NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0372

STATE OF LOUISIANA

VERSUS

JOE MITCHELL, JR.

Judgment Rendered: September 12, 2008.

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On Appeal from the
22nd Judicial District Court,
in and for the Parish of St. Tammany
State of Louisiana
District Court No. 398369

The Honorable Martin E. Coady, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

CARTER, C.J.

The defendant, Joe Mitchell, Jr., was charged by bill of information with carnal knowledge of a juvenile, a violation of La. R.S. 14:80. The defendant entered a plea of not guilty and was tried before a jury. The jury found the defendant guilty as charged. The trial court sentenced the defendant to ten years at hard labor, and the defendant appealed. This court, in an earlier unpublished opinion, affirmed the defendant's conviction and sentence wherein the defendant challenged the sufficiency of the evidence. **State v. Mitchell**, 2006-1824 (La. App. 1 Cir. 3/23/07), 953 So.2d 206 (not designated for publication).

On March 21, 2007, the State filed a habitual offender bill of information. A hearing was held on the habitual offender bill of information, and the defendant was adjudicated a second-felony habitual offender. The trial court vacated the prior sentence and sentenced the defendant to eighteen years imprisonment at hard labor without the benefit of probation or suspension of sentence. The defendant appeals, challenging the constitutionality of the enhanced sentence. For the following reasons, we affirm the sentence.

STATEMENT OF FACTS

During the summer of 2002, L.B.[1], the fifteen-year-old victim, was living with her family in Slidell. Sometime between July 15 and August 15, 2002, L.B.'s uncle, the defendant, arrived unexpectedly at her family home in Slidell. The defendant is the brother of L.B.'s mother, J.B.

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[1] In accordance with La. R.S. 46:1844W, the victim herein is referenced only by her initials. We have also referenced the minor victim's immediate family members by initials to protect her privacy.

According to J.B., her husband, P.B., Sr., called her while she was away from home and relayed that the children had called him to let him know that the defendant was at the back door of their house. The defendant was not immediately allowed inside the home. According to J.B.'s oldest son, P.B., who was seventeen years old at the time, no one was allowed in their home when their parents were away.

Later that morning, the defendant was allowed to enter the garage. P.B., Sr. had arranged to get the defendant a job at Deano's Marine Reconstruction Company doing concrete work. The defendant's job was supposed to begin the next day.

P.B. testified that he grew uncomfortable with the way the defendant acted toward his sister, L.B. L.B. testified that upon the defendant's arrival, he immediately began making statements toward L.B. concerning what she was wearing when she went to get the mail; how L.B. turned him on while dancing with her brothers; and the fact that the defendant made references to knowing that L.B. had been raped two months earlier. The defendant told L.B. explicit details about the sexual relationship between him and his wife. The defendant also told L.B. that he had "messed with" a sixteen-year-old girl some years earlier and wound up beating the girl.

According to L.B., the defendant's statements made her afraid because she was under the impression that if the defendant did not get what he wanted, he would do the same thing to her. L.B. testified that the defendant shadowed her around wherever she went. The defendant later told L.B. that there was a way to have sex without anyone finding out. The defendant also told L.B. that he would rather have someone in her family

teach her how to be rubbed and touched than have someone from the street do it.

Sometime after the defendant's first day in Slidell, J.B. returned from her trip. According to L.B., her mother was not pleased to see the defendant. Later that evening, J.B. went into her first-floor bathroom to take a shower. At the time, L.B. was in her bedroom, adjacent to her mother's bathroom. While her mother was in the shower, the defendant called L.B. into the kitchen and asked her if she was ready. L.B. knew the defendant was asking her to have sex with him. L.B. and the defendant went upstairs to the bedroom that her brothers were not using. The defendant told L.B. to take her clothes off. L.B. complied and then lay down on the bed. At that point, the defendant began having sex with L.B. L.B. specifically testified that the defendant inserted his penis into her vagina. L.B. began crying and then heard her mother calling for her. L.B. got up, and the defendant began grabbing her chest, but she moved his hand, dressed, and went downstairs.

According to J.B., she was calling for L.B. so they could watch a movie together. J.B. had looked for L.B. throughout the first floor of the residence but could not locate her. Because of the way the house was laid out with all the boys' bedrooms upstairs and L.B.'s bedroom downstairs, it was extremely uncommon for L.B. to be upstairs. J.B. testified that when her daughter appeared on the staircase, she was walking funny, holding onto the wall, and appeared very upset. As L.B. got closer to her mother, she appeared to be shaking, her voice was trembling, and her eyes were very red.

