

**STATE OF LOUISIANA**

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**NO. 2017-KA-0273**

**VERSUS**

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**COURT OF APPEAL**

**JAMAL BARTLEY**

\*

**FOURTH CIRCUIT**

\*

**STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 520-744, SECTION "I"  
Honorable Karen K. Herman, Judge

\* \* \* \* \*

**Judge Marion F. Edwards, Pro Tempore**

\* \* \* \* \*

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Marion F. Edwards, Pro Tempore)

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**CONVICTIONS AFFIRMED; SENTENCES  
VACATED AND MATTER REMANDED FOR  
RESENTENCING**

**OCTOBER 11, 2017**

Defendant, Jamal Bartley, appeals his convictions and sentences on four charges of criminal activity. For reasons that follow, we affirm the convictions on all four charges. We vacate the sentences on all four convictions and remand the matter for resentencing in accordance with this opinion.

On June 20, 2014, the State filed a Bill of Information charging Bartley with four counts of armed robbery with a firearm in violation of La. R.S. 14:64.3.<sup>1</sup> Bartley pled not guilty at his arraignment on June 26, 2014. On October 24, 2014, the court found probable cause for the charges and denied the defendant's motions to suppress the statement and identification. On May 25, 2016, a jury found Bartley guilty as charged on count one, and returned responsive verdicts of guilty of attempted armed robbery with a firearm on the other three counts. After defense motions for new trial and post-verdict judgment of acquittal were denied, the court sentenced Bartley to thirty-five years on count one and to seven-and-a-half years

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<sup>1</sup> Jamal Bartley was also charged with and convicted of one count of simple possession of marijuana, in violation of La. R.S. 40:966, which was decided by the judge while the jury deliberated the armed robbery charges. Gerald Williams and Jarvis Brown were also charged with armed robberies and other misdemeanor offenses committed on April 23, 2014 in the same bill of information. Gerald Williams pled guilty as charged to four counts of armed robbery with a firearm. Jarvis Brown was convicted of three counts of armed robbery with a firearm, one count of possession of marijuana and one count of access device fraud. His convictions were affirmed. See *State v. Brown*, 2016-0965 (La. App. 4 Cir. 5/3/17), 219 So.3d 518.

on each of the other three counts, all terms to run concurrently. The trial court denied Bartley's motion to reconsider the sentence, and granted a timely motion for appeal.

## **FACTS**

On April 23, 2014, New Orleans Police detectives investigated four armed robberies. One that occurred in the early morning hours in the Marigny and three that occurred in the afternoon in Lakeview. The description of the robbers matched in all four robberies. Cooperative investigations among detectives resulted in the arrest of three suspects later that day.

The first victim was Robert Boulanger, who was walking home alone at about 2:30 a.m. on April 23, 2014. He was listening to music through headphones and he was holding a beer. He noticed three men standing across the street. They ran up to him and two of the men pointed guns at him. One of the men pointed a gun at his chest and demanded his backpack, which contained training material from his job, his ID and keys. Mr. Boulanger called 911 and shortly afterward, spoke with Detective Flores who investigated the crime. Mr. Boulanger told Detective Flores the robbers were three black men with dreads. Two of the men drew guns and pointed them at him.

The second robbery victim was Michael Retiff, who was working on the remodel of a house in Lakeview in the afternoon of April 23, 2014. He was on a ladder scrapping windows when he noticed a green truck pass by the house twice. When he felt something tugging on his pants pocket, Mr. Retiff turned to see a man

pointing a gun at him. The man said “give me your wallet.” After Mr. Retiff gave the man his wallet, the gunman got into the front passenger seat of the green truck. The truck took off and Mr. Retiff called 911. Subsequently, Mr. Retiff went to the Third District Police Station to view photos. The man he identified as the gunman was Jarvis Brown. Mr. Retiff testified that he did not see Bartley.

Shortly afterward, Linda Hammerstein, a Lakeview resident, was sitting on her front porch one afternoon in April of 2014 when she noticed a green truck with an out-of-state license plate drive past her home. The truck stopped and backed up. Thinking the driver was seeking directions, Ms. Hammerstein was not alarmed at first. However, a man, whose face was covered with a bandanna got out of the car with a gun and demanded her cell phone. Ms. Hammerstein gave up her phone and the man got back into the front passenger seat of the truck and the truck drove off. Mr. Hammerstein went inside and dialed 911. She was able to track her phone by way of an app on her computer. She gave the location information to police officers.

