NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0344

STATE OF LOUISIANA

VERSUS

KERRI SMITH

Judgment Rendered: September 10, 2010

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 422493-3 "D"

Honorable Peter J. Garcia, Judge Presiding

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Walter P. Reed District Attorney Covington, LA	Counsel for Appellee State of Louisiana
Kathryn W. Landry Special Appeals Counsel Baton Rouge, LA	
Mary E. Roper Louisiana Appellate Project Baton Rouge, LA	Counsel for Defendant/Appellant Kerri Smith
Kerri Smith Angie, LA	Appellant In Proper Person

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Kerri Smith, was charged by bill of information with two counts of armed robbery by use of a firearm, in violation of LSA-R.S. 14:64 and 14:64.3. He pled not guilty and, after a trial by jury, was found guilty as charged on both counts. The defendant was originally sentenced to imprisonment at hard labor for 35 years. The defendant moved for reconsideration of the sentence. The trial court granted the motion and reduced the defendant's sentence to 25 years at hard labor.

The defendant appeals, asserting two counseled assignments of error regarding his right to counsel, an additional counseled assignment of error in which he contends that the new sentences imposed are excessive, and three additional *pro se* assignments of error regarding the composition of the jury, hearsay, and counsel's alleged ineffectiveness.

FACTS

Around 1:30 in the afternoon on September 21, 2006, the defendant and two other men dressed in black, wearing masks, and armed with guns entered the Statewide Bank in Slidell. A fourth man waited in the car. The perpetrators pulled their guns, ordered bank employees to the ground, physically handled them, threatened to kill them, and held the guns to the bank employees' heads. After forcing the tellers to open their money drawers, the perpetrators took the money and fled. After the Expedition that the defendant used to leave the robbery crashed into another vehicle, the defendant attempted to flee into the woods, where he struggled with officers and was arrested. He was found in possession of a gun at the time of his arrest.

RIGHT TO COUNSEL

In his first two counseled assignments of error, the defendant contends that he was denied his constitutional right to assistance of counsel when the court denied his objections to proceeding with appointed counsel, who the defendant contends was ill prepared.

As a general proposition, a person accused in a criminal trial has the right to counsel of his choice. If a defendant is indigent he has the right to court-appointed counsel. See LSA-C.Cr.P. arts. 511 and 513. An indigent defendant does not have the right to have a particular attorney appointed to represent him. An indigent's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice, if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice. **State v. Harper**, 381 So.2d 468, 470-71 (La. 1980). The trial court cannot be called upon to appoint counsel other than the one originally appointed merely to please the desires of the indigent accused in the absence of an adequate showing that the court-appointed attorney is inept or incompetent to represent the accused. **State v. O'Neal**, 501 So.2d 920, 928 (La. App. 2d Cir.), writ denied, 505 So.2d 1139 (La. 1987).

There has been no showing that the defendant's court-appointed attorney was inept or incompetent to represent him. On the contrary, counsel indicated that he met with the defendant several times to discuss his case and supplied the defendant with every document he received from the District Attorney. Counsel further explained that the defendant wanted him to object at what counsel felt were inappropriate times.

The record shows that counsel cross-examined the witnesses against the defendant and otherwise adequately represented him. The court, in denying the defendant's request to dismiss counsel, stated it would not allow the defendant to second-guess his lawyer's decisions in making evidentiary objections during the trial and noted that the defendant waited until the second day of trial to ask for a new attorney. The court noted that counsel had been handling the trial and that nothing the defendant said supported the contention that counsel was unprepared.

Likewise, we find no support in the record for defendant's contention that counsel was incompetent or that the court erred in denying the defendant's request for new counsel. These assignments of error are without merit.

EXCESSIVE SENTENCE

In his third counseled assignment of error, the defendant alleges that his sentences are excessive because his participation in the crimes was less than that of his co-defendants, yet he received the same sentences. He further contends that the court decided on the sentences prior to hearing any evidence.

Prior to trial, the following colloquy occurred:

> Counsel: Your Honor, . . . I've advised [the defendant] that the Court had offered on a plea 25 years at hard labor in this matter, and in repeated conversations with [the defendant], he's indicated he does not want to accept that and will rather go to trial. Is that correct, sir?
>
> Defendant: Yes, sir.
>
> Court: Are you ready for the jury?
>
> Counsel: Yes, sir. On the matter of [the defendant], I further advise the Court that I have discussed with him all of the facets of this case and what I would anticipate happening at trial as far as the anticipated outcome and all of that. He still wants to go ahead with the matter; is that correct?

> Court: The reason I ask your attorney to have this discussion with you on the record is that I want you to be very clear about the fact that I have offered a plea in this matter that will not be in existence after trial of this matter.
>
> I don't know what the sentence is going to be. It depends on the facts that I hear during the case. I can tell you it will not be less than the sentence I previously offered, and I wanted to make sure that [counsel] stated for the record that he's discussed the facts with you and given you his opinion regarding the likelihood of success in this matter and that you understand that and advise him that you do not want to take the plea.

At the hearing on the motion to reconsider the original sentencing, the court reduced the defendant's sentence from 35 years to 25 years, noting that the co-defendants had all pled guilty subsequent to the defendant's trial and had received, in return for their pleas, a sentence of 25 years. The court stated that a reduction in the defendant's sentence was warranted because his involvement "was no greater than, at least, and possibly less than some of the other defendants."

Article I, Section 20 of the Louisiana Constitution 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. **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. A sentence is constitutionally 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. See **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 the sense of justice. **State v. Hogan**,

480 So.2d 288, 291 (La. 1985). 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. Guzman**, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. LSA-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 guidelines. **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).

By his own statement, the defendant, along with his friends, planned to rob a bank. They drove around, considered different banks, and decided on one in particular. They then stole a car to use in the robbery. The defendant explained that he drove to the bank and went inside while the robbery occurred. The defendant had a gun, as did his cohorts, which he stated that he had bought from a drug dealer. One of the victims testified that the defendant and his partners verbally and physically threatened the lives of bank personnel by holding guns to their heads while they took money from the tellers' drawers. The employees were "grabbed," "yanked," and forcefully made to cooperate.

The defendant suggests that because he only told a lady to get on the floor and otherwise just stood around, he is less culpable than the others. However, the evidence showed that the defendant had a gun and was a principal to the offenses from the moment the plan was conceived. Although the defendant faced the potential of 99 years' imprisonment, the sentences received are actually at the lower end of the spectrum, where the minimum sentence was 15 years' imprisonment (a minimum of 10 years for armed robbery plus an additional five years for use of a firearm), and the defendant was sentenced to 25 years' imprisonment. See LSA-R.S. 14:64 and 14:64.3. Absent a showing of manifest abuse of discretion, we will not set aside a sentence as excessive. **Guzman**, 99-1528, 99-1753 at p. 15, 769 So.2d at 1167. The defendant has failed to show such abuse of discretion. Thus, this assignment of error lacks merit.

***PRO SE* ASSIGNMENTS OF ERROR**

In his first *pro se* assignment of error, the defendant argues that his jury composition was unconstitutional because two jurors were not legally qualified to serve. Of the two jurors of which he complains, one was successfully challenged for cause. Thus, she did not actually serve on the defendant's jury, although an apparent error in the record lists her as being sworn in. No objections relevant to this prospective juror appear in the record. As for the other complained-of juror, no objections were made to her service. 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. 841A. Accordingly, this assignment of error is not preserved for appellate review.

In his second *pro se* assignment of error, the defendant argues that a State's witness, Detective Sean McClain, was allowed to give hearsay testimony concerning the firing capability of the weapons used during the robbery for which the defendant was on trial. The complained-of testimony follows:

> Q: The first question is there were a number of weapons involved in this, correct?
>
> A: Yes, sir.
>
> Q: Do you remember how many?
>
> A: Four.
>
> Q: Were all those weapons different in caliber and size?
>
> A: Yes, sir.
>
> Q: Did you personally see to it that those weapons were test fired?
>
> A: Yes, sir.
>
> Q: And that all – what were the results of those test firing?
>
> A: That they all fired and they were entered into IVIS.
>
> Q: First off, they were all fired. So the jury understands, what does that mean?
>
> A: Basically, they were sent to the St. Tammany Crime Lab where a technician fires all of the weapons to get a ballistics check, and then that ballistics check –
>
> [Defense Counsel]: Your Honor, I'd object if he didn't do this. He said a technician did it.
>
> * * *
>
> Court: I sustain the objection. Just lay a better foundation.
>
> * * *
>
> Q: Who test fired it?
>
> A: Somebody at the sheriff's office lab.

