Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 992,
La. C. Cr. P.

No. 52,731-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA Appellee

versus

MICHAEL DEWAYNE KELLY Appellant

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Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 345696

Honorable Roy Brun, Judge

* * * * *

LOUISIANA APPELLATE PROJECT Counsel for Appellant
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Before PITMAN, GARRETT, and STONE, JJ.

GARRETT, J.

The defendant, Michael Dewayne Kelly, was charged with armed robbery. Following a jury trial, he was convicted of attempted armed robbery. He was subsequently adjudicated a fourth felony offender and sentenced to 60 years at hard labor without benefit of parole, probation, or suspension of sentence. We affirm the defendant's conviction, adjudication as a fourth felony offender, and sentence.

FACTS

On December 13, 2016, the elderly victim drove to his place of business on Pro Street in Shreveport. As he was preparing to turn from Curtis Lane onto Pro Street, a Suburban was trying to turn from Pro Street. The victim motioned for it to turn, which it did. The victim then drove up to his business, went inside, and locked the front door. About three to four minutes later, Kelly – a complete stranger to the victim – knocked on the door. When the victim opened the door, Kelly said he was looking for a job and asked if the victim was hiring. The victim said he was not.

The men then stood at the doorway for about five minutes, talking about how bad business was. According to the victim, whenever anyone came in the business, he would leave the door open. While he was talking to Kelly, he was leaning against the doorjamb, half in and half out of the building. The victim said this was his usual practice, in case something happened with a stranger.

When Kelly asked if he could use the victim's restroom, the victim agreed and invited him to grab a cold drink on the way out. While Kelly was in the restroom, he called to the victim, claiming that there was a terrible water leak in the bathroom. The victim told him not to worry about

it and that he would fix it later. The victim later told the police that he felt Kelly was trying to lure him to the back of the business.

After exiting the restroom, Kelly did not get a Coke or a bottle of water, as he had been invited to do by the victim. Instead he walked to the open door, which he grabbed and shut. Kelly's actions startled the victim, who caught his shoe cleats on a rug and fell backwards. Kelly got on top of him, placed a pistol to his head, and said, "I'm going to kill you. Where's the money?" The victim told Kelly he had no money and begged for his life. He told Kelly that he had a small wallet with maybe $15 to $20 in his left-hand shirt pocket.

The victim had a .38 caliber snub nose revolver in his right-hand pants pocket, which he was able to maneuver underneath him to keep Kelly from discovering it. Deciding that Kelly was going to kill him once he got the wallet, the victim grabbed the hand with which Kelly was holding his gun and twisted as hard as he could. When Kelly started to stand up, the victim kicked him between the legs. Kelly hit the door, then stumbled outside, where he dropped the victim's wallet in the parking lot.

The victim jumped up, grabbed the open door with his left hand, and tried to shut it so he could lock it. Kelly began to shoot at him. Fortunately, instead of the victim, the bullets hit the building. The victim returned fire and hit Kelly multiple times.[1] The victim then shut and locked the door. Running into the break room, he called 911 and began loading his shotgun

[1] Kelly's medical records indicated that he was struck twice in the left arm, once in the chest, and once in the lower back. The police recovered five spent shell casings from the victim's revolver.

because he feared Kelly had a partner who would come through the shop door.

As the victim watched from the break room window, he saw Kelly, who was lying in the road, motion to a Suburban parked 20 to 30 feet down the road. The victim thought it was the same Suburban he had seen earlier, but he was "not absolutely positive." The Suburban raced up, and the driver jumped out. The victim saw the driver bend down twice; he assumed that the man picked up the wallet and Kelly's gun, neither of which were recovered by the police. The driver then fled in the Suburban, leaving Kelly lying on the ground. Kelly, who initially gave the police a false name, was transported to the hospital for treatment of his injuries.

Kelly was charged by bill of information with armed robbery, in violation of La. R.S. 14:64, and possession of a firearm or carrying a concealed weapon by a person convicted of domestic abuse battery, in violation of La. R.S. 14:95.10. The firearm charge was subsequently dismissed.

Jury trial was held in June 2018. The state presented the testimony of the victim, a responding patrol officer, and a member of the crime scene investigation unit who processed the crime scene. Photos of the crime scene were admitted. The defendant did not testify, but his medical records were introduced. During their deliberations, the jurors requested that the trial judge advise whether something had been admitted into evidence and that they be given instructions on various offenses. As to the former request, the trial court declined to comment on the evidence, and, as to the latter, it recharged them as to the pertinent offenses. Thereafter, the jury returned a

responsive verdict of attempted armed robbery. Kelly's motion for post-verdict judgment of acquittal was denied by the trial court.

