NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0765

STATE OF LOUISIANA

VERSUS

KENNETH HARRIS

Judgment Rendered: November 3, 2006

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 08-04-0652

Honorable Todd W. Hernandez, Judge Presiding

* * * * * *

Hon. Doug Moreau
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Defendant/Appellant
In Proper Person

* * * * * *

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Kenneth Harris, was charged by bill of information with attempted armed robbery, a violation of LSA-R.S. 14:27 and LSA-R.S. 14:64. He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant was sentenced to twelve years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, urging the following assignments of error by counseled and pro se briefs:

Counseled:

1. The sentence imposed is excessive considering the circumstances of the case.

2. Trial counsel was ineffective in failing to file a motion asking for reconsideration of the twelve-year sentence without benefit of parole, probation, or suspension.

Pro Se:

1. The evidence in this case is insufficient to establish that the defendant committed the alleged crime.

2. The defendant was denied his constitutional right to effective representation by counsel by virtue of his court-appointed lawyer's failure to adequately investigate the defendant's alibi and failure to present evidence at trial proving such alibi.

Finding no merit in the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

On June 23, 2004, as part of her job duties at Sally's Beauty Supply, Danielle Mann was discarding trash into a dumpster located at the rear of the store when she observed two males walking in the area. One of the men was wearing a white shirt and a pair of blue shorts, and the other was wearing a red and white jersey type shirt. Shortly thereafter, the individual in the white shirt approached Ms. Mann, pulled out a gun, showed it to Ms. Mann, and

then placed it in his belt under his shirt. Without saying anything to Ms. Mann, the gunman entered the store through the rear door Ms. Mann had left open.

Inside the store, the gunman approached Pat Fernandez, the manager, as she worked at her desk located in the rear of the store. He showed Ms. Fernandez the gun and demanded that she "open the register and give [him] the money." When Ms. Fernandez explained that the register was located at the front of the store, the man proceeded to walk toward the front. After he walked away, Ms. Fernandez called 911 and advised the operator that there was a man in the store attempting to rob them.

Meanwhile, the gunman approached Lisa Collins, a cashier, as she walked toward the front of the store returning from her break. He showed Ms. Collins the gun and demanded that she give him "all the money out the register." Ms. Collins informed the gunman that she had to first "clock in" before she could open the register. As Ms. Collins prepared to "clock in," a customer approached, and the gunman fled.

At approximately 2:50 p.m., in response to the robbery report, Officer Mark Browning of the Baton Rouge Police Department was dispatched to Sally's Beauty Supply to investigate. Ms. Fernandez, Ms. Mann, and Ms. Collins provided consistent descriptions of the clothing worn by the gunman. Officer Browning patrolled the immediate area in search of individuals matching the descriptions provided. Approximately thirty-five minutes later, Officer Browning observed the defendant and another black male walking down the street. The defendant had on a red shirt and blue pants, and the other individual was wearing a white shirt. As Officer Browning approached them, the individual wearing the white shirt fled on foot. The defendant was apprehended and returned to Sally's Beauty Supply for

identification. Ms. Fernandez, Ms. Mann, and Ms. Collins all identified the defendant as the individual who attempted to rob them. They each indicated that the defendant, who was then wearing a red shirt, had changed his shirt. The defendant was arrested and taken into custody. Ms. Fernandez, Ms. Mann, and Ms. Collins each identified the defendant as the gunman in open court during the trial.

The defendant testified on his own behalf at trial. He denied any involvement in the armed robbery attempt. He maintained that he was being wrongly accused of a crime he did not commit. Through his trial testimony, the defendant attempted to establish a timeline that would have made it impossible for him to commit the armed robbery attempt at the time in question.