Q: Did they report back to you in regards to the results of the test?

[Defense Counsel]: Your Honor, I still object to what somebody else told him or what he read about it. He didn't do it.

Court: Overrule the objection.

Q: What [were] the results of the test firing?

A: That the weapons were fired.

Reversal for erroneous admission of hearsay is only mandated when there is a reasonable possibility that the evidence might have contributed to the verdict. **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990). The correct inquiry is whether the reviewing court is convinced that the error was harmless beyond a reasonable doubt. Facts to be considered include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. See **Wille**, 559 So.2d at 1332.

We conclude that any error in allowing the testimony was harmless beyond a reasonable doubt. See LSA-C.Cr.P. art. 921; **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). In this case, the State's evidence was strong and any evidence that the weapons were in good working condition was unnecessary to support the verdict. A gun, pointed at a robbery victim, carries the inherent threat that death or great bodily harm is likely to result. The jurisprudence has long held that unworkable or unloaded guns can constitute dangerous weapons when used in a manner likely to produce death or great bodily harm. The likelihood of this serious harm can come from the threat perceived by

victims and bystanders. The highly charged atmosphere of a pistol robbery is conducive to violence, regardless of whether the pistol is loaded or workable, because the danger created invites rescue and self-help. **State v. Leak**, 306 So.2d 737 (La. 1975); **State v. Levi**, 259 La. 591, 250 So.2d 751 (1971). This assignment of error is without merit.

In his final *pro se* assignment of error, the defendant contends that counsel rendered ineffective assistance by failing to move to suppress his confession. He argues that he was physically coerced into giving the statement.

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 him. **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 conduct, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068; **State v. Felder**, 2000-2887, pp. 10-11 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369-70, writ denied, 2001-3027 (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). A claim of ineffectiveness is generally relegated to

post-conviction proceedings, unless the record permits definitive resolution on appeal. **State v. Miller**, 99-0192, p. 24 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).

Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, that must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1st Cir. 1993). "For purposes of an ineffective assistance of counsel claim, the filing of pretrial motions is squarely within the ambit of the attorney's trial strategy, and counsel is not required to engage in futility." **State v. Pendelton**, 96-367, p. 23 (La. App. 5th Cir. 5/28/97), 696 So.2d 144, 156, writ denied, 97-1714 (La. 12/19/97), 706 So.2d 450.

The record shows that the court heard a motion to suppress the defendant's statement, although no written motion appears in the record and the transcript suggests that the Clerk of Court could not locate one. The court accepted the motion orally. Detective Ralph Morel testified that he took the defendant's statement and found him to be cooperative and truthful. Morel denied forcing the defendant to give the statement by threat or promise. A digital recording of the statement was offered into evidence.

The defendant contends that two photographs taken of him after the robbery show that he was physically assaulted while in the custody of the Slidell Police Department. However, nothing in the record supports the defendant's assertions. The record shows that the getaway car was wrecked during the pursuit after the robbery occurred. Captain Kevin Swann testified that he saw the defendant attempting to flee from the wreckage. Swann chased the defendant, caught him, and "did use knee strikes and some strikes

to get [the defendant's] hands from underneath him," because Swann had seen that the defendant had a gun in his possession.

In ruling, the court stated that it did not find that "any force, threats, or promises were made, that the statement was made freely and voluntarily without any coercion," and denied the motion. Because the record fails to support the assertion that counsel was ineffective, this assignment of error is without merit.

CONCLUSION

Having found no merit in the defendant's assignments of error, the convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.