NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2010-KA-0421**
VERSUS	*	**COURT OF APPEAL**
DELLOYD RAYFIELD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 473-538, SECTION "H"
Honorable Camille Buras, Judge

* * * * * *

PAUL A. BONIN
JUDGE

* * * * * *

(Court composed of Judge James F. McKay, III, Judge Michael E. Kirby, Judge Paul A. Bonin)

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AFFIRMED

DECEMBER 22, 2010

Arguing that the evidence is insufficient to support a verdict of guilty beyond a reasonable doubt, Delloyd Rayfield appeals his conviction for attempted first degree murder of Kevin McGrath. He also appeals his 49-1/2 year sentence, without the benefit of parole, probation, or suspension of sentence, as unconstitutionally excessive. Reviewing the record under the *Jackson v. Virginia* standard, we conclude that the evidence is sufficient and affirm Mr. Rayfield's conviction.[1] Because of the egregiousness of Mr. Rayfield's conduct during the commission of the crime, and because of the trial judge's careful and commendable compliance with the sentencing guidelines, we also conclude that the trial judge did not abuse her discretion in imposing a sentence very near to the maximum permitted by law and that the sentence is not unconstitutionally excessive. We explain our reasons below.

[1] We have, as we always do, conducted an independent review of the record for any errors patent and have found none. *See* La. C.Cr. P. art. 920.

I

In this Part we first address the constitutional standard of review for claims of insufficiency of evidence, and then turn to consider the evidence presented to the jury as the factfinder. Finally, we explain why we are satisfied that there was sufficient evidence to prove beyond a reasonable doubt every element of the offense of attempted first-degree murder.

A

The standard of review for sufficiency of evidence applicable to criminal convictions in state courts is set out in *Jackson v. Virginia,* 443 U.S. 307, 318-319:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, *but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.* But this inquiry does not require a court to "ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt." … Instead, the relevant question is *whether, after viewing the evidence in the light most favorable to the prosecution,* **any** *rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana,* 406 U.S., at 362, 92 S. Ct., at 1624-1625.

(bold emphasis in original; italicized emphasis added; ellipsis indicate citations omitted).

The United States Supreme Court has explained that this standard of review for sufficiency of evidence is highly deferential to the factfinder:

> This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the

> factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, 443 U.S. at 319 (emphasis in original). Thus, "[a] reviewing court may impinge on the factfinding function of the jury only to the extent necessary to assure the *Jackson* standard of review." *State v. Macon,* 2006-481, p. 8 (La. 6/1/07), 957 So. 2d 1280, 1285-1286. "It is not the function of an appellate court to assess credibility or re-weigh the evidence." *Id.* The Due Process Clause of the Fourteenth Amendment, the source of the *Jackson* standard, does not countenance, much less require, that we re-weigh testimony and witness credibility. And "[i]n criminal cases [a court of appeal's] appellate jurisdiction extends only to questions of law." La. Const. art. V, § 10 (B). *See also State v. Barthelemy,* 09-0391, p. 11 (La. App. 4 Cir. 2/24/10), 32 So. 3d 999, 2010 WL 681424.

Therefore, in discharging our review function for sufficiency of evidence, we cannot re-weigh or re-consider any conflicts in the testimony. We must confine ourselves to questions of law except to the extent, and only to the extent, that *Jackson* mandates otherwise. *State v. Gilmore,* 10-0059 (La. App. 4 Cir. 10/6/10), --- So. 3d ---, 2010 WL 3910335.

Moreover, we specifically discussed the sufficiency standard to be employed when a defendant disputes proof of identity in *State v. Stewart*, 2004-2219, p. 6 (La. App. 4 Cir. 6/29/05), 909 So. 2d 636, 639:

> When identity is disputed, the State must negate any reasonable probability of misidentification in order to satisfy its burden under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). *State v. Edwards*, 97-1797

> (La. 7/2/99), 750 So.2d 893; *State v. Woodfork*, 99-0859 (La. App. 4 Cir. 5/17/00), 764 So.2d 132. The reviewing court must examine the reliability of an identification according to the test set out in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977): (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' 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. *See State v. Brealy*, 2000-2758 (La. App. 4 Cir. 11/7/01), 800 So.2d 1116.