The defendant testified that he was a sophomore at Baton Rouge Community College and worked at the Veterans Administration Outpatient Clinic. The defendant claimed he worked until approximately 2:00 p.m. on the date in question. He then proceeded to walk to the bus stop at the corner of Florida Boulevard and North Foster Drive to catch the 2:12 p.m. bus. The defendant claimed that he routinely exited the bus at the corner of Florida Boulevard and Sherwood Forest Boulevard. The defendant stated it normally took the bus between forty-five minutes to one hour to reach this destination. From the bus stop, the defendant walked down Sherwood Forest Boulevard to Alby's convenience store located at the corner of Sherwood Forest Boulevard and Stan Drive. This walk, according to the defendant, took approximately 10-20 minutes. The defendant claimed that he came into contact with an individual he knew only as "Josh." Sometime after leaving the store, they came in contact with Officer Browning on Tams Drive. The defendant claimed he had no idea why "Josh" ran at the sight of

the police. The defendant denied ever going to Sally's Beauty Supply on the day in question. He further testified that he had money, and thus had no reason to attempt to rob Sally's Beauty Supply. The defendant admitted he had previously been convicted of misdemeanor theft for stealing money from a previous employer, but explained that he was "younger" when this offense was committed.

John Denman, the Chief of Operations at the Capital Area Transit System, testified for the defense. Mr. Denman traced the route of the bus that picks up at North Foster Drive and Florida Boulevard. He testified that the buses assigned to this route (route 44) depart the bus terminal (located at Florida Boulevard and North 22nd Street) at 1:42 p.m., 2:12 p.m., and 2:43 p.m. Mr. Denman testified that the 2:12 p.m. bus, the bus the defendant allegedly rode, was scheduled to arrive at the corner of Sherwood Forest Boulevard and Florida Boulevard at approximately 2:40 p.m. Mr. Denman also acknowledged that the bus did not always arrive and depart at the scheduled times. He stated, however, that the bus would not arrive at that particular stop anytime before 2:40 p.m. While the bus could possibly arrive later, it would not arrive earlier. Because he was not the bus driver, Mr. Denman was unable to confirm whether the defendant actually rode the bus on the day in question.

COUNSELED ASSIGNMENTS OF ERROR 1 & 2

In his first counseled assignment of error, the defendant contends the trial court erred in imposing an unconstitutionally excessive sentence. However, we note that the record does not reflect the making or filing of either an oral or written motion to reconsider sentence. In the second counseled assignment of error, the defendant argues that the failure of his trial attorney to file a motion to reconsider sentence should not preclude our

review. He contends that if review is so precluded, this failure constitutes ineffective assistance of trial counsel.

Louisiana Code of Criminal Procedure article 881.1(E) provides that the failure to make or file a motion to reconsider sentence precludes a defendant from raising an excessive sentence argument on appeal. Ordinarily, we are constrained by the provisions of this article and the holding of **State v. Duncan**, 94-1563, p. 2 (La.App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam), and we would not consider an excessive sentence argument in a case where no motion to reconsider sentence was filed. However, in the interest of judicial economy, we will entertain the defendant's argument that his sentence is excessive, even in the absence of a motion to reconsider sentence, in order to address the defendant's claim of ineffective counsel. See **State v. Mance**, 2000-1903, p. 3 (La.App. 1 Cir. 5/11/01), 797 So.2d 718, 720.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. To prove ineffective assistance of counsel, a defendant must establish not only that the performance of his counsel was deficient, but also that the deficient performance prejudiced his defense. The prejudice element requires a showing of a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. See **Strickland v. Washington**, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). A failure to file a motion to reconsider sentence does not in itself constitute ineffective assistance of counsel. 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. **State v. Felder**, 2000-2887,

pp. 10-11 (La.App. 1 Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

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, pp. 8-9 (La.App. 1 Cir. 5/5/95), 655 So.2d 448, 454. 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. Wilkinson**, 99-0803, p. 4 (La.App. 1 Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that should be considered by the trial court before imposing sentence. Although a trial court need not recite the entire checklist of article 894.1, the record must reflect that it adequately considered the criteria. **State v. Herrin**, 562 So.2d 1, 11 (La.App. 1 Cir.), writ denied, 565 So.2d 942 (La.1990). However, even in the absence of adequate compliance with article 894.1, it is not necessary to remand the matter for resentencing when the sentence imposed is not apparently severe in relation to the particular offender or the particular offense. Thus, a sentence imposed without the assignment of reasons will be set aside on appeal and remanded for resentencing only if the record is inadequate, or the record clearly indicates

the sentence is excessive. See **State v. Harris**, 601 So.2d 775, 778-79 (La.App. 1 Cir. 1992).

