Judgment rendered September 27, 2006
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 41,343-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA — Appellee

versus

JAMIE RAY WARE — Appellant

* * * * *

Appealed from the
Third Judicial District Court for the
Parish of Lincoln, Louisiana
Trial Court No. 51,346

Honorable Cynthia T. Woodard, Judge

* * * * *

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* * * * *

Before WILLIAMS, CARAWAY and DREW, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16.3, Uniform Rules, Courts of Appeal.

CARAWAY, J.

Jamie Ray Ware was convicted as charged of three counts of attempted first degree murder and one count of armed robbery. For the attempted first degree murder convictions, Ware received concurrent 45-year hard labor sentences without benefits. After his adjudication as a second felony offender, Ware received an enhanced sentence of 63 years at hard labor without benefits for the armed robbery conviction to be served concurrently with the other sentences. Ware appeals the convictions and sentences. We affirm the convictions and sentences, with the sentence for armed robbery affirmed as amended.

Facts

During the early morning of July 4, 2003, while working as an auditor at the Ruston Ramada Inn, David Brumett was robbed by two men wearing hats and masks and carrying guns. The first robber jumped over the counter and the second walked through a door. Brumett described the first robber as slender and dressed in shorts, a light-colored tee shirt and tennis shoes. The second wore a lighter-colored (or white) shirt and carried a blue/green-colored bag. Brumett complied with their demands for money because he felt threatened. He was directed to take money from two front cash drawers, the backroom safe and his own wallet and put it in a blue/green bag. Brumett estimated they took about $600.00 from the cash drawers, $900.00 to $1,000.00 from the safe and $140.00 from his wallet. After they left, Brumett called the police using his cell phone. The entire robbery sequence was captured by the surveillance videotape. The videotape and still

photographs produced therefrom were introduced into evidence at trial and corroborated Brumett's account of the robbery.

The robbers went to a car where Corey Jernigan and Jerrick Stephens waited. Jernigan, the driver, wore a blue tee shirt and Stephens, sitting in the front passenger seat, wore a grey tee shirt over a white undershirt. Stephens took off his tee shirt during the chase and when he was arrested, was wearing only the white undershirt. At trial, Stephens identified Jamie Ray Ware as one of the offenders. Ware pulled a stocking rag over his face, wore a white tee shirt and had a blue plastic bag filled with money. The other robber, also identified by Stephens as Damien Law, wore a grey tee shirt over a red undershirt.

Ware got into the car's back seat on the driver's side and Law sat beside him on the other side. Jernigan drove through another parking lot and then north onto Louisiana Highway 167, when a police cruiser came up from behind. Stephens saw its flashing lights as Jernigan accelerated. Stephens testified that Law fired a gunshot out of the rear, passenger-side window. A high-speed chase ensued. Stephens recalled hearing multiple gunshots emanating simultaneously from what sounded like two guns–all coming from the back seat of their car, although he never saw Ware shooting a gun.

Ruston Police Officer Brian Davis spotted the speeding vehicle. As it accelerated, he activated his flashing lights and followed. He could read the license plate. As Officer Davis pursued the speeding car north on Highway 167, shots were fired in his direction. He heard bullet fragments hit his

vehicle and decided to fall back and keep a safe distance. Officer Davis was shot a during the entire chase. He estimated the number of gunshots at between eight and ten.

The video recording from Officer Brian Davis' dashboard camera showed simultaneous flashes of gunfire coming from both sides of the getaway car during the pursuit.

Ruston Police Officer Chris Davis, who is Officer Brian Davis' brother, was working the same shift and joined in on the chase. Gunshots were also fired in his direction. Subsequent inspection of Officer Chris Davis' vehicle revealed that one round struck the windshield at eye level. He could not identify who shot at him.

Lincoln Parish Deputy Sheriff Taff Watts, was also on patrol and entered the chase, eventually becoming the lead vehicle in pursuit as the Ruston officers left their municipal jurisdiction near Dubach. Deputy Watts' vehicle was first hit by gunfire as he pulled alongside the Ruston police cars to take the lead. Specifically, when Deputy Watts was just one or two car-lengths away, he saw someone lean out of the passenger side read window with a shotgun, level it at him and shoot in his direction. The shooter was wearing a white tee shirt. Simultaneously, something struck his windshield directly in front of his eyes. Deputy Watts estimated he was shot at about 10 times and 20 to 30 pellet marks were on his vehicle.

