

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2014 KA 0450**

**STATE OF LOUISIANA**

**VERSUS**

**JOSHUA DOUGLAS**

**Judgment Rendered: NOV 07 2014**

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On Appeal from the Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne  
State of Louisiana  
No. 643569

Honorable David W. Arceneaux, Judge Presiding

\* \* \* \* \*

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\* \* \* \* \*

**BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.**

Handwritten initials: JMC, EDW, TMH

**McCLENDON, J.**

Defendant, Joshua Gary Douglas, was charged by amended bill of information with two counts of armed robbery, violations of LSA-R.S. 14:64 (counts one and two); one count of attempted armed robbery, a violation of LSA-R.S. 14:27 and 14:64 (count three); and one count of aggravated battery, a violation of LSA-R.S. 14:34 (count four). He pled not guilty and, following a jury trial, was found guilty as charged on counts one, two, and three; the jury returned a verdict of not guilty on count four. Defendant filed motions for new trial and postverdict judgment of acquittal, but the trial court denied those motions. On each of counts one and two, the trial court sentenced defendant to twenty-seven years at hard labor, without benefit of parole, probation, or suspension of sentence; on count three, the trial court sentenced defendant to twenty years at hard labor, without benefit of parole, probation, or suspension of sentence. These sentences were ordered to run concurrently with each other. Defendant filed no motion to reconsider his sentences, but he objected to the sentences at the time they were imposed. He now appeals, alleging three assignments of error. For the following reasons, we affirm defendant's convictions and sentences.

**FACTS**

Around 9:00 p.m. on June 29, 2012, M.B., D.D., and T.F.<sup>1</sup> were walking down Alma Street in the Lisa Park area of Houma. During their walk, the boys noticed approximately four black males who were riding bicycles. Feeling that they were being followed, the victims turned onto Westview Drive. Shortly after they turned onto Westview drive, the boys were approached by the individuals on bicycles.

One of the individuals, identified at trial as defendant, dropped his bicycle and approached the boys, asking "where the weed was at." The boys replied that they did not have any drugs. Defendant pulled a gun from his waistband

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<sup>1</sup> In accordance with LSA-R.S. 46:1844(W), the minor victims herein are referenced only by their initials.

and stuck it in T.F.'s face. He and a young accomplice<sup>2</sup> in a red shirt, who had also pulled a gun, instructed T.F. to give up his wallet and phone. The red-shirted accomplice then approached M.B. with his weapon and asked him what he had; M.B. responded that he had nothing, and he was left alone. The red-shirted accomplice then went up to D.D. and asked for his phone; when D.D. refused, both defendant and the accomplice hit him with their weapons. Shortly thereafter, a car drove down the street. M.B., D.D., and T.F. began to walk away. As they did, someone began to fire a BB gun in their direction, striking D.D. several times. The boys returned to T.F.'s home and contacted the police.

In the early morning hours of June 30, 2012, John Carmona was skateboarding home from a friend's house. As he made his way to his house on Willie Lou Avenue in the Lisa Park area, he was approached by two black males who were riding one bicycle together. The larger male, identified at trial as defendant, pedaled the bike as the smaller individual<sup>3</sup> rode upon the handlebars. As the two males approached Carmona, the smaller individual hopped off the handlebars, pulled out a gun, and pointed it at his face. He demanded Carmona's cell phone. When Carmona pushed the gun out of his face and attempted to walk away, defendant got off the bike, pulled his own gun, and pointed it at Carmona's face. Carmona threw his cell phone away from his person and began to run away. He called the police once he reached his house.

Around 4:00 a.m. the same morning, Officer Billy Dupre of the Houma Police Department observed two black males riding bicycles on Alma Street near Westside Boulevard. Believing that they might be the individuals reportedly involved in the earlier robberies, Officer Dupre attempted to stop them; both males fled on their bicycles. After a pursuit, Officer Dupre apprehended defendant's accomplice, who was a minor. Defendant turned himself into the police several days later.