Kristina Forshee returned to her home in Lakeview after picking up her two small children from school about 3:00 p.m. on April 23, 2014. As she was getting them out of the car she noticed a green truck speeding down the street. The truck came to an abrupt stop next to her car. A man got out of the passenger seat of the truck with a gun and ran, pointing the gun at her and her daughter. He said, “give me your purse, give me your stuff.” Ms. Forshee threw her purse and keys in the robber’s direction. The robbery picked the items up and ran back to the truck. He

got in and the truck drove off. A woman driving by called 911 and followed the truck. A neighbor also called police. Ms. Forshee learned from one of her credit card companies that her card was used at a gas station on Tulane Avenue. She gave that information to detectives investigating the crime. Subsequently, she was called to the Third District to retrieve her stolen items. She later identified Jarvis Brown as the robber.

Detective Michael Flores with the New Orleans Police Department testified that he investigated a report of an armed robbery in the Marigny, near the intersection of Frenchmen and North Rampart Streets. As part of the investigation, he interviewed the victim and viewed a surveillance video tape from a nearby restaurant. The surveillance tape was played for the jury and is a subject of one of Bartley's assignments of error. The surveillance video shows the men who robbed the victim getting out of an SUV. Mr. Boulanger viewed the footage several times the morning after the robbery before making the identification of the robbers in the photo lineup. At trial Mr. Boulanger identified Bartley as one of the robbers who pointed a gun at him.

According to Detective Flores' testimony, he was able to identify Tevin Henderson as a potential suspect from the video tape. A few days later, he developed two additional suspects in the robbery; namely, Gerald Williams and Jamal Bartley. Williams and Bartley were arrested in the robberies that occurred on the same day in the Lakeview area, and their descriptions matched those in the videotape of the robbery Detective Flores was investigating. Detective Flores

constructed two six-person photo lineups to show Mr. Boulanger and gave them to Detective Chris Laborde who showed the photos to the victim. The victim picked Jamal Bartley out of the lineup as the perpetrator of the armed robbery. Based on the victim's identification, Detective Flores arrested Bartley for armed robbery.

The jury also heard testimony from Detective Stephen Kriebel of the New Orleans Police Department. Detective Kriebel responded to three armed robberies within fifteen minutes of each other in Lakeview on April 23, 2014. A wallet was taken from the first victim, a cell phone from the second, and keys and a purse from the third.

Detectives tracked the cell phone taken from one of the victims and apprehended the suspects near the Iberville and Marais Street intersection. The suspects were in possession of the victims' credit cards. Detectives also found two hand guns in the suspects' vehicle. The clothes the suspects were wearing at the time, including a pair of khaki shorts, a white T-shirt, a pair of red shoes and a red bandanna worn by Bartley, were also taken into evidence at that time. Both guns and the clothing were introduced into evidence at trial. A credit card transaction at a gas station on Tulane Avenue led detectives to find a discarded purse taken from one of the victims.

Detective Russell Green of the New Orleans Police Department testified that he was involved in the investigation of the armed robberies in Lakeview on April 23, 2014. He was driving an unmarked police vehicle and was tracking a cell phone stolen from one of the victims down Canal Street. He ultimately located the

vehicle at Iberville and North Villere Street. It was a green truck parked near a construction zone. Detective Green was operating undercover and was wearing a white T-shirt, jeans and a contractor's work vest. The detective got out of his vehicle and observed the truck from about 30 feet away. When he saw three men matching the description of the robbers approach the truck, he notified other police units. Then he jumped into his vehicle and blocked the truck. By this time 30 or 40 police officers arrived, mostly in unmarked vehicles. The truck was now surrounded by police. Jarvis Brown was the driver, Bartley was in the back seat and Gerald Williams was in the passenger seat. Two firearms were visible. One was on the front seat and one on the back seat next to Bartley. Marijuana was also on the front seat of the truck. Detective Green also testified that he saw credit cards in the truck.

Detective Roy Shackelford, a Third District investigator, also participated in the investigation of the Lakeview robberies on April 23, 2014. He went with Detective Kriebel to talk to two of the victims. One of the victims was tracking her stolen cell phone and gave the detectives the information. That led to the apprehension of three suspects including Bartley.

