NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1768

STATE OF LOUISIANA

VERSUS

JOSHUA JOHNSON

Judgment Rendered: May 6, 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 455651-1

Honorable Allison H. Penzato, Judge Presiding

* * * * * *

Walter P. Reed District Attorney	Counsel for Appellee State of Louisiana
Kathryn W. Landry Special Appeals Counsel Baton Rouge, LA	
Gwendolyn K. Brown Louisiana Appellate Project Baton Rouge, LA	Counsel for Defendant/Appellant Joshua Johnson
Joshua Johnson Kinder, LA	Defendant/Appellant In proper person

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

The defendant, Joshua Johnson, was charged by bill of information with two counts of armed robbery, in violation of La. R.S. 14:64.[1] He pled not guilty. Prior to trial, count one was severed from count two. The defendant was tried by a jury on count one (armed robbery of James Baldwin) and unanimously convicted as charged. The defendant moved for a post-verdict judgment of acquittal and for a new trial. Both motions were denied. The defendant was sentenced to imprisonment at hard labor for thirty-five years, without the benefit of probation, parole, or suspension of sentence. The defendant moved for reconsideration of the sentence, but the trial court denied the motion. The defendant now appeals, urging the following assignments of error:

Counseled assignments of error:

1. The trial court erred by sustaining the State's objection to testimony which the defense sought to elicit to impeach the credibility of Leval Butler's testimony.

2. The trial court erred in imposing an excessive sentence.

3. The trial court erred in failing to comply with La. C.Cr.P. art. 894.1.

4. The trial court erred in denying the motion to reconsider sentence.

Pro se assignment of error:

1. [Defendant] was denied effective assistance of counsel in accordance with article I, § 13, of the Louisiana Constitution of 1974, as well as, the Sixth Amendment of the United States Constitution when Defendant was deprived of the right to have his own DNA testing done on the glove as well as, to have his own expert witness present at the Daubert hearing. [Emphasis omitted.]

We affirm the conviction and sentence.

FACTS

On September 18, 2008, sixty-year-old James Baldwin was inside his room at the Value Travel Inn in St. Tammany Parish, passing time before work. As Baldwin

[1] Bruce Owens, Jr. and Leval Butler were also charged in the bill of information. The charges against Owens and Butler were later reduced to two counts of simple robbery.

sat on the bed, with the front door partially ajar, a black male forced his way into the room and held Baldwin at gunpoint. The intruder, later identified by Baldwin as the defendant, started rummaging through the room and demanding that Baldwin give him money. When Baldwin advised that he only had a dollar in his pocket, the perpetrator repeatedly hit him on the head with the gun. The perpetrator then took Baldwin's wallet, cellular phone, and the dollar from his pocket. The perpetrator disconnected the telephone and fled. Shortly thereafter, Baldwin went to a neighboring room and contacted the police.

In response to the call, Sergeant George Cox, of the St. Tammany Parish Sheriff's Office, was dispatched to the Value Travel Inn to investigate the robbery report. When he arrived at Room 313, Sgt. Cox made contact with Baldwin, who advised that he had been robbed and beaten by a black male. Baldwin explained that the perpetrator wore a white shirt and had some type of black cloth covering his head. The perpetrator also had a glove on one of his hands. Sgt. Cox also talked to the occupant of a neighboring room, who provided descriptions of two suspicious black males she observed in the area. According to this neighbor, one of the men was wearing a dark colored shirt and red shoes. The second male was wearing a white shirt with "graffiti" on it and a pair of yellow shoes. Sgt. Cox noted that neither of these clothing descriptions matched the description of the perpetrator provided by Baldwin.

Shortly thereafter, the owner/manager of the Value Travel Inn arrived and allowed Sgt. Cox to access the video surveillance footage from the cameras monitoring the parking lot. In the surveillance footage, Sgt. Cox observed a Ford Taurus drive into the parking lot. The vehicle pulled up on the side of the property where Baldwin's room was located. One male subject quickly exited the vehicle wearing a white shirt with something black covering his head. This individual then quickly moved toward the breezeway near Baldwin's room. Meanwhile, as another

individual attempted to back out in the Taurus, the vehicle crashed into a dumpster before driving to a different area of the parking lot and parking. Two black males, who fit the description previously provided by the neighbor, exited the Taurus and walked back and forth around the parking lot. The men returned to the vehicle several times. Moments later, the subject with the white shirt and black head covering returned to the area and ran toward the vehicle. All three men entered the Taurus and the vehicle drove away.

