NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1358

STATE OF LOUISIANA

VERSUS

TIMOTHY ALFORD

Judgment Rendered: APR 2 4 2015

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, State of Louisiana
Trial Court Number 10-CR8 110496

Honorable William J. Crain, Judge Presiding

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

WHIPPLE, C.J.

The defendant, Timothy Wallace Alford, was charged by bill of information[1] with attempted first degree murder of Deputy Paul Pajak, a violation of LSA-R.S. 14:27 and LSA-R.S. 14:30. At arraignment, the defendant pled not guilty. A pre-trial motion to determine the defendant's mental condition was filed, but was denied by the trial court. However, the trial court did order that the sanity reports from the defendant's previous criminal matters be made a part of the record. During voir dire, a second motion for hearing to determine the defendant's mental condition was filed, which, after a hearing, was denied by the trial court. The trial court specifically found that the defendant was competent to "assist and participate and go forward with the trial." Following a jury trial, the defendant was found guilty of the responsive offense of attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1. Motions for new trial and post-verdict judgment of acquittal were filed, but were denied by the trial court. The defendant was sentenced to imprisonment at hard labor for forty years without benefit of probation, parole, or suspension of sentence. An oral motion to reconsider sentence was subsequently made, but was denied by the trial court.

The State filed a habitual offender bill of information against the defendant, alleging he was a fourth-felony habitual offender. Following a hearing, the

[1]Timothy N. Esteve and Wade A. Esteve were also charged by the same bill of information with attempted first degree murder of Deputy Paul Pajak, and, by a subsequently amended bill of information, were charged with: three counts of simple burglary, violations of LSA-R.S. 14:62; one count of conspiracy to commit simple burglary, a violation of LSA-R.S. 14:26 and LSA-R.S. 14:62; and three counts of theft of a firearm, violations of LSA-R.S. 14:67.15.

defendant was adjudged a fourth-felony habitual offender.[2] The trial court vacated the previously imposed sentence and then sentenced the defendant to life imprisonment without benefit of probation, parole, or suspension of sentence in accordance with LSA-R.S. 15:529.1(A)(4)(b). A second oral motion to reconsider sentence was argued by the defendant, but was also denied by the trial court.

The defendant now appeals, assigning error to the sufficiency of the evidence presented at trial and to his sentence. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

The victim, Deputy Paul Pajak of the Washington Parish Sheriff's Office, testified at trial. On August 16, 2010, at approximately 3:30 a.m., Deputy Pajak began his patrol shift when a fellow Washington Parish deputy, Deputy Hickman, returned Deputy Pajak's vehicle following his night shift. Upon leaving Deputy Pajak's residence, Deputy Hickman began traveling eastbound on Highway 60, and Deputy Pajak began traveling westbound toward Franklinton on Highway 60. Almost immediately after turning out of his driveway, Deputy Pajak observed a red and gray pickup truck stationary in the westbound lane of traffic. Three individuals were located inside the truck, with another standing outside of the vehicle on the passenger side. At first, Deputy Pajak pulled directly behind the truck, and asked the individual standing outside "what he was doing and he mumbled something about a battery, I believe." Deputy Pajak then moved into the

[2]Predicate #1 was set forth as the defendant's March 7, 2005 guilty plea, under Fifteenth Circuit District Court, County of Pearl River, State of Mississippi, docket # K2005009E, to a RICO Act violation under MS-R.S. 97-43-1. Predicate #2 was set forth as the defendant's March 11, 2005 guilty plea, under Fifteenth Circuit District Court, County of Pearl River, State of Mississippi, docket #K2004558E, to Aggravated Assault under MS-R.S. 97-3-7(2)(b). Predicate #3 was set forth as the defendant's April 26, 2010 guilty pleas, under Twenty-Second Judicial District Court, Parish of Washington, State of Louisiana, Docket # 88947, to twenty-one counts of Simple Burglary under LSA-R.S. 14:62. Predicate #4 was set forth as the defendant's April 26, 2010 guilty plea, under Twenty-Second Judicial District Court docket # 88175, to one count of Simple Burglary under LSA-R.S. 14:62.

