NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 2029

STATE OF LOUISIANA

VERSUS

RYAN V. HARRIS

Judgment Rendered: May 6, 2011

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On Appeal from the
23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Trial Court No. 22,940

Honorable Ralph Tureau, Judge Presiding

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Ryan V. Harris, was charged by bill of information with armed robbery, a violation of LSA-R.S. 14:64. The defendant entered a plea of not guilty, and waived his right to a jury trial. After a bench trial, the defendant was found guilty as charged and was sentenced to forty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.[1] The defendant now appeals, raising counseled and pro se assignments of error challenging the assistance of his trial counsel and the sentence imposed. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On the night of October 26, 2007, a male entered a Showbiz Video store located in a strip mall off La. Highway 42 in Prairieville, Louisiana (Ascension Parish) armed with a revolver. Keith Eiermann, a witness who was at his nearby home at the time, observed a black male exit a white van located in a field behind the strip mall. Eiermann became suspicious and contacted the police. Jody L. Cooper, who was an employee of the store at the time, was alone when the gunman entered the store. The gunman was described in detail by the victim as having dark, caramel-colored skin; a low-cut, fade-styled haircut; little to no facial hair; weighing approximately 180 to 200 pounds; and wearing a light, beige stocking over his head and face, clear vinyl gloves, a gray and white hooded-sweater, and blue jeans.

Pointing the loaded gun at Cooper, who specifically observed bullets in the cylinder, the gunman requested money from the store's cash register. In compliance with the gunman's demands, Cooper gave the gunman all of the money

[1] According to the minutes from the sentencing hearing, defendant entered a guilty plea; however, this contradicts the sentencing transcript that indicates defendant was found guilty after a bench trial. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

in the cash register, which she speculated to be more than one thousand dollars. The gunman then instructed Cooper to turn around and walk towards the wall and get on her knees, facing the wall. Cooper further complied with the gunman's demands, and the gunman then exited the store.

The police responded to the scene and issued a "Be on the Lookout" bulletin to the police in the surrounding areas of Gonzales, Sorrento, and Kleinpeter/East Baton Rouge Parish Sheriff's Office, for a white van occupied by a black male and another unknown adult. The defendant and his girlfriend at the time, Tamara Jones Dangerfield, were ultimately apprehended. Dangerfield and her children were in the van during the offense. Dangerfield stated that she did not know what the defendant was doing. The defendant also informed the police that Dangerfield was not involved, indicating that instead, he had a male accomplice.

The victim stated that she carefully observed the perpetrator's face during the offense and was able to see his facial features through the stocking. The victim identified the defendant as the perpetrator in a photographic lineup with near absolute, 99.9 percent certainty. The victim also positively identified the defendant as the perpetrator in court during the trial of this matter.

COUNSELED ASSIGNMENTS OF ERROR

In the counseled brief, the defendant presents a combined argument for three assignments of error, contending that the sentence is excessive; that the trial court failed to comply with the sentencing guidelines in LSA-C.Cr.P. art. 894.1; and that the trial counsel was ineffective in failing to file a motion to reconsider sentence. The defendant specifically argues that it is impossible to determine the trial court's reasons for sentencing. The defendant contends that under the facts herein, the case cannot be said to be the worst in its class of offenses. The defendant notes that the victim described the perpetrator as "polite" and indicated that she initially thought the whole thing was a joke. The defendant notes that he did not harm the

victim or threaten her in an intimidating manner. The defendant further notes that there was only one victim. The defendant argues that the only aggravating factor is that the offense was executed with a weapon, and notes that this fact is already contemplated by the charge itself. Additionally, the defendant points out that the trial court stated that it considered his criminal background, but did not acknowledge any consideration of other aspects of his personal life such as his employment, educational background, and social history. The defendant also remarks that the imposed sentence will effectively imprison him for the rest of his life. In this regard, the defendant contends that the trial court did not adequately comply with the sentencing guidelines and that the trial counsel should have filed a motion to reconsider sentence to raise and preserve these arguments. The defendant argues the failure to do so was prejudicial.

Under the clear language of LSA-C.Cr.P. art. 881.1E, failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. One purpose of the motion to reconsider sentence is to allow the defendant to raise any errors that may have occurred during sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. **State v. Mims**, 619 So.2d 1059, 1060 (La. 1993) (per curiam). As noted by the defendant in this case, a motion to reconsider sentence was not filed. Accordingly, the defendant is procedurally barred from having his challenge to the sentencing reviewed by this court on appeal. **State v. Felder**, 00-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173.