## **DISCUSSION**

On appeal, Bartley assigns four errors:

- 1.) The trial court erred in denying the motion to sever the counts.
- 2.) The evidence is insufficient to support the convictions.
- 3.) The sentence for the armed robbery conviction is excessive.

4.) The defendant's right to full appellate review is compromised by an incomplete record.

### **ERRORS PATENT**

A review of the record reveals an error patent with regard to Bartley's sentences for armed robbery with a firearm and attempted armed robbery with a firearm. In the bill of indictment, the State invoked the firearm sentence provision of La. R.S. 14:64.3, which provides that when a firearm is used in the commission of an armed robbery or attempted armed robbery, the "offender shall be imprisoned for an additional period of five years without benefit of parole, probation, or suspension of sentence."

The trial court sentenced Bartley to thirty-five years at hard labor without benefit of probation, parole, or suspension of sentence for the count of armed robbery with a firearm, and to seven and one-half years on each of the three counts of attempted armed robbery with a firearm. However, the trial judge did not specify whether the sentences imposed included the enhanced term of imprisonment under La. R.S. 14:64.3. A sentence is indeterminate when the trial court fails to impose a consecutive five-year enhancement as mandated by La. R.S. 14:64.3.<sup>2</sup> Therefore, we hereby vacate the sentences and remand the matter for resentencing or clarification as to whether the sentences include any additional punishment as prescribed by La. R.S. 14:64.3.<sup>3</sup>

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<sup>2</sup> *State v. Burton*, 2009-0826, p. 3 (La. App. 4 Cir. 7/14/10), 43 So.3d 1073, 1076.

<sup>3</sup> *Id.*; see *State v. Amos*, 2015-0954 (La. App. 4 Cir. 4/6/16), 192 So. 3d 822, 826–827.



## ASSIGNMENT OF ERROR NUMBER TWO

The second assignment relates to the sufficiency of evidence. When issues are raised on appeal as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence.<sup>4</sup> Accordingly, Bartley's second assignment of error will be addressed first. Our standard of reviewing the sufficiency of the evidence to support a criminal conviction is well established. In reviewing the sufficiency of evidence, an appellate court must determine that the evidence, whether direct or circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt.<sup>5</sup> In cases relying on circumstantial evidence to prove one or more elements of the crime, when the fact-finder reasonably rejects the hypothesis of innocence advanced by the defendant at trial, that hypothesis fails, and the verdict stands unless the evidence suggests an alternative hypothesis sufficiently reasonable that rational jurors could not find proof of the defendant's guilt beyond a reasonable doubt.<sup>6</sup>

In the matter before us, in the conviction for the armed robbery of Mr. Boulanger, Bartley claims the State failed to negate the possibility that Mr. Boulanger misidentified him. In the three convictions for attempted armed

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<sup>4</sup> *State v. Miner*, 2014-0939 (La. App. 4 Cir. 3/11/15), 163 So.3d 132, 135 (citing *State v. Hearold*, 603 So.2d 731, 734 (La.1992)).

<sup>5</sup> *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *rehearing denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979).

<sup>6</sup> *State v. Captville*, 448 So.2d 676, 680 (La. 1984).

robbery, Bartley claims the State failed to present evidence sufficient to prove his involvement as a principal to the crimes.

In order to prove the armed robbery with a firearm of Mr. Boulanger, the State must prove beyond a reasonable doubt that the defendant “took something of value belonging to another from the person of another or that is in the immediate control of another, by force or intimidation, while armed with a dangerous weapon, and that the dangerous weapon used was a firearm,” and that “the dangerous weapon used in the commission of the crime of armed robbery is a firearm.”<sup>7</sup>

Bartley does not dispute that Mr. Boulanger was robbed at gunpoint, or that his backpack was taken by the robbers. Bartley asserts the State did not prove he was the one who committed the armed robbery. He argues Mr. Boulanger’s identification was unreliable because Mr. Boulanger did not identify him as the robber until having viewed a grainy surveillance video, taken at night in a partially illuminated area. Further Bartley argues Mr. Boulanger did not say Bartley was the man who robbed him, only that Bartley looked “closest to” the robber, and was “pretty damn close.”

