STATE OF LOUISIANA	*	**NO. 2001-KA-0391**
VERSUS	*	**COURT OF APPEAL**
RAOUL A. HARRIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 326-415, SECTION "A"
Honorable Miriam G. Waltzer, Judge

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Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray and Judge Terri F. Love)

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AFFIRMED

Raoul A. Harris appeals his conviction and sentence for the crime of simple robbery. We affirm.

PROCEDURAL HISTORY

Harris was charged by bill of information on April 29, 1988 with armed robbery, a violation of La. R.S. 14:64. At trial, Harris was found guilty of simple robbery. The district court denied Harris' motion for new trial on September 20, 1988. He was sentenced to seven years at hard labor. Subsequently, he was adjudicated a second-felony habitual offender and resentenced to fourteen years at hard labor. The district court granted his motion for appeal. On May 31, 1989, this Court transferred Harris' application for a writ of mandamus to the district court for consideration of his motion for production of documents and request to dismiss appellate counsel. On June 16, 1989, the district court denied his motion for production of documents and on July 6, 1989, this Court denied his writ application regarding his request for documents. On December 1, 1989, the district court denied his application for writ of mandamus and motion to vacate an illegal sentence. On January 12, 1990, this Court denied

defendant's writ application wherein he attacked his habitual offender adjudication. On that same date this Court granted another of his writ applications, ordering his appellate counsel to file a brief within thirty days. On February 5, 1990, the district court denied Harris' motion for new trial. On October 18, 1991, this Court affirmed his conviction and sentence on an errors patent brief and supplemental pro se brief filed by Harris, after appellate counsel withdrew with an Anders brief. On July 6, 1992, the district court denied his motion to correct an illegally lenient sentence. On August 30, 2000, the Fifth U.S. Circuit Court of Appeals found that Harris had been constructively denied effective assistance of appellate counsel because counsel failed to mention any non-frivolous issues for appeal. The case was then remanded to federal district court for entering of judgment granting Harris' writ of habeas corpus, unless the State of Louisiana afforded him an out-of-time appeal. On November 3, 2000, the district court granted Harris an out-of-time appeal at the State's request.

FACTS

The facts of this case were recited in State v. Toledano, unpub., 89-0734 (La. App. 4 Cir. 10/15/91).

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1(a)

In his first assignment of error, Harris raises two separate errors, which will be referenced as (a) and (b). First Harris argues that the evidence was insufficient to support his conviction. He specifically alleges that the State failed to prove his identity as one of the robbers.

This Court has often discussed the well-settled standard for reviewing convictions for sufficiency of the evidence and will not repeat that standard herein. State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99).

Harris argues that the "one-on-one" identification of him and his two codefendants by Mr. Allini was suggestive. An identification procedure is suggestive if it focuses attention on the defendant. State v. Laymon, 97-1520, p. 16 (La. App. 4 Cir. 3/15/00), 756 So. 2d 1160, 1172, writs denied, 2000-1519 (La. 5/4/01), __ So. 2d __, 2001 WL 501476, 2000-1412 (La. 5/11/01), __ So. 2d __, 2001 WL 538486. We commented on these types of identifications in State v. Tapp, 99-2279 (La. App. 4 Cir. 5/30/01), __ So. 2d __, 2001 WL 669968:

> One-on-one identifications generally are not favored, but they are permissible when they are justified by the overall circumstances, particularly when the accused is apprehended within a relatively short period of time after the crime has been committed and has been returned to the crime scene. State v. Nogess, 98-0670 (La. App. 4 Cir. 3/3/99), 729 So. 2d 132; State v. Hunter, 92- 2535 (La. App. 4 Cir. 4/13/95), 654 So. 2d 781. Such identifications have been upheld because prompt confrontation between a defendant and victim promotes fairness

> by assuring the reliability of the identification-while the victim's memory is fresh-and the expeditious release of innocent suspects. State v. Short, 96-2780, p. 5 (La. App. 4 Cir. 11/18/98), 725 So. 2d 23, 25. A one- on-one identification is not suggestive per se. State v. Martello, 98-2066 (La. App. 4 Cir. 11/17/99), 748 So.2d 1192, writ denied, 2000-0240 (La. 12/15/00), 777 So. 2d 475.