See also State v. Mathieu, 07-0204, p. 16 (La. App. 4 Cir. 2/27/08), 980 So. 2d 716, 725.

B

We turn now to a consideration of the record facts. Mr. McGrath was visiting New Orleans for a video project on which he employed. On his last night of work he went alone to Bourbon Street where he got "messed up" on alcohol and cocaine. He was either abducted by a group of men or willingly went with them to an apartment in the nearby Iberville public housing project. In the apartment he became their hostage. They stole his credit cards and demanded his ATM personal identification numbers in order to access cash. His cell phone was also stolen by them.

One of his captors, whom he described as particularly mean and cruel and whom he later identified as Mr. Rayfield, the defendant, became incredulous that Mr. McGrath did not have or did not know some PIN numbers for the accounts. While they were temporarily alone in the apartment, Mr. Rayfield became ever more insistent and frustrated with what he believed to be Mr. McGrath's lack of cooperation. Armed with a gun, he began to beat Mr. McGrath with the gun.

In the commotion, Mr. McGrath tried to escape the apartment. Mr. Rayfield began shooting him. When Mr. McGrath fell wounded outside the apartment, Mr. Rayfield approached him, placed the gun to Mr. McGrath's head, and pulled the trigger. Apparently, the weapon had been emptied of its ammunition. As Mr. McGrath began to reload, the wounded Mr. McGrath made it to the street where he was lucky to almost immediately flag down a police car.

Mr. Rayfield fled. Officer Arnesia Ambrose, who rescued Mr. McGrath, radioed a description of Mr. Rayfield to other police units in the immediate vicinity. Detective Hillary Smith, about one city block away, heard the broadcast and instantly observed a shirtless person, who fit the description, running away from the direction of the incident. He called out to the individual who continued to flee. He pursued the individual through several courtyard areas in the housing project. In one nearby area, certain that the fleeing suspect must be contained in one of the apartment buildings, Detective Smith began a search of the buildings. In the hallway of the very first apartment building, he located Mr. Rayfield crouching down amid a tee-shirt, gun, and identification. He arrested Mr. Rayfield and photographed him.

In the meantime, Mr. McGrath, the victim, was transported to University Hospital where he underwent surgery and remained in critical condition for several days. Several days later Detective Smith was able to interview Mr. McGrath and present him with several photographic line-ups, each containing the photographs of six persons. A photograph of Mr. Rayfield was contained in one of the line-ups

and Mr. McGrath instantly and positively selected and identified him as the "mean one" who had pistol-whipped, shot him, and tried to kill him.

Before the trial the crime lab established that bullet casings recovered from the apartment from which Mr. McGrath escaped as well as the bullet recovered by the surgeons from Mr. McGrath's body matched the gun located at Mr. Rayfield's arrest.

At the trial Mr. McGrath positively identified Mr. Rayfield as the person who shot and tried to kill him, and Detective Smith positively identified him as the person he saw fleeing from the direction of the shooting and whom he located in the hallway next to the gun used in the shooting.

Mr. Rayfield, and his sister, Marijuana Lewis, claimed that Mr. Rayfield had spent the evening on Bourbon Street, partying with his friend Jonny Virgil, who did not testify. Both Mr. Rayfield and Ms. Lewis suggested that the police were framing Mr. Rayfield and intimated that the evidence photographed in the hallway at the point of Mr. Rayfield's arrest was staged. Mr. Rayfield testified that he had no involvement whatsoever in the hostage-taking, in the thefts of property, in the shooting of Mr. McGrath, or in the attempted point-blank shooting of Mr. McGrath. But the jury rejected his testimony and accepted the testimony of the police, the criminalist, and Mr. McGrath.

C

First-degree murder is defined as the killing of a human being:

> When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, cruelty to juveniles, or second-degree cruelty to juveniles.

La. R.S. 14:30 A(1). First degree murder is punishable by death or life imprisonment. La. R.S. 14:30 C.