As previously noted, the defendant in this case was convicted of attempted armed robbery. The maximum penalty for the crime of attempted armed robbery is forty-nine and one-half years imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. See LSA-R.S. 14:27(D)(3) & 14:64(B). Thus, the defendant's sentence of twelve years is well within the statutory limit.

The defendant argues he should have received a lesser sentence in this case. While he concedes that a term of imprisonment is warranted, the defendant avers that the facts and circumstances of the instant offense, and his status as a first felony offender susceptible to rehabilitation, does not support the imposition of the lengthy twelve-year sentence.

At the sentencing hearing, prior to imposing the sentence, the trial court indicated that it received and reviewed a presentence investigation report (PSI) containing information on the defendant's personal and criminal history. The court observed:

> [The PSI] reveals you to be a first time felony offender; you have an adult arrest record of a May 2000, misdemeanor theft, arrest and conviction; and in December of 2000, a felony theft charge, which was dismissed; and the only other offense, as an adult, would be the offense to which you stand before the court today for and that is the charge of attempted armed robbery.
>
> After the court's review of the information previously mentioned, the court imposes the following sentence. Under docket No. 09-05-0341, on the charge of attempted armed robbery, the court orders that the accused serve 12 years at hard labor in the custody of the Department of Corrections concurrent to any other time to which the defendant may be serving. Credit for time served from date of arrest until bond. The court will note for the record that the crime to which the defendant was convicted is a crime of violence, and the court will also order that the sentence be served without benefit of probation, parole, and/or suspension of sentence.

After a thorough review of the record, and considering the facts and circumstances of the instant offense, we do not find that the trial court abused its discretion in imposing the twelve-year sentence; a sentence that is well below the maximum sentence that could have been imposed on the attempted armed robbery conviction. Even considering the defendant's classification as relatively youthful first felony offender, we do not find that the sentence constitutes the needless imposition of pain and suffering. Although the court did not articulate every factor considered, our review of the record reveals that the sentence is adequately justified. In light of the potential harm to society and to the victim, the twelve-year sentence, which falls within the lower range of the spectrum of possible sentences, is not so grossly disproportionate to the severity of the crime as to shock the sense of justice, nor is it needless infliction of pain and suffering. Thus, contrary to the defendant's claim, the sentence is not unconstitutionally excessive.

Accordingly, even if the defendant's trial counsel's failure to move for reconsideration of the sentence constituted deficient performance, the defendant suffered no resulting prejudice. The sentence imposed was not excessive and is fully supported by the record. Consequently, this ineffective assistance of counsel claim must fall. These assignments of error lack merit.

PRO SE ASSIGNMENT OF ERROR 1

In his first pro se assignment, the defendant asserts that the evidence was insufficient to support the conviction. In particular, the defendant asserts the state did not adequately establish his identity as the perpetrator. [1] He asserts the victims' identifications were unreliable. Thus, the defendant

[1] Because defendant has only alleged the state failed to prove he was the perpetrator of the crimes, we need not address the sufficiency of the evidence with respect to the statutory elements of attempted armed robbery.

argues that the state failed to negate every reasonable probability of misidentification.

The standard for appellate review of the sufficiency of evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.Cr.P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-09 (La.1988).

The **Jackson** standard of review, incorporated in LSA-C.Cr.P. art. 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Hendon**, 94-0516, p. 4 (La.App. 1 Cir. 4/7/95), 654 So.2d 447, 449. When the key issue in a case is the defendant's identity as the perpetrator, rather than whether the crime was committed, the state is required to negate any reasonable probability of misidentification in order to meet its burden of proof. **State v. Millien,** 2002-1006, pp. 2-3 (La.App. 1 Cir. 2/14/03), 845 So.2d 506, 509. However, positive identification by only one witness may be sufficient to support a defendant's conviction. **State v. Coates**, 2000-1013, p. 3 (La.App. 1 Cir. 12/22/00), 774 So.2d 1223, 1225.

In the instant case, the facts and circumstances surrounding the commission of the offense are essentially undisputed. The defendant does not contest that the offense was committed. Rather, he only challenges the eyewitness identifications. The thrust of the defendant's sufficiency argument appears to be that the jury should not have believed Ms.