99-2279, p. 14, __ So. 2d at __.

In the instant case, Harris concedes that Mr. Allini made the identifications less than one-half hour after the robbery. He represents that it was approximately seventeen to twenty-two minutes, based on the time Mr. Allini said it took for Officer Ballex to arrive at the store, and the time the officer was at the store before they left to go to the arrest scene. However, this fails to consider the minutes of transit time from the Seven-Eleven to the We Never Close store. Before arriving at the arrest scene, Mr. Allini overheard on Officer Ballex's police radio that the police had detained suspects as well as a car that matched the description and license plate number he had given. As this Court noted in State v. Valentine, 570 So.2d 533, 537 (La. App. 4 Cir. 1990), "[i]ndeed, by the very nature of a one-on-one identification occurring soon after a crime, there is a possibility that the suspect could be the perpetrator."

In State v. Nogess, 98-0670 (La. App. 4 Cir. 3/3/99), 729 So.2d 132, as in the instant case, the victim overheard a police radio call that two

suspects matching descriptions she provided had been stopped. Police then transported her to a motel, where she identified the two suspects as the men who had robbed her. This Court found that the fact that the victim overheard the radio call did not render the identifications any more suggestive than one-on-one identifications. Similarly, in the instant case, the fact that Mr. Allini overheard the radio transmission did not render his subsequent identification of defendant suggestive. Nor was the identification suggestive because of the unavoidable circumstances under which it, as all one-on-one identifications, were made. In fact, this one-on-one identification procedure was less suggestive than many, as Mr. Allini viewed four individuals, and there had only been three perpetrators. In many such procedures the number of suspects presented for identification matches the number of perpetrators. Moreover, Mr. Allini was able to identify each of the three perpetrators by their distinct roles in the robbery.

Harris next argues that the one-on-one identification was unreliable under the criteria set forth in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), in which the United States Supreme Court set forth five factors for consideration in determining whether a suggestive identification was nevertheless reliable, and thus admissible: (1) the opportunity of the witness to view the assailant at the time of the crime; (2)

the witness's degree of attention; (3) the accuracy of the witness's prior description of the assailant; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation.

Mr. Allini had an excellent opportunity to see Harris inside of the store because the three robbers were there that morning. Harris entered the store first, with a gun in his hand, threatening Mr. Allini that he better not move. Mr. Allini's testimony indicates that his attention was very focused on Harris, the only one with a gun. After the second robber emptied the cash register and walked out the door, Harris directed the third man to "move it" and Harris was the last person to leave the store. There was no evidence presented regarding any description of Harris by Mr. Allini yet, Mr. Allini testified that he believed that he gave a clothing and height description to Officer Ballex, but did not remember what those descriptions were. Harris attacks the reliability of the identification by noting that Mr. Allini referred to all three robbers in court as "young men," but Harris was thirty-two years old. However, this generalization does not serve to undermine the reliability of Mr. Allini's identification. Harris also states that Mr. Allini initially described the vehicle as red. This assertion is based on Officer Ballex's testimony that he radioed a description of a red car, however, Mr. Allini testified that the vehicel was gray. Mr. Burnett, the resident who saw the

three men enter the vehicle as he was on his way to work, also testified that the vehicle was gray. Officer Riley, who apprehended the three men at the We Never Close store, simply testified that the car he found in response to radio call was gray. Any rational trier of fact could have found that Officer Ballex was mistaken in this respect.

Harris also attacks the identification by noting discrepancies between the testimony of witnesses, in addition to those already mentioned. However, these rather minor inconsistencies were considered by the jury in its verdict.

Harris further attacks the "in-court" identification of him. During his testimony Mr. Allini identified each defendant by their role in the robbery, pointing out Harris as the gunman. Mr. Allini also testified that he had identified the suspects by their roles at the arrest scene. Harris' sole argument as to this in-court identification is that it was tainted because the one-on-one identification was tainted. This argument has no merit.

