NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0128**
VERSUS	*	**COURT OF APPEAL**
WILBERT J. MEREDITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 396-772, SECTION "E"
Honorable Calvin Johnson, Judge
* * * * * *
Chief Judge William H. Byrnes III
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Miriam G. Waltzer,
Judge James F. McKay III)

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AFFIRMED

STATEMENT OF THE CASE

By bill of information dated April 1, 1998, defendant was charged with armed robbery; and, he pleaded not guilty. The trial court granted defendant's motion for appointment of a sanity commission; and, on February 23, 1999, a hearing was held at which defendant was found competent to stand trial. On March 25, 1999, defendant was tried by a twelve-member jury that found him guilty as charged. On April 8, 1999, the trial court sentenced defendant to thirty years at hard labor without benefit of parole, probation, or suspension of sentence. On the same date, a hearing was held on the multiple bill filed by the State; and, the trial court found defendant to be a third felony offender. On July 7, 1999, defendant moved to quash the multiple bill; and, on October 28, 1999, the trial court again found defendant to be a third offender. The trial court vacated the original sentence and resentenced defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

STATEMENT OF THE FACTS

Officer Therence White testified that on February 11, 1998, he investigated an armed robbery of Hattie Kelly in the 2200 block of Clio. He stated that during his investigation he recovered a flat-head screwdriver. He further stated that Ms. Kelly told him that she and defendant had gotten into an argument over lending money to defendant's uncle.

Hattie Kelly testified that she lived with defendant and her seven children; and, that on February 11, 1998, she gave defendant's uncle one hundred dollars. She further testified that after the uncle left, defendant became angry because she had given the uncle the money faster than she would have given it to him. She stated that she did not get angry and that she and defendant then walked over to his mother's house. While they were at his mother's house, defendant's mother told defendant that his ex-girlfriend had called. Ms. Kelly stated that she complained to defendant that his mother was always throwing his ex-girlfriend in her face. She further stated that defendant just looked at her and then went to lie down. She and defendant's mother spoke for a while, after which she and defendant went home. She stated that defendant had drunk about nine or ten cans of beer that evening.

When they got home, she lay on her bed; but, she stated that defendant came into the bedroom, closed the door, kept one of his hands behind his

back, and got on top of her. He told her that he was tired of her, and she told him to go to his mother's house. Ms. Kelly testified that defendant then began to choke her, and that when he brought his hand from behind his back, he had a screwdriver. He held the screwdriver against her neck and demanded the pouch she was wearing around her waist. She refused, and he again starting choking her. She stated that she threw the pouch onto the floor and that the pouch contained fifty-four dollars and her paycheck. She further stated that she slept with the pouch because defendant would steal her money. Ms. Kelly testified that after she threw the pouch on the floor, defendant ordered her to unplug the phone and lie on the floor. He told her that if she did not do so, he would kill her. Defendant left, and she waited about five minutes before going into the living room where she found her pouch and the screwdriver. She then called the police.

Dinnia Bridges testified that she was at the home of her daughter Ruby Meredith when defendant, Ms. Meredith's son, and Ms. Kelly were there. She stated that defendant went to bed because he was "kind of high." She further stated that Ms. Kelly kept picking up the telephone every time it rang.

Raymond Mathis, defendant's uncle, testified that he took defendant and Ms. Kelly to the grocery store and that Ms. Kelly lent him sixty dollars

after defendant said it was all right to lend him the money.

Ruthie Meredith, defendant's mother, testified that she, defendant, and Ms. Kelly were sitting in her kitchen singing gospel, talking about God, and praying. She stated that defendant got tired and went to lie down. She stated that no one drank beer because she did not allow it. She denied telling defendant that his ex-girlfriend had called.

ERRORS PATENT

A review of the record shows no errors patent.

ASSIGNMENTS OF ERROR NOS. 1 & 2

In these assignments of error, which are argued together in defendant's brief, defendant complains that the trial court erred in imposing an excessive sentence and that he received ineffective assistance of counsel because his trial counsel failed to file a motion for reconsideration of sentence. He argues that there was no compliance with La. C.Cr.P. art. 894.1 and that his counsel's failure to file a motion for reconsideration of sentence, as required by La. C.Cr.P. art. 881.1, prejudiced his right to have this court review the adequacy of the trial court's compliance with Article 894.1.

Generally, the issue of ineffective assistance of counsel is a matter more properly raised in an application for post-conviction relief to be filed in

the trial court where an evidentiary hearing can be held. State v. Prudholm, 446 So.2d 729 (La.1984); State v. Sparrow, 612 So.2d 191 (La.App. 4 Cir.1992). Only when the record contains the necessary evidence to evaluate the merits of the claim can it be addressed on appeal. State v. Seiss, 428 So.2d 444 (La.1983); State v. Kelly, 92-2446 (La.App. 4 Cir. 7/8/94), 639 So.2d 888. The present record is sufficient to evaluate the merits of defendant's claim.

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced him. With regard to counsel's performance, the defendant must show that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. As to prejudice, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, i.e. a trial whose result is reliable. Id., 466 U.S. at 687, 104 S.Ct. 2064. Both showings must be made before it can be found that the defendant's conviction resulted from a breakdown in the adversarial process that rendered the trial result unreliable. Id. A claim of ineffective assistance may be disposed of on the finding that either of the Strickland criteria has not been met. State v. James, 555 So.2d 519 (La.App. 4 Cir.1989), writ

denied 559 So.2d 1374 (La.1990). If the claim fails to establish either prong, the reviewing court need not address the other. State ex rel. Murray v. Maggio, 736 F.2d 279 (5th Cir.1984).

