NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2004 KA 0758R

STATE OF LOUISIANA

VERSUS

JENNIFER COLEMAN

Judgment rendered: DEC 21 2007

****

On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Criminal Number 361635; Div. "B"
The Honorable Jerome J. Barbera, III, Judge Presiding

****

Julie E. Cullen
Assistant Attorney General
Baton Rouge, LA

Counsel for Plaintiff/Appellee
State of Louisiana

Sherry Watters
New Orleans, LA

Counsel for Defendant/Appellant
Jennifer Coleman

BEFORE: WHIPPLE, DOWNING AND HUGHES, JJ.

Hughes, J., dissents for reasons previously assigned

DOWNING, J.

The defendant, Jennifer Coleman, was charged by bill of information with aggravated second-degree battery (count one) and second-degree kidnapping (count two), violations of La. R.S. 14:34.7 and La. R.S. 14:44.1, respectively. (R.p. 31). She entered a plea of not guilty as to both charges. (R.pp. 5, 19). Upon completion of a trial by jury, the defendant was found guilty as charged on both counts. (R.pp. 25-26, 997-998). The trial court denied the defendant's motion for post verdict judgment of acquittal and motion for a new trial. (R.pp. 28, 165, 170). On count one, the defendant was sentenced to fifteen (15) years imprisonment at hard labor and to pay a fine of five thousand dollars ($5,000.00) plus court costs. Upon the failure to pay the fine and costs, the trial court ordered the defendant to serve an additional six (6) months in the parish detention center. On count two, the defendant was sentenced to fifteen (15) years imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence for the first two years. The sentences are to run concurrently with each other. (R.pp. 1003-1004).

On March 24, 2005, this court rendered an opinion in this matter wherein we reversed the defendant's convictions of aggravated second-degree battery (count one) and second-degree kidnapping (count two), vacated the sentences, and remanded to the trial court for a new trial. **State v. Coleman**, 2004-0758 (La. App. 1st Cir. 3/24/05), 918 So.2d 23. Therein, we found that the trial court abused its discretion in denying the motion for new trial based on newly discovered evidence. We pretermitted discussion of the sentencing issues raised in assignment of error number three. On May 20, 2005, this court rendered an opinion granting the State's "Application for Rehearing and Clarification," in part, to clarify that the convictions on both

counts were reversed and the matter remanded for a new trial on both counts. We again pretermitted discussion of the sentencing issues raised in assignment of error number three. [1]

Subsequently, the State sought writs with the Louisiana Supreme Court. The Supreme Court granted writs, vacated this court's decision, and remanded the case for consideration of the remaining assignment of error. **State v. Coleman**, 2005-1617 (La. 6/29/07), 959 So.2d 465.[2] For the following reasons, we affirm the convictions and the sentence imposed on count two; and as to the sentence imposed on count one, we amend and affirm the sentence, as amended.

STATEMENT OF FACTS[3]

On May 25, 2001, believing that Frank Bayonne (the victim) had broken into her apartment and stolen some of her belongings, the defendant made a report to the police. The defendant subsequently confronted the victim regarding the whereabouts of her belongings. According to witnesses, the defendant struck the victim with a bat and he fled to a convenience store. The defendant and others followed the victim to the store. At the defendant's request, others forcefully removed the victim from the store. Different people attacked the victim, and the defendant was seen hitting the fallen victim in the head with a baseball bat.

When the officers arrived at the scene, the brawl was over and the victim was standing in the parking lot with no apparent injuries. Based on the defendant's statements regarding the burglary of her apartment, the victim was placed under arrest and transported to the police station. After

---

[1] While the convictions were reversed as stated above, we found no merit in the defendant's claim (raised in the second assignment of error of the defendant's original brief) that there was insufficient evidence to support the conviction for second-degree kidnapping.

[2] Further procedural history for this case is set out in this court's original opinion and in the Supreme Court's opinion.

[3] Further detailed facts of this case are set out in this court's original opinion and in the Supreme Court's opinion. A summation of the facts detailed in those opinions is adopted and set forth herein.

being placed in the holding cell, the victim abruptly lost consciousness. The victim was transported to the emergency room at Thibodaux Regional Medical Center and underwent an immediate CAT scan of the brain. The CAT scan revealed that the victim had suffered a large acute subdural hematoma, which in layman's terms is a large blood clot on the surface of the brain between the brain and the inside of the skull. After surgery, the victim remained in a comatose state and was ultimately transferred to a nursing home, unable to walk, talk, feed himself, or dress himself. The victim was paralyzed on the right side of his body, and his arms and legs were drawn. The victim eventually died in 2006.

