NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 0343

STATE OF LOUISIANA

VERSUS

TERRANCE DAMON MOORE

Judgment rendered September 21, 2018.

******

Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne, State of Louisiana
Trial Court No. 716770
Honorable Juan W. Pickett, Judge

******

JOSEPH L. WAITZ, JR.
DISTRICT ATTORNEY
ELLEN DAIGLE DOSKEY
ASSISTANT DISTRICT ATTORNEY
HOUMA, LA

ATTORNEYS FOR
STATE OF LOUISIANA

BERTHA M. HILLMAN
LOUISIANA APPELLATE PROJECT
COVINGTON, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
TERRANCE DAMON MOORE

TERRANCE MOORE
ANGOLA, LA

PRO SE
DEFENDANT-APPELLANT

******

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

PETTIGREW, J.

The defendant, Terrance Damon Moore, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1.[1] He pled not guilty and, following a jury trial, was found guilty of the responsive offense of manslaughter, a violation of La. R.S. 14:31. The State filed a habitual offender bill of information, which alleged the defendant had a prior conviction, via a guilty plea, for armed robbery.[2] Following a hearing on the matter, the defendant was adjudicated a second-felony habitual offender and sentenced to eighty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two counseled assignments of error and one pro se assignment of error. We affirm the conviction, amend the sentence to remove the parole restriction, and affirm the sentence as amended.

FACTS

On the night of November 11, 2015, Ernest Sims[3] drove to his home on Mozart Drive in an Ashland North subdivision in Houma. As he parked his truck and exited the vehicle, two men armed with handguns approached Ernest. Ernest ran, and the two armed men ran after him. Ernest got as far as the yard of his neighbor, Martin Reyes. Ernest was shot and died as a result of multiple gunshot wounds to the torso. Martin heard the gunshots, went outside, and found Ernest on the ground.

Detective Lieutenant Mitch Legendre, with the Terrebonne Parish Sheriff's Office, was the lead investigator on the case. The Sheriff's Office received an anonymous tip about the defendant's involvement in the shooting. Detective Legendre prepared an

---

[1] Co-defendant Michael Scott was charged with second degree murder and accessory after the fact under different docket numbers: 32nd Judicial District Court ("JDC"), Parish of Terrebonne, docket nos. 744,277 and 722,150. The cases of both defendants were consolidated, and the co-defendants were initially tried together. During trial, Scott pled guilty to the accessory-after-the-fact charge in exchange for the State dismissing the second-degree-murder charge.

[2] The habitual offender bill of information alleged the following predicate felony conviction: January 26, 2004 conviction of armed robbery under 32nd JDC, Parish of Terrebonne, docket number 410,281.

[3] Sims is incorrectly referred to as "Simms" in the appellate record. The Coroner's Report contains the correct spelling.

arrest warrant and attempted to locate the defendant, to no avail. The defendant subsequently surrendered.

Keyonka Livas and Renata Livas, the defendant's cousins, both testified at trial. According to their testimony, the defendant called Renata about 4:00 a.m. to pick him up in Ashland. Renata, who lived in Schriever, did not know the Ashland area very well, so she called Keyonka, who lived in Houma, to go pick up the defendant. Renata, however, still drove toward Houma. Keyonka picked up the defendant in Ashland, and drove to Glynn Avenue, off of Industrial Boulevard, near Chabert Medical Center, where they met Renata. The defendant got out of Keyonka's vehicle and into Renata's vehicle. Renata drove the defendant back to her house in Schriever. When the defendant asked Renata to drive him back to Houma, she was confused because they had just come from Houma. The defendant told Renata that he had shot someone. Renata drove the defendant back to Senator Circle, in Houma.

The defendant did not testify at trial.

COUNSELED ASSIGNMENT OF ERROR NO. 1

In his first counseled assignment of error, the defendant argues the trial court erred in sustaining the State's objection to Detective Legendre's testimony regarding statements that Sabrina Washington made to him during the investigation.

The State filed a motion in limine during trial. At the beginning of the second day of trial, outside the presence of the jury, the trial court took up the State's motion. Detective Legendre had not yet testified. The statement at issue, according to Ella Kliebert, defense counsel, was a statement that Jeremy Williams (also known as "Kenny Boo") made to Ernest Sims. Sabrina Washington, according to Kliebert, was near or around Ernest and overheard what Jeremy told Ernest during an allegedly heated argument. The statement (or statements) Sabrina heard was: "I'm gonna kill you. You're going to be a dead man tomorrow." According to Kliebert, this conversation took place the day before Ernest was killed. Sabrina then went to the police and told Detective Legendre what she heard Jeremy tell Ernest. Neither Jeremy nor Sabrina could be found before trial and, as such, they were unavailable witnesses.