eastbound lane of traffic, activated his spotlight and emergency lights, and positioned his vehicle almost directly beside the pickup truck. As Deputy Pajak looked out of his passenger window into the stationary truck, he observed that "everybody in the truck would not look at me, so I thought something was up at that point." Additionally, the driver of the truck "turned his head to the right as if to look out his passenger's door and [Deputy Pajak] couldn't see his face at that point." When Deputy Pajak said, "Driver," the driver of the truck "stomped on it" and "took off."

Deputy Pajak began his pursuit of the truck, activated his emergency siren, and then noticed that an "individual in the middle seat of the truck opened up the sliding glass - - the back sliding glass and stuck a shotgun out." After hearing shots strike his vehicle, Deputy Pajak began to return fire, aiming for the truck's tires. However, during his attempt to disable the truck, Deputy Pajak, with his left hand out of the window, was struck by shotgun pellets in his hand and arm. The chase continued approximately three to four miles westbound on Highway 60, with Deputy Pajak firing approximately forty-two rounds before he hit the truck's left rear tire. Although the tire eventually came off of its rim, and sparks were emitting from underneath the vehicle, Deputy Pajak observed the truck was not attempting to stop. Later, during another round of gunfire, Deputy Pajak stuck his head out of his vehicle in order to "line up [his] shots," and was struck by shotgun pellets in the head. He stopped his vehicle, and reported the injury to his dispatcher. Deputy Hickman quickly approached his position, but Deputy Pajak instructed him to continue the chase, as the truck's taillights were still visible. Once an ambulance arrived, Deputy Pajak was taken to the emergency room for treatment of his injuries.

Deputy Chris Hickman testified that once he left Deputy Pajak's residence, he turned eastbound on Highway 60, and then heard Deputy Pajak radio in that he was in pursuit and that "shots [were] fired." Deputy Hickman immediately turned around, began traveling westbound on Highway 60, and eventually reached Deputy Pajak's position. Based on the call log, Deputy Hickman testified the first call came in at 3:56 a.m. The next string of calls was at 4:14 a.m., with one of the calls being "shots fired." During his pursuit, Deputy Hickman was having direct communication with Deputy Pajak, could see the shots being fired from the pickup truck, and observed shotgun pellets striking his (Hickman's) vehicle's windshield. Deputy Hickman heard five or six shots being fired from the pickup truck. Eventually, when Deputy Hickman reached Deputy Pajak's position, Deputy Pajak informed him that "he was fine," and "to keep going." Deputy Hickman continued his pursuit, and then, as he came around a curve, "[he] [saw] the truck up in the edge of the woods." Upon observing the truck, Deputy Hickman noticed one subject standing by the truck on the driver's side. Subsequently, a search party located Timothy and Wade Esteve in the woods.

Sergeant Robert Harris of the Washington Parish Sheriff's Office testified at trial that he participated in the ensuing manhunt for the defendant. Upon his arrival at the crashed pickup truck's location, Harris was given a description of the suspects – three white males with one wearing a black skullcap – and, along with other law enforcement agencies, Sergeant Harris began searching for the defendant. After traversing swampy and wooded areas, the two passengers, Timothy and Wade Esteve, were located, identified, and secured. Additionally, a pellet rifle was found near their location. The defendant was not located during this initial search, nor during the five or six days following the incident.

However, Sergeant Harris later received information by the Hattiesburg Police Department in Hattiesburg, Mississippi that the defendant had been arrested following a traffic stop. Sergeant Harris picked up the defendant and, thereafter, read him his **Miranda**[3] rights, and returned with him to Washington Parish.