ASSIGNMENT OF ERROR

In the third assignment of error raised in the defendant's original appeal brief (pretermitted in this court's original opinion) and in the defendant's supplemental brief filed upon remand, the defendant contends that the sentence imposed on count one, aggravated second-degree battery is illegal in that it requires the defendant to serve additional jail time in the event of a failure to pay a fine of five thousand dollars ($5,000.00) and court costs. The defendant contends that her representation by a public defender was proof of her indigent status. The defendant argues that this court should amend the sentence imposed on count one to delete the default imprisonment term.

The defendant further argues that the trial court erred in imposing unconstitutionally excessive sentences. The defendant notes her status as a single mother. The defendant further notes that the sentence imposed on count one is the maximum term of imprisonment statutorily allowed. The defendant contends that the culpability for the attack on the victim does not rest on her shoulders alone. The defendant notes that others have been

sentenced in connection with this offense to a fraction of the fifteen years imposed upon the defendant. In the supplemental brief, the defendant adds an ineffective assistance of counsel claim as to the trial counsel's failure to object to the sentences. The defendant further notes her status as a first felony offender and contends that the victim herein was not without fault. The defendant contends that she "got caught up in the frenzy of the crowd." (Supplemental defense brief p. 6). The defendant also contends that she played a minor role in the second-degree kidnapping offense. The defendant further contends that it was not proven that she caused the exact blow that fractured the victim's skull. The defendant concludes that the trial court failed to comply with La. Code Crim. P. art. 894.1.

At the outset, we note that the defendant's trial counsel failed to either object to the sentence at the time of sentencing, or to file a motion to reconsider sentence thereafter. A thorough review of the record reveals the absence of either a written or oral motion to reconsider sentence. The failure to file or make a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. La. Code Crim. P. art. 881.1E; **State v. Duncan**, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). Accordingly, the defendant is procedurally barred from having the portion of the instant assignment of error regarding the constitutionality of the sentence imposed on count one reviewed. However, we will examine the sentences for excessiveness because it is necessary to do so as part of the analysis of the ineffective assistance of counsel issue raised in the defendant's supplemental brief. See **State v. Bickham**, 98-1839, pp. 7-8 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891-92.

A claim of ineffective assistance of counsel is ordinarily raised in an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, where evidence of the alleged error is contained in the record, and the issue is raised by assignment of error on appeal, we may address the issue in the interest of judicial economy. **State v. Felder**, 2000-2887, p. 10 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Accordingly, we will address the defendant's claim of ineffective assistance of counsel.

Effective counsel has been defined to mean "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." **U.S. v. Frugé**, 495 F.2d 557, 558 (5th Cir. 1974) (per curiam); see also **U.S. v. Johnson**, 615 F.2d 1125, 1127 (5th Cir. 1980) (per curiam). Whether or not the defendant's counsel's assistance was so defective as to require reversal of his sentence is subject to a two-part test established by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that this deficiency prejudiced the outcome of the trial. A failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-1039 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. **Felder**, 2000-2887 at pp. 10-11, 809 So.2d at 370. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been

different, a basis for an ineffective assistance claim may be found. **Felder**, 2000-2887 at p. 11, 809 So.2d at 370. Thus, the defendant must show that but for his counsel's failure to file a motion to reconsider sentence, the sentence would have been changed, either in the district court or on appeal.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence falls within statutory limits, it may nevertheless violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). 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. **State v. Reed**, 409 So.2d 266, 267 (La. 1982).

As governed by La. Code Crim. P. art. 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). The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). Where the record clearly demonstrates an adequate factual basis for the sentence imposed, a remand for compliance with La. Code Crim. P. art. 894.1 is unnecessary. **State v. Robertson**, 94-1379, p. 5 (La. App. 1st Cir. 10/6/95), 671 So.2d 436, 439, writ denied, 95-2654 (La. 2/9/96), 667 So.2d 527.

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. Lanclos**, 419 So.2d 475, 478 (La. 1982); see also **State v. Savario**, 97-2614, p. 8 (La. App. 1st Cir. 11/6/98), 721 So.2d 1084, 1089, writ denied, 98-3032 (La. 4/1/99), 741 So.2d 1280. Maximum sentences permitted under statute may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety. **State v. Hilton**, 99-1239, p. 16 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113.