Speeds in excess of 100 mph were common during the entire chase which continued across the Arkansas State Line into Junction City. The Union County, Arkansas Sheriff's Deputies took over the pursuit and the

shooting continued until a car tire was shot out two miles south of El Dorado. The four suspects were arrested and taken into custody.

Two nine millimeter guns–one from each side of the rear seat–and one sawed-off shotgun, which was angled across the rear seat, were recovered from the vehicle. Live and spent ammunition was also recovered from the rear seat and floorboard. A blue bag containing over $1,000.00 in cash was found on the driver's floorboard. Union County Sheriff's Department investigators confirmed that Ware wore a white tee shirt and was in sitting in the backseat on the driver's side and Law was in back on the passenger-side seat during the chase. Live nine millimeter rounds were recovered from a shoe box on the rear floorboard.

At trial, the parties stipulated that an expert in firearms identification would testify that eight spent shotgun shells introduced into evidence were fired by the shotgun found in the robbers' car and that six spent nine millimeter cartridges found in the road and inside the car were fired from the nine millimeter Lorcin pistol, also recovered from the robbers' car.

After Ware's arrest, he waived his *Miranda* rights and gave a recorded statement in which he admitted participating in the armed robbery, but denied shooting at the police officers. Ware claimed he hid on the rear floorboard while Law used all three guns (the two nine millimeter handguns and the shotgun) to shoot at the police.

Ware was charged by bill of indictment with three counts of attempted first degree murder and one count of armed robbery while armed with a firearm. Prior to trial, Ware pled not guilty and not guilty by reason

of insanity, requesting the appointment of a sanity commission to determine his mental condition at the time of the offense. Relying upon two expert medical reports, the trial court found Ware competent to stand trial. Ware's jury trial commenced and he withdrew his plea of not guilty by reason of insanity at the end of the presentation of the state's evidence. Ware was found guilty as charged of all four counts. His motions for post-verdict judgment of acquittal and new trial, were denied.

Ware originally received sentences of 42 years imprisonment at hard labor for the armed robbery and 45 years imprisonment at hard labor for each of the three counts of attempted first degree murder. All sentences were ordered to be served concurrently and without benefit of parole, probation or suspension of sentence. The state subsequently filed a habitual offender bill seeking to have the defendant adjudicated a second felony offender on the armed robbery conviction. After an adjudication hearing, Ware received an enhanced sentence for armed robbery of 63 years at hard labor without benefits. Ware made timely objections to each of the imposed sentences. This appeal followed.

Sufficiency of the Evidence

Ware argues that the evidence adduced at trial was not sufficient to support the attempted first degree murder convictions because the state did not prove that he fired a weapon in the direction of the officers or that he had the specific intent to kill.

The question of sufficiency of evidence is properly raised by a motion for post-verdict judgment of acquittal. *State v. Howard*, 31,807 (La. App.

2d Cir. 8/18/99), 746 So. 2d 49*, writ denied*, 99-2960 (La. 5/5/00), 760 So. 2d 1190.

The standard of appellate review for a sufficiency of the evidence claim 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 proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Cummings*, 95-1377 (La. 2/28/96), 668 So. 2d 1132; *State v. Murray,* 36,137 (La. App. 2d Cir. 8/29/02), 827 So. 2d 488, *writ denied*, 02-2634 (La. 9/05/03), 852 So. 2d 1020. This standard, now legislatively embodied in La. C. Cr. P. art. 821, does not provide the appellate court with a vehicle to substitute its own appreciation of the evidence for that of the fact finder. *State v. Robertson*, 96-1048 (La. 10/4/96), 680 So. 2d 1165.

The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So. 2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Gilliam*, 36,118 (La. App. 2d Cir. 8/30/02), 827 So. 2d 508, *writ denied*, 02-3090 (La. 11/14/03), 858 So. 2d 422.

When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of the events; rather, when evaluating the evidence in the light most favorable to

the prosecution, the court determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under *Jackson v. Virginia*. *State v. Davis*, 92-1623 (La. 5/23/94), 637 So. 2d 1012, *cert. denied*, 513 U.S. 975, 115 S. Ct. 450, 130 L. Ed. 2d 359 (1994); *State v. Owens*, 30,903 (La. App. 2d Cir. 9/25/98), 719 So. 2d 610, *writ denied*, 98-2723 (La. 2/5/99), 737 So. 2d 747.

Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *State v. Allen*, 36,180 (La. App. 2d Cir. 9/18/02), 828 So. 2d 622, *writs denied*, 02-2595 (La. 3/28/03), 840 So. 2d 566, 02-2997 (La. 6/27/03), 847 So. 2d 1255, *cert. denied*, 540 U.S. 1185, 124 S. Ct. 1404, 158 L. Ed. 2d 90 (2004).

La. R.S. 14:30 provides in part:

> A. First degree murder is the killing of a human being:
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> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, peace officer, or civilian employee of the Louisiana State Police Crime Laboratory or any other forensic laboratory engaged in the performance of his lawful duties, or when the specific intent to kill or to inflict great bodily harm is directly related to the victim's status as a fireman, peace officer, or civilian employee.
> (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.
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> ***
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> B. (1) For the purposes of Paragraph (A)(2) of this Section, the term "peace officer" means any peace officer, as defined in R.S. 40:2402, and includes any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement agent, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney

general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

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La. R.S. 14: 27, regarding attempt, provides in pertinent part:

A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

To prove attempted first degree murder, the state must establish that the defendant specifically intended to kill a human being and that he committed an overt act in furtherance of that goal. *State v. Calvin James Mitchell* 39,305 (La. App. 2d Cir. 2/17/05), 894 So. 2d 1240, *writ denied,* 05-0741 (La. 6/3/05), 903 So. 2d 457*; State v. Fauchetta,* 98-1303 (La. App. 5th Cir. 6/1/99), 738 So. 2d 104, *writ denied,* 99-1983 (La. 1/7/00), 752 So. 2d 176. Under Louisiana law, to be guilty of attempted murder, a defendant must have the specific intent to kill; the mere intent to inflict great bodily harm is insufficient to convict a defendant of attempted first or second degree murder. *State v. Calvin James Mitchell, supra; State v. Fauchetta, supra; Harris v. Warden, Louisiana State Penitentiary,* 152 F.3d 430 (5th Cir.1998).

Under Louisiana law, a person may be convicted of intentional murder even if he has not personally struck the fatal blows. *State v. Wright,* 01-0322 (La. 12/04/02), 834 So. 2d 974, *cert. denied*, 540 U.S. 833, 124 S. Ct. 82, 157 L. Ed. 2d 62 (2003). Only those persons, however, who knowingly participate in the planning or execution of a crime are principals. *State v.*

Pierre, 93-0893 (La. 2/3/94), 631 So. 2d 427. Mere presence at the scene is not enough to "concern" an individual in a crime. *Id.* However, it is sufficient encouragement that the accomplice is standing by at the scene of the crime ready to give some aid if needed. *State v. Logan,* 36,042 (La. App. 2d Cir. 6/14/02), 822 So. 2d 657, *writ denied,* 02-2174 (La. 9/19/03), 853 So. 2d 621. A principal can be connected only to those crimes for which he has the requisite mental state. *State v. Mitchell,* 99-3342 (La. 10/17/00), 772 So. 2d 78; *State v. Calvin James Mitchell, supra*. In a specific intent homicide, the state must show more than the defendant's direct or indirect involvement but must show that the defendant specifically intended the death of the victim. *State v. Pierre, supra; State v. Calvin James Mitchell, supra.* The intent of the accomplice cannot be inferred to the accused. *State v. Mitchell, supra; State v. Calvin James Mitchell, supra.*

La. R.S. 14:10(1) defines specific criminal intent as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." Intent is a question of fact. Nevertheless, the intent at issue in this case, specific criminal intent, need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. *State v. Maxie*, 93-2158 (La. 4/10/95), 653 So. 2d 526.

A specific intent to kill may be reasonably inferred from the defendant's intentional use of a deadly weapon in firing a shot aimed at the intended victim, along with the other circumstances of the case. *State v. Tassin,* 536 So. 2d 402, 411 (La. 1988), *cert. denied,* 493 U.S. 874, 110 S.