Harris was charged with armed robbery, defined by La. R.S. 14:64 as "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by the use of force or intimidation, while armed with a dangerous weapon." He was convicted of simple robbery, a responsive verdict to the charge of armed robbery. La.

C.C.P. art. 814(A)(22). "If the evidence adduced at trial was sufficient to support a conviction of the charged offense, the jury's [responsive] verdict is authorized." State v. Harris, 97-2903, p. 8 (La. App. 4 Cir. 9/1/99), 742 So.2d 997, 1001-1002, writ denied, 99-2835 (La. 3/24/00), 758 So. 2d 146.

Even though no gun or money was recovered, viewing this fact and all of the other evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense of armed robbery present beyond a reasonable doubt. Accordingly, the evidence was sufficient to sustain the verdict of simple robbery.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 1(b)

In the second part of Harris' first assignment of error, he contends that the district court erred in denying his motion for a new trial on the ground that the State failed to turn over Brady material.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the disclosure upon request of evidence which is favorable to the accused when the evidence is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This rule has been expanded to include evidence that impeaches the testimony of a witness where the reliability or credibility of the witness

may be determinative of guilt or innocence. Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The Brady rule is based on due process of law; "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial, that is, evidence favorable to the defendant which is material to guilt or punishment." State v. Rosiere, 488 So.2d 965, 970 (La.1986).

Harris argues that the district court in ruling on his motion for a new trial did not consider what he characterizes as "Brady material". He further argues that all information Mr. Allini provided to police that was contradictory to his testimony was Brady material, and should have been provided to him. He suggests that material would include such things as the police report that he avers contains the "original description of the perpetrators' red car" and any descriptions Mr. Allini gave to police before he learned that suspects had been stopped, a computerized print out of the transcript of Mr. Allini's 911 call, and the 911 tape itself. However, Harris merely speculates that these materials constitute Brady material and sought to have them produced in the district court before the court ruled on his motion for new trial. He maintains that the material was never produced, and the trial court denied his motion for new trial without considering it.

Harris filed a motion with this Court to supplement the record on appeal with these materials, which was denied by this Court on the ground that the incident report is contained in the record as an attachment to his federal habeas corpus petition, and that this Court found in the original appeal that counsel had failed to preserve any errors as to the possible failure to produce the 911 tapes at the time the motion for new trial was denied. Harris filed a motion to reconsider the denial of its motion to supplement, seeking to have this Court order the Orleans Parish District Attorney's Office and/or the New Orleans Police Department to produce the 911 tapes or complaint history of any calls from Mr. Allini or the Seven-Eleven store from the morning of the robbery, as well as the entire police incident report.

This Court is a court of record, limited to review of matters made part of the record in the trial court. State v. U.S. Currency, 2000-0209, p. 4 (La. App. 4 Cir. 10/31/00), 772 So. 2d 882, 883-884, writ denied, 2001-0116 (La. 6/1/01), __ So. 2d __, 2001 WL 685648. Harris remedy is to file an application for post-conviction relief in the district court, pursuant to La. C.Cr.P. art. 924 et seq., in which he can urge his grounds for production of these materials. His motion to reconsider the denial of his motion to supplement is denied.

Finally, Harris did not assert any ground in his written motion for new

trial and failed to show that the district court erred in denying that motion.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2(a)

In this second assignment of error, Harris raises two errors: (a) the district court erred in adjudicating him a second-felony habitual offender; and (b) his sentence is excessive.

As to the habitual offender bill of information, Harris claims the State presented insufficient proof that he was properly Boykinized before pleading guilty to the 1984 conviction for which he was adjudicated a second-felony habitual offender. He also asserts that there was a lack of evidence to identify him as the person previously convicted. The transcript of the habitual offender hearing reflects that defense counsel did not object orally or in writing to the habitual offender charges, or present any argument with respect to the evidence or to the sufficiency thereof. In the absence of such an objection or objections, Harris has failed to preserve his right to appeal these issues—under the applicable law, the jurisprudence in effect at the time of the 1989 habitual offender hearing. State v. Barrow, 352 So. 2d 635, 637 (La. 1977) (specific objection required under La. C.Cr.P. art. 741 to preserve error with regard to introduction of evidence of prior conviction, and to preserve review of sufficiency of that evidence); State v. Johnson,