On count one, aggravated second-degree battery, the trial court sentenced the defendant to fifteen years at hard labor and to pay a fine of five thousand dollars ($5,000.00) and court costs. The trial court further ordered that if the defendant failed to pay the fine and costs in the time given, she would serve an additional six (6) months in the parish detention center. See La. Code Crim. P. art. 884. (R. 1003-1004). The sentencing range for aggravated second-degree battery is a fine of not more than ten thousand dollars or imprisonment, with or without hard labor, for not more than fifteen years or both. La. R.S. 14:34.7B. On count two, second-degree kidnapping, the trial court sentenced the defendant to fifteen years at hard labor, without the benefit of probation, parole, or suspension of sentence for the first two years. The sentencing range for second-degree kidnapping is imprisonment at hard labor for not less than five years nor more than forty years. At least two years of the sentence shall be without benefit of parole, probation, or suspension of sentence. La. R.S. 14:44.1C. Thus, the trial court imposed the maximum term of imprisonment for count one and a low-

range sentence for count two. The trial ordered that the sentences are to run concurrently with each other. (R.pp. 1003-1004).

Before sentencing the defendant, the trial court reviewed a presentence investigation report. At the sentencing hearing, the trial court reviewed the facts of the case. The trial court noted that the defendant served as "the catalyst for an angry assault against the victim." The trial court further noted that the defendant chased, cornered, and, after soliciting others to bring him before her, beat the victim with a baseball bat. (R.p. 1004). While the maximum term of imprisonment was imposed on count one, we note that the defendant was not subject to the maximum sentencing exposure of this case, as a low range sentence was imposed on count two. This court finds that the sentences imposed herein are well supported by the record. The defendant took matters into her own hands by violently attacking the victim. Considering the defendant's actions and the harm suffered by the victim, this is one of the most serious aggravated second-degree battery offenses and the defendant is one of the worst aggravated second-degree battery offenders. The sentences are neither grossly disproportionate to the severity of the offenses nor are they shocking to our sense of justice. There is no showing of an abuse of the trial court's discretion in the imposition of these sentences. The defense counsel's failure to move for reconsideration of the sentences did not constitute deficient performance. Even if we were to make such an assumption, the defendant has failed to prove that such deficient performance prejudiced his defense since his sentences are not excessive. See **State v. Wilkinson**, 99-0803, p. 3 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631. Thus, we find no merit in the

excessive sentence and ineffective assistance of counsel arguments urged herein.

We now turn to the challenge of the legality of the sentence imposed on count one. An indigent person may not be incarcerated because he is unable to pay a fine which is part of his sentence. **Bearden v. Georgia**, 461 U.S. 660, 667-668, 103 S.Ct. 2064, 2070, 76 L.Ed.2d 221 (1983); **State v. Monson**, 576 So.2d 517, 518 (La. 1991). Where an appellate court can determine indigency from the record, such a penalty may be treated as error. **State v. Seal**, 581 So.2d 735, 736-737 (La. App. 1st Cir. 1991); **State v. Washington**, 605 So.2d 720, 724 (La. App. 2d Cir. 1992), writ denied, 610 So.2d 817 (La. 1993). However, the impoverished status must be clearly reflected. See **State v. Lukefahr**, 363 So.2d 661, 666 (La. 1978), cert. denied, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979).

The record shows that the public defender's office of the 17th Judicial District Court was appointed as counsel for the indigent defendant. (R. 34). After the defendant's arraignment, her family retained private counsel. (R. 48). According to the defendant's motion and order to appoint public defender, the private counsel was later allowed to withdraw due to the defendant's lack of funds to pay further attorney fees. (R. 111). The Louisiana Appellate Project was appointed to represent the defendant on appeal. (R. 113). The State concedes the defendant's indigent status. Therefore, the portion of the count one sentence imposing six months imprisonment in default of payment of the fine and costs hereby is deleted based on the defendant's indigent status. This matter is remanded to the trial court with instructions to correct the minutes and commitment order, if necessary, to reflect this amendment to the sentence. See **State v. Templet**,

2005-2623, p. 17 (La. App. 1st Cir. 8/16/06), 943 So.2d 412, 422, writ denied, 2006-2203 (La. 4/20/07), 954 So.2d 158.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we do not note any reversible errors. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc) (petition for cert. filed at La. Supreme Court on 1/24/07, 2007-K-130).

For the above stated reasons, we affirm the convictions and the sentence imposed on count two. We amend the sentence imposed on count one to delete default time and we affirm the sentence imposed on count one as amended. This matter will be remanded to the Seventeenth Judicial District Court with instructions.

CONVICTIONS AFFIRMED AND THE SENTENCE IMPOSED ON COUNT TWO. AMEND THE SENTENCE IMPOSED ON COUNT ONE TO DELETE DEFAULT TIME AND THE SENTENCE IMPOSED ON COUNT ONE AFFIRMED AS AMENDED. REMANDED TO THE SEVENTEENTH DISTRICT JUDICIAL COURT WITH INSTRUCTIONS.