A person in commission of an "attempt" is:

> Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object . . . and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

La. R.S. 14:27 A. "If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence." La. R.S. 14:27 D(1)(a).

The elements, then, of attempted first degree murder, all of which the prosecution must prove beyond a reasonable doubt, require proof of the offender's specific intent to kill or to inflict great bodily harm while engaged in one of the enumerated felonies.

In our review, in which we do not re-weigh the testimony of the witnesses, we are satisfied that the evidence when viewed in the light most favorable to the prosecution is sufficient for a rational finder of fact to conclude beyond a reasonable doubt that Mr. Rayfield is guilty of the attempted second-degree murder of Mr. McGrath.

II

We explain in this Part why the sentence imposed upon Mr. Rayfield is not constitutionally excessive. Mr. Rayfield's specific argument for excessiveness is that he has never before been convicted of a crime of violence and that the trial judge failed to consider the following mitigating circumstances which indicate that he is capable of rehabilitation: that he was trying to improve himself through education and community service, that he was working two jobs and that he has the support of family members.

La. Const. art. I, § 20 prohibits the imposition of excessive punishment. *See State v. Landry*, 2003-1671 (La. App. 4 Cir. 3/31/04), 871 So.2d 1235, 1239-1240. A sentence may violate a defendant's constitutional right against excessive punishment even if it is within the statutory limit. *Id.*; *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993). A sentence within the statutory limit is constitutionally excessive if it is grossly out of proportion to the severity of the crime or is nothing more than the purposeless imposition of pain and suffering. *State v. Landry*, 871 So.2d at 1239-1240, citing *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672, 676

Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Black*, 98-0457, p. 8 (La.App. 4 Cir. 3/22/00), 757 So.2d 887, 892. If adequate compliance with Article 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 his case. *State v. Caston*, 477 So.2d 868, 871 (La. App. 4 Cir. 1985). The reviewing court must also keep in mind that maximum sentences should be reserved for the most egregious violators of the offense charged. *State v. Quebedeaux*, 424 So.2d 1009, 1014 (La.1982).

The trial court has great discretion in sentencing within the statutory limits. *State v. Trahan*, 425 So.2d 1222 (La. 1983). And 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.

Anyone convicted of first degree murder in Louisiana, when a capital verdict is not sought, shall be punished by life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence. *See* La. R.S. 14:30 C(2). Anyone convicted of the attempted commission of an offense that would otherwise be punishable by death or life imprisonment shall be imprisoned at hard labor for not less than ten nor more than fifty year without the benefit of parole, probation or suspension of sentence. *See* La. R.S. 14:27(D(1)(a). This is the sentencing range for Mr. Rayfield's convicton.

In tailoring the defendant's sentence in this case, the trial court reviewed the presentence report and stated:

THE COURT:

> The presentence investigation report details a juvenile history of the defendant, which is mainly curfew violations, truancy, things to that effect.
>
> Adult record:…October 22, 2002, municipal charge for resisting arrest, credit for time served; theft, also a plea of guilty as charged on February 4, 2003, credit for time served; February 22, 2003, arrest for armed robbery,…found not guilty by jury;…April 14, 2005, possession of marijuana,…pled guilty as charged…; May 11, 2005, not even a month later, another marijuana charge,…pled guilty…90 days inactive probation, probation revoked; July 5, 2006, battery,…pled guilty…; July 6, 2006, marijuana,...sentence six months…then his arrest for the charges of aggravated kidnapping, aggravated battery, illegal use of weapons, and attempted first degree murder,…
>
> * * *
>
> However, the Court would note from its reading of the criminal history of Mr. Rayfield that certainly he is a repeat offender. Even though those crimes are misdemeanors, there are some crimes of violence arrests for crimes of violence.
>
> Number two, "The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution." The Court finds that this case meets that criteria.
>
> And number three, any lesser sentence that the one the Court will impose would certainly deprecate the seriousness of this offense.
>
> Number one, that "The offender's conduct during the commission of this offense manifested deliberate cruelty to the victim." The Court would note that Mr. McGrath was shot several times, down one side of his body to the front, then when he turned to flee, he was

shot several times down the other side of his body, which fractured his leg and broke his leg so that he fell. And then the perpetrator, Mr. Rayfield, at that point came up, put the gun to his temple, clicked the gun, and it either malfunctioned or was out of ammunition. But for that malfunction or lack of ammunition, Mr. McGrath would have had a bullet to his brain.