548 So. 2d 1274, 1275 (La. App. 4 Cir. 1989) (objection required to preserve review of whether defendant was properly Boykinized before prior guilty plea); State v. Nelson, 544 So. 2d 13, 14 (La. App. 4 Cir.1989) (objection required to preserve review of whether State proved that cleansing period had not elapsed, and whether defendant was properly Boykinized before prior guilty plea). Accordingly, Harris has failed to preserve for appellate review either of these two issues pertaining to his habitual offender adjudication.

There is no merit to this assignment.

ASSIGNMENT OF ERROR NO. 2(b)

Harris claims that his sentence is excessive. He was sentenced as a second-felony habitual offender to fourteen years at hard labor for simple robbery. In 1988, at the time of his arrest, La. R.S. 14:65, proscribing simple robbery, provided for imprisonment with or without hard labor for not more than seven years. Under La. R.S. 15:529.1(A)(1), as in effect in 1989, the year he was adjudicated and sentenced as a habitual offender, a second-felony habitual offender convicted of a crime punishable by imprisonment for less than natural life was subject to imprisonment for not less than one-third the longest term and not more than twice the longest term prescribed for a first conviction. Thus, he was subject to a term of

imprisonment of not less than twenty-eight months and not more than fourteen years.

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. 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). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to 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.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in accordance with La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. If adequate compliance with La. C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Ross, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762; State v. Bonicard, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184, 185, writ denied, 99-2632 (La. 3/17/00), 756 So. 2d 324.

In sentencing Harris, who was thirty-two years old at the time of sentencing, the district court noted that it was doubling his sentence—giving him the maximum—because there was "so much" in his background. The

court noted a 1980 conviction for possession of a firearm by a convicted felon. The district attorney's office had originally charged him as a third-felony habitual offender, using this 1980 conviction and a 1984 theft conviction. However, the district court found that the State failed to meet its burden of proof as to the 1980 firearm charge. In connection with that 1980 arrest for possession of a firearm by a convicted felon, Harris was also charged with criminal damage and the then misdemeanor offense, now a felony, of illegal use of weapons by discharge of a firearm. It can be noted that after his 1984 theft conviction, Harris was adjudicated and sentenced as a second-felony habitual offender based on the 1980 firearm conviction. In sentencing him in the instant case, the district court said it believed he could benefit from being locked up for as long as possible under the law.

Harris argues that the district court did not consider any mitigating circumstances, including that evidence against him was "marginal," that no one was injured in the robbery, and that the alcohol was recovered. The evidence in the instant case supported a conviction for armed robbery, committed with a firearm. Even though there is less than a fully articulated record indicating that the distirct court considered not only aggravating circumstances, but also factors favoring a less severe sentence, a remand for resentencing is not appropriate in this case.

In State v. James, 490 So. 2d 616 (La. App. 2 Cir. 1986), the two defendants made an unauthorized entry into the residence of an elderly couple, and one of the men held a gun on them while the other searched their home. The robbers stole two to three hundred dollars in cash, some jewelry, and the couple's car. They were each charged with two counts of armed robbery, but were each convicted of the lesser charges of simple robbery, as in the instant case. Each defendant was adjudicated a second-felony habitual offender and sentenced to two fourteen-year terms of imprisonment, the maximum sentences, as in the instant case. The district court noted that one defendant, twenty-three years old, had convictions for theft, robbery and burglary, and was on probation at the time of the commission of the robbery of the couple. The other defendant, twenty-one years old, had two prior convictions for simple burglary. The district court noted that the elderly couple was obviously traumatized by the experience.

Considering the maximum sentences meted out in these similar cases, it cannot be said that Harris' identical sentence is disproportionate to the offense.

There is no merit to this assignment of error.

DECREE

For the foregoing reasons, the conviction and sentence of Raoul A.

Harris are affirmed.

AFFIRMED