NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1393

STATE OF LOUISIANA

VERSUS

GARY BRYANT

Judgment Rendered: MAR 25 2011

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 03-08-0652

Honorable Richard "Chip" Moore, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Gary Bryant, was charged by bill of information with armed robbery, a violation of LSA-R.S. 14:64. He pled not guilty and, after a trial by jury, was found guilty of the responsive offense of first degree robbery. See LSA-R.S. 14:64.1; LSA-C.Cr.P. art. 814A(22). Defendant originally was sentenced to twelve years at hard labor, with credit for time served. However, the state thereafter filed a habitual offender bill of information seeking to enhance his sentence pursuant to LSA-R.S. 15:529.1. Following a hearing, the trial court adjudicated defendant to be a third-felony habitual offender, and sentenced him to life imprisonment at hard labor, without benefit of parole, probation or suspension of sentence, with credit for time served.[1] Defendant has now appealed, raising three assignments of error. For the following reasons, we affirm the conviction, habitual offender adjudication and habitual offender sentence, vacate the original sentence, and remand this matter with instructions.

FACTS

On February 22, 2008, Chauncey Johnson was working as a truck driver delivering alcoholic beverages to various retail establishments. At approximately 11:30 a.m., he made a delivery to A.M. Mart, a small convenience store located on Highland Road in Baton Rouge, Louisiana. After the owner paid him in cash, he put the money in his pocket and walked out of the store. As he exited, he glanced toward the only customer in the store, noticing that the man's eyes looked "like he was high" or "geeked up".

A few seconds later, Johnson heard the bell on the door of the store tinkle as the door opened behind him. The man followed Johnson to the back of the delivery truck. As Johnson was attempting to unlock the truck, he felt someone push him in the back of the head. He turned around to find a gun being held in

[1] Although the trial court did not explicitly state that the sentence was to be served at hard labor, it specifically sentenced defendant to imprisonment with the Department of Corrections. A sentence to the Department of Corrections is necessarily a sentence at hard labor. See LSA-R.S. 15:824C; **Rochon v. Blackburn**, 97-2799, p. 4 (La.App. 1 Cir. 12/28/98), 727 So.2d 602, 604.

his face by the man he had noticed in the store. After the man twice demanded his money, Johnson gave it to him. The man then turned and walked away.

Johnson returned to the store and informed the owner that he had been robbed by "the guy that was just in the store." He also reported the robbery to the Baton Rouge City Police. Upon viewing the store's surveillance video, Johnson confirmed that the man it showed in the store as he was exiting was the person who robbed him. The police used the surveillance video to print still-frame photographs of the suspect.

A few hours later, the store owner, who was familiar with the suspect since he came into the store almost every day, called the police when he returned to the store. As detectives were responding to this call, they observed defendant walking down the street about a block from the store. Since he resembled the suspect's photograph, they detained him and advised him of his rights. When shown one of the photographs printed from the surveillance video, defendant confirmed that he was the person in the photograph. No cash or a gun related to this robbery was ever recovered by the police.

ASSIGNMENTS OF ERROR

1. The state failed to prove the essential element of identity beyond a reasonable doubt.

2. The trial court erred in imposing an unconstitutionally excessive sentence.

3. The failure of trial counsel to file a motion to reconsider sentence should not preclude a review of defendant's sentence for constitutional excessiveness and, if it does, then that failure constitutes ineffective assistance of counsel.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, defendant argues the state failed to prove beyond a reasonable doubt his identity as the perpetrator of the instant offense. Specifically, he points out that Johnson was unable to identify defendant in a photographic lineup presented to him several weeks after the robbery. Additionally, Johnson was unable at the trial of this matter to identify defendant as the person who robbed him. Thus, defendant argues the state failed to prove

beyond a reasonable doubt that he committed the offense of which he was convicted.