The issue, therefore, was the admissibility *vel non* of what Detective Legendre would testify to regarding this issue. Specifically, the defense sought to have Detective Legendre testify that he spoke to Sabrina, and Sabrina told the detective that she heard Jeremy threaten Ernest. The prosecutor, J. Christopher Erny, argued that such testimony from Detective Legendre constituted double hearsay, and there were no exceptions to allow either out-of-court statement into evidence. Kliebert argued that Sabrina's statement to Detective Legendre was admissible under the statement against interest exception. David Ardoin, defense counsel for co-defendant Michael Scott, argued that Jeremy's statement to Ernest was admissible under the excited utterance exception.

The trial court informed defense counsel it would take up each hearsay issue as it arrived during trial. In relevant part, regarding the right to present a defense and what Detective Legendre would be allowed to testify to, the trial court made the following findings:

> The crux of the evidence is trying, that is trying to be admitted is whether or not it's hearsay evidence. And sometimes it's what one person told another person, who told another person, and so forth and so on.
>
> I just want to remind everybody Article 805 of the Code of Evidence which deals with hearsay says, 'hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule'.
>
> The defendants have a right to present a defense. That is basic. The United States Supreme Court ruled many years ago in *U.S. vs. Taylor* that [ ]an accused, however, does not have an unfettered right to offer evidence that is incompetent and privileged, or otherwise inadmissible, under the Standard Rules of Evidence. The defendant's right to present a defense is subject to established Rules of Procedure and evidence designed to insure both the fairness and reliability in the ascertainment of guilt, or innocence. And that is also the United States Supreme Court case that Ms. Kliebert also cited, which is *Chambers versus Mississippi*.
>
> Evidentiary rules, again United States Supreme Court in the *Sheffer* case, *U.S. v. Sheffer*, 'evidentiary rules do not abridge an accused the right to present a defense, as long as they are not arbitrary, or disproportionate for the purpose they are designed to serve.'
>
> In this particular case, what some of the statements that we're trying to get in were statements made by other people through a police officer.
>
> So I think what we're going to end up having to do is take each one individually, outside the presence of the jury. But as of this time, the Court is not going to allow -- as far as the Motion *in Limine* is concerned -- the Court's not going to allow Detective Mitch Legendre to testify about other

things that other people have told him, unless a valid exception to the hearsay rule exists.

. . . .

- Washington overheard 'Kenny Boo' tell Ernest that 'you'll be dead tomorrow'. That's the statement that I heard yesterday. That's the statement and that's in the Memorandum.

Just for example, if you apply that to Article 805, first you've got to get Kenny Boo's statement. You've got to find an exception to the hearsay rule to get that statement in. And just say that it's a statement against interest and getting past that, then you've got to get in why certain, because Sabrina's the one that repeated it, and she's the one that told it to the police officer, how -- you've got to find an exception to the hearsay rule, to be able to get that in, before the officer can testify to that.

. . . .

So I don't have a problem if you ask an officer, did you investigate other suspects? Did you investigate other leads? Did you receive information about Kenny Boo or Joe Blow? Or did you follow up, did you follow up all information; and what did you do with that information?

But as far as the substance of what was said, the Court's not going to permit it, unless it falls within one of the clearly-defined exceptions to the hearsay rule.

On the cross-examination of Detective Legendre, the detective testified he interviewed Sabrina Washington. At this point, Kliebert asked for a ruling by the trial court, and the jury was removed from the courtroom. Kliebert sought to get the alleged threatening statement made by Jeremy to Ernest into evidence through the testimony of Detective Legendre. Similar arguments were made as those in the motion in limine. Kliebert added that Sabrina's statement to the detective also fell under the present sense impression exception to the hearsay rule. See La. Code Evid. art. 803(1).

Regarding the present sense impression exception, the trial court ruled:

All right, it's not [present sense impression] -- that requires that the statement be made while she was observing; and therefore immediately thereafter. There's been nothing presented before the Court that it was immediately thereafter.

