NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 0103

STATE OF LOUISIANA

VERSUS

ALFRED SERIALE

Judgment Rendered: June 6, 2014

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 03-11-0699

The Honorable Donald R. Johnson, Judge Presiding

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

The defendant, Alfred Seriale, was charged by bill of information with armed robbery on counts one and two, violations of La. R.S. 14:64, and with attempted armed robbery on counts three and four, violations of La. R.S. 14:64 and La. R.S. 14:27.[1] The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged on all four counts. After the State filed a habitual offender bill of information seeking to enhance the sentence on all four counts, the defendant was adjudicated a third-felony habitual offender on each count.[2] The trial court imposed sentences of sixty-six years imprisonment at hard labor on counts one and two, and sentences of thirty-three years imprisonment at hard labor on counts three and four.[3] The trial court ordered that the sentences be served concurrently to each other and to any other sentence that the defendant was required to serve. The defendant filed a timely appeal. For the following reasons, we affirm the convictions, habitual offender adjudications, and sentences.

ASSIGNMENTS OF ERROR

On appeal, the defendant raises two assignments of error:

1) The trial court erred in imposing unconstitutionally excessive sentences.

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[1] In accordance with the bill of information, the defendant was charged with codefendant Christopher Smith, but the cases were severed.

[2] The habitual offender adjudication is based on the following predicate guilty plea convictions in the 19th Judicial District Court on January 28, 2009: attempted carrying of a weapon with a controlled dangerous substance under docket number 03-08-0390; and simple burglary under docket number 05-08-0192 (the bill of information lists four counts, but based on the minute entry it appears that the defendant only pled guilty to one of the counts and that only one sentence was imposed in that case).

[3] When imposing the sentences, the trial judge did not state that the sentences would be served without the benefit of parole, as statutorily required for the underlying offenses. See La. R.S. 14:64(B); *State v. Bruins*, 407 So.2d 685, 687 (La. 1981). As *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So.2d 790, 799 and La. R.S. 15:301.1(A) provide, any applicable "without benefits" provision is self-activating. However, while La. R.S. 15:529.1(G) requires that a habitual offender sentence be imposed "without benefit of probation or suspension of sentence," the habitual offender statute makes no mention of "parole." The question as to whether *State v. Bruins* would control in such a circumstance and require sentencing in accordance with the reference statute, as to parole, will not be addressed herein since the State has not sought supervisory review of the lack of parole restriction on the habitual offender sentences in accordance with the reference statute. See *State v. Thomas*, 2012-0177 (La. App. 1st Cir. 12/28/12), 112 So.3d 875, 880, n.7, (citing *State v. Dickerson*, 584 So.2d 1140 (La. 1991) (per curiam).

2) Trial counsel's failure to file a motion to reconsider sentence constituted ineffective assistance of counsel.

STATEMENT OF FACTS

The following series of armed robberies and attempted armed robberies took place in Baton Rouge on February 3, 2011. Matthew Faldyn, who was an LSU student at the time, left the Middleton Library near its midnight closing time. Faldyn proceeded to go home to the apartment he resided in at the Tiger Plaza apartment complex. As he entered the complex parking lot just after midnight, he observed a man wearing white clothing walking upstairs at one of the adjacent buildings. Faldyn parked his vehicle, exited it, and began walking to his apartment located on the second floor near the front gate of the front entrance of the complex. Just as he was opening his apartment door, he felt the barrel of a pistol against his left temple and the assailant demanded all of his belongings. Faldyn turned to face the assailant, and the gun was then placed in front of his face as the assailant held it in his left hand. Faldyn dropped the book that he was holding at the time, pushed the gun out of his face, and began yelling. As he struggled with the assailant, his roommate heard the commotion, opened the apartment door, and pulled Faldyn into the apartment. They immediately contacted the police. Faldyn was able to get a good look at the assailant after he turned around and stood face-to-face with him. Faldyn described the assailant as an approximately six foot tall, light-skin toned African American male with a lazy left eye. Faldyn identified the defendant as the assailant from a photographic lineup conducted a few days later, and again in open-court during the trial.