Fernandez's, Ms. Mann's, and Ms. Collins's identification of him as the gunman.

At trial, the three female employees all positively identified the defendant as the individual who entered Sally's Beauty Supply with a gun and demanded money. Each of the women also testified that they positively identified the defendant as the gunman shortly after the incident. Contrary to the defendant's assertions, Ms. Fernandez, Ms. Mann, and Ms. Collins testified that they each had ample opportunity to view the defendant's face at the time of the offense and was absolutely certain in their identification. In his brief, the defendant cites the portion of Ms. Mann's testimony wherein she stated that she only had "ten seconds" to view the gunman before the robbery. The defendant fails to note, however, that Ms. Mann further testified she saw the gunman again after he entered the store. She explained, "...he kept turning around looking at me and Miss Pat. He kept turning around looking to see what we were doing I guess."

As further support of his contention that the identifications are not credible, the defendant claims there were discrepancies in the descriptions provided by the witnesses. The record does not support this claim. The record reflects that each of the women described the gunman as wearing a white shirt during the commission of the offense. Thereafter, when the defendant was presented for a face-to-face identification, the witnesses identified him by his facial features and not his clothing. They each observed that he was no longer wearing the white shirt he wore during the robbery attempt.

After reviewing the trial testimony and evidence, we conclude that the defendant's identification as the person who attempted the armed robbery at Sally's Beauty Supply was established beyond a reasonable doubt. It is the

function of the jury to determine which witnesses are credible. It is obvious from the verdict rendered that the jury found Ms. Fernandez, Ms. Mann, and Ms. Collins credible, accepted their unequivocal identifications of the defendant as the perpetrator, and rejected the defendant's theory of mistaken identity. On appeal, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a jury's determination of guilt. **State v. Williams**, 2002-0065, pp. 6-7 (La.App. 1 Cir. 6/21/02), 822 So.2d 764, 768, writ denied, 2003-0926 (La. 4/8/04), 870 So.2d 263.

Viewing the evidence in the light most favorable to the state, we are convinced that any rational trier of fact could have concluded, beyond a reasonable doubt, that the evidence was sufficient to negate any reasonable probability of misidentification and that the defendant was the perpetrator.

This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR 2

In this assignment of error, the defendant argues he received ineffective assistance of counsel at trial. In support of this claim, the defendant recounts numerous instances in which he claims that the failure of his trial counsel to properly represent him affected the outcome of his case. He claims his counsel's performance fell below the standard of care when he failed to file a pretrial motion to suppress attacking the out-of-court identifications, failed to conduct an adequate investigation of the defendant's alibi or to present any alibi evidence, failed to introduce the defendant's clothing into evidence, failed to object to allegedly prejudicial remarks by the state during its cross-examination of the defendant, and failed to object to leading questions by the prosecutor.

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full

evidentiary hearing may be conducted. However, if the record discloses the evidence needed to decide the issue of ineffective assistance of counsel and that issue is raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Williams**, 632 So.2d 351, 361 (La.App. 1 Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So.2d 139.

As previously noted, to prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him. **Strickland v. Washington**, 466 U.S. at 687, 104 S.Ct. at 2064. To show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. **Strickland v. Washington**, 466 U.S. at 694, 104 S.Ct. at 2068; **State v. Felder**, 2000-2887 at pp. 10-11, 809 So.2d at 369-370. 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, 860 (La.App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La.1993).

Failure to file motion to suppress identifications

The defendant claims his trial counsel was ineffective for failing to file a motion to suppress the various identifications of him by the victims. The defendant points out that although his trial counsel, through examination of the witnesses during the trial, noted the weaknesses in the identification procedures to emphasize the possibility of mistaken identification, counsel never moved to suppress the out-of-court identifications prior to trial.

To suppress an identification, a defendant must prove that the identification was suggestive, and that there was a substantial likelihood of

misidentification as a result of the identification procedure. An identification procedure is suggestive if it unduly focuses a witness's attention on the suspect. **State v. Johnson**, 2000-0680, p. 7 (La.App. 1 Cir. 12/22/00), 775 So.2d 670, 677, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066.