The trial court reiterated: "The Court does not find that the statement to Detective Legendre from Sabrina Washington falls under the hearsay exception under number 3, then existing mental, emotional, and physical conditions." The trial court concluded:

You know one of the things in Article 805, with the Code of Evidence, when you are dealing with statements made outside of court, hearsay included within hearsay, which is exactly what Detective Legendre's statement is. It is a statement that includes a statement that somebody else heard

somebody else make. So it's hearsay included within hearsay. It is not excluded under the hearsay rule, if each part of the combined statement conforms with an exception to the hearsay rule.

The Court finds that the statement in Detective Legendre's report, in reference to Sabrina Washington -- the combined statements do not conform with the exceptions to the hearsay rule.

Hearsay evidence is evidence of an out-of-court, unsworn, oral or written statement made by a person other than the testifying witness that is offered for the truth of its content. La. Code Evid. art. 801(C); **State v. Veal**, 583 So.2d 901, 903 (La. App. 1 Cir. 1991).

Louisiana Code of Evidence article 803 provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> **(2) Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> **(3) Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or his future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.

The defendant in brief argues that Jeremy's statement to Ernest was during a heated argument, and that Jeremy's angry, emotional outburst was an excited utterance under Article 803(2). The defendant further argues that Jeremy's statement fell under the existing mental, emotional, or physical condition exception under Article 803(3). According to the defendant, the statement established Jeremy's state of mind, and his intent and plan. The defendant simply notes in brief that the trial court rejected his argument that Sabrina's statement to Detective Legendre was a present sense impression exception and, therefore, admissible. According to the defendant, the exclusion of the statements impaired his due process right to present a defense. The primary defense was that someone else murdered Ernest and, according to the defendant, by not allowing

the defendant to place this statement before the jury, the trial court impermissibly impaired his right to present a defense.

Few rights are more fundamental than a defendant's right to present a defense. **Chambers v. Mississippi**, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). In compelling circumstances, the defendant's right to present his defense allows admission of hearsay evidence. See **State v. Rubin**, 2015-1753 (La. 11/6/15), 183 So.3d 490, 491 (per curiam). Constitutional guarantees, however, do not assure the defendant the right to admit any type of evidence -- only that which is deemed trustworthy and has probative value. **State v. Governor**, 331 So.2d 443, 449 (La. 1976). See **State v. Nixon**, 2017-1582 (La. App. 1 Cir. 4/13/18), __ So.3d __, 2018 WL 1773210, at *4.

Based on our careful review of the entire record, we find no reason to disturb the trial court's ruling on the State's motion in limine (or in sustaining the State's objection at trial). The defendant, in being prohibited to allow a witness, Detective Legendre, to testify what another witness had told him she heard someone else say to Ernest, did not prevent the defendant from presenting a defense. The fundamental right to present a defense does not require the trial court to admit irrelevant evidence or evidence with such little probative value that it is substantially outweighed by other legitimate considerations. **State v. Coleman**, 2014-0402 (La. 2/26/16), 188 So.3d 174, 197, cert. denied, __ U.S. __, 137 S.Ct. 153, 196 L.Ed.2d 116 (2016). See **Holmes v. South Carolina**, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); **State v. Mosby**, 595 So.2d 1135 (La. 1992).

We agree with the trial court that what Detective Legendre would have testified to regarding what Sabrina told him she had heard constituted double hearsay. As such, both statements -- the statement Jeremy made and then the statement Sabrina made (to the detective) -- would be excluded unless each statement conformed with an exception to the hearsay rule. See La. Code Evid. art. 805. We agree, as well, with the trial court that both statements, together, did not fall under a hearsay exception and, as such, Detective Legendre's statement about what Sabrina told him she had heard Jeremy say,

was inadmissible. In addition to being inadmissible hearsay, such testimony by Detective Legendre would have been overly prejudicial and would have served only to confuse the jury. See La. Code Evid. art. 403.

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. La. Code Evid. art. 803(2). The two basic requirements for an excited utterance are: (1) an occurrence or event sufficiently startling to render normal reflective thought processes of an observer inoperative, and (2) the statement of the declarant was a spontaneous reaction to the occurrence or event and not the result of reflective thought. **State v. Hilton**, 99-1239 (La. App. 1 Cir. 3/31/00), 764 So.2d 1027, 1034, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. In considering the spontaneity of the reaction, the trial court must determine whether the time interval between the event and the statement was long enough to permit a subsidence of emotional upset and a restoration of a reflective thought process. **Id.** at 1035. If Jeremy and Ernest were in an argument, there was no event therein so startling as to render Jeremy's normal reflective thought process inoperative. Jeremy may have made a statement, and it may have been made in anger, but such a statement would not have constituted an excited utterance under Article 803(2).