The state filed a habitual offender bill of information in which it asserted that Kelly had four prior felony convictions: 2004, simple burglary of a vehicle (Bossier Parish); 2005, burglary of a vehicle (Bossier Parish); 2006, illegal possession of stolen things (Caddo Parish); and 2010, domestic abuse battery with strangulation (Caddo Parish). Kelly filed a motion to quash. At the ensuing hearing, the state agreed to proceed without the 2005 conviction due a defect. Also, the defendant rejected the state's offer of a 40-year sentence under the habitual offender bill.

On September 6, 2018, a hearing was held on the habitual offender bill. The state presented the testimony of an expert in fingerprint analysis, who verified that Kelly was the same person whose fingerprints were affixed to the bills of informations in the 2004, 2006, and 2010 convictions. Certified copies of the bills of information, minutes, and transcripts of the guilty pleas in each of the predicate offenses were admitted into evidence. The trial court adjudicated Kelly a fourth felony offender and sentenced him to 60 years at hard labor without benefit of parole, probation, or suspension of sentence. The defendant's timely motion to reconsider sentence was denied.

The defendant appealed. His eight assignments of error assert issues pertaining to: (1) the reinstruction of the jury; (2) institution of prosecution by bill of information instead of indictment; and (3) sentencing.

REINSTRUCTION OF JURY

In two assignments of error, Kelly raises issues pertaining to questions asked by the jurors after they retired to deliberate. He argues that the trial

court erred in reinstructing the jury by only partially instructing as to the law on attempt and in failing to instruct as to the possibility of a not guilty verdict. Kelly further contends that the trial court's "selective reinstruction" amounted to an expression of the trial court's opinion that a not guilty verdict did not apply.

Definitions of Offenses

Before retiring for deliberations, the jury was given a comprehensive charge, which included all responsive verdicts and a possible verdict of not guilty, as well as a complete charge on attempt. Kelly takes no issue with this original charge to the jury. After retiring to deliberate, the jurors requested that the jury charge be brought into the jury room. They specifically wanted the instructions on the various offenses included in the jury charge. The defense agreed, but the state objected. After the jurors returned to the courtroom, the trial court verified with them that "there was a question about the various offenses." It then reread to them the definitions of armed robbery, first degree robbery, and simple robbery. It also reread the provisions of La. R.S. 14:27(A), which sets forth the basic elements of attempt. After the trial court finished reading that subsection, it inquired of the jurors: "Is that – does that help? Okay. Then we will send you back again." The jurors returned to their deliberations and subsequently rendered their verdict.[2] Kelly made no contemporaneous objection to the recharging of the jury.

[2] According to the court minutes, the jurors originally retired to deliberate at 11:37 a.m. After being recharged, they went back to the jury room at 1:12 p.m. They returned to the courtroom at 2:03 p.m. to render their verdict.

A party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error. La. C. Cr. P. art. 801(C). However, jury instructions may be reviewed on appeal even without a contemporaneous objection when the alleged error violates a fundamental right. *State v. Roth*, 52,359 (La. App. 2 Cir. 11/14/18), 260 So. 3d 1230. To fall under the exception, the error must cast substantial doubt on the reliability of the fact-finding process. *State v. Matthews*, 50,838 (La. App. 2 Cir. 8/10/16), 200 So. 3d 895, *writ denied*, 16-1678 (La. 6/5/17), 220 So. 3d 752. An invalid instruction on the elements of an offense is harmless if the evidence is otherwise sufficient to support the jury's verdict and the jury would have reached the same result if it had never heard the erroneous instruction. *State v. Matthews*, *supra*.

After reviewing the record, we conclude that an exception to the contemporaneous objection rule is not warranted in this case, and, if it were, the error was harmless. The jury's request for the instructions pertaining to the various offenses indicated only a desire for clarity as to their elements. After rereading the portions of the jury instructions containing this information, the trial court asked the jurors if this satisfied their request. After obviously receiving a positive response, the trial court sent them back to continue their deliberations.[3] The jury verdict form clearly indicated that a not guilty verdict was one of the options before the jury. Nothing in this record suggests confusion on the jurors' part as to their ability to render a

[3] Although Kelly complains that the trial court did not reread La. R.S. 14:27(B)(1) and (C) to the jurors, we note with interest that, nonetheless, they apparently applied subsection (C), which provides "any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt."

verdict finding the defendant not guilty if they felt the evidence warranted such action.

