STATE OF LOUISIANA	*	**NO. 2017-KA-0520**
VERSUS	*	
		COURT OF APPEAL
ANTOINE GREEN	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 527-650, SECTION "A"
Honorable Laurie A. White, Judge
* * * * * *
Judge Roland L. Belsome
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(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Marion F. Edwards, Pro Tempore)

LOBRANO, J., DISSENTS AND ASSIGNS REASONS

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AFFIRMED

NOVEMBER 15, 2017

Statement of Facts

In the early morning hours of July 13, 2015, the Defendant entered Barcadia Bar and Grill, an establishment in New Orleans, with the intent of robbing the business. The Defendant brandished a firearm and proceeded to the money room in the back of the business. The Defendant pointed the firearm at the three people located in the money room and demanded the money be placed into a plastic bag. During this time, the Defendant was pointing the gun at Lea Wolfe, the manager on duty. When the Defendant was momentarily distracted by some activity outside of the room, one of the other victims was able to shut the Defendant outside of the room and lock the door. That action caused the Defendant to flee the scene without the money.

Ms. Wolfe triggered the alarm alerting the police of the attempted armed robbery. Upon arrival, New Orleans Police Detective Steve Nolan viewed the surveillance recordings with the manager. Ms. Wolfe informed Det. Nolan that the suspect resembled a former employee, Antoine Green. Det. Nolan learned the name of the Defendant's then employer and went to his place of employment to discuss the incident. Det. Nolan brought Defendant to the police station where he

was read his rights, and the Defendant fully confessed to the attempted armed robbery of Barcadia.

Procedural History

On December 23, 2015, the Defendant was charged by bill of information with attempted armed robbery while armed with a firearm. On January 11, 2016, the Defendant appeared for arraignment and entered a plea of not guilty. On March 7, 2017, the Defendant appeared for trial with counsel. Trial was continued due to the possibility of a plea offer. The state offered to remove the firearm enhancement under La. R.S. 14:64.3 (B) and request a five-year sentence in the Department of Corrections. The Defendant elected to reject the plea offer, enter a plea of guilty as charged and requested a downward departure from the mandatory sentence in accordance with *State v. Dorthey*.[1] Thereafter, the district court sentenced Defendant to five years.

A *Dorthey* hearing was conducted immediately following sentencing to determine if a downward departure from the statutorily required minimum sentencing was warranted. Following the *Dorthey* hearing, the district court imposed the mandatory five-year hard labor without benefits sentence under La. R.S. 14:64.3 (B) for commission of attempted armed robbery when the dangerous weapon is a firearm. This appeal followed.

Assignment of Error

On appeal, the Defendant maintains that the trial court erred in making inconsistent findings regarding the excessiveness of his sentence and by declining to impose a downward departure in accordance with *Dorthey*.

[1] 623 So.2d 1276 (La. 1993).

The Louisiana Constitution guarantees that "[n]o law shall subject any person to ... cruel, excessive or unusual punishment."[2] That protection allows the judicial branch to determine whether the range of sentences authorized by a criminal statute is excessive for a particular defendant. [3] The court must start with the presumption that a mandatory minimum sentence is constitutional.[4] In order to rebut that presumption, a defendant must clearly and convincingly prove that he is exceptional. This Court has articulated that exceptional "means that because of unusual circumstances he 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."[5]

If the mandatory minimum sentence is constitutionally excessive then a downward departure is required under *Dorthey*. [6] "A punishment is constitutionally excessive 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."[7] 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.[8]

In the instant case, the Defendant alleged his sentence was excessive due to his youth, age twenty-three, and the fact that it was his first offense. The

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[2] LSA–Const. art. 1, § 20.
[3] *See, State v. Fobbs,* 99-1024 (La. 9/24/99), 744 So.2d 1274.
[4] *State v. Johnson*, 97-1906, pp. 6-7 (La. 3/4/98), 709 So.2d 672, 676.
[5] *Id.*
[6] *Id.*
[7] *Dorthey*, 623 So. 2d at 1280 (citing *State v. Scott*, 593 So.2d 704, 710 (La.App. 4th Cir.1991); *State v. Lobato*, 603 So.2d 739, 751 (La.1992)).
[8] *Lobato*, 603 So.2d at 751.

Defendant has asserted no additional factors which would make his situation exceptional. In *State v. Henry*, Demonte Henry was found guilty of attempted armed robbery and attempted armed robbery with a firearm.[9] He was sentenced to twenty years at hard labor without benefits for the attempted armed robbery conviction, and five years at hard labor without benefits for the attempted armed robbery with a firearm conviction.[10] On appeal, Henry cited to his youth and the fact that he was a first time offender to challenge his sentence as excessive. The Court of Appeal affirmed the defendant's sentence stating: "[W]e cannot say that the defendant's sentences shock our sense of justice or make no measurable contribution to acceptable penal goals." [11]

In this case, the Defendant held three people at gun point in their place of employment. Ms. Wolfe testified that she and the other victims were frightened and now carry firearms for their protection. After hearing the testimony of Ms. Wolfe, Nicholas Johnson (the Defendant's employer at the time of the hearing), and allowing the defendant to speak on his own behalf, the trial court made a clear finding that the legislatively mandated minimum sentence of five years was not constitutionally excessive. The trial court stated, "I don't think that it's constitutionally excessive." After declaring the sentence constitutional, the trial court further stated:

> I think that it is an inappropriate sentence. I don't think that it has reasonable contributions for this individual, but the Legislature that makes those laws and the State that establishes which law to charge each person that walks into this Court…could have made these

[9] 14-1131 (La.App. 3 Cir. 3/4/15), 159 So.3d 1176.
[10] Henry had allegedly pointed a gun at an acquaintance and told him to "give it up." The acquaintance threw his cell phone at him and ran. In his defense, Henry suggested the incident was a prank, and he had no intent to rob the victim.
[11] *Henry*, p. 10, 159 So.3d at 1183.

> changes. But you're now asking a judge to look at a statute that says you can't go below it, and then you're asking a Judge to look at a statute and then go below it by using one case from the Supreme Court that no one has ever used to go below it on a matter like his, on a violent offense, and I'm not going to do it.

On appeal, the Defendant maintains that the later statements made by the trial court indicates that she misapplied the law. We disagree. Clearly, the trial court did not agree with the length of the minimum sentence, but ultimately concluded that it was not unconstitutionally excessive. The relevant question for this Court is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.[12] Thus, absent a showing that the Defendant was exceptional, the trial court was within its discretion to impose the sentence.

On the record before us, the Defendant failed to meet his burden of clearly and convincingly proving he was exceptional to warrant a downward departure in his sentence. Accordingly, we cannot find that the trial court abused its discretion in imposing the five-year minimum sentence. Antoine Green's sentence is affirmed.

AFFIRMED

[12] *State v. Cook*, 95–2784 (La.5/31/96); 674 So.2d 957, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996).