In addition, Bartley argues the photo lineup from which Mr. Boulanger identified him was suggestive because in one of the lineups, his picture was in the number six position, and in the other his co-defendant’s picture was also in the number six position. Bartley notes that Mr. Boulanger even remarked on the positioning, commenting that it was “silly” that the detective put “the guy” (the

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<sup>7</sup> La. R.S. 14:64(A); La. R.S. 14:64.3(A); *State v. Amos*, *supra*, 192 So.3d at 829.

suspect) Mr. Boulanger picked from each lineup in the same number position in both lineups.

“[W]hen the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification.”<sup>8</sup> A positive identification by only one witness is sufficient to support a conviction<sup>9</sup>

Robert Boulanger testified he viewed the surveillance video on April 28, 2014 and watched it “multiple” times. During sentencing, the trial judge remarked that the surveillance video was “very perfect, clear, crystal clear video”. Further, the day after the armed robbery, Mr. Boulanger identified Bartley from a photo lineup presented to him at his home on April 29, 2014. He again identified Bartley from a lineup presented by Detective Laborde at the police station. Mr. Boulanger pointed to Bartley brandishing a weapon in the surveillance video. Although he admitted having had three beers earlier in the night, no evidence exists to suggest Mr. Boulanger was not being attentive. Notably he observed the robbers standing across the street and was sure they were going to rob someone but was hoping it would not be him. Mr. Boulanger had good opportunity to view his assailants. He looked at all three of the robbers; his vision was not just directed at one of his assailants; and he was confident Bartley was one of the robbers.

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<sup>8</sup> *State v. Weary*, 2003-3067 (La. 4/24/06), 931 So.2d 297, 311, quoting *State v. Neal*, 2000-0674 (La. 6/29/01), 796 So.2d 649, 658.

<sup>9</sup> *State v. Lambert*, 2015-0886 (La. App. 4 Cir. 1/20/16), 186 So.3d 728, 734, *writ denied*, 2016-0335 (La. 2/17/17), and *cert. denied*, No. 16-9132, 2017 WL 2080916 (U.S. Oct. 2, 2017).

Mr. Boulanger called 911 immediately after the robbers fled and met with Detective Flores approximately one-half hour after the robbery. Mr. Boulanger described the armed suspects as three black males with dreadlocks. He denied choosing Bartley's photo because it was No. 6 in the lineups and clarified he chose the picture because that was the man who robbed him at gunpoint.

Although Bartley argues that police protocol dictates that when there is more than one suspect in witness identification procedures, the suspects should not be placed in the same position in separate lineups, he offers no other proof the lineups were suggestive, and, in any event, does not show that a rational juror could not have accepted Mr. Boulanger's identification testimony. Robert Boulanger testified that his observation of his assailants was not limited to just one suspect but to all three. He was confident of his identification of Bartley and unequivocally testified that the identification was not influenced by the positioning of the suspects' pictures in the number six position of the photo lineups.

We find no merit in this assignment as it relates to Mr. Boulanger's identification of Bartley as the man who pointed a gun at him and took his backpack.

As to the attempted robberies, although the three victims were unable to identify the Bartley as their assailant, all of the victims identified the green truck the defendant was arrested in as the vehicle in which their assailant fled. Detective Kriebel testified the police tracked the suspects' flight immediately after the robberies via Ms. Hammerstein's stolen cell phone. Detective Kriebel identified

co-defendant Jarvis Brown seen in the gas station video, fueling the green truck with what proved to be Ms. Fortier's credit card. Moreover, Detective Kriebel verified the unauthorized charge on Ms. Fortier's credit card from the gasoline station's computer run of daily receipts for April 23, 2014, the day of the robberies. Detective Russell Green's testimony verified that Ms. Fortier's credit card and the cell phone of each of the victims were found in Bartley's possession when he was arrested. Detective Green also testified Ms. Fortier's purse containing Mr. Retif's wallet was found at the gasoline station.

La. R.S. 14:24 provides that "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." A principal is equally as culpable regardless of whether the principal directly commits the crime.<sup>10</sup> Given the evidence, a rational fact finder could have concluded the defendant participated in the crimes as a principal.

#### **ASSIGNMENT OF ERROR NUMBER ONE**

In this assignment, Bartley asserts that the trial court erred by denying his motion to sever the offenses.

La C.Cr.P. art. 495.1 provides for severance of offenses, and states:

If it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires.