The "state of mind" exception to the hearsay rule under Article 803(3) is based on the belief that a spontaneous expression of a declarant's condition at the time the statement is made is generally a reliable indicator of the declarant's state of mind. **State v. Magee**, 2011-0574 (La. 9/28/12), 103 So.3d 285, 316, cert. denied, 571 U.S. 830, 134 S.Ct. 56, 187 L.Ed.2d 49 (2013). The limitation of this exception, however, is that a statement of present state of mind cannot be used to prove the acts of a third party. See **State v. Weedon**, 342 So.2d 642, 646 (La. 1977) (An out-of-court declaration by one person is inadmissible to show what another person did). **Magee**, 103 So.3d at 316-317. At the time of the alleged statement, Jeremy, while angry and threatening toward Ernest, was not making any kind of spontaneous remark about his *own* condition. Further, Sabrina's statement to Detective Legendre would have constituted an out-of-court

declaration by her to show what Jeremy allegedly did. Accordingly, neither statement would have been admissible under Article 803(3).

Under the present sense impression exception to the hearsay rule pursuant to Article 803(1), the critical factor is whether the statement was made while the individual was "perceiving" the event or "immediately thereafter." This immediacy requirement permits only the passage of "time needed for translating observation into speech." **State v. Johnson**, 2000-0680 (La. App. 1 Cir. 12/22/00), 775 So.2d 670, 679, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066. The party seeking to admit evidence under an exception to the hearsay rule has the burden to establish application of the exception. **Id.** The amount of time that elapsed between Jeremy's alleged statement and when Detective Legendre spoke to Sabrina is not evident in the testimony. It is apparent, however, from the detective's testimony that the time was longer than that needed for translating Sabrina's observation into speech. Accordingly, Sabrina's statement through the testimony of Detective Legendre would not have been admissible under the present sense impression exception. See **Id.**

As a general matter, this court has recognized that under compelling circumstances a defendant's right to present a defense may require admission of statements which do not fall under any statutorily recognized exception to the hearsay rule. **State v. Van Winkle**, 94-0947 (La. 6/30/95), 658 So.2d 198; **State v. Gremillion**, 542 So.2d 1074, 1078-1079 (La. 1989). Normally inadmissible hearsay may be admitted if it is reliable, trustworthy, and relevant, and if to exclude it would compromise the defendant's right to present a defense. **Van Winkle**, 658 So.2d at 202. See **State v. Juniors**, 2003-2425 (La. 6/29/05), 915 So.2d 291, 325-26, cert. denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006).

We find Jeremy's statement to Ernest neither reliable nor trustworthy so as to be admissible under the **Gremillion** exception. As Erny noted at the motion in limine hearing: "With respect to a statement that Sabrina Washington heard 'Kenny Boo' tell the victim, we don't know any of the circumstances surrounding it [or] how far apart they were. We don't know anything about it. There's no evidence, or indicia, of reliability to

that statement." Erny further opined that "we can go on the street and hear that kind of talk all the time," and that Detective Legendre had, in fact, spoken to Jeremy about this statement, and Jeremy had denied that he had made any such threat, but did say there was a disagreement over money owed.

Detective Legendre testified at trial that during his investigation of the case, he spoke to both Sabrina Washington and Jeremy Williams ("Kenny Boo"), as well as Jeremy's girlfriend, at the Sheriff's Office. When asked if after speaking to Jeremy and his girlfriend he had gained anything helpful in the investigation, the detective replied, "No, sir." According to Detective Legendre, Jeremy was six feet and five inches tall. The detective had seen the video of the suspects near Ernest's home. When asked if he suspected that Jeremy was one of the individuals he had seen in the video, the detective replied, "No, sir."

At trial, when the trial court ruled that Detective Legendre's testimony regarding what Sabrina had told him was inadmissible, the defense proffered the testimony. Outside the presence of the jury, Kliebert continued her cross-examination and asked the detective what Sabrina had told him about "Kenny Boo." According to Detective Legendre, Sabrina said that "Kenny Boo" said that "he's going to kill" Ernest Sims, "and you are going to be a dead man by tomorrow." On redirect examination, Erny asked Detective Legendre if he had spoken to Jeremy Williams ("Kenny Boo") about that particular statement. The detective indicated he had spoken to Jeremy about the statement and that Jeremy had told him (the detective) that "they had an argument, but he didn't say that." The following relevant exchange then took place between Erny and Detective Legendre:

> Q. Were you able to obtain information about the nature of the relationship between Ernest [Sims] and 'Kenny Boo'?
> A. Yes, sir.
> Q. What was your understanding of what the nature of the relationship between 'Kenny Boo' and Ernest [Sims] was?
> A. They were lifelong friends.
> Q. Okay, was it, in your experience from dealing with – from the information that you learned, was it unusual for them to have arguments?
> A. No.
> Q. Did you get any information from Sabrina, as to how close they were to each other, when these threats were being made – alleged threats?

