**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2008 KA 1502**

**STATE OF LOUISIANA**

**VERSUS**

**KEVIN J. EDWARDS**

Judgment Rendered: March 27, 2009

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 12-06-0256, Section "VII"

Honorable Todd Hernandez, Judge Presiding

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**BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.**

**HUGHES, J.**

The defendant, Kevin J. Edwards, was charged by bill of information with one count of armed robbery (count I), a violation of LSA-R.S. 14:64, and one count of first degree robbery (count II), a violation of LSA-R.S. 14:64.1, and pled not guilty on both counts. Following a jury trial, he was found guilty as charged on both counts by unanimous verdicts. Thereafter, in regard to count I, the State filed a habitual offender bill of information against the defendant, alleging that he was a fourth-felony habitual offender.[1] On count I, the defendant was adjudged a fourth-felony habitual offender and was sentenced to ninety-nine years at hard labor. On count II, he was sentenced to forty years at hard labor to run concurrently with the sentence imposed on count I. He now appeals, contending that the trial court erred in imposing an unconstitutionally excessive sentence on count I and that his trial counsel rendered ineffective assistance of counsel by failing to move for reconsideration of sentence. We affirm the conviction, the habitual offender adjudication, and the sentence on count I, as well as the conviction and sentence on count II.

**FACTS**

**Count I-Armed Robbery of Easter Martin**

On November 7, 2006, Ms. Easter Martin was working at the Cracker Barrel store on Winbourne Avenue in Baton Rouge. The defendant walked into the store at approximately 2:30 p.m. Ms. Martin testified that she was familiar with the defendant because he frequently hung around the store and

[1]Predicate #1 was set forth as the defendant's May 12, 1997 guilty plea, under Orleans Parish Docket #385-586, for theft greater than $500 on August 5, 1996. Predicate #2 was set forth as the defendant's March 18, 1998 conviction, under Orleans Parish Docket #393-459, for simple burglary on October 25, 1997. Predicate #3 was set forth as the defendant's February 22, 2001 guilty plea, under Orleans Parish Docket #418-841, for attempted unauthorized entry of an inhabited dwelling on December 7, 2000.

would beg people for money. In fact, she had purchased items for him in the past. The defendant approached the counter, told Ms. Martin that he had something for her, and threw a brick at her face. The brick struck Ms. Martin on the top of her head, causing immediate bleeding. The defendant came around the counter and told Ms. Martin, "[T]hat's what I have for you right there. You take that." He then tried to push Ms. Martin into the bathroom, but she was able to escape from the store. The defendant took approximately $230 from the counter and ran out of the store. Ms. Martin further testified that as a result of being struck with the brick, her face was so swollen that she could not care for her son, and he did not recognize her.

**Count II-First Degree Robbery of Mae Cousin**

Earlier that day, Ms. Mae Cousin was working at Hollywood Cleaners in Baton Rouge. Ms. Cousin testified that at approximately 8:00 a.m., a man walked into the store with a multi-colored jacket, and she greeted him and asked him how he was doing. When the man responded that he was not feeling well, she sympathized with him. She then wrote out a ticket for the jacket and gave it to the man. He looked at the ticket for a few minutes, put it back on the counter, and put his hand in his pocket and stated, "I have something on me. I want you to open the register and give me the money and go in the back and don't – do not look." Ms. Cousin was afraid that the man had a gun and begged him not to shoot her. She complied with his demands, including his demand for the money from the register. The man left with approximately seventy-one dollars. At trial, Ms. Cousin identified the defendant as the man who had robbed her.

## EXCESSIVE SENTENCE; INEFFECTIVE ASSISTANCE OF COUNSEL

In assignment of error number 1, the defendant argues that the trial court erred in imposing the mandatory sentence under LSA-R.S. 15:529.1(A)(1)(c)(i) because it failed to consider: the circumstances of the instant case, including the seriousness of the offense and whether there was any violence; his background, including his age, family ties, marital status, health, employment record, and problems such as mental illness, drug addiction, or retardation; the likelihood of rehabilitation; his prior criminal history; the proportionality of the sentence to the seriousness of the offense; and whether there was any societal purpose and need for the infliction of pain and suffering on him. In assignment of error number 2, he argues that the failure of trial counsel to file a motion to reconsider sentence should not preclude this court from considering the constitutionality of the sentence; and, in the event that it does, the failure of trial counsel to file a motion to reconsider sentence constitutes ineffective assistance of counsel.

We will address assignment of error number 1, even in the absence of a timely motion to reconsider sentence or a contemporaneous objection, because it would be necessary to do so as part of the analysis of the ineffective assistance of counsel claim. 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 ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as

counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may still violate a defendant's constitutional right against excessive punishment and is therefore 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. That said, 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, pp. 10-11 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. LSA-R.S. 14:64(B).

Louisiana Revised Statute 15:529.1, in pertinent part, provides:

> A. (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> . . .
>
> (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[.]

Therefore, the minimum sentence that could have been imposed upon Mr. Edwards was ninety-nine years (the longest prescribed sentence for a first conviction of armed robbery.) The Louisiana Supreme Court, on numerous occasions, has held that the Habitual Offender Law is constitutional. **State v. Johnson**, 97-1906, p. 5 (La. 3/4/98), 709 So.2d 672, 675. Since the Habitual Offender Law in its entirety is constitutional, the minimum sentences it imposes upon multiple offenders are also presumed to be constitutional. **Johnson**, 97-1906 at pp. 5-6, 709 So.2d at 675.

To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which in this context 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.

On count I, the defendant was adjudged a fourth-felony habitual offender and was sentenced to ninety-nine years at hard labor. In sentencing the defendant, the court noted that it had reviewed the pre-sentence investigation (PSI) as well as the sentencing guidelines under "title 15, section 529." The PSI contained the offender's statement (denying counts I and II), the victims' statements, a discussion of the defendant's criminal record, and a discussion of the defendant's social history. It concluded that, "[b]ased on the subject's criminal history, offender class and seriousness of the offense, we will recommend an extensive period of incarceration." No motion to reconsider sentence was filed or made at sentencing.

The defendant failed to rebut the presumption that the mandatory minimum sentence under LSA-R.S. 15:529.1(A)(1)(c)(i) was constitutional. He failed to clearly and convincingly show that because of unusual circumstances he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Accordingly, there was no reason for the trial court to deviate from the provisions of LSA-R.S. 15:529.1(A)(1)(c)(i) in sentencing the defendant. Further, the sentence imposed on count I was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive.

In regard to the defendant's ineffective assistance of counsel claim, we note, even assuming arguendo, defense counsel performed deficiently in failing to timely move for reconsideration of the sentence on count I, the defendant suffered no prejudice from the deficient performance because this

court considered the defendant's excessive sentence argument in connection with the ineffective assistance of counsel claim.

These assignments of error are without merit.

**CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.**