He drug himself to a car where he attempted to hide from the perpetrators. When he got to the hospital, it was also discovered that he had been stabbed some—how many times, state, five to seven times?

[PROSECUTOR]:

Approximately seven times.

THE COURT:

Approximately seven times that he was stabbed to his abdomen and other parts of his body.

So, the Court finds that the offender's conduct during the commission of this crime certainly manifested deliberate cruelty to the victim.

…And upon the victim's not being able to give that PIN number to the perpetrators, that is when the violence started against the victim in this case, Mr. McGrath.

Number nine, "That the offense resulted in a significant, permanent injury or significant economic loss to the victim or his family." The victim testified during this trial that he had been employed with this company for, I think, close to 20 years; that he was the main person at this production company;…that the victim in this case was the main supervisor, the production lead person; that he was required to stand and lift for many hours a day; that after these injuries, he's gone through several surgeries.

…he has lost his house; he lost his two cars; he had to move in with his in-laws with his family because he lost his job; that he will not be able to work again in that capacity because of the physical permanent injuries that have resulted.

> In fact, the victim testified at the trial that he had just recently not had to wear his colostomy bag for the first time since the offense happened.
>
> And, lastly, "That the offender used a dangerous weapon in the commission of this offense."
>
> Taking into mitigation Mr. Rayfield is 24 years old, has never been convicted of a crime of violence, although he went to trial for an armed robbery where a jury found him not guilty.
>
> The Court notes that he does have three marijuana convictions and also a simple burglary that was a nolle prosequied case.
>
> Certainly, the horrific experience that the victim went through, Mr. Rayfield, the Court feels that any lesser sentence than the one that it's about to impose would, again, deprecate the seriousness of this offense. The Court finds that your testimony at the trial was not credible in the jury's eyes.
>
> And, lastly, … Mr. Hillary Smith, responding to that signal and hearing the gunshots, literally apprehended you in a stairwell with bloody clothing and other items from this case.
>
> …and you were caught literally by the scene fleeing from the perpetration of the crime.

The trial judge complied with the requirements of law that she consider the sentencing guidelines. And she amply articulated her reasons which justify imposing a near-maximum sentence upon Mr. Rayfield. The sentencing judge pointedly noted that, "But for that malfunction or lack of ammunition, Mr. McGrath would have had a bullet to his brain." In other words, the fact that Mr. McGrath is not a murder victim is not because of any the lack of effort by Mr. Rayfield to kill him.

Also, we disagree with Mr. Rayfield's contention that the sentencing judge did not adequately consider mitigating factors that Mr. Rayfield wanted to

rehabilitate himself. But we note that what little evidence there was more on the order of Mr. Rayfield's "good intentions." There is, for example, negligible evidence that he performed any community service before he subjected Mr. McGrath to his cruelties. And, while he had some family support, the sentencing judge could hardly have overlooked that his sister, with whom he had been living, supported him by giving questionable testimony on his behalf at the trial.

Although some defendants, who were also convicted of attempted first-degree murder, may have received lesser sentences than Mr. Mayfield, *see, e.g., State v. Laird*, 572 So. 2d 793 (La. App. 4th Cir. 1990) (upholding a sentence of forty years for first time offender), *State v. Jones*, 1999-1074 (La. App. 3 Cir. 3/8/00), 758 So. 2d 905 (holding forty year sentences on each of two counts were not excessive), we cannot conclude that this near-maximum sentence is excessive after considering the circumstances of this offense and the history of this particular offender. We are mindful that maximum sentences are reserved for the most egregious violators of the offense charged and we do not find that the sentencing judge abused her discretion in imposing this particular sentence.

DECREE

Delloyd Rayfield's conviction and sentence are affirmed.

AFFIRMED