The defendant gave a recorded statement to Washington Parish Sheriff's Office Detective Glen McClendon. The defendant stated that prior to his encounter with Deputy Pajak, he and three other individuals had participated in the burglary of two local used car dealerships, with the defendant driving the vehicle. The defendant stated that after completing his repairs, he re-entered his truck, and Deputy Pajak arrived soon thereafter. The defendant admitted he was afraid Deputy Pajak was going to "send [him] back to prison," as he was violating the terms of his probation, that he became "spooked out," and that he wanted to run away to avoid returning to prison. He stated to Detective McClendon that during the gunfight, one of Deputy Pajak's shots hit his windshield, and another fell into his lap. The defendant claimed he did not fire a gun at Deputy Pajak, but conceded he told his two passengers that they needed to get Deputy Pajak to "back up," and to get him "off of us."

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant avers that the evidence presented at trial was "legally insufficient to support a conviction for [attempted] second degree murder where the acts alleged to have been committed...do not evidence an intent to kill." He further argues that he "was simply trying to get away from Officer Pajak," and that the statements made to his passengers "to get Officer Pajak off of him and to make him 'back up'...do not evidence an intent to kill, nor can an intent to kill be inferred from the actions of a co-conspirator." As

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

such, the defendant contends that "[t]he facts presented by the [S]tate only support a verdict of aggravated battery – a battery with a dangerous weapon," and argues that "the conviction for attempted second degree murder should be set aside and a conviction for aggravated battery should be entered instead."

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 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. Patton, 2010-1841 (La. App. 1st Cir. 6/10/11), 68 So. 3d 1209, 1224. 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." LSA-R.S. 15:438; State v. Millien, 2002-1006 (La. App. 1st Cir. 2/14/03), 845 So. 2d 506, 508-09.

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. State v. Wright, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 487, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157 & 2000-0895 (La. 11/17/00), 773 So. 2d 732.

Second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. LSA-R.S. 14:30.1(A)(1).

Specific criminal 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." LSA-R.S. 14:10(1). Such state of mind can be formed in an instant. State v. Cousan, 94-2503 (La. 11/25/96), 684 So. 2d 382, 390. Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the fact finder. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. 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.

As set forth in LSA-R.S. 14:27(A), to attempt a crime, an accused must do an act for the purpose of and tending directly toward accomplishing his object, with a specific intent to commit the crime. While murder requires the specific intent to kill or to inflict great bodily harm, attempted murder requires the specific intent to kill. Thus, the elements of attempted second degree murder are the specific intent to kill a human being and an overt act in furtherance of the object. State v. Butler, 322 So. 2d 189, 192 (La. 1975).

All persons can be convicted as a principal to a crime if they are "concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime." LSA-R.S. 14:24. Under Louisiana law, a person may be convicted of intentional murder even if he has not personally struck the fatal blows. See State v. Anthony, 98-0406 (La. 4/11/00), 776 So. 2d 376, 386, cert denied, 531 U.S. 934, 121 S. Ct. 320, 148 L.

Ed. 2d 258 (2000) ("[E]ven without establishing that defendant was the triggerman, his conviction is valid because he was involved in this felony-murder and he intended, from the outset, to kill these victims."). Not all principals are automatically guilty of the same grade of offense as the main offender because the mental state of the offenders may be different. Thus, "an individual may only be convicted as a principal for those crimes which he personally has the requisite mental state." State v. Mitchell, 99-3342 (La. 10/17/00), 772 So. 2d 78, 82. Mere presence at the scene is not enough to "concern" an individual of a crime. In a specific intent homicide, the State must show more than the defendant's direct or indirect involvement and must show that the defendant specifically intended the death of the victim. See State v. Pierre, 93-0893 (La. 2/3/94), 631 So. 2d 427, 428 (per curiam). However, it is a general principal of accessorial liability that when two or more persons embark on a concerted course of action, each person becomes responsible for not only his own acts but also for the acts of the other, including "deviations from the common plan which are the foreseeable consequences of carrying out the plan." State v. Smith, 2007-2028 (La. 10/20/09), 23 So. 3d 291, 296 (per curiam).