When her mother asked L.B. what she was doing upstairs, L.B. responded that she was called upstairs to bring some towels to the boys'

bathroom. Her mother did not believe this and continued to question L.B. After some time, the defendant appeared on the stairs. L.B. later explained at trial that she did not tell her mother what occurred because she knew her mother would become upset and that her mother could not defend herself against the defendant.

J.B. called her oldest son, P.B., to come home from his job during the confrontation with the defendant. According to J.B., the defendant was restricted to certain areas of the house and was not allowed upstairs. L.B. testified that her mother had her back toward the defendant as she spoke to them both and that the defendant kept his finger over his mouth while shaking his head "no." Although L.B. kept telling her mother that nothing happened, J.B. made the defendant leave their house that night.

Approximately a year later, L.B. told her mother what happened after allowing a friend to read her journal that contained a poem about the incident. L.B.'s friend had told her that she would tell L.B.'s mother of the incident if she did not, so L.B. woke her mother at 3:00 a.m. one day in November 2003 and told her everything.

Charlie Craddock, a detective with the St. Tammany Parish Sheriff's Office, made contact with L.B. and her mother following the initial report of this incident. Detective Craddock testified that his initial impression after speaking with L.B. was that she had been sexually abused. J.B. testified that, between the summer of 2002 and the time the incident was reported to her, L.B. had become withdrawn, and her grades declined.

The defendant testified at trial. The defendant denied having sex with L.B., denied flirting with L.B., and denied telling her that he previously had

sex with another sixteen-year-old girl. The defendant claimed his brother-in-law had told him that he could get him a job working for the railroad and that he knew the defendant was coming. The defendant said that his sister, Sonya, had purchased a bus ticket for him to travel from Pensacola to Slidell, but when he arrived, he could not get in touch with anyone at the B. family residence. The defendant testified that while staying at the B. family home, L.B. revealed that she had not been previously raped but was allowing her parents to believe she had.

The defendant admitted to his lengthy criminal history, estimating that he had spent seventeen of his forty years in prison. The defendant acknowledged prior convictions for armed robbery, theft, burglary, and DWI.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that the enhanced sentence is excessive. The defendant notes that he is a second-felony offender, as he had one conviction within ten years of the instant offense. The defendant further notes that the prior conviction was based on a guilty plea to forgery and that none of his older convictions were based on sex crimes. The defendant also contends that the trial court erred in considering the older convictions in imposing the sentence. The defendant argues that the punishment is cruel and unusual.

Article I, section 20, of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court

must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See **State v. Guzman**, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167. The trial court has wide discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Loston**, 2003-0977, pp. 19-20 (La. App. 1 Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Leblanc**, 2004-1032, p. 10 (La. App. 1 Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 2005-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); **State v. Faul**, 2003-1423, p. 4 (La. App. 1 Cir. 2/23/04), 873 So.2d 690, 692. Maximum sentences are reserved for cases involving the most serious offenses and the worst offenders. **State v. Easley**, 432 So.2d 910, 914 (La. App. 1st Cir. 1983).

In **State v. Dorthey**, 623 So.2d 1276, 1280-1281 (La. 1993), the Louisiana Supreme Court recognized that, if a trial judge determines that the punishment mandated by the Habitual-Offender Law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering and is

grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that the determination and definition of acts that are punishable as crimes are purely legislative functions. **Dorthey**, 623 So.2d at 1278. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. **Id.** Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. **Id.**

As a second-felony offender, the defendant was subject, under La. R.S. 15:529.1A(1)(a), to a minimum of five years imprisonment and a maximum of twenty years imprisonment. See also La. R.S. 14:80D. As previously stated, the defendant was sentenced to eighteen years imprisonment at hard labor. Under the sentencing guidelines, Article 894.1, the trial court may consider an offender's criminal history that is not part of the habitual offender bill. **State v. Williams**, 2002-1815, pp. 7-8 (La. App. 4 Cir. 11/20/02), 833 So.2d 428, 433, writ denied, 2003-0036 (La. 10/3/03), 855 So.2d 307. Based on the record before us, we do not find that the trial court abused its discretion in imposing an enhanced sentence of eighteen years imprisonment at hard labor. Considering the facts of the offense, the sentence is not shocking or grossly disproportionate to the defendant's behavior. The defendant's sole assignment of error is without merit.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for

such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-125 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

SENTENCE AFFIRMED.