NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1730

STATE OF LOUISIANA

VERSUS

WILLIAM P. SHANNON

Judgment Rendered: May 2, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 494606

Honorable Allison H. Penzato, Judge Presiding

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William P. Shannon

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BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.

WHIPPLE, J.

The defendant, William P. Shannon, was charged by bill of information with one count of production and manufacture of marijuana, a violation of LSA-R.S. 40:966(A)(1), and pled not guilty. Following a jury trial, he was found guilty of the responsive offense of attempted production and manufacture of marijuana. Thereafter, the State filed a habitual offender bill of information against the defendant, alleging he was a third-felony habitual offender.[1] The defendant agreed with the allegations of the habitual offender bill, and the court adjudged him a third-felony habitual offender. He was sentenced to fifteen years at hard labor without benefit of probation or suspension of sentence and was fined $5,000.00. He moved for reconsideration of sentence, but the motion was denied.

He now appeals, filing a counseled and a pro se brief. In his counseled brief, he contends the trial court imposed an unconstitutionally excessive sentence and abused its discretion in failing to order a presentence investigation report (PSI). In his pro se brief, he contends: the trial court abused its discretion in sustaining a State objection to the questioning of a witness; the prosecutor tainted the jury by referring to the defendant as "Mr. Criminal"; and the prosecutor improperly commented on the credibility of a witness. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence.

FACTS

Stacey Anne Matherne inherited the house located at 2923 Camilla Drive in Slidell. According to Matherne, she lived at the home with her roommate, Julie

[1]Predicate #1 was set forth as the defendant's October 16, 2001 guilty plea, under Twenty-fourth Judicial District Court Docket #95-3602, to unauthorized use of a credit card. Predicate #2 was set forth as the defendant's November 4, 2003 guilty plea, under Fourth Circuit Court (Florida) Docket #162002CF011615AXXXMA, to aggravated battery on a pregnant female.

Anne Oakley, and the defendant. She met the defendant approximately three years prior to the incident, and he was her boyfriend for approximately one year. According to Matherne, the defendant initially slept on the couch and she slept in the master bedroom of the home, but in April or May of 2010, she allowed the defendant to have the master bedroom because she was afraid he would use violence against her if she refused. Matherne indicated the defendant also "took over" another bedroom, where he stored tools, and which he kept locked. Matherne stated she was afraid the defendant would burn the house down if she tried to evict him. She conceded that in 2009, in connection with an incident involving Johnny Sontag, she had been convicted of domestic battery (two counts), simple assault, disturbing the peace, and resisting arrest.

According to Matherne, on August 13, 2010, while looking for a screwdriver to repair a table, she tried to get into the usually locked bedroom containing tools. The door was unlocked, and Matherne entered the room. She was surprised to see light coming from the closet because she thought the room was only used for storing tools. She looked in the closet and found marijuana plants growing behind a slab of sheetrock which was placed against the wall. Matherne was on probation and immediately confronted the defendant about having the marijuana plants in her house. According to Matherne, the defendant started "ranting and raving," telling her it was his house and he would have what he wanted in the house. Matherne told the defendant, "get [the marijuana plants] out or the police will get them out." The defendant called Matherne a "stupid f------ whore," and threatened to kill her. He then threw Matherne's keys, a group of approximately twenty keys, at her, striking her in the face. Matherne grabbed her miniature Dachshund and ran to her neighbor's house. According to Matherne, the defendant stated he was going to

blame the marijuana plants on her and Oakley. Oakley went to get ice for Matherne's face.

Thereafter, Matherne went back into her house because she did not have her cigarettes or any money. According to Matherne, the defendant attacked her, throwing her to the floor and striking her head on concrete. He tried to prevent her from leaving, but she was able to escape in Oakley's truck. Matherne went to the home of a "DEA," who lived on the street.

Matherne denied she was growing the marijuana plants or that she had any knowledge of them being in the closet before she discovered them. She testified the defendant had exclusive control over the bedroom where the marijuana plants were growing.

Louisiana Division of Probation and Parole Officer and former Louisiana Office of Alcohol and Tobacco Control Agent Francisco Dean lived three doors from Matherne. He knew Matherne because she cut his grass in connection with her grass-cutting business. On August 13, 2010, Matherne came to his house late in the evening. Her face was swollen, her eyes were puffy, and she was very nervous. She stated, "My boyfriend beat me up because I found his marijuana plants." Agent Dean reported the incident to the Slidell Police Department.