Ct. 205, 107 L. Ed. 2d 159 (1989); *State v. Lee,* 275 So. 2d 757 (La.1973); *State v. Allen,* 40,972 (La. App. 2d Cir. 5/17/06), 930 So. 2d 1122. On more than one occasion, the supreme court has held that specific intent to kill may be inferred from a defendant's act of pointing a gun and firing at a person. *See State v. Seals*, 95-0305 (La. 11/25/96), 684 So. 2d 368, *cert. denied*, 520 U.S. 1199, 117 S. Ct. 1558, 137 L. Ed. 2d 705 (1997); *State v. Williams*, 383 So. 2d 369 (La. 1980), *cert. denied,* 449 U.S. 1103, 101 S. Ct. 899, 66 L. Ed. 2d 828 (1981). See also *State v. Brooks*, 36,855 (La. App. 2d Cir. 3/05/03), 839 So. 2d 1075, *writ denied*, 03-0974 (La. 11/07/03), 857 So. 2d 517; *State v. Dooley*, 38,763 (La. App. 2d Cir. 9/22/04), 882 So. 2d 731, *writ denied*, 04-2645 (La. 2/18/05), 896 So. 2d 30.

In this matter, there is no dispute that all three victims were peace officers engaged in the performance of their lawful duties when the crimes were committed. Ware has conceded that he was seated in the backseat behind the driver of the vehicle during the chase. Additionally, independent testimony from investigating officer Mark Thomas and Jerrick Stephens, a co-perpetrator who rode in the front seat of the vehicle, established this fact. Ware's arguments are that the state failed to prove he fired at the officers or had the specific intent to kill any of the three. Specifically, Ware points out that no witness could identify him as a shooter so that a reasonable theory exists that the other back seat passenger fired the guns. Further, he argues that the state failed to exclude the reasonable possibility that the shooting was done as a scare tactic to get the officers to back off of the chase.

We can find no merit to Ware's arguments. The video recording from Officer Brian Davis' dashboard camera revealed almost simultaneous flashes of gunfire emanating from both the driver's side and passenger's side of the car during the chase. Eyewitness testimony explained that this verbal description of the flashes as "almost simultaneous" meant the flashes occurred "within a second" of each other. Stephens testified that he heard multiple gunshots emanating at the same time from what sounded like two guns–all coming from the back seat of the car, although he never saw Ware shoot a gun. Three guns were recovered in the back seat of the vehicle as were spent and unspent nine millimeter cartridges and spent shells from the shotgun. When viewed in the light most favorable to the state, this circumstantial evidence supports the jury's finding that, beyond a reasonable doubt, two separate shooters were firing the guns.   From this, the jury could have reasonably concluded beyond a reasonable doubt that Ware participated as a shooter in the crime.

Furthermore, the circumstantial evidence was sufficient to establish that Ware's act of shooting involved the specific intent to kill the three officers. The robbers' vehicle was involved in a high-speed chase in which shots were fired at three Louisiana law enforcement vehicles displaying activated lights and sirens as a necessary precaution. Bullets struck the vehicles. Specific intent to kill could reasonably be inferred solely from Ware's firing at the officers. Moreover, although the chase took place on a dark roadway, the lights and sirens would have served to illuminate the officers' vehicles as obvious targets to the robbers. The undisputed evidence

showed that the windshields of the three vehicles contained pellet damage in areas which could have caused fatal injuries had the pellets penetrated the glass. This determination was further buttressed by the testimony of firearms expert, Chris Bittick, who testified that both nine millimeter and shotgun pellets fired into a sloped windshield of an automobile could penetrate the windshield. From this evidence, the jury could have reasonably inferred, to the exclusion of every other reasonable hypothesis of innocence, that Ware had the specific intent to kill the three officers and committed overt acts in furtherance of that goal. This assignment is therefore without merit.

Multiple Offender Adjudication

In his second assignment of error, Ware argues that he was improperly adjudicated a second felony offender. The record showed that the state filed a second felony offender bill, charging that Ware was previously convicted of simple robbery in Docket No. 220,323, First Judicial District Court, by guilty plea entered May 21, 2002. On appeal, Ware does not contest that these charges were filed, but complains that the trial court failed to sufficiently ascertain his ability, at the age of 17, to understand the consequences of his guilty plea. Both in his written response to the habitual offender bill and on appeal, Ware argues that the issue of his mild mental retardation was never discussed at the time of the guilty plea and that the court failed to inquire about any alcohol or drug dependency or whether he was under the influence of any substance. Ware also complains that he was not asked if he specifically waived his right against self-incrimination, was not advised of the nature and elements of the charge, nor informed of his

right to an attorney or that the right to cross-examine witnesses included the right to have an attorney conduct that cross-examination or of a right to compulsory process. Finally, Ware argues that he was never informed of his right to appeal in the absence of a guilty plea.