We find no merit to the defendant's argument that the trial court improperly and prejudicially reinstructed the jury.

Comment on the Evidence

The other request from the jury involved a question about the evidence. Specifically, they asked the trial court "if somebody said something." After the jurors returned to the courtroom, the trial court addressed this query as follows:

> First of all, it was communicated to me that there was a request for me to comment on what had been placed into evidence or not placed into evidence. I am specifically prohibited, under the law, from commenting on the evidence.
>
> And the purpose for that could well be that the – this whole case is yours to decide, and they don't want, obviously, the Judge influencing you by what he says about the evidence. So you have to rely on your memory as to what was put on.

La. C. Cr. P. art. 772 provides:

> The judge in the presence of the jury shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.

In a similar vein, La. C. Cr. P. art. 806 states:

> The court shall not charge the jury concerning the facts of the case and shall not comment upon the facts of the case, either by commenting upon or recapitulating the evidence, repeating the testimony of any witness, or giving an opinion as to what has been proved, not proved, or refuted.

Our review of the record reveals that the trial court scrupulously complied with these articles. To the extent that the defendant asserts that the trial court's handling of the reinstruction matter amounted to a "comment" on the evidence, we find no merit to this argument.

These assignments of error lack merit.

INSTITUTION OF PROSECUTION

The defendant contends that, since the offense of armed robbery carries a maximum sentence of 99 years, the prosecution against him should have been instituted by indictment instead of bill of information. In support of this argument, the defendant cites *State ex rel. Morgan v. State*, 15-0100 (La. 10/19/16), 217 So. 3d 266, and claims that it abrogated *State v. Donahue*, 355 So. 2d 247 (La. 1978), which held that, since armed robbery is neither a capital crime nor a crime punishable by life imprisonment, it may be charged by grand jury indictment or by bill of information. We find no merit to this argument.

A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. Other criminal prosecutions in a district court shall be instituted by indictment or by information. La. C. Cr. P. art. 382(A). Only when a crime is capital or punishable by life imprisonment is a grand jury indictment mandated. *State v. Johnson*, 365 So. 2d 1267 (La. 1978); *State v. Qualls*, 353 So. 2d 978 (La. 1977). The maximum term of imprisonment for armed robbery is imprisonment at hard labor for not more than 99 years. As a result, the institution of prosecution in the instant case by bill of information was proper.

In the *Morgan* case, the Louisiana Supreme Court, in the context of a motion to correct an illegal sentence filed by a juvenile offender, construed the defendant's 99-year sentence as "an effective life sentence," in violation of *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), which held that a sentence of life without the possibility of parole for

a nonhomicide offense committed when the defendant was a juvenile constitutes cruel and unusual punishment. *Morgan*, *supra*, did not involve any alleged defect in the institution of prosecution, and it is inapplicable to the defendant in the instant case, who was 36 years old at the time of the offense.

This assignment of error is meritless.

ASSIGNMENTS PERTAINING TO SENTENCING

In five assignments of error, Kelly challenges his sentencing. He asserts that the trial court erred in imposing an excessive sentence and in not considering the mitigating factors set forth in the statement on sentencing he filed. He also contends that the trial court abused its discretion and committed legal error in finding prior crimes of violence. Finally, he asserts that his trial counsel was ineffective because he failed to object to these alleged errors.

Imposition of Sentence

Shortly after his conviction, Kelly filed a statement on sentencing listing the factors he considered to be mitigating: his age (38 years); his assertion that none of his four prior felony convictions were crimes of violence; his failure to harm or threaten police or bystanders during his "shootout" with the victim; his failure to shoot and wound the victim, who did not require medical attention for the pain he sustained to his ribs and/or stomach; and his failure to torture or inflict "pitiless suffering" on the victim.[4] During the hearing on Kelly's motion for post-verdict judgment of

[4] In his motion to reconsider sentence, defense counsel reurged the mitigating factors asserted in this statement, especially the defendant not harming any other witnesses or shooting the victim.

acquittal, the trial court acknowledged receipt of the statement and expressed its appreciation to defense counsel for submitting it.