In evaluating a challenge to an identification procedure, courts must consider the totality of the circumstances to determine whether an identification procedure presents a substantial likelihood of misidentification. **State v. Winfrey**, 97-427, p. 9 (La.App. 5 Cir. 10/28/97), 703 So.2d 63, 70, writ denied, 98-0264 (La. 6/19/98), 719 So.2d 481. Even if it is established that a pretrial identification of an accused is the product of impermissible suggestion, in-court identification is admissible if it has an independent basis. **State v. Winn**, 412 So.2d 1337, 1341 (La.1982); **State v. Reed**, 97-0812, p. 5 (La.App. 1 Cir. 4/8/98), 712 So.2d 572, 576, writ denied, 98-1266 (La. 11/25/98), 729 So.2d 572. It is the likelihood of misidentification that violates due process, not merely the suggestive identification procedure. See **State v. Thibodeaux**, 98-1673, p. 21 (La. 9/8/99), 750 So.2d 916, 932, cert. denied, 529 U.S. 1112, 120 S. Ct. 1969, 146 L.Ed.2d 800 (2000). To determine if an identification is reliable and independent of a primary taint, the jurisprudence has applied the following five-factor test: 1) the witness's opportunity to view the defendant at the time the crime was committed; 2) the degree of attention paid by the witness during the commission of the crime; 3) the accuracy of any prior description; 4) the level of the witness's certainty displayed at the time of the identification; and 5) the length of time elapsed between the crime and the identification. **Manson v. Brathwaite**, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977).

Analyzing the reliability of the in-court identifications in this case under the totality of the circumstances, this court finds them to be reliable. As previously noted, the record before us confirms that during the offenses, Ms. Fernandez, Ms. Mann, and Ms. Collins had ample opportunity to view the gunman face to face inside the store. The gunman did not wear a mask over his face or otherwise attempt to conceal his identity. Immediately following the incident, each of the victims gave similar descriptions of the perpetrator's physical appearance and clothing to the police. Upon viewing the defendant when he was returned to the scene, each of the women unequivocally identified the defendant as the gunman and informed the police that the defendant had changed his shirt. Furthermore, at the trial, all three women positively identified the defendant as being the gunman.

Therefore, even if the defendant's trial counsel's failure to file a pretrial motion to suppress the identifications constituted deficient performance, the defendant has failed to make the required showing of sufficient prejudice. Consequently, this ineffective assistance of counsel claim must fall.

Failure to conduct adequate investigation, present alibi evidence, or introduce the defendant's clothing.

Next, the defendant asserts his trial counsel was ineffective in failing to sufficiently investigate the issue of alibi and in failing to call, as alibi witnesses, the defendant's employer and the city bus driver. The defendant also contends his counsel's failure to introduce the defendant's clothing into evidence at trial constituted deficient performance and had a direct effect on the outcome of his trial.

These particular allegations of ineffective assistance of counsel cannot be sufficiently investigated from an inspection of the record alone. The

adequacy of counsel's pretrial investigation and the decision of whether or not to call a certain witness are not reviewable on appeal. It is well settled that decisions relating to investigation, preparation, and strategy require an evidentiary hearing and cannot possibly be reviewed on appeal. See **State v. Martin**, 607 So.2d 775, 788 (La.App. 1 Cir. 1992). Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond that contained in the instant record, could these allegations be sufficiently investigated.[2] Accordingly, these allegations are not subject to appellate review. See **State v. Albert**, 96-1991, p. 11 (La.App. 1 Cir. 6/20/97), 697 So.2d 1355, 1363-1364.

Failure to object to prejudicial remarks and leading questions by the state

Finally, the defendant states general allegations and conclusory charges that his attorney was ineffective for failing to object to allegedly prejudicial comments and leading questions by the state. With no elaboration, the defendant simply asserts his trial counsel should have lodged objections when the prosecutor "made several prejudicial remarks while cross-examining the defendant[,]" and when the prosecutor "lead the witness' testimony to where they would just agree on his assumption[.]" Because the defendant does not specify the comments or questions to which he assigns error herein, it is impossible for us to review these claims.

This assignment of error lacks merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

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