NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

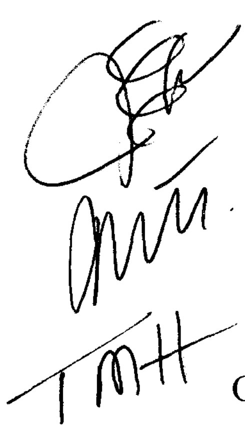
FIRST CIRCUIT

2014 KA 0034

STATE OF LOUISIANA

VERSUS

TALANDIS COTTON



DATE OF JUDGMENT: JUN 0 6 2014

ON APPEAL FROM TWENTY-THIRD JUDICIAL DISTRICT
NUMBER 29400, DIV. B, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE THOMAS KLIEBERT, JUDGE

* * * * * *

Ricky L. Babin, District Attorney Donald D. Candell, Assistant District Attorney Donaldsonville, Louisiana	Counsel for Plaintiff-Appellee State of Louisiana
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* * * * * *

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: **CONVICTION AND SENTENCE AFFIRMED.**

KUHN, J.

Defendant, Talandis Cotton, was charged by bill of information with attempted aggravated kidnapping of Melissa Cotton, a violation of Louisiana Revised Statutes 14:27(A) and 14:44. Defendant was subsequently arraigned and pled not guilty. At trial, the jury returned a unanimous guilty verdict. Motions for new trial and post-verdict judgment of acquittal were filed, but denied by the trial court. Defendant was sentenced to fifteen years at hard labor without benefit of parole, probation or suspension of sentence. He now appeals, with three counseled assignments of error and three pro se assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On January 17, 2012, Melissa Cotton, an employee at St. Elizabeth Hospital in Gonzales, LA, was finishing her evening shift, when around 6:00 p.m., a hospital security guard approached and informed her that a box was tucked underneath her vehicle. Ms. Cotton informed the guard she was unaware of any box, and after she finished treating her patient, she walked to her vehicle. The security guards and Ms. Cotton began searching through the box's contents, which she identified as coming from her vehicle's trunk. Ms. Cotton attempted to open the car's trunk with her keyless entry, but the trunk lid would not open. Eventually, the guards were able to open the trunk, where they found defendant tucked inside. Upon seeing defendant, Ms. Cotton testified she became "hysterical," and ran inside the hospital yelling for someone to call 911. Defendant was subsequently removed from the vehicle, and as he was being escorted to the hospital security desk, he said "so this is how you gonna do it, huh?" as he passed Ms. Cotton. Additionally, Ms. Cotton testified that inside her trunk was a lever which allowed the backseat to move forward, and at the time when the defendant

was found, the seat was inclined forward, with defendant's head positioned on the driver's side. Furthermore, Ms. Cotton testified that none of the items found in the trunk belonged to the defendant.

At the time of the instant crime, defendant and Ms. Cotton remained married, though they physically separated in November 2011. Ms. Cotton also explained that about one month prior to the current incident, she returned to her home to find defendant present in her house. She was unaware of how defendant entered her home as he had supposedly returned his key to her. Ms. Cotton indicated that defendant initially pushed her against the bedroom and closet doors, and then pushed her onto the bed. Defendant then caught Ms. Cotton in a chokehold, and began to explain how much he loved her. Ms. Cotton testified that the only way she was able to escape from defendant's chokehold was to agree that she loved him, and that they could work out their differences. She believed it was what defendant wanted to hear, and was eventually released from his grasp. Afterwards, the two moved into a spare bedroom, where defendant cornered Ms. Cotton and would not let her leave the room. While in the bedroom, one of Ms. Cotton's neighbors called her, and subsequently arrived at her house. When Ms. Cotton greeted her neighbor, she gave her a hug and asked the neighbor to call 911. The police subsequently arrived. Following this incident, Ms. Cotton obtained a restraining order against the defendant. In fact, the day before the incident at the hospital, Ms. Cotton spoke to defendant on the telephone in order to obtain a valid address so he could be served with the order.

