim "swinging" at him with "full force." Pictures of the large machete and the injuries the victim sustained depicted a severed thumb and several lacerations to the victim's head and back. The testimony further established that the victim attempted to defend himself while other bar patrons beat defendant sustaining injuries themselves in order to pry the machete from defendant's fingers before defendant fled. The 9-1-1 call also confirmed the chaos in the crowded bar full of innocent bystanders as screams were heard in the background during the attack in which "blood [was] everywhere."

Moreover, in his victim impact statement, the victim told the court of the lasting effects he has suffered as a result of the attack, including depression, anxiety, PTSD, and sleep disturbances. He recounted his countless physical therapy and psychiatry sessions, as well as the scarring he has sustained from the lacerations on his back, and the loss of the use of his hand which prohibits him from engaging in his past hobbies and has cost him his employment.

In similar cases, courts have upheld comparable or greater sentences. In *State v. Solomon*, 461 So.2d 548 (La. App. 3 Cir. 1984), the court of appeal upheld a near maximum sentence for attempted manslaughter when the defendant, a first-time offender, stabbed the defenseless victim twice in the chest area causing him to suffer grave injuries.[7] Also, in *Dean*, *supra*, the appellate court found the defendant's mid-range sentence was not unconstitutionally excessive where the defendant stabbed the victim once in the upper back after which the victim was taken to the hospital where the wound was sutured, and he was sent home.[8] Finally, in *State v. Raev*, 36,847 (La. App. 2 Cir. 3/5/03), 839 So.2d 1015, *writ denied*, 03-988 (La. 10/10/03), 855 So.2d 330, the Second Circuit found a twelve-year sentence for attempted manslaughter not to be unconstitutionally excessive where the evidence at trial showed the remorseful defendant, a first-time offender, stabbed the victim in the throat with a letter opener and kicked the victim after she fell to the ground. In sentencing the defendant, the trial court noted the crime had caused a substantial economic loss to the victim and a permanent physical scar.

While a comparison of sentences imposed for similar crimes may provide some insight, "it is well settled that sentences must be individualized to the particular offender and to the particular offense committed." *State v. Batiste*, 594

[7] The defendant in *Solomon* received a ten-year sentence at a time when the maximum sentence for attempted manslaughter was ten and one-half years.

[8] The defendant in *Dean* received a five-year sentence at a time when the maximum sentence for attempted manslaughter was ten and one-half years.

So.2d 1, 3 (La. App. 1 Cir. 1991). Additionally, it is within the purview of the trial court to particularize the sentence because the trial judge "remains in the best position to assess the aggravating and mitigating circumstances presented by each case." *State v. Cook*, 95-2784 (La. 5/31/96), 674 So.2d 957, 958, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996).

Based on the foregoing, we find that defendant's twelve-year sentence is not unconstitutionally excessive. The record demonstrates that the trial court adequately considered defendant's personal history and mitigating factors, and does not show an abuse of the trial court's discretion in sentencing defendant. Thus, after considering the circumstances of this case, defendant's mid-range sentence is neither grossly disproportionate to the seriousness of the offense committed, nor shocking to the sense of justice. This assignment of error is without merit.

ERRORS PATENT REVIEW

The record was reviewed for errors patent, according to La. C.Cr.P. art. 920, *State v. Oliveaux*, 312 So.2d 337 (La. 1975), and *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990). The following matters merit attention.

While the commitment indicates that defendant was advised by the trial court of the applicable prescriptive period for post-conviction relief, the transcript does not. Where there is a conflict between the transcript and the minute entry, the transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983). It is well settled that if a trial court fails to provide such advice, pursuant to La. C.Cr.P. art. 930.8, the appellate court may correct this error by informing the defendant of the applicable prescriptive period for post-conviction relief. *See State v. Neely*, 08-707 (La. App. 5 Cir. 12/16/08), 3 So.3d 532, 538, *writ denied*, 09-0248 (La. 10/30/09), 21 So.3d 272; *State v. Davenport*, 08-463 (La. App. 5 Cir. 11/25/08), 2 So.3d 445, 451, *writ denied*, 09-0158 (La. 10/16/09), 19 So.3d 473. Accordingly, by means of

this opinion, we advise defendant that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C.Cr.P. arts. 914 or 922.

Also, there is a discrepancy between the State of Louisiana Uniform Commitment Order and the record in this case. The Uniform Commitment Order incorrectly provides that defendant was convicted of "14:27:30.1 Attempted Second Degree Murder." While defendant was in fact charged with attempted second degree murder, he was ultimately found guilty of the lesser included offense of attempted manslaughter (La. R.S. 14:27 and 14:31). Accordingly, we remand the matter for correction of the Uniform Commitment Order to accurately reflect the crime for which defendant was convicted. We also direct the Clerk of Court for the 24th Judicial District Court to transmit the original of the corrected Uniform Commitment Order to the appropriate authorities in accordance with La. C.Cr.P. art. 892(B)(2) and the Department of Corrections' legal department. *See State v. Lyons*, 13-564 (La. App. 5 Cir. 1/31/14), 134 So.3d 36, 41, *writ denied*, 14-0481 (La. 11/7/14), 152 So.3d 170 (citing *State v. Long*, 12-184 (La. App. 5 Cir. 12/11/12), 106 So.3d 1136, 1142).

CONCLUSION

For the foregoing reasons, defendant's conviction and sentence are affirmed. The matter is remanded for correction of the Uniform Commitment Order, as noted above.

CONVICTION AND SENTENCE AFFIRMED; REMANDED FOR CORRECTION OF THE UNIFORM COMMITMENT ORDER

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-35

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE NANCY A. MILLER (DISTRICT JUDGE)
HOLLI A. HERRLE-CASTILLO (APPELLANT)
TERRY M. BOUDREAUX (APPELLEE)
GAIL D. SCHLOSSER (APPELLEE)

MAILED
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