A. No.
Q. Did you get information from Sabrina, as to where this incident was supposed to have taken place?
A. I believe she said it happened in front of Pop's mom's house.
Q. Did you get any information from Sabrina, as to where Pop's was located, and where 'Kenny Boo' was supposedly located, when all this was taking place?
A. In front of 416 Ashlawn.
Q. Well, I mean, were they like this – close to each other – or was one across the street –
A. Yes –
Q. – any information?
A. I believe – let me read my report -- No, she didn't – she didn't say.
Q. Was there any information from Sabrina about any particular weapons that 'Kenny Boo', or Ernest may have had?
A. No.
Q. Did you obtain any other information, from any source, whatsoever to corroborate the actual wording of the threat, 'I'm going to kill you. You gonna be a dead man by tomorrow', from anybody else?
A. No one else said that.

Later on redirect examination, Detective Legendre stated, "I mean, 'Kenny Boo' was 6'5" - I mean, it wasn't the guys on the video, so --". The trial court made the following ruling on the proffered testimony:

> Again, since the statement is being offered for the truth of the matter asserted – the statement by Sabrina Washington is being asserted for the truth of the matter asserted; and for no other grounds, there's nothing in the statement of Sabrina Washington to indicate whatsoever that the double-hearsay statement that you are trying to get out through Detective Legendre is reliable.
>
> Based on the testimony that was introduced on the Proffer, the officer followed up. He heard the statement from Sabrina. He followed up on the statement, or interviewed people, and could not verify the statement.
>
> Furthermore, the Court is of the opinion that allowing inadmissible hearsay testimony for the truth of the matter asserted, places that witness' version of the facts before the jury, without subjecting the witness to Cross Examination in that manner.

Based on the foregoing, we find that any information about what Jeremy Williams said, predicated on Sabrina Washington's assertion of what she heard Jeremy say, was irrelevant. And even if some semblance of relevance were found, the probative value of such evidence would have been substantially outweighed by the danger of unfair prejudice and confusion of the issues. See La. Code Evid. art. 403. The defendant was not deprived of his right to present a defense. In opening statement and closing argument, as well as throughout the trial, especially during the cross-examination of

Detective Legendre, defense counsel presented the theory that it was someone else other than the defendant who shot and killed Ernest. According to defense counsel, who provided names of several others who should have been investigated, the police did not look at all of the evidence or possible suspects, and further, the police should have continued their investigation to find the real individuals responsible for the shooting.

Constitutional guarantees do not require the admission of statutorily inadmissible evidence where a defendant's ability to present a defense has not been impaired. Further, constitutional guarantees do not require the admission of evidence that is not trustworthy or lacks probative value. See **State v. McBride**, 2000-0422 (La. App. 3 Cir. 11/15/00), 773 So.2d 849, 858-859, writ denied, 2001-0294 (La. 2/8/02), 807 So.2d 858; **State v. Corley**, 97-235 (La. App. 3 Cir. 10/8/97), 703 So.2d 653, 663, writ denied, 97-2845 (La. 3/13/98), 712 So.2d 875. Accordingly, we find the trial court did not err in granting the State's motion in limine and/or the State's objection to limit testimony regarding Jeremy Williams. See **McBride**, 773 So.2d at 861. We also find that the defendant was not deprived of the opportunity to present a defense.

The trial court's evidentiary ruling(s) did not undermine the reliability of the jury's verdict in this case and, as such, this counseled assignment of error is without merit.

COUNSELED ASSIGNMENT OF ERROR NO. 2

In his second counseled assignment of error, the defendant argues his eighty-year sentence is excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive 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. A sentence is considered 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. Andrews**, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 454. 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. 1 Cir. 1988). 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 La. Code of Crim. 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. 1 Cir. 5/9/03), 849 So.2d 566, 569.

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). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981). 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).