The state's burden of proof in habitual offender proceedings under La. R.S. 15:529.1 is stated in *State v. Shelton*, 621 So. 2d 769 (La. 1993):

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self incrimination, and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* rights. [Footnote omitted.]

The record shows that at the adjudication hearing, the state introduced certified copies of the bill of information, district court minutes and the transcript of the plea colloquy of the predicate offense. The minutes and transcript reflect that Ware was represented by counsel. From the record, we find that Ware's prior guilty plea was informed, voluntary and made with a sufficient waiver of his *Boykin*[1] rights. The transcript of the guilty plea

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[1] *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

submitted into evidence by the state shows that Ware was informed of and explained his rights to trial before a judge or jury, to confront and cross-examine the witnesses against him and his right against compulsory self-incrimination. The record reflects that the trial court ascertained Ware's ability to read and write as well as his age. The court also inquired about his understanding of his rights and whether he had any questions about his waiver or "giving up" of those rights. After each explanation, Ware answered in the affirmative regarding his waiver of the rights. We find that the transcript submitted by the state reflects a knowing and adequate waiver of Ware's *Boykin* rights. Hence, the trial court did not err in adjudicating Ware to be a second felony offender based on this record.

Excessive Sentence

Ware also argues that the trial court erred in imposing constitutionally excessive sentences for his convicted offenses. At Ware's original sentencing, the trial court indicated that the entire record, including the pre-sentence investigation report and sentencing considerations had been reviewed. Due to the nature of the crime and the facts surrounding its commission, the court determined that there appeared an undue risk that another crime would be committed during a period of a suspended sentence or probation and that Ware was in need of correctional treatment in a custodial environment. The court found that lesser sentences would deprecate the seriousness of the crimes and reviewed the facts of the offense before determining that Ware's conduct manifested deliberate cruelty to the victims and were senseless acts of violence. The trial court noted that the

defendant created a risk of death or great bodily harm to more than one person and used threats of or actual violence in the commission of the offenses. It further found that a dangerous weapon was used in the crimes which involved multiple victims. The trial court discussed Ware's prior conviction for simple robbery, recent involvement in an attempted escape, lack of mental illness and ability to distinguish between right and wrong. Ware was then sentenced to serve 42 years imprisonment at hard labor for armed robbery, and 45 years imprisonment at hard labor for each of the three counts of attempted first degree murder. All sentences were ordered to be served concurrently with each other, and without benefit of parole, probation or suspension of sentence.

Ware filed a motion to reconsider sentence on August 29, 2005, which the trial court denied. The State had filed an habitual offender bill of information against Ware on July 13, 2005, and conducted that hearing immediately after denying Ware's motion to reconsider sentence. After his adjudication as a second felony habitual offender, Ware's sentence for the armed robbery conviction was enhanced to 63 years at hard labor without benefits. In this ruling, the trial court adopted all of the reasons articulated at the original sentencing. Ware orally objected to the sentence, arguing that the minimum sentence should have been 49.5 years. The trial court overruled the objection.

On appeal, Ware argues that his sentences are constitutionally excessive because the trial court gave insufficient consideration to the fact that he is youthful, mildly retarded, and that no one was physically injured

during the commission of these offenses. Specifically regarding his enhanced sentence for armed robbery, Ware argues that the court's reasons for sentencing were articulated at the original sentencing and nothing changed after his adjudication as a second felony offender. Ware argues that imposition of the minimum enhanced sentence for armed robbery would have been more appropriate, particularly considering his loss of credit for good time due to the habitual offender adjudication.

The test imposed by the reviewing court in determining the excessiveness of a sentence is two-pronged. 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 trial judge is not required to list every aggravating or mitigating circumstance so long as the record reflects that he adequately considered the guidelines of the article. *State v. Smith,* 433 So. 2d 688 (La. 1983); *State v. Dunn*, 30,767 (La. App. 2d Cir. 6/24/98), 715 So. 2d 641. 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. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. C. Cr. P. art. 894.1. *State v. Lanclos,* 419 So. 2d 475 (La. 1982); *State v. Hampton*, 38,017 (La. App. 2d Cir. 1/28/04), 865 So. 2d 284, *writs denied*, 04-0834 (La. 3/11/05), 896 So. 2d 57, 04-2380 (La. 6/3/05), 903 So. 2d 452.