Two hospital security guards testified at trial. Major Brandon Gilmore stated that earlier in the evening on January 17, 2012, he walked out to his vehicle, where he noticed a box underneath Ms. Cotton's car. After Ms. Cotton informed him that she was unaware of the box's presence, Major Gilmore and two other

security guards returned to the vehicle. Officer Bruce Pearson removed the box from underneath the car, and various items such as clothes, a cell phone charger, and "all kind of stuff" were found therein. Major Gilmore returned to speak with Ms. Cotton, while the other guards remained by the vehicle. Once Ms. Cotton completed her shift, she walked outside with Major Gilmore and attempted to open the trunk using her keyless entry device. After multiple attempts, one of the guards was able to open the trunk by pulling on its lid, revealing defendant inside. Defendant was escorted inside the hospital, and turned over to the Gonzales Police Department upon their arrival. Major Gilmore specifically testified that when he inspected the box and the vehicle prior to the trunk being opened, he did not hear any noises, screams, or cries for help coming from within.

Further, Officer Bruce Pearson, another hospital security guard on the night of January 17, 2012, testified at trial. He indicated that when he arrived at the hospital to begin his shift, he noticed the box underneath Ms. Cotton's vehicle. Officer Pearson entered the hospital, made his initial security sweep, and then met Major Gilmore and Officer Gray, a third security officer, at Ms. Cotton's vehicle. Officer Pearson testified that Major Gilmore had Ms. Cotton's keys and inserted a key into the trunk to open it. However, the trunk would not "pop" open, so the three of them pulled on the trunk, and when it opened, defendant was found inside, and subsequently instructed to exit the vehicle. As defendant was being escorted to the security desk, Officer Pearson testified that defendant commented that he went to retrieve his tools from Ms. Cotton's vehicle. Officer Pearson also noticed that defendant had zip-ties and was stuffing them into his pockets, which Officer Pearson retrieved. The Gonzales Police Department took over the investigation upon their arrival. Consistent with Major Gilmore's testimony, Officer Pearson

testified that prior to opening the trunk, he did not hear any noise coming from within the vehicle that might have indicated someone needed assistance.

Two Gonzales Police Department officers testified at trial. Deputy Jeffery Rogillio arrived on the scene at approximately 6:45 p.m., and after discussing the facts and circumstances with the hospital security guards, he took the defendant into custody and waited for other officers to arrive. Officer Mike Johnson subsequently arrived and also testified at trial. Officer Johnson read defendant his **Miranda**[1] rights and placed him in the back of his vehicle. As defendant was being placed in the back of the squad car, he stated that he went to Ms. Cotton's vehicle to retrieve his tools when the trunk lid fell and trapped him inside. Deputy Rogillio conducted a pat-down of defendant, whereby he found a small key in defendant's pocket, which Deputy Rogillio subsequently discovered opened the car's trunk. Furthermore, in addition to the zip-ties discovered by the security guards, a toy gun and duct tape were found on defendant's person.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, defendant argues the evidence presented by the State is insufficient to support the jury's verdict. Specifically, he argues the State failed to produce any evidence reflecting his specific intent to extort something of value in exchange for Ms. Cotton's release. He also argues that it also failed to prove beyond a reasonable doubt that he committed an overt act towards attempting to seize, move or imprison Ms. Cotton. Defendant does not challenge his identity on appeal, and argues he should be guilty, at most, of attempted simple kidnapping.

The standard of review for sufficiency of the evidence to support a conviction is whether or not, viewing the evidence in the light most favorable to

[1] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime, and defendant's identity as the perpetrator of that crime, beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Patton**, 2010-1841 (La. App. 1st Cir. 6/10/11), 68 So.3d 1209, 1224; See La. Code Crim. P. art. 821. In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; **State v. Millien**, 2002-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 508-509. However, when a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

As pertinent here, the essential elements of aggravated kidnapping under Louisiana Revised Statute 14:44 are:

> [t]he doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant an advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:
>
> (1) the forcible seizing and carrying of any person from one place to another; or
> (2) the enticing or persuading of any person to go from one place to another; or
> (3) the imprisoning or forcible secreting of any person.

Further, Louisiana Revised Statute 14:27(A) defines attempt as:

> 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.