Slidell Police Department Officer Michael Giardina responded to a report of a domestic disturbance involving Matherne on August 13, 2010. Matherne's face was swollen and bleeding. Officer Giardina stated Matherne advised him she had been in "an altercation" with the defendant "over her finding some marijuana plants in the residence." She also indicated the defendant had thrown keys at her face. Matherne gave the police permission to enter her home and the key to the front door.

Officer Giardina and other police officers knocked on the front door of Matherne's home and yelled for the defendant to open the door. He did not open the door, so they entered the home, using Matherne's key. The defendant came down the hall from the back bedrooms and stated, "Where is your f------ search warrant?" The defendant continued to curse the police officers and acted aggressively toward them. After they placed him into custody, he told them to take him to jail, "because he's going to beat the charges anyway." Officer Giardina transported the defendant to jail. He saw no indication that the defendant was injured. The defendant made no claim that his tooth had been knocked out. He also never stated that he did not live in Matherne's home.

Slidell Police Department Major Crimes and Narcotics Agent Brian Dale Brown entered the back bedroom of Matherne's home. He saw men's clothing in the room. He found a key to a locked bedroom on the dresser, in the area where Matherne had indicated the key would be located. He unlocked the locked bedroom and, in the closet, found a small air-conditioning unit, numerous fluorescent lights above the unit, and a timer. There was also potting soil on the ground, large black buckets with root systems, and a fan. Marijuana plants were stuffed behind tools in different areas of the room. The defendant claimed "it was not his house" and "he didn't know anything about what was in the room."

The defendant testified at trial. He conceded that in 1994, he pled guilty to possession with intent to distribute valium and possession of Xanax. He also conceded that in 1999, he pled guilty to possession of marijuana. On cross-examination, he further conceded he had pled guilty to "beating up a police officer," unauthorized use of a credit card, and felony theft. He denied growing marijuana in Matherne's home, and denied any knowledge of the marijuana plants.

The defendant stated Matherne had "a real mean streak when she takes those pills and drinks." He claimed he was working in Lafitte for six to eight weeks prior to the incident, and during that time, he lived at a camper on the job site. He alleged that on August 13, 2010, he visited Matherne to celebrate her birthday. He claimed Matherne had been drinking, and when she was drinking he had to "give her her space." According to the defendant, he and Matherne began fighting, and he tried to leave in her truck, but she threatened to have him arrested for stealing the truck. He asked her to leave the house, but she refused. He conceded he threw keys at Matherne, but claimed he tried to console her afterwards. He denied smashing Matherne's head on the floor or beating her against concrete. He alleged Matherne hit him with a beer bottle, knocking out one of his front teeth. He claimed he exited the house to attend to his mouth, and when he came back inside, he told Matherne he had told a neighbor to call the police. He indicated he wanted to scare Matherne into leaving, and she and Oakley left because they thought the police were coming.

EXCESSIVE SENTENCE

In counseled assignment of error number 1, the defendant argues the trial court imposed a constitutionally excessive sentence and abused its discretion in failing to order a presentence investigation report (PSI) in this case.

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. LSA-C.Cr.P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. In light of the criteria expressed by Article 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. Hurst, 99-2868 (La. App. 1st Cir. 10/3/00),

797 So. 2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So. 2d 962. Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. State v. Harper, 2007-0299 (La. App. 1st Cir. 9/5/07), 970 So. 2d 592, 602, writ denied, 2007-1921 (La. 2/15/08), 976 So. 2d 173.

Louisiana Constitution Article I, Section 20 prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is 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. 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. Hurst, 797 So. 2d at 83.

Any person who violates LSA-R.S. 40:966(A)(1) with respect to marijuana, shall upon conviction be sentenced to a term or imprisonment at hard labor for not less than five nor more than thirty years, and pay a fine of not more than fifty thousand dollars. LSA-R.S. 40:966(B)(3). As applicable here, any person who attempts to commit any offense denounced and/or made unlawful by the provisions of the Uniform Controlled Dangerous Substances Law, shall, upon conviction, be fined or imprisoned in the same manner as for the offense attempted, but such fine or imprisonment shall not exceed one-half of the longest term or imprisonment prescribed for the offense, the commission of which was the

object of the attempt. LSA-R.S. 40:979(A). 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: if the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then the person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction. LSA-R.S. 15:529.1(A)(3)(a).[2] Herein, the defendant was sentenced as a third-felony habitual offender to fifteen years at hard labor without benefit of probation or suspension of sentence and was fined $5,000.00.

In imposing sentence, the court set forth that it had considered aggravating and mitigating circumstances, including that there was an undue risk that during the period of a suspended sentence or probation the defendant would commit another crime and that a lesser sentence would deprecate the seriousness of his crime.

A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentence herein. See LSA-C.Cr.P. art. 894.1 (A)(1) & (A)(3). Additionally, the sentence imposed was not grossly disproportionate to the severity of the offense and, thus, was not unconstitutionally excessive. The defendant makes no claim that he requested the preparation of a PSI. Furthermore, even if he made such a request,

[2]The trial court referenced "La. R.S. 15:529.1(A)(1)(b)(i)" at sentencing. This provision, however, was renumbered by 2010 LA Acts No. 973, § 2, effective July 6, 2010.

the decision to order a PSI lies within the discretion of the trial court. LSA-C.Cr.P. art. 875(A)(1); State v. Johnson, 604 So. 2d 685, 698 (La. App. 1st Cir. 1992), writ denied, 610 So. 2d 795 (La. 1993). The trial court did not abuse its discretion by relying on the testimony and other evidence at trial, rather than a PSI, in sentencing the defendant.

This assignment of error is without merit.

LIMITATION OF CROSS-EXAMINATION

In pro se assignment of error number 1, the defendant argues the trial court abused its discretion by sustaining the State's objection to defense counsel asking Matherne whether, "in the last seven years, other than with Billy, you have been involved in 16 similar domestic incidents?"[3]

In response to questioning from the court, defense counsel indicated the matters which he was referencing did not involve the defendant. Defense counsel also stated he had no proof Matherne had been convicted of anything in any of the incidents.

On review, we find no abuse of discretion in the trial court's sustaining of the State's objection to the question at issue. See LSA-C.E. art. 609.1(B) ("Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility, and no inquiry is permitted into matters for which there has only been an arrest[.]").

This assignment of error also lacks merit.

[3]The trial court permitted defense counsel to proffer this question and Matherne's negative response thereto for purposes of appeal.

PROSECUTORIAL MISCONDUCT

In pro se assignment of error number 2, the defendant argues the prosecutor tainted the jury by referring to the defendant as "Mr. Criminal" during closing argument. In pro se assignment of error number 3, the defendant argues the prosecutor improperly commented on the credibility of Matherne during voir dire and closing argument.

A thorough review of the record indicates these issues were not preserved for review. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. LSA-C.Cr.P. art. 841(A).

The defendant failed to object to the State referring to him as "Mr. Criminal" at the end of its closing argument. The defendant also failed to object to the State's comments during voir dire:

> Okay. I live in the Beau Chene community in Mandeville. Doesn't matter to me a single thing, because a bunch of people in there probably don't know the truth from anything. It doesn't matter also if somebody comes up here in rags. We can have somebody come up here and testify that's got a criminal record, that works in a hard laboring job who may not look like a lot of y'all. Does that mean that that person can't tell the truth? Does it?
>
> Because you know when we deal in situations when we deal in particular cases, we don't always have as witnesses to a crime a bunch of people in coats and ties. We don't always have people who you may want to hang around with, you may want to associate with. We have human beings. And not everyone is perfect.
>
> Now, we are going to have somebody that's – let's say someone is uneducated, kind of rough around the edges, criminal record. [Defense counsel] over there has been practicing 30 years, tough cross-examiner.
>
> So my question is, and I'm getting around to it, is that is there anybody here that because somebody doesn't talk well, enunciate well, or just because they have a criminal record, is there anybody

here that just because of that, just because of that, you couldn't believe them.

Similarly, the defendant failed to object to the State's argument in closing, "[Matherne] has never had any drug offenses, never had any problems with drugs[.]"

These assignments of error also lack merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.