Aware that the perpetrator had taken Baldwin's cellular phone, Sgt. Cox sought to have the phone located. The tracking results suggested the general location of the phone. Sgt. Cox immediately drove toward that area. As he exited the interstate, Sgt. Cox observed a gold Ford Taurus with three individuals inside. Sgt. Cox immediately radioed for backup. Shortly thereafter, Sgt. Lance Vitter, of the St. Tammany Parish Sheriff's Office, arrived in the area and initiated a traffic stop. The defendant, Owens, and Butler were taken in for questioning. A black glove was recovered from the console of the vehicle. A matching black glove had been located in the parking lot at the Value Travel Inn.

Based upon information provided by Butler and Owens, which was corroborated by the surveillance footage, Sgt. Cox compiled a photographic array with the defendant's photograph and presented it to Baldwin for identification. Baldwin immediately identified the defendant as the individual who had entered his room and robbed him.

Butler and Owens testified at the defendant's trial. Both men admitted that they accompanied the defendant to the Value Travel Inn on the morning in question, but denied ever entering the victim's room. They also claimed they were unaware that the defendant intended to rob anyone when they arrived at the motel. Butler explained that he and Owens had been riding around in the Taurus, a vehicle they rented in exchange for drugs, when they saw the defendant and asked him for some

money for gas. The defendant entered the vehicle and agreed to provide the gas money. According to both Butler and Owens, when they arrived at the motel, the defendant momentarily left the area while they remained in the parking lot. Later, when the defendant ran back to the vehicle, the men left the area. Both men admitted that they were aware that the defendant had robbed someone when he returned, because he had some keys, a cell phone, and a portable television in his possession.

In his trial testimony, Butler admitted that the gloves found in the vehicle and at the scene belonged to him. He explained that he wore the gloves when driving because his hands sweat. Butler claimed he took the gloves off when they arrived at the Value Travel Inn on the morning in question. He denied seeing the defendant with the gloves. DNA analysis of the glove found inside the vehicle revealed a profile that was consistent with at least one individual. Leval Butler could not be excluded as the donor of that sample. Analysis of the glove found at the property revealed a full DNA profile consistent with at least two DNA donors. The major DNA donor profile was consistent with Leval Butler. Both the defendant and the victim were excluded as possible donors for the sample collected from this glove. Tara Brown, an expert in DNA analysis and molecular biology, testified that it is possible for an individual to have briefly worn the glove in question without depositing enough skin cells for a conclusive DNA analysis.

COUNSELED ASSIGNMENT OF ERROR NO. 1
FAILURE TO ALLOW IMPEACHMENT EVIDENCE

In his first counseled assignment of error, the defendant argues the trial court erred by sustaining the state's objection to testimony the defense sought to introduce in its efforts to impeach Leval Butler's trial testimony. Specifically, the defendant argues the trial court should have allowed the defense to introduce testimony regarding the substantial benefit Butler received in exchange for his trial testimony.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The confrontation clause of the Louisiana Constitution similarly affords the defendant the right to "confront and cross-examine the witnesses against him." La. Const. art. I, § 16.

Louisiana Code of Evidence article 609.1 provides, in pertinent part:

> **A. General criminal rule.** In a criminal case, every witness by testifying subjects himself to examination relative to his criminal convictions, subject to limitations set forth below.
>
> **B. Convictions.** 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, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.

The general rule provided by the foregoing is that the credibility of a witness may be impeached by evidence showing the witness has been convicted of a crime. On the other hand, evidence of an arrest, an arrest warrant, an indictment, prosecution, or an acquittal may not be used to impeach the **general credibility** of a witness. See State v. Casey, 99-0023, p. 9 (La. 1/26/00), 775 So. 2d 1022, 1031, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