The important elements which should be considered are the defendant's personal history (age, family ties, marital status, health, employment record), prior criminal record, seriousness of offense and the

likelihood of rehabilitation. *State v. Jones,* 398 So. 2d 1049 (La. 1981); *State v. Haley*, 38,258 (La. App. 2d Cir. 04/22/04), 873 So. 2d 747, *writ denied*, 04-2606 (La. 06/24/05), 904 So. 2d 728. There is no requirement that specific matters be given any particular weight at sentencing. *State v. Jones*, 33,111 (La. App. 2d Cir. 3/1/00), 754 So. 2d 392, *writ denied*, 00-1467 (La. 2/2/01), 783 So. 2d 385.

Second, a sentence violates La. Const. art. 1, §20 if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless imposition of pain and suffering. *State v. Smith*, 01-2574 (La. 1/14/03), 839 So. 2d 1; *State v. Dorthey*, 623 So. 2d 1276 (La. 1993); *State v. Bonanno,* 384 So. 2d 355 (La. 1980). 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. Lobato,* 603 So. 2d 739 (La. 1992); *State v. Hogan,* 480 So. 2d 288 (La. 1985).

For an enhanced conviction of armed robbery as a second felony offender, Ware faced sentencing exposure at hard labor for 49.5 to 198 years. La. R.S. 14:64 B; La. R.S. 15:529.1A(1)(a). The range for conviction of attempted first degree murder of a peace officer engaged in the performance of his lawful duty is imprisonment at hard labor for 20 to 50 years. See La. R.S. 14:27 D(1)(b).

The record reflects that contrary to Ware's argument, prior to sentencing the trial court considered the entire record, including the defendant's pre-sentence investigation report which sets forth details of the

defendant's personal history and prior criminal record. Thus, adequate 894.1 compliance is reflected on this record.

Ware's sentences are not grossly disproportionate to the crimes committed. Ware participated in a brazen armed robbery and "wild west" style shoot-out with three law enforcement officers. His actions demonstrated a total disregard for human life. When his punishments are viewed in light of the harm done to society, the near-minimum enhanced sentence of 63 years at hard labor without benefits for the armed robbery conviction is constitutionally permissible. Likewise, the near-maximum sentences of 45 years at hard labor without benefits for each count of attempted first degree murder does not shock the sense of justice. This assignment of error is without merit.

Ineffective Assistance of Counsel

In a supplemental *pro se* brief, Ware has raised an ineffective assistance of counsel claim. He asserts that his trial counsel erred in failing to call Damien Law, the other shooter, to testify.

Ineffective assistance of counsel claims are usually addressed in post-conviction proceedings, rather than on direct appeal. *State v. Leger*, 05-0011 (La. 7/10/06), 2006 WL 1883421; *State v. Deruise,* 98-0541 (La. 4/3/01), 802 So. 2d 1224, *cert. denied,* 534 U.S. 926, 122 S. Ct. 283, 151 L. Ed. 2d 208 (2001). The post-conviction proceeding allows the trial court to conduct a full evidentiary hearing, if one is warranted. *State v. Howard,* 98-0064 (La. 4/23/99), 751 So. 2d 783, *cert. denied,* 528 U.S. 974, 120 S. Ct. 420, 145 L. Ed. 2d 328 (1999).

Under these circumstances, the content of Damien Law's alleged statements may be considered by the trial court through the post-conviction relief process. This court will not consider evidence for the first time on appeal.

Error Patent

At the sentencing hearing after the habitual offender adjudication, the trial court did not vacate the previously imposed sentence of 42 years at hard labor without benefits for armed robbery [as required by La. R.S. 15:529.1(D)(3)] before resentencing the defendant to 63 years at hard labor without benefits as a second felony offender for armed robbery. However, if a trial court fails to vacate the previous sentence, this court can amend the sentence to do so. *See State v. George*, 39,959 (La. App. 2d Cir. 10/26/05), 914 So. 2d 588. Accordingly, we vacate Ware's original 42-year sentence for the armed robbery conviction and affirm the new habitual offender sentence of 63 years at hard labor.

Conclusion

For the foregoing reasons, we affirm Ware's convictions and sentences after amending his armed robbery conviction to vacate the previous armed robbery sentence.

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS AMENDED.