Defendant asserts that his counsel was ineffective for failing to file a motion for reconsideration of sentence. La. Const. art. I, § 20 explicitly prohibits excessive sentences; State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So.2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La.App. 4 Cir. 2/3/99), 727 So.2d 1264, 1272, rehearing granted on other grounds, (La.App. 4 Cir. 3/16/99); State v. Francis, 96-2389, p. 6 (La.App. 4 Cir. 4/15/98), 715 So.2d 457, 461, writ denied, 98-2360 (La. 2/5/99), 737 So.2d 741. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979, citing State v. Ryans, 513 So.2d 386, 387 (La.App. 4 Cir.1987), writ denied, 516 So.2d 366 (La.1988). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and is grossly out of proportion with the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; State v.

Webster, 98-0807, p. 3 (La.App. 4 Cir. 11/10/99), 746 So.2d 799, 801, reversed on other grounds, State v. Lindsey, 99-3256 (La. 10/17/00), 770 So.2d 339. 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. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So.2d 1215, 1217. The trial court has great discretion in sentencing within the statutory limits. State v. Trahan, 425 So.2d 1222 (La.1983). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D).

Defendant was found to be a third felony offender; and, because armed robbery is a crime of violence, as defined by La. R.S. 14:2(13), he was subject to a mandatory life sentence under La. R.S. 15:529.1(A)(1)(b)(ii). Even though a sentence is the minimum provided by La. R.S. 15:529.1, the sentence may still be unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or is nothing more than the needless and purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 677; State v. Dorthey, 623 So.2d 1276 (La.1993). However, the entire Habitual Offender Law has been found

constitutional; thus, the minimum sentences it imposes upon multiple felony offenders are presumed to be constitutional. State v. Johnson, 97-1906 at pp. 6-7, 709 So.2d at 675. There must be substantial evidence to rebut the presumption of constitutionality. State v. Francis, 96-2389 (La.App. 4 Cir. 4/15/98), 715 So.2d 457.

In State v. Lindsey, 99-3256 (La. 10/17/00), 770 So.2d 339, the Supreme Court discussed what it characterized as the "rare" circumstances where a sentence lower than the minimum sentence mandated by the Habitual Offender Law is required to be imposed because imposition of the mandatory sentence would be excessive under the Louisiana Constitution. The court, discussing State v. Johnson, stated:

> We held that "[a] court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it which would rebut [the] presumption of constitutionality" and emphasized that "departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." State v. Johnson, supra at 676, 677. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that:
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> > [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.
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> Id. (Citing State v. Young, 94-1636 (La. App. 4 Cir. 01/26/95), 663 So. 2d 525, 529).
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> In making this determination, we held that "while a defendant's record of non-violent offenses may play a role in a sentencing judge's determination that a minimum sentence is too long, it cannot be the only reason, or even the major reason, for declaring such a sentence excessive." Id. This is because the defendant's history of violent or non-violent offenses has already been taken into account under the Habitual Offender Law for third and fourth offenders, which punishes third and fourth offenders with a history of violent offenses more severely than those with a history of non-violent offenses. Id.
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> In addition, we held that the trial judge must keep in mind the goals of the statute, which are to deter and punish recidivism, and, we instructed that the sentencing court's role is not to question the wisdom of the Legislature in requiring enhanced punishments for multiple offenders, but rather to determine whether the particular defendant before it has proven that the minimum sentence is so excessive in his case that it violates Louisiana's constitution. Id.
>
> Finally, we held that if a trial judge finds clear and convincing evidence which justifies a downward departure, he is not free to sentence the defendant to whatever sentence he feels is appropriate under the circumstances, but must instead sentence the defendant to the longest sentence which is not constitutionally excessive. Id.

Lindsey, at p. 5, 770 So. 2d at 343.

Trial counsel was not ineffective for not filing a motion for reconsideration of sentence because defendant received the minimum mandatory sentence. Moreover, a review of the record and the sentencing transcript shows that at the conclusion of the sentencing hearing, the trial judge noted an objection on defendant's behalf. Therefore, defendant was able to preserve a "bare claim of excessiveness." See State v. Mims, 619 So.2d 1059 (La.1993). Defendant has not rebutted with clear and convincing evidence the presumption that the mandatory life sentence is constitutional. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 1

In this assignment of error, defendant complains that the evidence is insufficient to support the conviction against him. He points to the lack of fingerprint evidence on the screwdriver and asserts that the testimony of the victim is insufficient to show that he used this weapon to commit the offense.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Hawkins, 96-0766

(La. 1/14/97), 688 So.2d 473. The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.2d 1268 (La.App. 4 Cir.1989).

Defendant was found guilty of armed robbery. The elements of armed robbery are: (1) the taking; (2) of anything of value; (3) from the person of another or that is in the immediate control of another; (4) by the use of force or intimidation; (5) while armed with a dangerous weapon. La. R.S. 14:64; State v. Guy, 97-1387 (La.App. 4 Cir. 5/19/99), 737 So. 2d 231, writ denied 99-1982 (La. 1/7/00), 752 So.2d 175.

The State presented sufficient evidence of defendant's guilt. Ms. Kelly testified that defendant used the screwdriver as weapon as he held it against her neck and demanded the pouch in which she kept her money. Clearly, the jury found Ms. Kelly's testimony credible, and this credibility determination should not be disturbed. This assignment of error is without

merit.

DECREE

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED