NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0373

STATE OF LOUISIANA

VERSUS

DANIEL F. LOPEZ

Judgment Rendered: NOV 0 1 2013

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 516731

HONORABLE WILLIAM J. KNIGHT, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

Defendant, Daniel F. Lopez, and one codefendant[1] were charged by bill of information with one count of home invasion, a violation of La. R.S. 14:62.8. He pled not guilty. After a jury trial, defendant was found guilty as charged. He filed motions for new trial and postverdict judgment of acquittal, but the trial court denied these motions and sentenced him to ten years at hard labor, with the first five years to be served without benefit of parole, probation, or suspension of sentence. The state subsequently filed a habitual offender bill of information, alleging defendant to be a third-felony habitual offender.[2] After a hearing, the trial court adjudicated defendant a third-felony habitual offender, vacated his earlier sentence, and imposed the mandatory sentence under La. R.S. 15:529.1(A)(3)(b) of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Defense counsel objected to this mandatory sentence as cruel and unusual, but the trial court overruled that objection. Defendant now appeals, alleging that his sentence is constitutionally excessive. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and sentence.

FACTS

On the evening of September 20, 2011, defendant and Andre Francis entered the unlocked apartment of Kyle Alexander and Hayden Folse on Brownswitch Road in Slidell. Alexander knew defendant from two previous encounters. In the first, Alexander sold defendant and another acquaintance a small amount of marijuana. In the second, defendant told Alexander that he wanted to buy more marijuana, but he instead attempted to rob Alexander with a knife, cutting

[1] The codefendant, Andre A. Francis, pled guilty to the charge of home invasion, in addition to several other crimes. At the time of defendant's trial, Francis had already been sentenced for all of those offenses. He is not a party to the instant appeal.

[2] The state alleged defendant's predicate convictions to be: 1) a May 19, 2006 conviction for simple burglary under St. Tammany Parish docket number 408487; and 2) a January 9, 2007 conviction for aggravated battery under St. Tammany Parish docket number 422249.

Alexander's hand in the process. Alexander did not call the police after the second encounter because he was afraid that he would be arrested for selling marijuana.

Upon entering Alexander's apartment on September 20, 2011, defendant and Francis made their way upstairs and forced themselves into Alexander's bedroom. Francis entered the room first, holding a gun. Defendant followed, forcing Alexander down into a chair before beginning to strangle him. During the ensuing struggle, Alexander freed himself briefly and yelled for Folse to call the police. Defendant and Francis then ran from the apartment. Francis testified at trial and denied defendant's involvement in the incident. However, the state played a videotaped recording of Francis's interview with the police wherein he detailed defendant's actions, including defendant's instructions to shoot Alexander during the scuffle. The jury found defendant guilty of home invasion.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant argues that his mandatory sentence of life imprisonment, without benefit of parole, probation, or suspension of sentence, is constitutionally excessive.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. 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). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. **State v. Reed**, 409 So.2d 266, 267 (La. 1982). To determine if a sentence is grossly disproportionate the court considers the punishment and the crime in light of the harm caused to society and determines whether the penalty is so disproportionate as to shock the sense of justice. **Id.** A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence

imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

In the instant case, defendant was sentenced as a third-felony habitual offender under the provisions of La. R.S. 15:529.1(A)(3)(b). That section states, in pertinent part, that if a defendant's third felony and his two prior felonies are defined as crimes of violence under La. R.S. 14:2(B), or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, he shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence. See La. R.S. 15:529.1(A)(3)(b). Here, defendant's third felony – home invasion – is defined as a crime of violence under La. R.S. 14:2(B)(44), and it is punishable by imprisonment for twelve years or more. See La. R.S. 14:62.8(B)(1) (prior to 2012 amendment). His predicate conviction for aggravated battery, a violation of La. R.S. 14:34, is defined as a crime of violence under La. R.S. 14:2(B)(5). Lastly, his predicate conviction for simple burglary, a violation of La. R.S. 14:62, was punishable by imprisonment up to twelve years. See La. R.S. 14:62(B). Therefore, defendant's third-felony habitual offender sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence, was mandatory under La. R.S. 15:529.1(A)(3)(b).

Even though a sentence is the mandatory minimum sentence, it may still be excessive if it makes no "measurable contribution to acceptable goals of punishment" or amounts to nothing more than the "purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime." **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993). In order for a defendant to rebut the presumption that a mandatory minimum sentence is constitutional, he must "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, 676. Departures downward from the minimum sentence should only occur in rare situations. See **Id.** at 677.

Defendant contends that his sentence is excessive due to the trial court's failure to consider his relative youth, twenty-seven, or to order a presentence investigation (PSI) report. He argues that the sentencing record does not adequately reflect that the trial court considered not only the seriousness of his crime and his past criminal record, but also his personal history and potential for rehabilitation.

We note first that the decision to order a PSI report lies within the discretion of the trial court. La. C.Cr.P. art. 875(A)(1); **State v. Johnson**, 604 So.2d 685, 698 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). Further, even where a trial court assigns no reasons, the sentence will not be set aside on appeal and remanded for resentencing unless the record is either inadequate or clearly indicates that the sentence is excessive.[3] See La. C.Cr.P. art. 881.4(D); **State v. Harris**, 601 So.2d 775, 779 (La. App. 1st Cir. 1992).

We have reviewed the record and find that it supports the sentence imposed. Based on our review, we cannot say that the trial court abused its discretion in imposing the statutory minimum sentence under La. R.S. 15:529.1(A)(3)(b). The only mitigating factors cited by defendant in his brief are his age and the fact that he did not hold the gun during the offense. We do not find these factors to be sufficient circumstances to warrant a downward departure from the minimum

[3] We note that while the trial judge cited no reasons for defendant's sentence at the habitual offender hearing, presumably due to the mandatory nature of the sentence, he in fact, cited extensive reasons at defendant's sentencing on his underlying conviction for home invasion. Those considerations were certainly still present in the mind of the trial judge at the time of defendant's habitual offender sentencing.

sentence. Moreover, we do not find that defendant has "clearly and convincingly" shown that he is "exceptional." See **Johnson**, 709 So.2d at 676. He has failed to cite any unusual or exceptional circumstances to show that he is a victim of the legislature's failure to assign a sentence meaningfully tailored to his culpability, the circumstances of his case, and his status as a third-felony habitual offender. Therefore, there was no reason for the trial court to deviate from the mandatory minimum sentence. Accordingly, we find no abuse of discretion in the sentence imposed.

This assignment of error lacks merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.