The standard of review for the sufficiency of evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime and the defendant's identity beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also LSA-C.Cr.P. art. 821; **State v. Lofton**, 96-1429, p. 4 (La.App. 1 Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. The **Jackson** standard of review incorporated in LSA-C.Cr.P. art. 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Riley**, 91-2132, p. 8 (La.App. 1 Cir. 5/20/94), 637 So.2d 758, 762. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La.App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Where the key issue raised by the defense is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the state is required to negate any reasonable probability of misidentification. **State v. Johnson**, 99-2114, p. 4 (La.App. 1 Cir. 12/18/00), 800 So.2d 886, 888, writ denied, 01-0197 (La. 12/7/01), 802 So.2d 641. Positive identification by only one witness is sufficient to support a conviction. **State v. Davis**, 01-3033, p. 3 (La.App. 1 Cir. 6/21/02), 822 So.2d 161, 163. Moreover, it is the factfinder who weighs the respective credibilities of the witnesses, and this court generally will not second-guess those determinations. See **State v. Hughes**, 05-0992, p. 6 (La. 11/29/06), 943 So.2d 1047, 1051.

In the instant case, defendant does not contest that Johnson was robbed. Rather, relying on the fact that Johnson was unable to identify defendant in either a photographic lineup or in court as the perpetrator of the robbery, he argues that the state failed to carry its burden of proof. He contends the evidence presented did not establish beyond a reasonable doubt his identity as the person who committed this offense.

However, a careful examination of the totality of the evidence presented reveals it was sufficient for a rational trier of fact to find that the state negated any reasonable probability of misidentification. At trial, Johnson candidly admitted that, with a gun being pointed at him, he did not want to stare his assailant in the face. However, he testified that he did glance at the robber and observed what the assailant was wearing, as well as the fact that his eyes looked like he was "high". Johnson testified that he was one hundred percent positive the person who robbed him was the same person he noticed as he was walking out of the store, indicating he recognized the man by his eyes and his clothing.

This testimony was consistent with the fact that, when he returned to the store after the robbery, Johnson told the store owner that he had been robbed by the man who had just been in the store. Further, after viewing the surveillance video shortly after the robbery, Johnson indicated that the robber was the man shown on the video as Johnson was exiting the store. The surveillance video shows Johnson leaving the store and the man following him outside almost immediately. Johnson then proceeded to the back of his truck, with the customer still following him. Johnson indicated that he saw no one else in the area. The video did not show what occurred behind the truck, because no cameras were located in that area. According to Johnson's testimony, this is where the robbery occurred. In any event, the surveillance video next showed someone walking from behind the truck and down the street. Johnson then returned to the store and reported the robbery.

Admittedly, Johnson could not identify defendant in court as the same man he saw in the store. To establish that defendant was that man, the state

introduced the testimony of Larry Walters, a detective with the Baton Rouge City Police robbery division. Detective Walters testified that, when he showed defendant one of the photographs obtained from the surveillance video, defendant acknowledged that he was the person depicted in the photograph. Thus, defendant's own admission established that he was the man shown in the surveillance video, since the photograph was a print of a still frame obtained from the video.

Additionally, the surveillance video revealed that the suspect was wearing a white shirt, blue jeans or dark pants, a jacket, and a knit cap. When defendant was detained by the police a few hours after the robbery, he was wearing blue jeans, a white t-shirt, and a blue knit stocking cap. When asked about his jacket, he said it was at his sister's residence. The police retrieved a jacket at that location, which defendant confirmed was his jacket. At trial, the state introduced defendant's jacket, jeans and knit cap into evidence, giving the jury an opportunity to compare these items to the clothing the suspect was shown wearing in the surveillance video.

The jury heard all of the testimony and viewed all of the evidence presented to it at trial. After hearing all of the evidence and testimony, the jury found defendant guilty of the instant offense. In doing so, the jury clearly rejected defendant's theory of misidentification.

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier-of-fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. **Lofton**, 96-1429 at p. 5, 691 So.2d at 1368. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. In cases involving circumstantial evidence, where the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty

unless there is another hypothesis that raises a reasonable doubt. **Moten**, 510 So.2d at 61. In this case, defendant has raised no hypothesis of innocence other than misidentification, which was rejected by the jury.

