NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0072

STATE OF LOUISIANA

VERSUS

CHESTER L. REDMOND, III

Judgment Rendered: JUL 14 2010

* * * * * * *

APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASCENSION
STATE OF LOUISIANA
DOCKET NUMBER 24714, DIVISION "A"

THE HONORABLE RALPH TUREAU, JUDGE

* * * * * * *

Ricky L. Babin
District Attorney
Donaldsonville, Louisiana
and
Donald D. Candell
Assistant District Attorney
Gonzales, Louisiana

Attorneys for Appellee
State of Louisiana

Gwendolyn K. Brown
Louisiana Appellate Project
Baton Rouge, Louisiana

Attorney for Defendant/Appellant
Chester L. Redmond, III

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

McDONALD, J.

The defendant, Chester L. Redmond, III, was charged by grand jury indictment with one count of molestation of a juvenile, a violation of La. R.S. 14:81.2, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to fifty years at hard labor, with twenty-five years of the sentence without benefit of probation, parole, or suspension of sentence. He now appeals, designating the following assignments of error:

1. The trial court erred by denying the motion for mistrial after the State elicited other crimes evidence.

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

3. The trial court erred by failing to comply with the sentencing mandates of La. Code Crim. P. art. 894.1.

4. The defendant was denied the effective assistance of counsel as a result of his counsel's failure to file a motion to reconsider sentence to preserve for appellate review his right to object, on specific grounds, to the excessiveness of his sentence.

For the following reasons, we affirm the conviction and sentence.

FACTS

Kimberly Rodney testified at trial. She was the victim's, [S.L.'s],[1] baby-sitter in March 2007. During that month, the victim told Rodney that "Chester" had been telling her nasty things and locking her in the bathroom. The victim told Rodney that "Chester" had made the victim watch "nasty stuff," had touched her private parts, had made her touch his private parts, and had "licked her." The

[1] The victim is referenced herein only by her initials. See La. R.S. 46:1844(W).

victim told Rodney that "Chester" had "white stuff" coming out of his private part. The victim also told Rodney that "Chester" had told her not to tell anyone about what he had been doing to her.

The victim's mother also testified at trial. She indicated that in 2007, the defendant was her sister's boyfriend and lived with her sister at their mother's house. The victim had visited the home while the defendant was there and had spent the night there. After learning of the victim's claims, the victim's mother had her examined by Dr. Quinn, a pediatrician. