

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 2040

STATE OF LOUISIANA

VERSUS

MARLON HARRIS

RHS

[Signature]

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**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 09-07-0864, Section 2
Honorable Richard D. Anderson, Judge Presiding**
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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered May 6, 2011

PARRO, J.

The defendant, Marlon Harris, was charged by bill of information with three counts of armed robbery, in violation of LSA-R.S. 14:64.¹ He pled not guilty. The defendant was tried by a jury and convicted as charged on all three counts. Polling of the jury revealed that the verdict was ten to two. The defendant moved for a new trial, but the trial court denied the motion. The state filed a bill of information seeking to have the defendant adjudicated and sentenced under LSA-R.S. 15:529.1, the Habitual Offender Law. Following a hearing, the defendant was adjudicated a second-felony habitual offender. He was sentenced to imprisonment at hard labor for seventy-five years, without the benefit of probation, parole, or suspension of sentence, on each count. The court ordered that the sentences be served concurrently. The defendant moved for reconsideration of the sentences, but the trial court denied the motion. The defendant now appeals, urging the following assignments of error:

1. The evidence is insufficient to support the convictions.
2. The trial court erred in denying the motion to reconsider the sentences.
3. The sentences are unconstitutionally excessive.
4. The defendant was convicted by non-unanimous verdicts in violation of the United States and Louisiana Constitutions.

Finding no merit in the assigned errors, we affirm the defendant's convictions, habitual offender adjudication, and sentences.

FACTS

On the night of July 22, 2007, Justin Thompson, Leanne Borne, and Sarah Russell worked together as the closing team at Outback Steakhouse on Acadian Thruway in Baton Rouge. At approximately 10:30 p.m., Leanne, the front-end manager, was prepared to leave work. Justin, the back-house manager, agreed to walk Leanne to her vehicle. When Leanne and Justin exited the back door of the restaurant, they were approached by three African-American men wearing hats and bandanas to

¹ Jonathan Williams was also charged in the bill of information. The charges against Williams were later dismissed. A handwritten notation on the bill of information reads, "After a jury trial - a review of the evidence of this [defendant] presents ID issues that make the state unable to prove beyond a reasonable doubt."

conceal their faces. Two of the men were armed with handguns. The men forced Justin and Leanne back inside the restaurant and directly toward the office where Sarah, the headwaiter, was counting money. All three employees were forced down onto the floor. One perpetrator held a gun to Justin's head and demanded that he open the safe. Justin was then forced, at gunpoint, over to the safe. As he was opening the safe, the gunman yelled, "Hurry up. Quit playing around." Justin recognized the gunman's voice to be that of Jonathan Williams, a former Outback employee.

Once the safe was opened, the gunman demanded that Justin also open the locked box located inside the safe. When Justin advised that he could not open the box, the gunman struck him in the head with the gun. The gunman removed the cash-filled drawers from the safe and handed them to another perpetrator, who was standing immediately outside the office near the fryer station. Based upon this individual's physical stature and the way he rocked back and forth while standing, Justin recognized this perpetrator as the defendant, a former Outback employee who had recently been fired for stealing alcohol. Three empty cash drawers were later found on top of the fryer station.

The perpetrators took Leanne's purse, which contained her wallet, credit cards, and approximately \$100 in cash. They also took approximately \$80 from Sarah's pocket. Justin, Leanne, and Sarah were then forced into the restaurant's freezer. The perpetrators locked the freezer and fled.

From inside the freezer, Justin was able to engage the panic alarm. Shortly thereafter, the Baton Rouge Police Department was dispatched to the restaurant to investigate an alarm. Corporal Dwayne Stroughter arrived at the restaurant and found the back door of the business ajar. Inside, he found the restaurant in a state of disarray. Moments later, Justin, Leanne, and Sarah emerged from the freezer. Justin had successfully unscrewed the latch from inside the freezer to open the door.

During the initial police investigation, Justin named the defendant and Jonathan Williams as possible suspects. Later, when fingerprints lifted from one of the cash

drawers found on the scene were determined to match those of the defendant, a warrant was obtained for the defendant's arrest. The defendant was eventually arrested and charged with armed robbery. Jonathan Williams was also arrested.²

ASSIGNMENT OF ERROR NUMBER 1
SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant asserts that the evidence presented at the trial of this matter was insufficient to support the armed robbery convictions. Specifically, he argues that the state failed to prove, beyond a reasonable doubt, his identity as a participant in the armed robberies.³ The state asserts that the evidence, when viewed in the light most favorable to the prosecution, amply supports all of the essential elements of the crimes and the defendant's identity as a perpetrator beyond any reasonable doubt.

The standard for appellate review of the sufficiency of evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). Obviously, the defendant's identity as a perpetrator of the crime is an essential element of the crime that must also be proven beyond a reasonable doubt. See State v. Wright, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486. The **Jackson** standard of review, incorporated in LSA-C.Cr.P. art. 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-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. When the key issue in a case is the defendant's identity as the perpetrator, rather than whether the crime was committed, the state is required to negate any reasonable probability of

² The third perpetrator was never identified.

³ Since the defendant has only alleged that the state failed to prove he was a participant in the crimes, we need not address the sufficiency of the evidence with respect to the statutory elements of armed robbery.

misidentification in order to meet its burden of proof. **State v. Millien**, 02-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 509. However, positive identification by only one witness may be sufficient to support a defendant's conviction. **State v. Coates**, 00-1013 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1225.

In the instant case, the facts and circumstances surrounding the commission of the offenses are essentially undisputed. The defendant does not contest that the offenses were committed. Rather, he only challenges the sufficiency of the evidence connecting him with the crimes. The defendant argues that reasonable doubt exists and that the jury should not have convicted him based solely on Justin Thompson's identification of him as a participant in the armed robberies and the presence of his fingerprints at the scene. In support of his argument, the defendant notes that Justin wavered in his identification, stating only that he was "almost positive" that the defendant and Jonathan Williams were two of the perpetrators. The defendant further notes that the presence of the fingerprint evidence was not determinative because he worked at the restaurant and could have possibly touched the cash drawer at some other time.

At trial, the state presented the following evidence with respect to the defendant's identity as a participant in the robberies. Rober Alamirie, the proprietor of the Outback Steakhouse restaurant, testified that the defendant was hired as a dishwasher sometime around February 2007. The defendant eventually was moved to the fryer station. According to Alamirie, the defendant was fired in July 2007, after he was caught stealing a bottle of vodka. Approximately one week later, the instant offenses were committed.

Detective Carl Mayo of the Baton Rouge Police Department testified that fingerprints were lifted from the cash drawers found at the scene. Because Justin had identified two possible suspects, Detective Mayo requested that the prints be compared to those of the named suspects. Jason Guillot, a latent fingerprint examiner for the Baton Rouge Police Department, testified that two of the prints submitted for comparison matched the defendant.

Alamirie also testified regarding the restaurant's money-handling procedures. He explained that kitchen personnel do not handle any money at the restaurant. According to Alamirie, the only employees allowed to handle the cash drawers were the managers, the bar employee, the employee working the take-out area, and himself.

Justin and Leanne also testified that kitchen employees do not have access to the money drawers at the restaurant. Justin explained that the cash drawers are stored in the safe when not in use. At the beginning of each workday, either Justin or Alamirie counts the money in the drawers, and then places one drawer in the register at the bar and one drawer in the register at the take-out area. A third "petty cash" drawer remains inside the safe. At the end of the day, the drawers are removed from the registers and returned to the office to be counted and prepared for the next day. The drawers are eventually placed in the safe until the next morning, when the procedure is repeated. During his testimony, Justin explained that office procedure prohibits anyone else from handling the cash drawers. He further testified that he followed the procedure. There would never have been a reason or occasion for the defendant to handle the cash drawer.

During the initial police investigation and at the defendant's trial, Justin indicated that he recognized the defendant and Jonathan Williams as participants in the robberies, despite their faces being covered. He explained that Williams did a lot of talking during the incident and he recognized his voice. At one point, Williams yelled to the defendant, "Hey, yo, O.G.," a phrase Justin frequently heard Williams use. Justin denied ever hearing anyone else use this phrase at the restaurant. Justin testified that he recognized the defendant based upon his physical appearance and his mannerisms as he rocked back and forth at the fryers. He explained that he regularly observed the defendant performing the rocking motion when he worked at the restaurant.

Justin testified that the perpetrators appeared to be familiar with the layout of the restaurant. They knew exactly where the office and the freezer were located. The perpetrators also seemed to be aware that Justin, as the main manager on duty, was the only person who could open the safe. Justin testified that the perpetrators also

appeared to be familiar with the procedure used to open the freezer.

The state also presented evidence of a robbery previously committed by the defendant. On August 22, 1990, at closing time, the defendant and two other individuals entered the Frostop Restaurant in Baton Rouge with their faces covered with bandannas and demanded that the employees open the safe. When one of the employees indicated that he could not open the safe, he was repeatedly beaten with a handgun. Meanwhile, unbeknownst to the perpetrators, another employee dialed 911. Shortly thereafter, the defendant and his accomplices were all apprehended at the restaurant. The defendant pled guilty to armed robbery.

It is the function of the jury, as the trier of fact, to determine which witnesses are credible. It is obvious from the verdicts rendered that the jury found the state's witnesses to be credible and accepted Justin's identification of the defendant as one of the perpetrators. Even considering Justin's testimony indicating that he was "almost positive" on the identification, the jury apparently rejected the defendant's theory of mistaken identity. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. **State v. Williams**, 02-0065 (La. App. 1st Cir. 6/21/02), 822 So.2d 764, 768, writ denied, 03-0926 (La. 4/8/04), 870 So.2d 263.

Based on a thorough review of the entire record, we conclude that, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. Thus, the evidence was sufficient under the **Jackson** standard to support the conviction.

This assignment of error lacks merit.

ASSIGNMENTS OF ERROR NUMBERS 2 AND 3
DENIAL OF MOTION TO RECONSIDER SENTENCES
AND EXCESSIVE SENTENCES

In the next two assignments of error, the defendant argues that the trial court erred in imposing unconstitutionally excessive sentences and in denying his motion to reconsider the sentences. Specifically, he contends that the seventy-five year

sentences are essentially life sentences and are not warranted under the facts and circumstances of this case. He notes that he is forty years old and his last criminal conviction occurred over seventeen years before the instant offense.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is unconstitutionally excessive if it is grossly disproportionate to the severity of the offense, or is nothing more than a purposeless and needless infliction of pain and suffering. **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); **State v. Lanieu**, 98-1260 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness must consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). Furthermore, whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without the benefit of parole,

probation, or suspension of sentence. LSA-R.S. 14:64(B). However, any person who, after having been convicted within this state of a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows: "[i]f the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction." LSA-R.S. 15:529.1(A)(1)(a) (prior to the 2010 amendments). As previously noted, the defendant was adjudicated a second-felony offender.

Prior to imposing sentence, the trial court reviewed the facts of the instant offenses and the presentence investigation report (PSI), which contained the defendant's personal and criminal history. The court further noted that Leanne Borne provided an impact statement describing how the violent offense detrimentally affected her life. Leanne asked that the defendant receive the maximum sentences allowed to assure that he would never harm another person. The PSI also recommended imposition of the maximum sentences allowed by law.

Considering the information contained in the PSI, the court noted that the defendant had an extensive criminal history, dating back to 1987. The court further noted, among other things, that the defendant had previously been convicted of several armed robberies. Also, at the time of the instant offenses, the defendant was on parole for four counts of armed robbery and one count of aggravated burglary.

Given the trial court's wide discretion in the imposition of sentences and the fact that the defendant's sentences are well within the statutory limits, we cannot say that the trial court manifestly abused its discretion in sentencing the defendant to seventy-five years at hard labor. The seventy-five year sentences are neither grossly disproportionate to the severity of the offenses, in light of the harm to the victims, nor so disproportionate as to shock our sense of justice. Therefore, considering the violent nature of the instant offenses, coupled with the defendant's propensity to continue criminal activity and his inability and/or unwillingness to respond to past rehabilitation

efforts, we conclude that the sentences imposed in this case are not unconstitutionally excessive. The trial court did not err in denying the defendant's motion to reconsider the sentences.

These assignments of error lack merit.

ASSIGNMENT OF ERROR NUMBER 4 **NON-UNANIMOUS JURY VERDICTS**

In his final assignment of error, the defendant argues that the ten-to-two verdicts are in violation of the United States and Louisiana Constitutions. While the defendant concedes that the verdicts are in conformity with the present state of the law, the defendant maintains that, in light of recent jurisprudence, LSA-C.Cr.P. art. 782(A) and LSA-Const. art. I, § 17(A)⁴ violate the Sixth and Fourteenth Amendments of the United States Constitution.

The punishment for armed robbery is confinement at hard labor. See LSA-R.S. 14:64(B). As we have previously held in **State v. Smith**, 06-0820 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352:

Louisiana Constitution article I, § 17(A) and La. Code Crim. P. art. 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La.1982); **State v. Shanks**, 97-1885, pp. 15-16 (La. App. 1st Cir.6/29/98), 715 So.2d 157, 164-65.

The defendant's reliance on **Blakely v. Washington**, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); **Ring v. Arizona**, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and **Jones v. United States**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) is misplaced. These Supreme Court decisions do not address the issue of the constitutionality of a non-unanimous jury verdict; rather, they address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the trial judge, sitting alone. Nothing in these decisions suggests that the jury's verdict must be unanimous for a defendant's conviction to be constitutional. Accordingly, La. Const. art. I, § 17(A) and La. Code Crim. P. art. 782(A) are not unconstitutional and,

⁴ Both LSA-C.Cr.P. art. 782(A) and LSA-Const. art. I, § 17(A) provide that cases in which the punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.

hence, not violative of the defendant's Sixth Amendment right to trial by jury.

Our supreme court has also affirmed the constitutionality of Article 782. See State v. Bertrand, 08-2215 (La. 3/17/09), 6 So.3d 738. The **Bertrand** court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. **State v. Bertrand**, 6 So.3d at 743.

For these same reasons, we find that this assignment of error is without merit.

Considering the foregoing, we affirm the defendant's convictions, habitual offender adjudication, and sentences.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.