As noted, the defendant argues that his trial counsel was ineffective in failing to file a motion to reconsider sentence. As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court rather than on appeal. This is because post-conviction relief provides the opportunity for a full evidentiary hearing under LSA-C.Cr.P. art. 930.[2] However, when the record is sufficient, this court may resolve this issue on direct appeal. **State v. Lockhart**, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. Thus, in the interest of judicial economy, we will consider the defendant's excessiveness argument in order to address the claim of ineffective assistance of counsel. See **State v. Wilkinson**, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

The claim of ineffective assistance of counsel is to be assessed by the two-part test of **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); **State v. Fuller**, 454 So.2d 119, 125 n.9 (La. 1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced him. Counsel's performance is deficient when it can be shown that he made errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

[2] In order to receive such a hearing, the defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq.

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068.

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. **Felder**, 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. 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. **Felder**, 809 So.2d at 370.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. 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. Leblanc**, 04-1032 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 05-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005).

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Although 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. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454.

The trial court has wide discretion in imposing a sentence within the statutory limits; and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Loston**, 03-0977 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 04-0792 (La. 9/24/04), 882 So.2d 1167. Thus, 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. **State v. Holmes**, 99-0631 (La. App. 1st Cir. 2/18/00), 754 So.2d 1132, 1135, writ denied, 2000-1020 (La. 3/30/01), 788 So.2d 440.

In accordance with LSA-R.S. 14:64B, whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. As previously noted herein, the trial court imposed a sentence of forty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Before imposing sentencing, the trial court ordered a presentence investigation report (PSI) despite the defendant's request for a PSI waiver. The trial court noted the inclusion of the PSI as part of its reasons for sentence. The trial court specified that the defendant was twenty-nine years old, was found guilty of the instant offense after the bench trial, and was classified as a third-felony offender. The trial court noted the defendant's extensive criminal history reflects a pattern of violence and the carrying and use of weapons during the commission of criminal acts. We find that the trial court adequately considered the facts of the case and the defendant's background. The record supports the sentence imposed herein. We reiterate that the defendant was subject to a maximum imprisonment term of ninety-nine years. In addition to the use of a gun in the commission of the instant offense, we note that the defendant committed the offense while children were in his van and were thereby endangered. The

defendant has failed to show that the sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances herein. See **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676. Thus, even if we were to conclude that the defendant's trial counsel performed deficiently in not filing a motion to reconsider sentence, the defendant fails to show that he was prejudiced in this regard. Thus, counseled assignments of error numbers one, two, and three lack merit.

PRO SE ASSIGNMENTS OF ERROR

In the pro se brief, the defendant raises two additional grounds to support his claim of ineffective assistance of counsel. First, the defendant contends that his trial counsel was unable to conduct a proper background investigation, asserting the trial began the day after they met. On that basis, the defendant argues that his trial counsel's strategy was ineffective. The defendant further asserts that there was no contact between him and his trial counsel prior to the trial, with the exception of a telephone call that took place shortly before the trial. The defendant contends that he was deprived of a viable defense in light of the evidence against him. The defendant notes that he has an extensive history of mental illness, including a diagnosis with childhood schizophrenia, treatment at several mental-health clinics and psychiatric hospitals, and the use of medication.

The defendant also asserts that his trial counsel's strategy was ineffective in that he did not challenge the admissibility or legality of identification evidence provided by the State's witness.[3] The defendant notes that the pretrial identification of him as the perpetrator was not one-hundred percent positive. The defendant contends that the identification in court was not reliable since he was the

[3] Although the defendant seems to indicate in his pro se brief that the photo lineup identification was not admitted, the record reflects that it was admitted into evidence during the trial. The pro se brief also asserts that a police report indicated that the victim claimed not to be able to identify the perpetrator. The record does not support this assertion.

only suspect available for viewing and one of only a handful of people in the courtroom. The defendant further asserts that the victim's testimony also had noteworthy discrepancies regarding facial marks and tattoos. The defendant concludes that his attorney's actions or lack thereof may have cost him a fair trial.

Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Moody**, 00-0886 (La. App. 1st Cir. 12/22/00), 779 So.2d 4, 9-10, writ denied, 01-0213 (La. 12/7/01), 803 So.2d 40. An evidentiary hearing[4] would be required to determine whether the deficient performance alleged in the defendant's pro se brief concerned matters of strategy. Likewise, without an evidentiary hearing, it would be impossible to conclude whether further trial preparation and investigation were required. **State v. Martin**, 607 So.2d 775, 788 (La. App. 1st Cir. 1992). Thus, those allegations of ineffective assistance of counsel cannot be reviewed on appeal. **Moody**, 779 So.2d at 9.

CONVICTION AND SENTENCE AFFIRMED.

[4] As previously noted, defendant must meet the requirements of LSA-C.Cr.P. art. 924, et seq., to receive such a hearing.