

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0641

STATE OF LOUISIANA

VERSUS

MICHAEL NICHOLAS

Judgment Rendered: November 9, 2011.

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 10-08-0702

The Honorable Donald R. Johnson, Judge Presiding

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

[Handwritten signatures: DJP, RHO, TMH]

CARTER, C. J.

The defendant, Michael Nicholas, was charged by grand jury indictment with armed robbery, a violation of Louisiana Revised Statutes Annotated section 14:64 (count 1), and four counts of attempted second degree murder, violations of Louisiana Revised Statutes Annotated sections 14:27 and 14:30.1 (counts 2 - 5). The defendant pled not guilty and, following a jury trial, was found guilty as charged on all counts. For each of the five counts, the defendant was sentenced to fifty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. All five sentences were ordered to run concurrently with each other. The defendant filed a motion to reconsider sentences, which was denied. The defendant now appeals, arguing that his sentences are unconstitutionally excessive and that the trial court erred in denying the motion to reconsider the sentences. Finding no merit, we affirm the convictions and sentences.

FACTS

On October 9, 2008, shortly after 9:00 p.m., the fifteen-year-old defendant walked into the Rite Aid Pharmacy (Rite Aid) on Plank Road in Baton Rouge. He grabbed a large bag of potato chips, moved toward the front of the store, and stood several feet from the checkout counter. Having just completed his shift, Rite Aid employee James Paul walked to the front of the store to tell the cashier, Eureka Long, that he was leaving. The defendant dropped the potato chips bag and, without provocation, withdrew a .45 caliber handgun and shot Paul in the chest. When Leroy Jackson, a customer who had been making a purchase, attempted to run, the defendant shot him several times from behind. The defendant also fired in the direction of Rite Aid employee Kasheva Armstard; however, Armstard was

able to escape to the office without being shot. The defendant then walked behind the counter and ordered Long to open the register. When Long told the defendant she could not open it without making a sale, the defendant shot her in the arm. While the defendant held the gun to her head, Long scanned an item that was on the counter so that the register would open. The defendant took cash from the register and left the store.

All of the shooting victims survived. However, a bullet severed Paul's spine, which caused paralysis from the waist down. Jackson suffered multiple gunshot wounds, and the bullet that struck Long traveled through her arm and lodged in her abdomen.

Shortly after the shootings, the defendant was apprehended by the Baton Rouge Police Department. After initially denying any involvement, the defendant confessed to the shootings and the armed robbery.

DISCUSSION

In his two assignments of error, the defendant argues, respectively, that his sentences are unconstitutionally excessive and that the trial court erred in denying the motion to reconsider the sentences.¹

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence falls within statutory limits, it may be

¹ The maximum sentence for armed robbery is ninety-nine years. *See* La. Rev. Stat. Ann. § 14:64B. The maximum sentence for attempted second degree murder is fifty years. *See* La. Rev. Stat. Ann. §§ 14:27D(1)(a) and 14:30.1B. In his brief, the defendant addresses only the maximum sentences. He asserts that “[b]y imposing the maximum sentence of fifty years in this case, the trial court imposed an unconstitutionally excessive sentence.” The defendant notes as well that “[m]aximum sentences are reserved for the most serious offenses and the worst offenders” and, accordingly, argues that there was no showing in the record that he was one of the worst offenders because he has no prior criminal history. The defendant received the maximum sentence of fifty years for each of the four counts of attempted second degree murder and only a fifty-year sentence for the armed robbery conviction. Thus, we confine our discussion to the fifty-year maximum sentences the defendant received for each count of attempted second degree murder.

excessive. *State v. Sepulvado*, 367 So. 2d 762, 764-67 (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. *State v. Andrews*, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So. 2d 448, 454. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *Id.* The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. *See State v. Holts*, 525 So. 2d 1241, 1245 (La. App. 1 Cir. 1988). Louisiana Code of Criminal Procedure Annotated article 894.1 sets forth the factors for the trial court to consider when imposing a sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. *State v. Brown*, 02-2231 (La. App. 1 Cir. 5/9/03), 849 So. 2d 566, 569.

The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. *State v. Lanclos*, 419 So. 2d 475, 478 (La. 1982). Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Article 894.1. *Id.* The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. *See State v. Jones*, 398 So. 2d 1049, 1051-52 (La. 1981).

In the instant matter, the defendant was sentenced to the maximum sentence of fifty years at hard labor without benefits for each count of attempted second degree murder, with the sentences to run concurrently. As a general rule, maximum or near maximum sentences are to be reserved for the worst offenders and the worst offenses. *State v. James*, 02-2079 (La. App. 1 Cir. 5/9/03), 849 So. 2d 574, 586. Also, maximum sentences permitted under a statute may be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. *See State v. Hilton*, 99-1239 (La. App. 1 Cir. 3/31/00), 764 So. 2d 1027, 1037, *writ denied*, 00-0958 (La. 3/9/01), 786 So. 2d 113. The defendant contends the fifty-year sentences are not supported by the record because there was no showing that he was one of the worst offenders "as he had no prior criminal history." Further, he was fifteen years old at the time of the offenses.

At sentencing, the trial court stated, in pertinent part:

He is guilty, according to the verdict of the jury. . . . [The prosecutor] was able to establish at the trial before the jury that that person in that video standing behind that register taking money, shooting a young lady behind the register, shooting one or more persons in front of the register was you. . . .

All of that was presented to the jury. I -- I have no doubt, based upon what I saw, that you are that individual; and that I have no doubt, based upon what I observed, that you did this crime. And it's serious. The fact that you're fifteen -- were fifteen-years-old [sic], everything I read tells me that a young person at age fifteen knows not to shoot anyone; . . .

I don't have reasons which would mitigate sufficiently the severity of your conduct. The fact that you were fifteen does mitigate in and of itself. That's on one side of the balance that I have to make a decision. On the other side is the severity of the charges that you've been convicted of, and the fact that you tried to kill more than one individual and you almost succeeded but for the intervention of medical assistance probably. You left one of those individuals without the use of his limbs. You've seen that. You will have that on your

conscience for the rest of your life[.] The court has reviewed the social history of this defendant. . . .

A football game, clothing to go to a football game or money to go to a football game is testimony that was revealed at the trial; that this young man wanted to go to a football game at Southern University, and he wanted to get money out of that register at that pharmacy that night to go. To give him a lesser sentence would deprecate the seriousness of his conduct. . . .

The trial court adequately considered the factors set forth in Article 894.1. Considering the trial court's careful review of the circumstances and the nature of the crimes, we find no abuse of discretion by the trial court. The trial court provided sufficient justification for the imposition of the maximum sentences allowed by law, and this court finds, in particular, that the defendant poses a serious and grave risk to the public safety because of his extraordinarily violent behavior in committing these attempted murders. Further, considering the vicious and callous execution of the completely unprovoked shootings of James Paul, who was shot in the chest at pointblank range, and Leroy Jackson, who was shot several times from behind, we find the defendant to be the worst type of offender. Accordingly, the sentences imposed are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive. The trial court did not err in denying the motion to reconsider the sentences.

These assignments of error are without merit.

CONCLUSION

For the foregoing reasons, we affirm the defendant's convictions and the sentences imposed.

CONVICTIONS AND SENTENCES AFFIRMED.