It is well settled, however, that this general rule gives way when a witness has a pending charge against him and the cross-examiner seeks to show the pending charge may **bias or influence** the testimony of the witness because of the prosecutor's leverage over him. State v. Woods, 00-2147, p. 13 (La. App. 1st Cir. 5/11/01), 787 So. 2d 1083, 1093, writ denied, 01-2389 (La. 6/14/02), 817 So. 2d 1153. The hope or knowledge of a witness that he will receive leniency from the state is highly relevant to establish the bias or interest of the witness. State v. Brumfield, 546 So. 2d 1241, 1246 (La. App. 1st Cir. 1989), writ denied, 556 So. 2d 54 (La. 1990). Thus, while a defendant may not cross-examine a witness about

an arrest for the purpose of impeaching his general credibility, he may cross-examine the witness about an arrest in order to determine whether the witness's testimony is affected by any bias or interest arising from his arrest. See Brumfield, 546 So. 2d at 1246; see also La. C.E. art. 607(D)(1) ("Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity is admissible to attack the credibility of the witness.").

As previously noted, Butler testified on behalf of the state at the defendant's trial. Butler identified the defendant as the individual who robbed Baldwin. During his testimony, Butler admitted that although he and Owens were originally charged with armed robbery as well, the state subsequently agreed to reduce the charges against them to simple robbery in exchange for their testimony against the defendant. After it was established that Butler had prior felony convictions for possession of cocaine and theft over $500.00, defense counsel asked Butler if the state also agreed to forego any multiple offender proceedings against him as part of his plea agreement. Butler responded affirmatively. In an effort to show bias and/or influence, counsel then asked Butler how his sentencing exposure would be affected if the state chose to file a multiple offender bill. Butler claimed his counsel never explained the matter to him.

Later, the defense sought to introduce testimony from John Linder, a criminal defense attorney, to explain the affect that a habitual offender adjudication would have had on Butler's penalty exposure. The state objected to the testimony as irrelevant. The court sustained the state's objection and ruled the testimony was inadmissible. The defense was allowed to proffer the testimony for the record. The defense also proffered the transcript of Butler's guilty plea wherein the state specifically stated, as part of the agreement, that the defendant would not be billed as a multiple offender unless he failed to cooperate with the terms of the plea agreement.

In connection with the proffer, Linder was accepted, by stipulation, as an expert in criminal law and defense. Linder explained that when a criminal defendant is convicted of a second or subsequent felony, the habitual offender law becomes relevant. He further explained that an individual with prior felony convictions for theft over $500.00 and possession of cocaine could face a possible sentence of imprisonment of 66 to 198 years on an armed robbery conviction. Finally, Linder noted that, under the habitual offender law, multiple offenders are not eligible for good time and third offenders are not eligible for parole.

On appeal, the defendant argues the jury should have been allowed to hear Linder's testimony to show that Butler's testimony was motivated by bias and/or influence. It is well settled that errors regarding the defendant's right of confrontation are subject to harmless-error analysis on appeal. Delaware v. Van Arsdall, 475 U.S. 673, 680-81, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986); State v. Vale, 95-0577, p. 5 (La. 1/26/96), 666 So. 2d 1070, 1072-73 (per curiam); State v. Butler, 30,798, p. 24 (La. App. 2d Cir. 6/24/98), 714 So. 2d 877, 891, writ denied, 98-2217 (La. 1/8/99), 734 So. 2d 1222. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); Woods, 787 So. 2d at 1094. In Van Arsdall, the United States Supreme Court noted the following in discussing application of the harmless-error analysis to confrontation issues:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684, 106 S.Ct. at 1438.

Assuming arguendo that the trial court erred in precluding the defense from introducing evidence of the ramifications of the state's agreement to abandon any multiple-offender charge against Butler (to show bias and/or interest), any error in this respect is harmless beyond a reasonable doubt. The state's case herein was strong. Both Butler and Owens testified that the defendant went into the room at the motel while they remained outside, a version of events that is entirely consistent with the video-surveillance footage. The victim also identified the defendant, with absolute certainty, from a pretrial photographic lineup and again in open court at trial, as the individual who robbed and beat him. Furthermore, even without any detailed discussion of the issue by Linder, through questioning at the trial, the jury was made aware that Butler, who had two prior felony convictions, benefitted from the state's decision not to pursue a multiple offender charge. Accordingly, we conclude that the verdict rendered in this case "was surely unattributable to the error."

Given the foregoing, it is clear that any error as to the trial court's refusal to allow the defendant to present evidence regarding the specific benefit that Butler stood to gain was harmless beyond a reasonable doubt. See La. C. Cr. P. art. 921.