Having been adjudicated a second-felony habitual offender, the defendant faced a sentence of not less than twenty years and not more than eighty years. See La. R.S. 15:529.1(A)(1) prior to amendment by 2017 La. Acts, Nos. 257 and 282, § 1; La. R.S. 14:31(B). The trial court imposed the maximum sentence of eighty years at hard labor without benefits. The defendant argues in brief that the trial court erred in basing his enhanced sentence on two armed robberies. According to the defendant, the jury rejected evidence of armed robbery in the instant matter by finding him guilty of manslaughter. The defendant also argues he is not the worst kind of offender and, as such, should not have received the maximum sentence.

We note initially that the defendant is incorrect in his assertion that the jury found him guilty of manslaughter because it rejected evidence of an armed robbery. There was

no evidence at trial to establish the killing of Ernest was committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. See La. R.S. 14:31(A)(1). It appears, thus, the jury in this case rendered a compromise verdict. Louisiana's system of responsive verdicts presupposes a jury's authority to compromise its verdict even in the face of overwhelming evidence of the charged crime. **State v. Johnson**, 2001-0006 (La. 5/31/02), 823 So.2d 917, 923 (per curiam). The fact finder has the right to "compromise" between the charged offense and a verdict of not guilty. A "compromise" verdict is allowed for whatever reason the fact finder deems to be fair, so long as the evidence is sufficient to sustain a conviction for the charged offense. **State v. Collins**, 2009-2102 (La. App. 1 Cir. 6/28/10), 43 So.3d 244, 251, writ denied, 2010-1893 (La. 2/4/11), 57 So.3d 311, cert. denied, 565 U.S. 818, 132 S.Ct. 99, 181 L.Ed.2d 27 (2011).

It is clear the trial court considered Article 894.1, as well as the defendant's criminal history, in arriving at an appropriate sentence. In its reasons for sentence, the trial court stated, in pertinent part:

> The evidence shows that Mr. Moore has been adjudicated a 2-time convicted felon. The evidence before me in docket number 410,281 shows that Terrance Moore was previously convicted of Armed Robbery, which is a crime of violence. The Bill of Information alleges that the incident occurred at the Jubilee Convenience Store, where other individuals involved with this, were alleged to have been involved with this. They were charged with it. But, the Bill of Information alleges that there was a gun involved in the Robbery of the Jubilee Convenience Store in Terrebonne Parish. He pled guilty to that offense.
>
> The evidence also shows that Mr. Simms, the victim was at his home. And the video showed two individuals ran up to him with firearms and shot him and killed him, shot him while he was on the ground; and it looks like he was - some objects were taken or removed from him, while he was on the ground.
>
> The evidence shows that there were two individuals - at least one of which was armed with a firearm and something of value was taken from Mr. Simms. So there was another Armed Robbery. So, the Court is looking at two Armed Robberies, both involved firearms. 1) the person survived and the second one, that we are here for today, the victim, did not survive.
>
> The testimony from the defendant's cousin in this matter was that he admitted to her, that he had just shot somebody. So based on the evidence that was presented at trial, the Court is going to take judicial notice of, and the Court having taken into consideration all the factors, of the Code of Criminal Procedure Article 894.1, the Court is of the opinion that there is

> undue risk that during any period of a suspended sentence, although he is not entitled to a suspended sentence, or any type of probation, that Mr. Moore will commit another crime.
>
> Mr. Moore is in need of correctional treatment, or a custodial environment, that can be best provided most effectively by his commitment to a penal institution. The Court finds that a lesser sentence will deprecate the seriousness of Mr. Moore's crimes.
>
> The following grounds, while not controlling the discretion of the Court, the Court accorded great weight in the determination on the type of sentence Mr. Moore should receive, the Court finds that Mr. Moore's conduct during the commission of this offense, manifested deliberate cruelty to Mr. Ernest Simms.
>
> The Court finds that Mr. Moore used actual violence in the commission of the offense. The Court finds that a firearm was used in the commission of the offense, like the previous crime of violence, that he had pled guilty to. The Court finds that the previous - prior Armed Robbery that he pled guilty to had a sentence of 10 years to 99 years.
>
> The Court also finds that the offense resulted in a significant and permanent injury to Mr. Simms, which resulted in his death.
>
> And again, the Court finds that a firearm was used in the commission of the offense.

At the hearing on the motion to reconsider sentence, the trial court denied the motion and found the following:

> ... The Court feels every human life is valuable - no matter what their profession is in life. But the Court does know that Mr. Moore had previously pled guilty to Armed Robbery, whether he was the driver or the gun man, he was taking something of value from another, with a dangerous weapon.
>
> And that is what happened in this particular case, which ultimately resulted in the murder of Mr. Ernest Simms. For those reasons, and the reasons stated at the sentencing, the Court's going to deny the Motion.