In State v. Curtis, 2011-1676 (La. App. 4th Cir. 3/13/13), 112 So. 3d 323, writs denied, 2013-0831 (La. 11/1/13), 125 So. 3d 419, 2013-0878 (La. 11/1/13), 125 So. 3d 420, cert denied, ___ U.S. ___, 134 S. Ct. 1939, 188 L. Ed. 2d 965 (2014), the defendant was the driver of a vehicle from which a co-defendant fired a fatal shot into the victim. The defendant argued that the evidence presented at trial was insufficient to support his conviction of second degree murder. The appellate court noted that, "viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant Curtis was a principal to the second degree murder of [the victim]

(having aided and abetted defendant Solomon in killing the victim by driving the vehicle and slowing down or stopping it to allow defendant Solomon to take aim and fire the fatal shot) while possessing the specific intent to kill or inflict great bodily harm upon the victim." State v. Curtis, 112 So. 3d at 333. While this case addresses actual, rather than attempted, second degree murder, it is instructive as it demonstrates that the driver of a vehicle, in which the passengers take aim and fire at their victims, may possess intent to kill. Furthermore, "[a]lthough an individual's flight does not in and of itself indicate guilt, it can be considered as circumstantial evidence that the individual has committed a crime; flight shows consciousness of guilt." State v. Williams, 610 So. 2d 991, 998 (La. App. 1st Cir. 1992), writ denied, 617 So. 2d 930 (La. 1993).

A thorough review of the record indicates that 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 second degree murder, including the defendant's specific intent to kill the victim, and the defendant's identity as a principal to that offense. The verdict rendered in this case indicates the jury credited the testimony of the victim and the other witnesses against the defendant and rejected his attempts to discredit those witnesses. Further, even under the defendant's version of the incident, he drove a truck, told the passengers to get the victim to "back up" and to get the victim "off of us," and a passenger then repeatedly fired a shotgun at the victim. 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 which raises a reasonable doubt. See State v. Moten, 510 So. 2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So. 2d 126

(La. 1987). The verdict returned in this case indicates the jury rejected the defendant's theory that he neither had the intent to kill the victim nor that it was a foreseeable consequence of his plan with the passengers that they would attempt to kill the victim.

In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. State v. Higgins, 2003-1980 (La. 4/1/05), 898 So. 2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S. Ct. 182, 163 L. Ed. 2d 187 (2005). Furthermore, the trier of fact may accept or reject, in whole or in part, the testimony of any witness. See State v. Johnson, 99-0385 (La. App. 1st Cir. 11/5/99), 745 So. 2d 217, 223, writ denied, 2000-0829 (La. 11/13/00), 774 So. 2d 971. 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. 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 State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder 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).

This assignment of error lacks merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant argues his sentence is unconstitutionally excessive because, "[a]lthough the trial court referred to consideration of the PSI, it does not appear that due consideration was given to his mental health problems, which are almost certainly exacerbated by the use of illegal substances." The defendant argues that, "[i]t was an abuse of discretion to sentence him to life in prison under the circumstances of this case – prisons are not designed to operate as mental health facilities. Accordingly, [the defendant] will suffer more intensely from being imprisoned than other inmates due to his psychological pathologies." Although he "admits to using Ecstasy, marijuana and alcohol at the time of his arrest," the defendant avers that "[h]is actions in this case were not so egregious that they merited the imposition of a life sentence, even as a fourth felony offender." Therefore, the defendant argues that his sentence should be vacated and that he should be resentenced.