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<sup>10</sup> See *State v. Pollard*, 14-0445 (La. App. 4 Cir. 4/15/15), 165 So.3d 289, 298, *writ denied*, 15-0926 (La. 4/22/16), 191 So.3d 1044.

A motion to sever offenses is directed to the sound discretion of the trial court, and the court's ruling thereon should not be disturbed on appeal absent a showing of an abuse of that discretion.<sup>11</sup> When ruling on a motion to sever, a trial court must weigh the possibility of prejudice to the accused against the important considerations of economical and expedient use of judicial resources.<sup>12</sup>

In determining whether joinder of the offenses will be prejudicial, a court should consider whether: (1) the jury would be confused by the various counts; (2) the jury would be able to segregate the various charges and evidence; (3) the defendant would be confounded in presenting his various defenses; (4) the crimes charged would be used by the jury to infer a criminal disposition; and (5) especially considering the nature of the charges, the charging of several crimes would make the jury hostile.<sup>13</sup> A defendant bears a heavy burden of proving prejudicial joinder of offenses, and he must make a clear showing of prejudice.<sup>14</sup>

Bartley argues he was prejudiced by the denial of his pre-trial motion to sever because he was confounded in presenting his defenses.

The defense in count one in the Marigny was that Bartley was not present at the scene and was misidentified. In the three Lakeview robbery counts, the defense was that although Bartley was present in the green truck, there was no proof he was involved in the robberies, and that he was not culpable because he played no part in those crimes.

Bartley's arguments are unpersuasive. As discussed *infra*, the State proved Bartley guilty of count one, the armed robbery of Robert Boulanger, through Mr.

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<sup>11</sup> *State v. Rowe*, 2013-1434 (La. App. 4 Cir. 10/8/14), 151 So.3d 838.

<sup>12</sup> *State v. Brooks*, 541 So. 2d 801, 804 (La. 1989).

<sup>13</sup> *State v. Hugle*, 2011-1121, p. 15 (La. App. 4 Cir. 11/7/12), 104 So.3d 598, 611.

Boulanger's testimony that he observed the faces of his assailants and identified Bartley from a photo lineup five days after the crime. Mr. Boulanger was confident of his identification of Bartley.

As Bartley's contention he was not culpable of the Lakeview armed robberies because there was no evidence he participated in any way, as discussed above, circumstantial evidence and the law of principals dictates otherwise.

Detective Russell Green's testimony verified that Bartley was seated in the rear of the green truck at the time of his arrest, and that the green truck was identified by the victims as the getaway vehicle. Detective Green added that credit cards and cell phones belonging to the victims of the Lakeview robberies, as well as marijuana and a hand gun were found in plain view on the rear seat where Bartley was located at the time he was arrested. In addition, the state showed that Bartley gave a statement implicating himself in each of the four robberies by admitting having been with the other suspects during the period of time all of the offenses were committed.<sup>15</sup>

In any event, Bartley has not shown any prejudice by the consolidation of the cases. The facts of each incident were simple and easily distinguishable from each other. In their opening statements, the state and the defense referred to the charges as separate offenses. The evidence against Bartley, which consisted of the victims' testimony, was not complex and was presented in an orderly fashion, allowing the jury to segregate the charges and the evidence. There was no indication the defense was stymied by the consolidation of the offenses. In fact,

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<sup>14</sup> *State v. Ennis*, 2011-0976 (La. App. 4 Cir. 7/5/12), 97 So.3d 575, 582.

<sup>15</sup> The defense takes exception to the state's assertion as will be explained in Assignment of Error Number 4.

the record shows that Bartley presented defenses of misidentification and non-participation in the crimes charged.

Considering that Bartley denied culpability and was able to present defenses without prejudice and the case was presented in an orderly and clear manner for the jury, thereby precluding any confusion, we find no merit in this assignment of error.

### **ASSIGNMENT OF ERROR NUMBER THREE**

Bartley argues his thirty-five year sentence for the armed robbery of Robert Boulanger is excessive given his age (twenty-one at the time of the armed robbery) and no prior criminal history.