Specific 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 proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting circumstances. Further, specific intent is an ultimate legal conclusion to be resolved by the factfinder. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

In **State v. Leger**, 2005-0011 (La. 7/10/06), 936 So.2d 108, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007), the defendant had an affair with the eventual victim, Zimmerman, which ultimately ended with the defendant becoming jealous and possessive. About a month after the affair ended, Zimmerman confided to defendant that she may be pregnant with his child. The two traveled back to Zimmerman's apartment, where she took a pregnancy test. While waiting on the results, the defendant attempted to persuade Zimmerman to reconcile with him, and that they should raise their baby together. When the test returned negative, defendant tried to persuade Zimmerman to have sex with him and to reconcile their relationship. When Zimmerman further refused, defendant bound her hands, placed duct tape over her mouth, held her at gunpoint, and drove her away from her apartment. Along the way, Zimmerman "pled for her life, and told defendant things she thought he wanted to hear, namely that she would stay with him." Zimmerman was able to escape from defendant's van. While in pursuit of her, defendant shot and fatally wounded an innocent bystander inside of

his own residence. At trial, the jury returned a guilty verdict of first degree murder, which required a finding that defendant specifically intended to kill or inflict great bodily injury while he was engaged in the perpetration of an aggravated kidnapping or second degree kidnapping, among other aggravating circumstances. **Leger,** 936 So.2d at 117-20.

On appeal, defendant contended that a reasonable jury could not have found defendant was engaged in aggravated kidnapping, as the facts failed to support the extortion element of the crime. The Court disagreed, noting that

> one of the apparent triggers for the defendant's abduction of Zimmerman was her refusal to have sex with him and his desire that she resume being his girlfriend. A reasonable jury could have found from the evidence presented that the defendant abducted Zimmerman at gunpoint and knife point in order to force her to comply with his sexual demands.
>
> **Leger**, 936 So.2d at 173.

The Court stated, "our law does not impose a requirement of ransom communicated to others or even the communication of the extortion requirement to the victim." **Id.** The Court referred to the following language from **State v. Arnold**, 548 So.2d 920, 925 (La. 1989), the Court stated:

> [T]he crucial question in determining whether an aggravated kidnapping has occurred is not whether the defendant had intent to release the victim at either the outset of the crime or indeed at any point during the crime. The more important question and the issue to be focused upon is whether the defendant sought to obtain something of value, be it sex or money or loss of simple human dignity, by playing upon the victim's fear and hope of eventual release in order to gain compliance with his demands.
>
> **Id.**

Ultimately, the Louisiana Supreme Court concluded that a reasonable juror could find from the circumstances that defendant was holding out hope of eventual release to Zimmerman if she would comply with his demands, either in her

acquiescence to sex or to a resumption of their relationship. **Leger**, 936 So.2d at 173.

The instant case follows **Leger** closely. The evidence elicited at trial reflects that approximately one month before the incident, the defendant entered Ms. Cotton's home, physically attacked her, and refused to release her in an attempt to rekindle the marital relationship. Ms. Cotton specifically testified that she told the defendant what she thought he wanted to hear in order to escape his grasp. As with **Leger**, in the instant case, a reasonable juror could have found that one of the "apparent triggers" for the defendant's actions was Ms. Cotton's refusal to rekindle the marital relationship and that the defendant attempted to imprison the victim and, as he did one month before, play on her fear and hope of eventual release to force her to comply with his demands. The record demonstrates that the defendant hid inside Ms. Cotton's vehicle with plastic zip-ties, duct tape, and a toy gun and had access to the inside of the vehicle by way of the rear seat.

Any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of attempted aggravated kidnapping. The verdict rendered against defendant indicates the jury rejected the defense theory that he went to retrieve items out of the vehicle and the lid closed on him. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **Moten**, 510 So.2d at 61. No such hypothesis exists in the instant case. This Court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. The testimony of the victim alone is sufficient

to prove the elements of the offense. Furthermore, the trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is on the weight of the evidence, not its sufficiency. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. After reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected, by the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

Therefore, this assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second assignment of error, the defendant argues that, although he had numerous defense attorneys, none of them were focused on him or his case, which caused a "fragmented, disorganized defense" and provided him with ineffective assistance of counsel. Furthermore, he argues the trial court erred by denying his motion for new trial pursuant to Louisiana Code of Criminal Procedure Article 851(5), in which he argued his ineffective counsel mandated a new trial.