Less than thirty minutes after the Faldyn incident, the next victim, Steven Tucker, arrived at his apartment located at 1806 South Brightside

View. After parking his vehicle in the lot next to his apartment building, Tucker walked towards his apartment carrying groceries and passed two men near the stairway leading to his apartment. As he continued up the stairway, he felt the barrel of a gun on his neck and the assailant demanded his belongings. Tucker's last recollection outside of his apartment was turning to set his grocery bags down. He next recalls regaining full consciousness in his kitchen with his girlfriend and younger brother. His face was swollen and the glass bottles from his grocery bag were broken. Tucker was able to see the face of one of the assailants when he passed them on the sidewalk and noted that the assailant's left-eye was "off color and pointed down to the left" and further noticed that the individuals were only a couple of inches shorter than his personal height of six feet, three inches tall. Just before he lost full consciousness, Tucker noticed that the assailant was holding the pistol in his left hand. Tucker later learned from a neighbor that a gun was discharged at the time of the incident, approximately between 12:20 a.m. and 12:30 a.m. Tucker did not make a positive identification from the subsequent photographic lineup but identified the defendant as the armed assailant in court.[4]

That same night, Aaron Roberts and Patty Hickman were robbed at gunpoint. Around 12:30 a.m., Roberts and Hickman were leaving a friend's apartment located at 5151 Highland Road. Their vehicle was parked in the back of the apartment complex at a significant distance from their friend's apartment. As they were walking in the parking lot toward their vehicle, someone asked if they had a lighter and they responded negatively. When they approached their vehicle, Hickman opened the back door to put her

[4] The photograph of the defendant used in the lineup had the left eye blotted out. Tucker testified that he was unable to make a positive identification of the defendant in the lineup because he was unable to see his distinct left eye on the photograph for confirmation.

backpack on the backseat. At that point, the assailant pulled out a gun, held it to her face, and told her to give him all of her "stuff." The assailant threatened to shoot her as she nervously tried to get the backpack out of the car to relinquish it. At that point, a dark blue vehicle drove up and someone exited the vehicle, approached Roberts, demanded his belongings, and punched him in the eye when he tried to keep his house key. The assailants took Hickman's backpack and purse, took Roberts' wallet, and took both victims' cell phones. The assailants then entered the blue vehicle and fled from the scene. Hickman did not get a good look at the assailants' faces and was unable to make a positive identification. Roberts was able to specifically describe the getaway vehicle as a dark blue, all stock, two-door Honda Civic Coupe. Roberts further noted that the assailant who approached him was about his same height, five feet and ten to eleven inches tall. Six days later, on February 9, 2011, Roberts positively identified the defendant and codefendant, Christopher Smith, in photographic lineups.

DISCUSSION

In his first assignment of error, the defendant argues that the trial court erred in imposing unconstitutionally excessive sentences. The defendant notes that the sentences are akin to a life sentence, that no one was shot during the offenses, and that two of the victims could not identify him in photographic lineups. The defendant further notes that while Roberts was unwavering in his trial testimony that the vehicle driven by the assailants had no license plate, the vehicle subsequently stopped by the police had a license plate. The defendant concludes that the trial court failed to adequately consider all of the circumstances in imposing the sentences.

However, the record does not contain an oral or written motion to reconsider sentence or an objection to the sentences. Louisiana Code of

Criminal Procedure article 881.1(E) provides that "[f]ailure to make or file a motion to reconsider sentence ... shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review." Accordingly, the defendant is procedurally barred from having his challenge to the sentencing, raised in assignment of error number one, reviewed by this court on appeal. See *State v. Felder*, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

The defendant argues in his second assignment of error that trial counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel. When faced with such interrelated arguments, we have previously chosen, in the interest of judicial economy, to consider the excessiveness argument, even without a motion to reconsider sentence, so as to address the defendant's claim of ineffective assistance of counsel. See *State v. Wilkinson*, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court than by appeal. This is because post-conviction relief provides the opportunity for a full evidentiary hearing under La. Code Crim. P. art. 930.[5] However, when the record is sufficient, a court may resolve this issue on direct appeal in the interest of judicial economy. *State v. Lockhart*, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132 (citing *State v. Teeter*, 504 So.2d 1036, 1039-40 (La. App. 1st Cir. 1987)).

