NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1696

STATE OF LOUISIANA

VERSUS

CEDRICK MORGAN

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 07-04-0479, Section 01
Honorable Anthony J. Marabella, Jr., Judge Presiding

Doug Moreau **District Attorney** **Stacy L. Wright** **Assistant District Attorney** **Baton Rouge, LA**	**Attorneys for** **State of Louisiana**
Gwendolyn K. Brown **Louisiana Appellate Project** **Baton Rouge, LA**	**Attorney for** **Defendant-Appellant** **Cedrick Morgan**
Cedrick Morgan **Kinder, LA**	**Defendant-Appellant** **In Proper Person**

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered February 13, 2009

PARRO, J.

The defendant, Cedrick Morgan, was charged by a bill of information with attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1. The defendant entered a plea of not guilty. Following a trial by jury, the defendant was found guilty of the responsive offense of aggravated battery, a violation of LSA-R.S. 14:34. The defendant was subsequently adjudicated a fourth felony habitual offender and sentenced to twenty years of imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The defendant appealed. In **State v. Morgan**, 06-0506 (La. App. 1st Cir. 9/15/06), 943 So.2d 500, this court affirmed the defendant's conviction and habitual offender adjudication, but vacated the sentence as illegal because the trial court improperly restricted the defendant's parole eligibility.

Following remand, the trial court resentenced the defendant to a term of twenty years of imprisonment at hard labor without benefit of probation or suspension of sentence. The defendant filed a motion to reconsider this sentence, which was denied by the trial court. The defendant appealed, and a counseled brief filed on his behalf raises the following as error:

1. The defendant was convicted by a non-unanimous verdict in violation of the United States and Louisiana Constitutions.

2. The sentence is unconstitutionally excessive.

The defendant also filed a pro se brief, citing the following as error:

3. The evidence was insufficient to support the conviction for attempted murder in the second degree.

4. The trial court committed reversible error in finding the state had not set a pattern of dismissing African-American prospective jurors after dismissing eight African-American prospective jurors and for not requiring the state to give race-neutral explanations.

For the following reasons, we affirm the sentence.

FACTS

The facts are not at issue and are taken from our previous opinion in this matter, as follows. The victim, Diane Henry, met the defendant in (or sometime near) June 2003. During an approximate one-year period, they had a relationship that consisted of frequent dates. The victim decided to end the relationship at the end of February 2004. According to the victim, the defendant did not want to end the relationship and continued to call her frequently.

On March 19, 2004, the defendant called the victim several times in an attempt to arrange a brief meeting. The victim initially refused, but ultimately agreed to meet the defendant. When the victim arrived at a residence at 2350 N. 20th Street in Baton Rouge, Louisiana (near Monroe Street), during the late evening hours, the defendant physically attacked her with beer bottles. According to the victim, the defendant stated, "You pretty bitch, die, if I can't have you, ain't (sic) nobody going to have you," as he continued to beat her with bottles, including some that were broken. The victim testified that the defendant also bit her fingers, face, breasts, and leg. The victim screamed and cried for help, then ultimately escaped from the residence.

An anonymous caller reported the incident and Officer Patrick Wennemann of the Baton Rouge City Police Department was dispatched to the area. The victim was discovered lying on Monroe Street with several visible injuries. According to Officer Wennemann's testimony, the victim's face was covered with blood, and her eyes were severely swollen. The victim was admitted to Our Lady of the Lake Regional Medical Center's emergency room and examined by Dr. Luke Corsten, the state's expert witness in the field of neurological surgery. The victim had external signs of trauma with multiple lacerations of the scalp, brow, ear, and neck, and injuries to her arms. The victim's consciousness was altered, and she was diagnosed with a concussion and a closed-head injury.

ISSUES NOT PRESERVED FOR APPEAL

We note that the defendant argues three assignments of error which raise issues concerning the non-unanimous jury verdict, the sufficiency of the evidence supporting his conviction, and the challenging of jurors. However, all of these issues are related to the defendant's conviction, which was affirmed in our original opinion in this matter. Moreover, we note that the sole assignment of error raised in the defendant's original brief in the first appeal challenged the constitutionality of his sentence. Under LSA-C.Cr.P. art. 922, the judgment affirming the defendant's conviction was final fourteen days after its rendition upon defendant's failure to file an application for rehearing or a writ application to the supreme court. Accordingly, none of these issues are properly before this court on this appeal, which was taken after resentencing. Only issues related to the new sentence can be raised in this appeal.

EXCESSIVE SENTENCE

In the defendant's second assignment of error, he contends the trial court imposed an excessive sentence.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868 (La. App. 1st

Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. LSA-C.Cr.P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

After adjudicating the defendant a fourth felony habitual offender, the trial court enhanced the penalty for his aggravated battery conviction to twenty years of imprisonment at hard labor.[1] As a fourth felony habitual offender,[2] the defendant was subject to receiving a sentence in accordance with the following provisions of LSA-R.S. 15:529.1(A)(1):

> (c) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:
> (i) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in **no event less than twenty years** and not more than his natural life; . . . .

Accordingly, the defendant was sentenced to the minimum possible term under the applicable provisions of the Habitual Offender Law. The defendant argues this minimum sentence was still excessive. We disagree.

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[1] The penalty provision for aggravated battery provides for a prison term with or without hard labor for not more than ten years. LSA-R.S. 14:34.

[2] The defendant's previous convictions included a 1988 conviction for distribution of cocaine, a violation of LSA-R.S. 40:967(A)(1); a 1990 conviction for possession of cocaine, a violation of LSA-R.S. 40:967(C); and a 2000 conviction for forgery, a violation of LSA-R.S. 14:72.

A sentencing 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. **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676. In the present case, we note the defendant caused serious injuries to the victim. Moreover, the presentence investigation (PSI) report indicates that, in addition to the defendant's prior felony convictions, he was also charged on five other occasions with crimes against the person, and the PSI noted that the defendant's criminal activity was escalating. In its reasons for originally sentencing defendant to the twenty-year term, the trial court specifically noted the defendant's lengthy criminal history (twenty arrests since 1988) and his complete lack of remorse for his present conviction.

Considering the foregoing, we cannot say the defendant has rebutted the presumption that the minimum twenty-year sentence is constitutional.

This assignment of error is without merit.

SENTENCE AFFIRMED.