Regarding each of his attorneys, defendant avers that "each of them handled little pieces, but no one had the 'big picture' or a coherent theory of the defense." Also, he alleges that Mrs. Southall, the public defender whom he considered to be his lead attorney at the outset of trial, had an "emotional melt-down" prior to the

Prieur[2] hearing, and her unexpected departure from the case caused the remaining attorneys, who he claims did not know "anything about [the defendant] or his case," to be ill-prepared as trial continued.

Further, he contends that none of the attorneys were prepared for the cross-examination of Ms. Cotton, whose testimony he claims was full of "contradictions and inconsistencies." Further, he argues his counsel should have called the police officers who responded to Ms. Cotton's residence during the December 2011 incident as defense witnesses in order to attack her credibility and story. Additionally, defendant argues that his trial counsel did not make appropriate objections to the jury charges, nor did they emphasize the jury's options of returning a lesser verdict or acquittal. Ultimately, defendant avers the trial would have reached a different outcome if he "had at least one prepared, competent counsel, who had the lead and was focused on him."

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). However, where the claim is raised as an assignment of error on direct review and where the record on appeal is adequate to resolve the matter, the claims should be addressed in the interest of judicial economy. **State v. Calhoun**, 96-0786 (La. 5/20/97), 694 So.2d 909, 914.

All of the deficiencies alleged by defendant on appeal address matters of trial preparation and strategy. Decisions relating to investigation, preparation, and strategy require an evidentiary hearing[3] and, therefore, cannot possibly be reviewed on appeal. **State v. Allen**, 94-1941 (La. App. 1st Cir. 11/9/95), 664 So.2d 1264,

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[2] **State v. Prieur**, 277 So.2d 126 (La. 1973).

[3] The defendant would have to satisfy the requirements of La. C.Cr.P. art. 924, et seq., in order to receive such a hearing.

1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1st Cir. 1993).

This assignment of error is without merit or otherwise not subject to appellate review.

EXCESSIVE SENTENCE; INEFFECTIVE ASSISTANCE OF COUNSEL

In his third assignment of error, the defendant argues the trial court erred by imposing a sentence which was unconstitutionally excessive. Furthermore, he avers this Court should consider the constitutionality of his sentence even though trial counsel failed to file a motion to reconsider sentence; and, in the event this Court finds the failure of trial counsel to file a motion to reconsider sentence precludes consideration of the constitutionality of the sentence, then this failure constitutes ineffective assistance of counsel.

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. Ordinarily, pursuant to the provisions of this article and the holding of **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam), we would not consider an excessive sentence argument. However, we will address this assignment of error, even in the absence of a timely filed motion to reconsider sentence or a contemporaneous objection, because it would be necessary to do so in order to

analyze the ineffective assistance of counsel claim. See **State v. Bickham**, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891-92.

The Eighth Amendment to the United States Constitution and Article I, Section 20 of the Louisiana Constitution prohibit the imposition of excessive or cruel 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. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Louisiana Code of Criminal Procedure Article 894.1 sets forth criteria which must be considered by the trial court before imposing a sentence. While the trial court need not recite the entire checklist of Article 894.1, the record must reflect that it adequately considered the factors. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. However, the goal of Article 894.1 is the articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). Even when a trial court assigns no reasons, the sentence will be set aside on appeal and remanded for sentencing only if the record is either inadequate or clearly indicates that the sentence is excessive. See **State v. Lanclos**, 419 So.2d at 478. On

appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. Thus, the defendant must show that but for his counsel's failure to file a motion to reconsider

sentence, his sentence would have been changed, either in the district court or on appeal. **State v. Felder**, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

Louisiana Revised Statute 14:44 provides for life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for whoever commits the crime of aggravated kidnapping. Further, the crime of attempted aggravated kidnapping carries a punishment of imprisonment at hard labor for not less than ten years and not more than fifty years, without benefit of parole, probation, or suspension of sentence. See La. R.S. 14:44 & La. R.S. 14:27(D)(1)(a). In the instant case, defendant was sentenced to fifteen years at hard labor without benefit of parole, probation or suspension of sentence. The defendant argues on appeal there were lesser options available to punish him for his "stupid actions." Further, he claims that since a weapon was not brandished during the crime, and because no one was threatened or injured, his sentence should be reduced.