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<sup>2</sup> Because the accomplice identified as wearing a red shirt is a juvenile, we would ordinarily refer to him by his initials. However, he shares initials with one of the minor victims in this case. To avoid confusion, we identify him as the accomplice with the red shirt.

<sup>3</sup> The red-shirted juvenile testified at trial and admitted that he was the second individual present with defendant at the time of this incident.

## **ASSIGNMENT OF ERROR #1**

In his first assignment of error, defendant alleges that the trial court erred in denying and failing to fully address his **Batson**<sup>4</sup> objections to the state's peremptory challenges of four African-American prospective jurors.

In **Batson**, 476 U.S. at 96-98, 106 S.Ct. at 1723-1724, the United States Supreme Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. **State v. Mitchell**, 99-0283 (La.App. 1 Cir. 6/22/01), 808 So.2d 664, 669; see also LSA-C.Cr.P. art. 795(C)-(E). Under **Batson**, a defendant must first establish a prima facie case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on account of their race. **State v. Tilley**, 99-0569 (La. 7/6/00), 767 So.2d 6, 12, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001). The combination of factors needed to establish a prima facie case are: (1) the defendant must demonstrate that the prosecutor's challenge was directed at a member of a cognizable group; (2) the defendant must then show the challenge was peremptory rather than for cause; and (3) finally, the defendant must show circumstances sufficient to raise an inference that the prosecutor struck the prospective juror on account of race. **State v. Myers**, 99-1803 (La. 4/11/00), 761 So.2d 498, 501.

The defendant may offer any facts relevant to the question of the prosecutor's discriminatory intent. Such facts include, but are not limited to, a pattern of strikes by a prosecutor against members of a suspect class, statements or actions of the prosecutor during voir dire that support an inference that the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empanelled, and any other disparate impact upon the suspect class that is alleged to be the victim of purposeful discrimination. **State v. Rodriguez**, 01-2182 (La.App. 1

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<sup>4</sup> **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Cir. 6/21/02), 822 So.2d 121, 128, writ denied, 02-2049 (La. 2/14/03), 836 So.2d 131.

No formula exists for determining whether the defense has established a prima facie case of purposeful discrimination. A trial judge may take into account not only whether a pattern of strikes against African-American prospective jurors has emerged during voir dire, but also whether the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. **Rodriguez**, 822 So.2d at 128.

In order to satisfy **Batson's** first step, a moving party need only produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. **State v. Elie**, 05-1569 (La. 7/10/06), 936 So.2d 791, 796. **Batson's** admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of panel members who expressed similar views or shared similar circumstances in their backgrounds. The one relevant circumstance for a trial judge to consider is whether the state articulated verifiable and legitimate reasons for striking other minority jurors. **Id.** The failure of one or more of the state's articulated reasons for striking a prospective juror does not compel a trial judge to find that the state's remaining articulated race-neutral reasons necessarily cloaked discriminatory intent. **Id.**

If the requisite showing has been made by the defendant, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. The second step of this process does not demand an explanation that is persuasive, or even plausible. At the second step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. **Mitchell**, 808 So.2d at 669-70. This is a burden of production, not one of persuasion. **State v. Harris**, 01-0408 (La. 6/21/02), 820 So.2d 471, 473.

Faced with a race-neutral explanation, the defendant then must prove to the trial court purposeful discrimination. The proper inquiry in this final stage of the **Batson** analysis is whether the defendant's proof, when weighed against the prosecutor's proffered race-neutral reasons, is sufficient to persuade the trial court that such discriminatory intent is present. Thus, the focus of the **Batson** inquiry is upon the intent of the prosecutor at the time he exercised his peremptory strikes. **Tilley**, 767 So.2d at 12. The ultimate burden of persuasion is on the defendant. **State v. Young**, 551 So.2d 695, 698 (La.App. 1 Cir. 1989). The trial court should examine all of the available evidence in an effort to discern patterns of strikes and other statements or actions by the prosecutor during voir dire that support or reject a finding of discriminatory intent. **Tilley**, 767 So.2d at 12-13.