The Eighth Amendment to the United States Constitution and Article I, Section 20 of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate the 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. Further, 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. 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. 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 the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect that the trial court adequately considered the criteria. See State v. Herrin, 562 So. 2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (La. 1990). The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary, even where there has not been full compliance with Article 894.1. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982). Even when the trial court assigns no reasons, the sentence will be set aside on appeal and remanded for sentencing only if the record is inadequate or clearly indicates the sentence is excessive. State v. Knight, 2011-0366 (La. App. 1st Cir. 9/14/11), 77 So. 3d 302, 304, writ denied, 2011-2240 (La. 2/17/12), 82 So. 3d 283. 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).

Prior to his habitual offender adjudication, the appropriate sentencing range for the defendant's crime of attempted second degree murder was imprisonment for not less than twenty, but no more than fifty, years at hard labor without benefit of probation, parole, or suspension of sentence. See LSA-R.S. 14:27(D)(1)(b) & LSA-R.S. 14:30.1. The defendant initially received a sentence of imprisonment for forty years at hard labor without benefit of probation, parole, or suspension of sentence. Thereafter, the defendant's sentence was vacated as he was adjudged

and sentenced as a fourth-felony habitual offender under the provisions of LSA-R.S. 15:529.1(A)(4)(b), which provides in pertinent part that:

> A. Any person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States...thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
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> * * *
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> (4) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:
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> * * *
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> (b) If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(B)...or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

We note that the instant offense, along with the 2005 predicate guilty plea of aggravated assault, are crimes of violence as defined by LSA-R.S. 14:2(B)(3) & (B)(7), and the 2010 predicate guilty plea of simple burglary is punishable by imprisonment for up to twelve years in accordance with LSA-R.S. 14:62(B). Thus, without even considering the predicate RICO Act guilty plea, the defendant was subject to a mandatory sentence of life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence pursuant to LSA-R.S. 15:529.1(A)(4)(b). The legislature has the unique responsibility to define criminal conduct and to provide for the penalties to be imposed against persons engaged in such conduct. The penalties provided by the legislature reflect the degree to which the criminal conduct affronts society. State v. Baxley, 94-2982 (La. 5/22/95), 656 So. 2d 973, 979. Imposition of a sentence, although within the statutory limit, may violate a defendant's constitutional right against excessive punishment.

Sepulvado, 367 So. 2d at 767. Thus, the imposition of a minimum sentence required under a particular statute might also violate a defendant's constitutional protection against excessive punishment as applied to a particular defendant and his circumstances. See State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993).

In Dorthey, the Louisiana Supreme Court considered a constitutional challenge to the Habitual Offender Law. In that case, the supreme court observed that it is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Furthermore, courts are charged with applying these punishments, unless they are found to be unconstitutional. The supreme court in Dorthey provided that the judiciary maintains the distinct responsibility for reviewing sentences imposed in criminal cases for constitutional excessiveness. Thus, if a trial court determines that the habitual offender punishment mandated by LSA-R.S. 15:529.1 makes no "measureable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime" the court has the option, indeed the duty, to reduce such a sentence to one that would not be constitutionally excessive. Dorthey, 623 So. 2d at 1280-81.

In State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672, the Louisiana Supreme Court reexamined the issue of when Dorthey permits a downward departure from a mandatory minimum sentence. The court held that a trial judge may not rely solely upon the nonviolent nature of the instant crime or past crimes as evidence which justifies rebutting the presumption of constitutionality. Further, the court held that, to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "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.

Johnson, 709 So. 2d at 676.

We have reviewed the record and find that it supports the sentence imposed. Based on our review, we cannot say that the trial court erred or abused its discretion in imposing the mandatory sentence under LSA-R.S. 15:529.1(A)(4)(b). The mitigating factors cited by defendant in his brief are not sufficient to warrant a downward departure from the minimum mandatory sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence, particularly in light of his admitted substance abuse and repeated criminality. 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, to the circumstances of his case, and to his status as a fourth-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 and, therefore, this assignment of error also lacks merit.

Finding no error or abuse of discretion by the trial court, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

CONVICTION, HABITUAL OFFENDER AJUDICATION, AND SENTENCE AFFIRMED.