As a general rule, maximum or near maximum sentences are to be reserved for the worst offenders and the worst offenses. **State v. James**, 2002-2079 (La. App. 1 Cir. 5/9/03), 849 So.2d 574, 586. Also, maximum sentences permitted under a statute may be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. See **Hilton**, 764 So.2d at 1037. See **State v. Reado**, 2012-0409 (La. App. 1 Cir. 11/2/12), 110 So.3d 1082, 1084-1085.

Given the trial court's consideration of the factors set forth in Article 894.1, the defendant's previous conviction for armed robbery, and the nature of the instant crime, we find no abuse of discretion by the trial court. The offender may not appear to be one

of the worst possible offenders, but the trial court implicitly found and the record before us convinces us that the defendant poses a grave risk to public safety. See **State v. Thompson**, 543 So.2d 1132, 1135 (La. App. 1 Cir. 1989). The record provides sufficient justification for the imposition of the eighty-year sentence. Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

This counseled assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR

In his sole pro se assignment of error, the defendant argues the trial court erred in instructing the jury with a modified **Allen** charge after it initially could not reach a verdict. See **Allen v. U.S.**, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

After some deliberation, the twelve jury members met with the trial court. Alyssa Neathery, the jury foreman, informed the trial court that the jury had not reached a vote of ten. She stated that they took a vote "about four times" and that it did not seem like "anyone is going to budge." The trial court informed the jurors:

> As you know, this is an important case. If you don't agree on a verdict, the case is left undecided. I don't see any reason that the case can be tried again better than it has been tried this time, or more exhaustively than it has been. Any future jury would be selected, as you have been selected, so there is no reason to believe that this case would ever be submitted to twelve people, more intelligent or more impartial, or more competent to decide it; or that clearer evidence could be produced on behalf of either side.
>
> Please, understand that I don't want any juror to surrender his or her beliefs. As I told you, when I sent you out to deliberate, don't surrender your honest convictions, as to the weight of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. But, I want to repeat that, it is your duty as jurors to consult with one another, and to deliberate with a view of reaching an agreement. Each of you must decide the case for yourself. But you should do, only after consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations, don't hesitate to change your opinion, when you are convinced that you are wrong.
>
> To return a verdict, you must examine the questions submitted to with candor and frankness; and with prior deference to and regard for the opinions of each other.

> Each of you should pay attention and respect the views of the others, and listen to each other's arguments, and positions with patience and understanding.
>
> Remember again, this is a very serious matter.
>
> We are going to abide by your decision - whatever it is. But, if you cannot decide - I'm going to send you back just to see what you can do, if there is any change. But if you cannot decide this case, the next time you come back, I will accept that. But we would all be grateful, if you could reach a decision. And I would just ask that please try once more.
>
> Thank you.

One of the defense counsels objected to the trial court's request on the grounds that it was a modified **Allen** charge. Defense counsel continued, "I think even though this is referred to as Modified Allen Charge, it urges them to strongly - that we all want them to have a verdict." The trial court overruled the objection and clarified that:

> ... When you look at the Allen case, one of the things that the Court was looking at is whether or not the Court gave undue coercion to the minority; and I didn't even ask what side was minority. And I didn't give an instruction for the minority to re-evaluate their opinion. I told everybody to. But, I also told them that we would accept whatever decision they have, whenever they came back.
>
> When the jury returned, it had reached a verdict.

We agree with the trial court. Its request to the jury to try to reach a verdict was not an **Allen** or a modified **Allen** charge. An **Allen** charge is an instruction acknowledged to be calculated to dynamite jury deadlocks and achieve jury unanimity. **State v. Nicholson**, 315 So.2d 639, 641 (La. 1975). Such a charge, and any coercive modification thereof, is banned in the courts of Louisiana. **Id**. An **Allen** charge emphasizes that the jury has a duty to decide the matter at hand, which implies that the trial judge will not accept a mistrial in the case. Additionally, when the duty to reach a verdict is coupled with the trial court's admonition that those in the minority should reconsider their position, there exists an almost overwhelming pressure to conform to the majority's view. **State v. Washington**, 93-2221 (La. App. 1 Cir. 11/10/94), 646 So.2d 448, 454-455. See **State v. Mitchell**, 2017-0431 (La. App. 1 Cir. 9/21/17), 232 So.3d 60, 67. The Louisiana Supreme Court has banned the use of **Allen** charges and

"modified" **Allen** charges to ensure that juror verdicts are not the product of coercion. **Nicholson**, 315 So.2d 641; **Washington**, 646 So.2d at 454.