Defendant asserts that the state established a pattern of peremptory strikes against members of a suspect class when it struck four of five African-American prospective jurors – Junius Vincent, Marvin Williams, Francena Williams, and Emma Newton. Mr. Vincent and Mr. Williams were seated on the same panel, and the defense urged a **Batson** objection after Mr. Williams had been peremptorily challenged. Similarly, Ms. Williams and Ms. Newton were on the same panel, and the defense urged a **Batson** objection after Ms. Newton had been peremptorily challenged.<sup>5</sup>

When defense counsel urged its first **Batson** objection, the trial court asked the prosecutor whether he had any reason to strike Mr. Williams independent of racial bias. The prosecutor responded he believed that, based on Mr. Williams responses to voir dire questioning, he would not be able to put aside his feelings of sympathy toward defendant, who was seventeen years old at the time of trial. In denying the **Batson** objection, the trial court stated that Mr. Williams did indeed initially indicate that he might have a problem putting

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<sup>5</sup> Defendant also urged a third **Batson** objection after Kierra Young was peremptorily challenged by the state. Ms. Young was seated on the same panel as Ms. Williams and Ms. Newton, and defendant urged this **Batson** objection after she was released by the state. The trial court overruled that **Batson** objection, but defendant does not explicitly take issue with that ruling on appeal. Therefore, we do not address it.

aside defendant's youth as a factor in evaluating the case. The trial court also noted that Mr. Williams stated he would have a difficult time judging anyone. Therefore, the trial court found that there was a reasonable basis for the state to strike Mr. Williams independent of any racial bias.

When the state exercised a peremptory challenge against Ms. Newton (after it had already peremptorily challenged Ms. Williams on the same panel), defense counsel urged its second **Batson** objection. In evaluating this **Batson** objection, the trial court first pointed out that the state accepted at least one African American as a juror – Cory Harris. The state argued first that there was no pattern of racial discrimination, citing Mr. Harris's presence on the jury and the presence of a Hispanic individual on the jury. The trial court noted that it did not necessarily agree with defense counsel's assessment of a pattern of racial discrimination, but it asked the state for a race-neutral reason for striking Ms. Newton. The state cited Ms. Newton's responses indicating that she did not think she would be a good juror in this case, that it was "her fear" to serve as a juror in a case such as this one, and that she had sympathy toward defendant because of his age. The trial court accepted the state's race-neutral reasons and found that Ms. Newton was not stricken based upon her race.

The state, in presenting race-neutral reasons for its excusal of prospective jurors, need not present an explanation that is persuasive, or even plausible; unless a discriminatory intent is inherent in the state's explanation after review of the entire record, the reason offered will be deemed race neutral. A reviewing court owes the district court's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. **State v. Handon**, 06-0131 (La.App. 1 Cir. 12/28/06), 952 So.2d 53, 58.

On review, we find that defendant failed to make a prima facie showing that the state exercised its peremptory challenges on the basis of race. He also failed to produce evidence sufficient to permit the district court to draw an inference that discrimination occurred. A defendant's reliance on bare statistics to support a prima facie case of race discrimination is misplaced. See **State v.**

**Duncan**, 99-2615 (La. 10/16/01), 802 So.2d 533, 550, cert. denied, 536 U.S. 907, 122 S.Ct. 2362, 153 L.Ed.2d 183 (2002). In the instant case, defendant's only support for his argument that the state improperly exercised its peremptory strikes in a racially-discriminatory way is the fact that the state struck four out of five African-American jurors. That statistic alone does not support defendant's argument. Moreover, we note that the state articulated legitimate race-neutral explanations for striking Mr. Williams and Ms. Newton. Although defendant now argues that the trial court erred in not requiring race-neutral reasons for all four African-American prospective jurors, defendant did not request race-neutral reasons for Mr. Vincent or Ms. Williams. Because defendant has failed even to make a prima facie showing of racial discrimination, we decline defendant's request to remand this case to the trial court for a completion of the **Batson** analysis with respect to these two other jurors.