Thus, after a thorough review of the record, we find that the totality of the evidence supports the guilty verdict rendered. The evidence presented by the state, including the victim's testimony that the man in the store was the person who robbed him and defendant's acknowledgement that he was the person depicted in the still photograph obtained from the surveillance video, negates any reasonable probability of misidentification. The guilty verdict returned by the jury indicates that it accepted the state's evidence and rejected the defendant's theory of misidentification. See **State v. Andrews**, 94-0842, p. 7 (La.App. 1 Cir. 5/5/95), 655 So.2d 448, 453. We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the jury and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected, by the jury. See **State v. Calloway**, 07-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Therefore, we are convinced that viewing all of the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that defendant was the perpetrator of the instant offense.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In assignment of error number two, defendant contends the trial court erred in imposing an unconstitutionally excessive punishment, since it is clear he is a drug addict in need of rehabilitation.

The record reflects that defendant did not file a written motion to reconsider sentence. However, at the conclusion of the sentencing hearing,

defense counsel orally objected to defendant's life sentence as being violative of the Eighth Amendment of the United States Constitution, which deals with cruel and unusual punishment. This court has previously stated that the Eighth Amendment of the United States Constitution prohibits excessive punishment. See **State v. Collins**, 09-1617, p. 5 (La.App. 1 Cir. 2/12/10), 35 So.3d 1103, 1107, writ denied, 10-0606 (La. 10/8/10), 46 So.3d 1265. Thus, although the basis of defense counsel's objection was poorly articulated, it arguably was sufficient to meet the requirements for an oral motion to reconsider sentence under LSA-C.Cr.P. art. 881.1 on the grounds of excessiveness. See **State v. Mims**, 619 So.2d 1059, 1059-60 (La. 1993) (per curiam). Accordingly, we will review defendant's sentence for the bare claim of excessiveness.[2] See **State v. Spradley**, 97-2801, p. 16 (La.App. 1 Cir. 11/6/98), 722 So.2d 63, 72, writ denied, 99-0125 (La. 6/25/99), 745 So.2d 625.

Article 1, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Even if a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **Andrews**, 94-0842 at pp. 8-9, 655 So.2d at 454.

In the instant case, defendant's conviction for first degree robbery ordinarily would have exposed him to a penalty of imprisonment at hard labor for not less than three years and for not more than forty years, without benefit of parole, probation or suspension of imposition or execution of sentence. See LSA-R.S. 14:64.1B. However, since he was adjudicated to be a third-felony habitual

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[2] Although unclear from his appellate brief, defendant may also be attempting to argue on appeal that the trial court failed to properly consider the sentencing criteria of LSA-C.Cr.P. art. 894.1. To the extent that defendant is attempting to do so, he is precluded from raising this issue on appeal since it was not urged as a ground for reconsideration of sentence. See LSA-C.Cr.P. art. 881.1E; **Mims**, 619 So.2d at 1060.

offender, he was subject to an enhanced penalty under LSA-R.S. 15:529.1A(1)(b)(ii).[3] At the time of the commission of the offense, this provision stated, in pertinent part, as follows:

> If the third felony and the two prior felonies are felonies defined as a crime of violence under R.S. 14:2(B) ... or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

Under this provision, defendant was subject to a mandatory life sentence, without benefit of parole, probation, or suspension of sentence for the following reasons. First, defendant's instant conviction for first degree robbery is designated as a crime of violence under LSA-R.S. 14:2B(22). Second, defendant's two predicate offenses are for distribution of cocaine (a violation of the Uniform Controlled Dangerous Substances Law punishable by a maximum term of imprisonment of thirty years) and for simple burglary (punishable by a maximum term of imprisonment of twelve years). See LSA-R.S. 40:967B(4)(b) and LSA-R.S. 14:62B. Thus, the mandatory life sentence imposed upon defendant pursuant to LSA-R.S. 15:529.1A(1)(b)(ii) not only complied with statutory requirements, but actually was the minimum sentence statutorily permissible.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in **Dorthey** was made only after express recognition by the court that the determination and definition of acts that are punishable as crimes is purely a

[3] All references made herein to LSA-R.S. 15:529.1 are made to that provision as it existed prior to its amendment by 2010 La. Acts No. 911, §1 and No. 973, §2.

legislative function. It is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. **Dorthey**, 623 So.2d at 1278.