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

The claim of ineffective assistance of counsel is to be assessed by the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also *State v. Fuller*, 454 So.2d 119, 125 n.9 (La. 1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must demonstrate that this deficient performance prejudiced his defense. Counsel's performance is deficient when it can be shown that he made errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Counsel's deficient performance will be found to have prejudiced the defendant if the defendant shows that the errors were so serious as to deprive him of a fair trial, a trial whose result is reliable. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. *Strickland*, 466 U.S. at 687. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. *Felder*, 809 So.2d at 370. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentencing would have been different, a basis for an ineffective assistance claim may be found. *Id.* Thus, here, the defendant must show that but for his counsel's failure to file a motion to reconsider sentence, the sentencing would have been changed, either in the district court or on appeal. See *id.*

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 falls within statutory limits, it may be excessive. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Andrews*, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. A sentence is considered 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. *Id.* 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. See *State v. Holts*, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988).

Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for a trial court to consider when imposing sentence. While the entire checklist of La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. *State v. Brown*, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. The factors guiding the decision of the trial court are necessary for an appellate court to adequately review a sentence for excessiveness and, therefore, should be in the record. Otherwise, a sentence may appear to be arbitrary or excessive and not individualized to the particular defendant. *Felder*, 809 So.2d at 371.

Under La. R.S. 14:64(B), a person convicted of armed robbery shall be punished by imprisonment at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. Pursuant to La. R.S. 14:27(D)(3), a person convicted of attempted armed robbery shall be imprisoned at hard labor for a term no

greater than forty-nine and one-half years, without benefit of parole, probation, or suspension of sentence.

In the instant case, the defendant was subject to enhanced penalties as a third-felony habitual offender in accordance with La. R.S. 15:529.1(A)(3)(a). Thus, for each armed robbery conviction on counts one and two, the defendant was subject to imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence for a minimum of sixty-six years and a maximum of one hundred ninety-eight years. Likewise, for each attempted armed robbery conviction on counts three and four, the defendant was subject to imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence for a minimum of thirty-three years and a maximum of ninety-nine years. Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. To rebut the presumption that a mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which 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. See *Felder*, 809 So.2d at 370.

Before imposing the sentences, the trial court ordered a presentence investigation. The trial court correctly noted the statutory sentencing exposure, the defendant's age, and the serious nature of the offenses in this case. The trial court imposed the minimum sentence mandated by law on each count and ordered the sentences to run concurrently. The defendant did not present any particular facts regarding his family history or unusual circumstances that would support a deviation from the mandatory minimum sentences. Indeed, the victims in this case were all violently accosted with a

firearm, one of the victims was punched in the eye, and another victim lost consciousness and suffered from a swollen face. Further, the gun was discharged during the offense against Tucker, while Hickman was verbally threatened with being shot. In short, all of the victims' lives were placed in serious danger by the defendant's conduct.

Based on the record before us, we find that the defendant has failed to clearly and convincingly show that he is exceptional or that the mandatory minimum sentences are not meaningfully tailored to his culpability, the gravity of the offenses, and the circumstances of the case. Thus, we do not find that a downward departure from the presumptively constitutional, mandatory minimum sentences was required in this case. See *State v. Henderson*, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 760-61, writ denied, 2000–2223 (La. 6/15/01), 793 So.2d 1235. The imposition of the minimum sentences allowed by statute in this case is clearly not excessive or cruel punishment. Thus, even if we were to conclude that the defendant's trial counsel performed deficiently in not filing a motion to reconsider sentence, the defendant fails to show that he was prejudiced in this regard. Therefore, the defendant has failed to support an ineffective assistance of counsel claim. Both assignments of error are without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND SENTENCES AFFIRMED.