Before the imposition of sentence, the trial court confirmed that Kelly's sentencing range was 20 years to life imprisonment. It stated on the record that it had reviewed the provisions of La. C. Cr. P. art. 894.1 and considered whether this was an exceptional case justifying deviation; the court concluded that it was not. The trial court held that it was "at a loss for mitigating factors" and noted that there were several aggravating factors. The court stated that there were prior crimes of violence. It also recalled the facts of the unprovoked and violent attack on the elderly victim in the course of a robbery and how the victim's hospitality to Kelly was rewarded with a gun pointed at him. The trial court stated that it saw no reason to go up or down from a midrange sentence. It found that a 60-year-sentence was appropriate for Kelly, who had failed to take responsibility or show remorse for his actions. The trial court concluded that it had seen no indication that Kelly would not continue the same course of conduct if he returned to society. For the record, defense counsel clarified that Kelly was adjudicated a fourth felony offender and objected to the sentence.

Prior crimes of violence

In two assignments of error, Kelly contends that the trial erred in finding that there were prior crimes of violence.

Kelly argues that his 2010 conviction for domestic abuse battery by strangulation should not have been considered as a "crime of violence" in

sentencing him for the instant offense because it was not considered a crime of violence in La. R.S. 14:2 at the time of his conviction for that offense.[5]

La. R.S. 14:2 provides, in pertinent part:

> B. In this Code, "crime of violence" means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.

The statute then sets forth a list of enumerated "crimes of violence." However, the list of offenses is illustrative, not exclusive. *State v. Robinson*, 46,737 (La. App. 2 Cir. 12/14/11), 79 So. 3d 1270, *writ denied*, 12-0487 (La. 8/22/12), 97 So. 3d 378; *State v. Smith*, 45,430 (La. App. 2 Cir. 8/11/10), 47 So. 3d 553, *writ denied*, 10-2384 (La. 3/4/11), 58 So. 3d 474. Because this list of enumerated crimes is merely illustrative, not exhaustive, unlisted offenses may be denominated as crimes of violence under the general definition of the term provided by the statute. *State v. Oliphant*, 12-1176 (La. 3/19/13), 113 So. 3d 165.

Domestic abuse battery is the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member. La. R.S. 14:35.3(A). "Strangulation" means intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of the victim. La. R.S. 14:35.3(B)(7). Based

[5] In 2018, the legislature added "[d]omestic abuse battery punishable under R.S. 14:35.3(M)(2) or (N)" to the statute. La. R.S. 14:2(B)(48). Both La. R.S. 14:35.3(M)(2) and (N) involve offenses where the victim sustained serious bodily injury. The defendant's domestic abuse battery by strangulation conviction was pursuant to La. R.S. 14:35.3(L).

upon the definition provided in La. R.S. 14:2, we find that the trial court correctly considered Kelly's 2010 conviction as a crime of violence.

Excessive Sentence

Kelly contends that his 60-year sentence was excessive for the following reasons: (1) the court did not consider all of the circumstances to meaningfully tailor the sentence to the defendant; (2) the court did not follow its own determination that the case justified a sentence in the "middle"; (3) it is the will of the present-day legislature that offenders like him not receive a life sentence; and (4) the jury's responsive verdict indicated leniency. Kelly also contends that the trial court failed to consider the mitigating factors he set forth in his statement on sentencing.

In reviewing a sentence for excessiveness, an appellate court uses a two-step process. First, the record must show that the trial court took cognizance of the criteria set forth in La. C. Cr. P. art. 894.1. The articulation of the factual basis for a sentence is the goal of La. C. Cr. P. art. 894.1, not rigid or mechanical compliance with its provisions. *State v. Jack*, 51,428 (La. App. 2 Cir. 6/21/17), 224 So. 3d 492, *writ denied*, 17-1281 (La. 4/27/18), 239 So. 3d 838. The trial court is not required to list every aggravating or mitigating circumstance so long as the record reflects that it adequately considered the guidelines of the article. *State v. Smith*, 433 So. 2d 688 (La. 1983); *State v. Jack, supra*. There is no requirement that specific matters be given any particular weight at sentencing. *State v. Thompson*, 50,392 (La. App. 2 Cir. 2/24/16), 189 So. 3d 1139, *writ denied*, 16-0535 (La. 3/31/17), 217 So. 3d 358.

Second, the court must determine whether the sentence is constitutionally excessive. A sentence violates La. Const. art. I, § 20, if it is

grossly out of proportion to the severity of the crime or nothing more than a purposeless and needless infliction of pain and suffering. *State v. Dorthey*, 623 So. 2d 1276 (La. 1993); *State v. Lewis*, 49,138 (La. App. 2 Cir. 6/25/14), 144 So. 3d 1174, *writ not cons.*, 16-0235 (La. 3/14/16), 188 So. 3d 1070. A sentence is considered grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice. *State v. Weaver*, 01-0467 (La. 1/15/02), 805 So. 2d 166; *State v. Jack*, *supra*; *State v. Lewis*, *supra*.