This assignment of error is without merit.

### **ASSIGNMENT OF ERROR #2**

In his second assignment of error, defendant contends that the trial court erred in denying his motion for postverdict judgment of acquittal, which alleged that the evidence presented at trial was insufficient to support his convictions. Specifically, he contends that the state's evidence was insufficient to show that he had the intent to commit any robberies or to show that he was armed with a dangerous weapon.

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, 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. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated



in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 01-2585 (La.App. 1 Cir. 6/21/02), 822 So.2d 141, 144.

Armed robbery is a general intent crime. In general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal. **State v. Payne**, 540 So.2d 520, 523-24 (La.App. 1 Cir.), writ denied, 546 So.2d 169 (La. 1989). To convict a defendant of armed robbery, the State is required to prove: (1) a taking; (2) of anything of value; (3) from a person or in the immediate control of another; (4) by the use of force or intimidation; (5) while armed with a dangerous weapon. See LSA-R.S. 14:64(A); **State v. Carter**, 522 So.2d 1100, 1109 (La.App. 1 Cir. 1988). To be guilty of an attempted armed robbery, a defendant must have a specific intent to commit armed robbery, and he must do or omit an act for the purpose of and tending directly toward the accomplishment of his object. See LSA-R.S. 14:27(A). Specific intent is the 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. See LSA-R.S. 14:10(1).

In the instant case, defendant was convicted for the completed armed robberies of T.F. and John Carmona, and for the attempted armed robbery of D.D. He advocates two positions in arguing that the evidence was insufficient to support these convictions. First, he contends that he had no intent to commit either of the robberies, stating that he only brandished his weapon in each instance when his friends' intended victims began to resist. Second, he contends that his convictions for armed robbery and attempted armed robbery are invalid because the gun he used was non-functioning.

At trial, M.B., T.F., and D.D. all testified that defendant was the instigator of the initial altercation. All three boys witnessed defendant drop his bicycle, draw a handgun from his waistband, and demand valuables from each of them.

Compared to the apparent BB gun that his red-shirted accomplice appeared to have, defendant's gun – a silver and black handgun – appeared to be real. They testified that while defendant and his accomplice were successful in taking a wallet and cell phone from T.F., he was unsuccessful in taking D.D.'s cell phone. M.B. testified that he had nothing of value on his person. With respect to the later incident, Carmona testified that defendant brandished a handgun and demanded his cell phone after he pushed the smaller male's gun out of his face. As a result of defendant's actions, Carmona complied and gave away his cell phone.

Defendant testified on his own behalf. He stated that on the night of the incident, he was riding bicycles with the red-shirted accomplice and two other juveniles, L.M. and L.J. With respect to the first incident, defendant stated that L.M.'s bicycle chain had slipped, so he was attempting to help him fix it when L.J. and the red-shirted accomplice approached the three boys. Defendant testified that he only approached the boys after he witnessed one of them get aggressive toward the red-shirted accomplice. Defendant admitted to brandishing his weapon and telling D.D. that it was not "worth it" to resist. With respect to the second incident, defendant testified that the red-shirted accomplice hopped off the handlebars of the bicycle they were riding and approached Carmona without any prompting. Defendant stated that once he saw Carmona begin to hit away his accomplice's gun, he approached and again brandished his weapon, saying, "Get away from him." Defendant stated that besides his actions, he never intended to rob or batter anyone on the night of the incidents. Defendant's three accomplices also testified at trial, and they related versions of the events that were similar to defendant's own version.

The trier of fact is free to 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 one of the weight of the evidence, not its sufficiency. The trier of fact's determination of the weight to be given

evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La.App. 1 Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La.App. 1 Cir. 1985).

In the instant case, the victims' own testimonies were sufficient to support all of defendants' convictions. Their observations were direct evidence that the defendant actively engaged in each of the instances of armed robbery or attempted armed robbery. The jury obviously made a credibility determination and found the victims' testimonies more believable than defendant's own testimony and the supporting testimonies of his accomplices. We will not reweigh the evidence to overturn that determination.

