NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0021

STATE OF LOUISIANA

VERSUS

TERRY DENHAM

Judgment Rendered: JUN 0 6 2014

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 04-12-0031

Honorable Bonnie Jackson, Judge Presiding

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Hillar C. Moore, III
District Attorney
Christopher J.M. Casler
Assistant District Attorney
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Frederick Kroenke
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Terry Denham

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Terry Denham, was charged by bill of information with two counts of armed robbery, violations of LSA-R.S. 14:64. The defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. In conformity with a sentencing agreement, for each count of armed robbery, the defendant was sentenced to twelve years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently. (In an unrelated conviction for possession with intent to distribute marijuana, the defendant was sentenced to five years imprisonment at hard labor, with that five-year sentence to run consecutively to the twelve-year concurrent sentences). The defendant now appeals, designating three assignments of error. For the following reasons, we affirm the convictions and sentences.

FACTS

Lakyerra Foreman and her roommate, Shalieta Dickey, lived in a one-bedroom shotgun-style house on West Polk Street in Baton Rouge. On January 29, 2012, at about 2:00 a.m., both women were awakened by a knock at the front door. While Shalieta stayed in bed, Lakyerra looked out the front door window and saw a man crouched down by the door. He said he had been stabbed and needed help. Lakyerra did not open the door, but went back to the bedroom. At that moment, two men broke through the back door of the house. One of the men went to the front door and opened it for the man who had been crouched down. All three perpetrators were wearing bandanas over their mouths and dressed in black. Each of the men who came through the back door had a handgun. Lakyerra was pushed into the corner of her bedroom and held at gunpoint. The three men ransacked the house, looking for anything of value. One of the perpetrators with a gun approached Shalieta, who was still on the bed, and told her that he was "going to f---" her and tried to pull down her pants. Shalieta began struggling with him and pulled down his bandanna. She immediately recognized him as the defendant, whom she knew from the

neighborhood. The defendant let her go, and the three men left the house. Shortly thereafter, the women discovered that a watch and almost one thousand dollars from a dresser drawer had been taken.

ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error, the defendant argues, respectively, that the twelve-year concurrent sentences imposed are excessive, and defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel.[1]

The defendant asserts that the trial court failed to consider the factors set forth in LSA-C.Cr.P. art. 894.1. This claim is baseless. The trial court did not address LSA-C.Cr.P. art. 894.1 because a specific sentence was imposed in conformity with a plea agreement. At his sentencing hearing, the defendant was facing an unrelated charge of possession with intent to distribute marijuana. It was agreed by all parties, and the trial court set out the agreement in detail, that the State would forego filing habitual offender proceedings against the defendant in exchange for a seventeen-year sentence at hard labor: twelve years for each of the armed robbery convictions to run concurrently; and five years for the possession with intent to distribute marijuana conviction, with that five-year sentence to run consecutively to the twelve-year concurrent sentences. The trial court then conducted a **Boykin** hearing wherein the defendant pled guilty to possession with intent to distribute marijuana in exchange for a seventeen-year total sentence and a waiver of the filing of habitual offender proceedings against him. Following the **Boykin** hearing, the trial court sentenced the defendant in accordance with the plea agreement.

The defendant's plea agreement involved a specific (set number of years) sentence. Further, in the plea agreement, there was no reservation, Crosby or otherwise, of the right to appeal the sentences. See **State v. Sorenson**, 98-

[1] The record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1(E) provides that the failure to file or make a motion to reconsider sentence precludes the defendant from raising an excessive sentence argument on appeal.

0520 (La.App. 1 Cir. 12/28/98), 725 So.2d 604. Cf. **State v. Shipp**, 98-2670 (La.App. 1 Cir. 9/24/99), 754 So.2d 1068. Accordingly, the defendant cannot appeal or seek review of the sentences imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. See LSA-C.Cr.P. art. 881.2(A)(2); **State v. Young**, 96-0195 (La. 10/15/96), 680 So.2d 1171, 1173. Defense counsel's failure to file or make a motion to reconsider sentence, therefore, neither constituted deficient performance nor prejudiced the defendant. See **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Defendant's claim of ineffective assistance of counsel, therefore, must fail. **State v. Robinson**, 471 So.2d 1035, 1038-39 (La.App. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985).

While clearly not dispositive of the issue before us, we note the defendant's maximum sentencing exposure, without being adjudicated a habitual offender, was two-hundred-twenty-eight years, assuming all were consecutive sentences. See LSA-R.S. 14:64(B) & LSA-R.S. 40:966(B)(3). In view of the circumstances of the offenses, and the fact the defendant was sentenced to less than one-thirteenth of the maximum possible sentence, we find no abuse of discretion by the trial court in imposing a total sentence of seventeen years. The sentences imposed are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court erred in failing to instruct the jury that it had to render unanimous verdicts. Specifically, the defendant contends that LSA-C.Cr.P. art. 782(A) and the Louisiana Constitution provision for non-unanimous jury verdicts violate the Fourteenth Amendment's Equal Protection Clause of the United States Constitution.

Whoever commits the crime of armed robbery shall be imprisoned at hard labor. LSA-R.S. 14:64(B). Louisiana Constitution article I, § 17(A) and Louisiana

Code of Criminal Procedure article 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**,[2] 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 (La.App. 1 Cir. 6/29/98), 715 So.2d 157, 164-65.

The defendant notes that only a plurality of the United States Supreme Court in **Apodaca** determined that non-unanimous verdicts were not constitutionally offensive. Because a majority of the Supreme Court has not definitely ruled on the constitutional validity of non-unanimous verdicts, the argument, according to the defendant, is being raised to preserve the issue in the event a reconsideration presents a different result than that reached in **Apodaca**.

The defendant's argument has been consistently rejected by this court. See **State v. Smith**, 2006-0820 (La.App. 1 Cir. 12/28/06), 952 So.2d 1, 15-16, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352; **State v. Caples**, 2005-2517 (La.App. 1 Cir. 6/9/06), 938 So.2d 147, 156-57, writ denied, 06-2466 (La. 4/27/07), 955 So.2d 684. Our supreme court in **State v. Bertrand**, 08-2215 (La. 3/17/09), 6 So.3d 738, 743, found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments.[3]

Thus, while **Apodaca** was a plurality rather than a majority decision, the United States Supreme Court, as well as other courts, has cited or discussed the

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[2] Oregon's non-unanimous jury verdict provision of its state constitution was challenged in **Apodaca**. **Johnson v. Louisiana**, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), decided with **Apodaca**, upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

[3] In **Bertrand**, the supreme court only considered Article 782, while the defendant in the instant case attacks Article I, § 17(A), as well. We find this approach to be a distinction without a difference, because Article 782 closely tracks the language of Article I, § 17(A).

opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. **Bertrand**, 6 So.3d at 742-43. Thus, Louisiana Constitution article I, § 17(A) and LSA-C.Cr.P. art. 782(A) are not unconstitutional and, therefore, not in violation of the defendant's constitutional rights. See **State v. Hammond**, 12-1559 (La.App. 1 Cir. 3/25/13), 115 So.3d 513, 514-15, writ denied, 2013-0887 (La. 11/8/13), 125 So.3d 442.

This assignment of error is without merit.

CONCLUSION

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

CONVICTIONS AND SENTENCES AFFIRMED.