This assignment of error lacks merit.

COUNSELED ASSIGNMENTS OF ERROR NOS. 2-4 EXCESSIVE SENTENCE, COMPLIANCE WITH SENTENCING GUIDELINES, DENIAL OF MOTION TO RECONSIDER SENTENCE

In the remaining three counseled assignments of error, the defendant argues that the trial court erred in imposing an excessive sentence, in failing to give adequate consideration to the sentencing guidelines set forth in La. C. Cr. P. art. 894.1, and in denying his motion to reconsider the sentence. Specifically, he contends the trial court failed to consider relevant factors, such as his employment

background, educational background, and/or family history when imposing the sentence.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is unconstitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993). A sentence is 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. Hogan, 480 So. 2d 288, 291 (La. 1985). 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. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979); State v. Lanieu, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So. 2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So. 2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Lobato, 603 So. 2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. C. Cr. P. art. 894.1. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. State v. Herrin, 562 So. 2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (La. 1990). 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. Watkins, 532 So. 2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is

unnecessary when a sufficient factual basis for the sentence is shown. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982).

Armed robbery carries a penalty of imprisonment at hard labor for not less than ten years nor more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. La. R.S. 14:64(B). As previously noted, the defendant was sentenced to imprisonment at hard labor for thirty-five years without the benefit of probation, parole, or suspension of sentence.

Our review of the record in this case reveals that, prior to imposing the sentence, the trial court reviewed the facts of the offense and specifically stated that consideration was given to the sentencing guidelines set forth in Article 894.1. In accordance with the guidelines, the court specifically noted that the defendant used actual violence during the commission of the offense and his conduct manifested deliberate cruelty to the victim. See La. C. Cr. P. art. 894.1(B)(1) & (6). The court also noted that the defendant had two prior felony drug convictions and a misdemeanor conviction. The court concluded that the defendant was in need of correctional treatment or a custodial environment that could be provided most effectively by his commitment to an institution. See La. C. Cr. P. art. 894.1(A)(2). The court further noted that a lesser sentence would deprecate the seriousness of the offense. See La. C. Cr. P. art. 894.1(A)(3).

Given the trial court's wide discretion in the imposition of sentences and the fact that the defendant's sentence is well within the statutory limits, we cannot say that the trial court manifestly abused its discretion in sentencing the defendant to thirty-five years at hard labor. Contrary to the defendant's assertions, we find that the trial court's reasons for sentence adequately demonstrate compliance with Article 894.1. Although the trial court may not have listed every aggravating and/or mitigating factor, the record provides a sufficient factual basis for the sentence imposed. Furthermore, considering the unprovoked brutality inflicted

upon the elderly victim by the defendant, we conclude that the instant sentence is in no way excessive. The sentence is neither grossly disproportionate to the severity of the offense, nor so disproportionate as to shock our sense of justice, and therefore, is not unconstitutionally excessive. Thus, the trial court did not err in denying the defendant's motion to reconsider the sentence.

These assignments of error lack merit.

PRO SE ASSIGNMENT OF ERROR
INEFFECTIVE ASSISTANCE OF COUNSEL

In his sole pro se assignment of error, the defendant argues he received ineffective assistance of counsel at trial. Specifically, he claims his counsel's performance fell below the required standard when she failed to request funding to have DNA testing performed on the glove introduced into evidence at the trial and failed to secure an expert witness in the field of molecular biology to counter the state's expert witness.

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. 1st Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So. 2d 139.

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. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is

prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; see State v. Felder, 00-2887, pp. 10-11 (La. App. 1st Cir. 9/28/01), 809 So. 2d 360, 3670, writ denied, 01-3027 (La. 10/25/02), 827 So. 2d 1173. 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. 1st Cir. 1992), writ denied, 614 So. 2d 1263 (La. 1993).

The allegations of ineffective assistance of counsel raised in the defendant's brief cannot be sufficiently investigated from the inspection of the record alone. The adequacy of counsel's trial investigation/preparation and the decision of whether or not to secure a particular witness's testimony at trial involve matters of trial preparation and/or strategy. 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. 1st 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. Accordingly, these allegations are not subject to appellate review. See State v. Albert, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So. 2d 1355, 1364.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.