Excessive sentences are explicitly prohibited by La. Const. art. 1, § 20. A sentence is excessive and therefore unconstitutional if it makes no measurable contribution to acceptable goals of punishment and is nothing more than the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime.<sup>16</sup> Thus, even though an imposed sentence may be within the statutory sentencing range, and therefore “legal,” it may still violate a defendant's constitutional right against excessive punishment.<sup>17</sup>

On appellate review of an excessive sentence claim, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion.<sup>18</sup> The reviewing court shall not

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<sup>16</sup> *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993) (internal citation omitted).

<sup>17</sup> *Id.*, at 1280.

<sup>18</sup> *State v. Cook*, 95-2784 (La.5/31/96), 674 So.2d 957, 959, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996).



set aside a sentence for excessiveness if the record supports the sentence imposed.<sup>19</sup>

C.Cr.P. art. 894.1 sets forth the guidelines to be considered by the trial court when sentencing a defendant convicted of a felony. Articulation of the factual basis for a sentence is the goal article 894.1.<sup>20</sup> “There is no requirement for a rigid or mechanical compliance with its provisions. Accordingly, the trial judge is not required to list every aggravating or mitigating circumstance so long as the record reflects that he adequately considered the guidelines of the article.”<sup>21</sup>

If the appellate court finds the trial court adequately complied with Article 894.1, it then must determine whether the sentence imposed is too severe in light of the particular defendant and the particular circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged.<sup>22</sup>

A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion.<sup>23</sup>

Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness.<sup>24</sup> For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, e.g, when it imposes punishment disproportionate to the offense.<sup>25</sup>

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<sup>19</sup> La. C.Cr.P. art. 881.4(D).

<sup>20</sup> *State v. Bell*, 2009-0588 (La. App. 4 Cir. 10/14/09), 23 So.3d 981, 983-84.

<sup>21</sup> *Id.*

<sup>22</sup> *State v. Landry*, 2003-1671 (La. App. 4 Cir. 3/31/04), 871 So.2d 1235, 1239.

<sup>23</sup> *State v. Cann*, 471 So.2d 701, 703 (La. 1985).

<sup>24</sup> *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979).

<sup>25</sup> *State v. Soraparu*, 97-1027 (La. 10/13/97), 703 So.2d 608.

The sentencing range for armed robbery is imprisonment at hard labor for not less than ten nor more than ninety-nine years, without benefit of parole, probation or suspension of sentence.<sup>26</sup> When a firearm is used in the commission of the offense, the law provides for an additional five years.<sup>27</sup> In this case, the trial court imposed a sentence of thirty-five years, slightly more than one-third of the maximum sentence allowed.

To comply with La. C.Cr.P. art. 894.1, the record must reflect that the judge adequately considered the guidelines.<sup>28</sup> In this case, the sentencing transcript shows the trial court adequately complied with La. C.Cr.P. art. 894.1. The district court articulated its factual basis for imposing the thirty-five year sentence for Bartley's conviction for armed robbery with a firearm. The court noted Bartley terrorized Mr. Boulanger by placing a gun in his ribs, took the victim's valuables and smirked as he did so.

We also note that, the court ordered that the sentences run concurrently notwithstanding the commission of multiple distinct robberies.<sup>29</sup> Further, we find the reasonableness of Bartley's sentence also is supported by the jurisprudence.<sup>30</sup>

This assignment is meritless.

#### **ASSIGNMENT OF ERROR NUMBER FOUR**

In a final assignment of error, Bartley argues his right to review on appeal has been compromised by missing and/or unidentified/misidentified evidence.

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<sup>26</sup> La. R.S. 14:64.

<sup>27</sup> La. R.S. 14:64.3.

<sup>28</sup> *State v. Davis*, 448 So.2d 645, 653 (La. 1984).

<sup>29</sup> La. C.Cr.P. art. 883.

<sup>30</sup> See *State v. Spencer*, 2014-0003 (La. App. 4 Cir. 10/8/14), 151 So.3d 816 (thirty-five year armed robbery sentence at hard labor without benefit of parole, probation or suspension of sentence enhanced by an additional five years at hard labor not excessive for twenty-year-old).

A criminal defendant has a constitutional right of appeal or review as to questions of law.<sup>31</sup> Moreover, “[n]o person shall be subjected to imprisonment ... without the right of judicial review based upon a complete record all evidence upon which the judgment is based.”<sup>32</sup>

Appellate counsel notes that when the record initially lodged, she filed a Motion to Supplement, requesting an additional transcript and the trial exhibits. The record was supplemented and a new briefing schedule set; however, not all of the items requested were supplemented. More particularly, counsel complains it is difficult to determine which evidence has been supplemented because most of the exhibits and CDs are not marked with the State’s exhibit stickers.