In what amounted to an untenable coercion of the minority view of the jurors, the **Nicholson** Court found the trial court invaded the province of the jury, noting as follows:

> In the course of giving its instruction, the trial court admonished the jurors that if a majority favor conviction, the minority should consider whether their doubts are reasonable, since they make no effective impression upon the minds of '* * * so many equally honest, equally intelligent fellow jurors. * * *' Likewise, the court instructed that if a majority or a lesser number favor acquittal, the other jurors should ask themselves whether they do not have reason to doubt the correctness of a judgment not concurred in '* * * by *many* of their fellow jurors. * * *'

Nicholson, 315 So.2d at 642. We found reversible error in **State v. Diggs**, 489 So.2d 1050, 1052 (La. App. 1 Cir. 1986), based on a similar instruction (reversing based on jury charge, in part, "If much the larger number of the jurors are of the opinion—are of one opinion, a dissenting juror should consider whether his or her opinion is reasonable in view of the fact that his or her opinion made no impression upon the minds of equally honest and equally intelligent people.").

In the instant matter, the trial court said nothing similar to the proscribed **Allen** charge. The trial court here, in fact, specifically informed the jurors it did not want any of them to surrender his or her beliefs. It particularly charged the jurors to not "surrender your honest convictions, as to the weight of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict." The trial court continued that each juror should "respect the views of the others and listen to each other's arguments, and positions with patience and understanding," and that if they had not come to a verdict when they returned, it would accept that. It is safe to state as a settled proposition that when the court is informed by a jury that they cannot agree, it is not error for the court to impress upon them the importance of the case, urge them to come to an agreement, and send them back for further deliberation. **Governor**, 331 So.2d 443.

The charge given by the trial court did not rise to the level of an **Allen** charge or a modified **Allen** charge, and accordingly, the trial court did not abuse its discretion by

giving this instruction to the jury. See **State v. M.L. Jr.**, 2009-392 (La. App. 3 Cir. 4/14/10), 35 So.3d 1183, 1191-1195, writ denied, 2010-1113 (La. 2/11/11), 56 So.3d 998.

The pro se assignment of error is without merit.

SENTENCING ERROR

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, we have found a sentencing error. See **State v. Price**, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-124 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

In this case, the trial court imposed a sentence of eighty years at hard labor, without the benefit of parole, probation, or suspension of sentence. A defendant's sentence under the Habitual Offender Act is determined by the sentencing provisions of both the underlying crime and the Habitual Offender Act. **State v. Bruins**, 407 So.2d 685, 687 (La. 1981). Since the sentence for manslaughter and the applicable provisions of the Habitual Offender Act do not preclude eligibility for parole, see La. R.S. 14:31(B), 15:529.1(A)(1) and 15:529.1(G), the trial court's denial of parole eligibility is illegally harsh.

An appellate court is authorized to correct an illegal sentence pursuant to La. Code Crim. P. art. 882(A). Ordinarily, when correction of such an error involves sentencing discretion, an appellate court should remand to the trial court for correction of the error. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). It is clear here, however, that the trial court attempted to impose the maximum sentence possible for the defendant's conviction. In doing so, the trial court accidentally restricted the benefit of parole. Because the trial court's intentions are clear from the record, correction of this error does not involve sentencing discretion. Therefore, we amend the defendant's sentence to delete the restriction on parole. See **State v. Boudreaux**, 2013-0834 (La. App. 1 Cir. 2/18/14), 2014 WL 651845, at *2 (unpublished), writ denied, 2014-0338 (La. 4/4/14), 135 So.3d 1186.

The entire sentence is still to be served without the benefit of probation or suspension of sentence. We remand this case to the trial court for correction of the minutes and, if necessary, correction of the commitment order, and for transmission of the amended record to the Department of Corrections.

CONVICTION AFFIRMED; SENTENCE AMENDED TO DELETE PAROLE RESTRICTION, AND AFFIRMED AS AMENDED; REMANDED FOR CORRECTION OF MINUTES AND, IF NECESSARY, CORRECTION OF THE COMMITMENT ORDER, AND FOR TRANSMISSION OF THE AMENDED RECORD TO THE DEPARTMENT OF CORRECTIONS.