The trial court has wide discretion in the imposition of sentences within the statutory limits and such sentences should not be set aside as excessive in the absence of a manifest abuse of that discretion. *State v. Williams*, 03-3514 (La. 12/13/04), 893 So. 2d 7; *State v. Jack*, *supra*. A trial judge is in the best position to consider the aggravating and mitigating circumstances of a particular case, and, therefore, is given broad discretion in sentencing. *State v. Allen*, 49,642 (La. App. 2 Cir. 2/26/15), 162 So. 3d 519, *writ denied*, 15-0608 (La. 1/25/16), 184 So. 3d 1289. On review, an appellate court does not determine whether another sentence may have been more appropriate, but whether the trial court abused its discretion. *State v. Jack*, *supra*.

The record shows that the trial court acknowledged receipt of Kelly's statement on sentencing. However, the factors cited therein were not, in fact, mitigating. Kelly's age does not show him to be a youthful offender to whom leniency should be extended; instead, it tends to show him to be a mature person who has repeatedly chosen to commit criminal acts since early adulthood. As discussed *supra*, he incorrectly claimed that none of his prior convictions were crimes of violence. He sought leniency for not

harming police officers or bystanders during his admitted "shootout," when the evidence did not reveal the presence of any such persons during the incident, and for not shooting the elderly victim, despite evidence that he attempted to do so.

The trial court exercised its discretion in imposing sentence upon "a fairly routine career criminal with attempted armed robbery." The trial court properly looked to the habitual offender law which was in effect at the time of the offense and determined the sentencing range was 20 years to life imprisonment. After finding no mitigating factors, the court considered the aggravating factors, which included his lack of remorse and potential for recidivism.

Based upon our review of the record, we find that the trial court did not abuse its discretion in sentencing the defendant. The trial court adequately complied with La. C. Cr. P. art. 894.1, and the sentence imposed does not shock the sense of justice.

Ineffective Assistance of Counsel

The defendant contends that his trial counsel was ineffective at sentencing because he failed to make objections or arguments based on the sentencing assignments of error raised in this appeal.

The test for effectiveness of counsel is two-pronged. First, a defendant must show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment to the U.S. Constitution. Second, he must show that the deficient performance prejudiced the defense by establishing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984). The assessment of an attorney's performance requires his conduct to be evaluated from counsel's perspective at the time of the occurrence. A reviewing court must give great deference to trial counsel's judgment, tactical decisions, and trial strategy, strongly presuming he has exercised reasonable professional judgment. *State v. Lloyd*, 48,914 (La. App. 2 Cir. 1/14/15), 161 So. 3d 879, *writ denied*, 15-0307 (La. 11/30/15), 184 So. 3d 33, *cert. denied*, __ U.S.__, 137 S. Ct. 227, 196 L. Ed. 2d 175 (2016).

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief ("PCR") in the trial court than by appeal. This is because PCR creates the opportunity for a full evidentiary hearing under La. C. Cr. P. art. 930. However, when the record is sufficient, an appellate court may resolve this issue on direct appeal in the interest of judicial economy. *State v. Lloyd*, *supra*.

We find that the record on appeal is sufficient to resolve this issue. Inasmuch as we have found Kelly's assignments of error pertaining to sentencing meritless, we likewise find no merit to the claim that his trial counsel was ineffective because he failed to raise those matters before the trial court. Kelly's conclusory assertions that defense counsel should have taken different actions – such as objecting to the trial court's alleged errors, presenting evidence, or giving opening or closing argument in favor of a lesser sentence – fail to show deficient performance or prejudice. Furthermore, we note that defense counsel properly sought review of the sentence by filing a timely motion to reconsider, which was denied by the trial court.

These assignments of error are meritless.

ERROR PATENT

Our error patent review reveals that the trial court did not properly advise the defendant of the prescriptive period for seeking PCR, as required by La. C. Cr. P. art. 930.8(C). Therefore, we advise the defendant, by way of this opinion, that no application for PCR shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under La. C. Cr. P. arts. 914 or 922. See La. C. Cr. P. art. 930.8(A); *State v. Little*, 50,776 (La. App. 2 Cir. 8/10/16), 200 So. 3d 400, *writ denied*, 16-1664 (La. 6/16/17), 219 So. 3d 341; *State v. Lloyd*, *supra*.

CONCLUSION

The defendant's conviction, adjudication as a fourth felony offender, and his sentence are affirmed.

AFFIRMED.