Appellate counsel maintains there is a CD of surveillance footage (State’s Exhibit 1) which purportedly captures the armed robbery of Robert Boulanger; however, counsel asserts the CD does not show the robbery. Defense counsel maintains the CD contains a total of thirteen clips, all black and white, none of which show the robbery. The trial transcript indicates that the State relied upon the surveillance video footage, not to show the actual robbery, but to verify the clothing worn by the suspects. In addition, Detective Michael Flores testified at trial, narrating the events purportedly presented in the video footage.

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<sup>31</sup> See La. Const. art. V, § 10.

<sup>32</sup> La. Const. art. I, § 19. See also *Hardy v. U.S.*, 375 U.S. 277, 279–282, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964); *State v. Ford*, 338 So.2d 107, 110 (La.1976).

The CD with the surveillance footage has been supplemented and is now contained in the record before this Court.<sup>33</sup> Therefore, this portion of the assignment of error is moot.

Lastly, appellate counsel complains that the interview of Bartley, contained on a DVD or CD (State's Exhibit 26), is saved as a .dvr file format, which he is unable to open and which does not comply with the Local Rules of the Court of Appeal, Fourth Circuit Rule 24.<sup>34</sup>

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<sup>33</sup> The State has supplemented the record in this Court with copies of the CDs with the proper certifications.

<sup>34</sup> Local Rule 24—ELECTRONIC AUDIO AND VIDEO EVIDENCE, provides in part:

1. All electronic audio and video evidence submitted to the Court shall be in the Windows Media Audio (WMA) or Windows Media Video (WMV) format to ensure that the evidence can be played on the default Windows Media Player.
2. In the event that audio or video evidence cannot be converted to the required formats, the software or codec required to view the evidence must be provided. This must include a description of the software or codec and instructions on how to install and use the software. Counsel for the parties must also inform the clerk of court in writing of these circumstances within five (5) days of the lodging of the record.
3. The following information must be provided with all submitted electronic evidence:
  - Title of file
  - Brief description of what is contained in the file
  - Length of file
  - Number of files
  - File format
  - Guarantee of no virus
  - The antivirus software that was used to scan the files and the date of the virus definitions.

It is the exclusive responsibility of counsel for all parties to ensure that all electronic audio and video evidence works properly before submitting it to the Court.

Adopted by the Court En Banc January 20, 2010  
Effective February 1, 2010

As for the Bartley's statement contained on CD, the State introduced that evidence because Bartley allegedly places himself at the scene of the armed robbery of Robert Boulanger. Counsel argues that although she has set out sufficiency arguments without viewing and hearing the statement itself, the arguments cannot be fully made without a review of the statement. We disagree. The evidence supports a conviction even without any consideration of the statement as discussed in this opinion.

Given that the victim, Robert Boulanger, identified Bartley with certainty from a photo lineup as the man who robbed him at gunpoint, the absence of the surveillance video does not supplant the victim's pretrial and trial identifications of the Bartley as his assailant. A positive identification by only one witness is sufficient to support a conviction.<sup>35</sup> Likewise, we find the absence of the Bartley's recorded statement has little impact on his right of review considering that Detective Green testified he observed in plain view credit cards and cell phones belonging to the victims of the Lakeview robberies, as well as marijuana and a hand gun on the rear seat of the green truck where Bartley was seated by the time of his arrest. Further, Detective Green's testimony was reinforced by Detective Steven Kriebel's testimony. Detective Kriebel testified that the items identified by Detective Green were retrieved from the green truck. This assignment is meritless.

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<sup>35</sup> *State v. Lambert*, 2015-0886 (La. App. 4 Cir. 1/20/16), 186 So.3d 728, 734, *writ denied*, 2016-0335 (La. 2/17/17).

For the foregoing reasons, Jamal Bartley's convictions on all four counts are affirmed. His sentences on all four counts are vacated and the matter is remanded to the trial court for resentencing in compliance with this opinion.

**CONVICTIONS AFFIRMED; SENTENCES VACATED; MATTER  
REMANDED FOR RESENTENCING**