In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court examined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences under the Habitual Offender Law. Under **Johnson**, a sentencing court must always start with the presumption that a mandatory minimum sentence under the Habitual Offender Law is constitutional. A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it that would rebut this presumption of constitutionality. Moreover, a trial court may not rely solely upon the non-violent nature of the instant crime or of past crimes as evidence that justifies rebutting the presumption of constitutionality. While the classification of a defendant's instant or prior offenses as non-violent should not be discounted, this factor has already been taken into account under the Habitual Offender Law for third and fourth offenders. **Johnson**, 97-1906 at p. 7, 709 So.2d at 676.

To rebut the presumption that a mandatory minimum sentence is constitutional, a defendant must clearly and convincingly show that he is exceptional, which means that, because of unusual circumstances, this defendant 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. **Johnson**, 97-1906 at p. 8, 709 So.2d at 676. Given the legislature's constitutional authority to enact statutes such as the Habitual Offender Law, it is not the role of the sentencing court to question the wisdom of the legislature in requiring enhanced punishments for multiple offenders. Instead, the sentencing court is only allowed to determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates the constitution. Departures

downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations. **Johnson**, 97-1906 at pp. 8-9, 709 So.2d at 677.

In the present case, defendant has failed to show any justification for a deviation from the mandatory sentence. The record reflects nothing unusual about defendant's circumstances that would justify a downward departure from the mandatory life sentence provided in LSA-R.S. 15:529.1A(1)(b)(ii). Defendant's bare assertion that he is a drug addict in need of rehabilitation does not meet this criteria. Further, contrary to defendant's assertion, the trial court indicated it considered the sentencing guidelines before imposing sentence. The court particularly noted defendant's "extremely long criminal history," which includes numerous arrests over a period of decades.

Accordingly, given the record before us, we find that defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we do not find that a downward departure from the mandatory life sentence was required in this case. The sentence imposed is not excessive.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In his third assignment of error, defendant argues that, in the event this court finds that the excessive sentence argument raised in assignment of error number two cannot be reviewed due to the lack of a motion to reconsider sentence, the failure of his trial counsel to file such a motion constituted ineffective assistance of counsel. However, this assignment of error is moot since we reviewed defendant's excessive sentence claim under the previous assignment of error.

REVIEW FOR ERROR

Pursuant to LSA-C.Cr.P. art. 920(2), this court routinely reviews all criminal appeals for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. See **State v. White**, 96-

0592, p. 2 (La.App. 1 Cir. 12/20/96), 686 So.2d 96, 98. Our review in the instant case reveals that, when the trial court sentenced defendant as a habitual offender, it failed to vacate the original sentence it had imposed on defendant. The habitual offender statute requires the sentencing court, when imposing a habitual offender sentence, to vacate any sentence already imposed. LSA-R.S. 15:529.1D(3). However, when dealing with this same situation in previous criminal appeals, this court has simply vacated the original sentence to conform to the requirements of the habitual offender statute and has not found it necessary to vacate the habitual offender sentence. See **State v. Jackson**, 00-0717, pp. 2-3 (La.App. 1 Cir. 2/16/01), 814 So.2d 6, 8-9 (en banc), writ denied, 01-0673 (La. 3/15/02), 811 So.2d 895. Accordingly, in order to conform to the requirements of LSA-R.S. 15:529.1D(3), we vacate the original twelve-year sentence imposed upon defendant on November 17, 2009.[4] This matter is remanded to the trial court for amendment of the minutes and criminal commitment to reflect that the original sentence has been vacated.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND HABITUAL OFFENDER SENTENCE AFFIRMED; ORIGINAL SENTENCE VACATED AND REMANDED WITH INSTRUCTIONS.

[4] We further note that, when it imposed the original sentence, the trial court failed to comply with the twenty-four hour sentencing delay required by LSA-C.Cr.P. art. 873 following the denial of a defendant's post-trial motions. However, several months later, defendant was adjudicated and sentenced as a habitual offender to a mandatory life sentence. Moreover, we are vacating the original sentence imposed by the trial court. Therefore, the trial court's failure to observe the twenty-four hour delay before imposing the original sentence is moot.