Noting that it had ordered and reviewed a pre-sentence investigation report, the trial court gave the following reasons for the sentence imposed: any lesser sentence would depreciate the seriousness of defendant's crime; that defendant was in need of correctional treatment most effectively provided by commitment to an institution; there was an undue risk the defendant would commit another crime during a period of suspended sentence; that defendant used his position to facilitate the offense; and that he had been persistently involved in similar cases. Further, the trial court noted that defendant was under a protective order and was also convicted in January 2013 of domestic abuse battery, both of which involved Ms. Cotton. Lastly, the trial court stated that defendant was given the opportunity to

submit character reference letters, but he failed to do so.

A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentence herein. See La. Code Crim. P. art. 894.1(A)(1), (A)(2), (A)(3), (B)(12), & B(21). The fifteen-year sentence imposed by the trial court is not grossly disproportionate to the severity of the offense, and thus was not unconstitutionally excessive, specifically in light of the fact that defendant's sentence was only five years above the statutory minimum. See La. R.S. 14:44 & La. R.S. 14:27(D)(1)(a).

In regard to the defendant's ineffective assistance of counsel claim, we note, even assuming, arguendo, defense counsel performed deficiently in failing to timely move for reconsideration of the sentence, the defendant suffered no prejudice from the deficient performance because this Court considered the defendant's excessive sentence argument in connection with the ineffective assistance of counsel claim. Defendant has not shown that his sentence was excessive and would have been changed, either in the district court or on appeal, had such a motion been filed. See **Felder**, 809 So.2d at 369-70.

These assignments of error are without merit.

PRO SE ASSIGNMENTS OF ERROR; JURY INSTRUCTIONS

In addition to his counseled brief, the defendant filed a pro se brief with three additional assignments of error. In his first two pro se assignments of error[4], he claims the trial court erred by failing to give certain jury instructions. Specifically, the defendant alleges jury charges should have been given regarding

[4] In defendant's second pro se assignment of error, he also contends the State failed to provide sufficient evidence to establish his specific intent to commit the crime of attempted aggravated kidnapping. This argument was not set forth as a specific pro se assignment of error. Nonetheless, hereinabove, we addressed this claim in connection with defendant's counseled assignment of error number one.

the definition of a "dangerous weapon" under La. R.S. 14:2(3) and his alleged lack of possession thereof, his theory that he went to Ms. Cotton's vehicle to retrieve his tools, as well as a "medical records" affirmative defense. Defendant claims the denial of these jury charges caused prejudice by creating an "unconstitutional mandatory presumption" which shifted the burden of proof from the State to the defendant.

Erroneous jury instructions or failure to give jury instructions are not patent errors, and absent an objection before the jury retires or within a reasonable time thereafter, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. See La. Code Crim. P. arts. 801(C), 841, and 920(2); **State v. Tipton**, 95-2483 (La. App. 1st Cir. 12/29/97), 705 So.2d 1142, 1147; **State v. Dilosa**, 2001-0024 (La. App. 1st Cir. 5/9/03), 849 So.2d 657, 671, writ denied, 2003-1601 (La 12/12/03), 860 So.2d 1153. In the present case, the record does not reflect that defendant made a contemporaneous objection to the jury charges on the basis of the alleged failures now asserted in this assignment of error. Accordingly, the issues raised in these assignments of error were not properly preserved for appellate review.

These assignments of error are without merit.

REVIEW FOR ERROR

The defendant requests that this Court examine the record for error under La. Code Crim. P. art. 920(2). This Court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

After a careful review of the record in these proceedings, we have found no

reversible errors. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.