Defendant also argues that the evidence supporting his convictions is insufficient because the gun that he used on the night of the incidents was inoperable. However, it is well settled that the inoperability of a weapon is immaterial to a defendant's guilt. A "dangerous weapon" includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm. See LSA-R.S. 14:2(A)(3). A person who commits a robbery by pointing an unloaded and unworkable pistol at the victim can be adjudged guilty of armed robbery. **State v. Levi**, 259 La. 591, 598-99, 250 So.2d 751, 754 (1971). Therefore, this contention clearly lacks legal support.

This assignment of error is without merit.

### **ASSIGNMENT OF ERROR #3**

In his final assignment of error, defendant asserts that his sentences are unconstitutionally excessive. He contends that because he was found not guilty

of aggravated battery, he should be found to be less culpable than his accomplices.

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). A sentence is constitutionally 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. See State v. Hurst, 99-2868 (La.App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). 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 recite 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. 1 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. 1 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).

For his armed robbery convictions, defendant was eligible to receive sentences of not less than ten years nor more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. See LSA-R.S. 14:64(B).

For his attempted armed robbery conviction, defendant was eligible to receive a sentence of up to forty-nine-and-one-half years, without benefit of parole, probation, or suspension of sentence. See LSA-R.S. 14:27(D)(3) & 14:64(B). Defendant actually received three concurrent sentences, two of twenty-seven years at hard labor, without benefit of parole, probation, or suspension of sentence, and one of twenty years at hard labor, without benefit of parole, probation, or suspension of sentence.

Prior to sentencing defendant, the trial judge ordered a presentence investigation report (PSI). The trial judge noted that, in his career, he rarely ordered PSIs, but he found the instant case to warrant a PSI, largely because of defendant's youth. Defendant also testified at his sentencing hearing.

In actually sentencing defendant, the trial judge stated extensive reasons supporting the sentences imposed. He first noted defendant's youth and the letters of support he had received from defendant's friend, his friend's family, his mother, a student defendant had tutored at one point, and a recruiter for an Upward Bound program with which defendant had been involved. He noted defendant's past scholastic success and his apparent intelligence.

The trial judge then spoke of correspondence he received from a couple of the victims in the instant case. Two of the victims, D.D. and T.F., respectively have lingering physical and emotional effects from the incident. The trial judge also noted that defendant had an extensive juvenile criminal history from the time he was ten years old. Furthermore, some officials with the Department of Public Safety and Corrections stated in the PSI that defendant appeared to be "dangerous, manipulative, and unpredictable."

With respect to the incidents, the trial judge noted that defendant was the oldest person in the group of individuals involved in the offenses. He cited the fact that defendant committed the offenses with a real gun and that the sight of that real weapon tended to be the impetus for the victims' compliant behavior. The trial judge stated that without defendant's participation, there might not have been any armed robberies.

Turning to the Article 894.1 factors, the trial judge stated that there is an undue risk that defendant would commit another crime if he were not imprisoned, that he is in need of correctional treatment or a custodial environment, and that a lesser sentence would deprecate the seriousness of his crimes. In aggravation, the trial judge also found that defendant knowingly created a risk of, at a minimum, great bodily harm to more than one person, that he used threats of violence or actual violence in the commission of the offense, that he used a dangerous weapon in the commission of the offense, that he had a significant prior criminal history, and that he was in a position of influence amongst the perpetrators. The trial judge did not find that any potential mitigating factors applied. Based upon this information, the trial court imposed the three concurrent sentences, two of twenty-seven years at hard labor, without benefit of parole, probation, or suspension of sentence, and one of twenty years at hard labor, without benefit of parole, probation, or suspension of sentence.

A thorough review of the record reveals that the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentences herein. Further, the sentences imposed were not grossly disproportionate to the severity of the offenses and thus, were not unconstitutionally excessive.

This assignment of error is without merit.

### **CONCLUSION**

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

**CONVICTIONS AND SENTENCES AFFIRMED.**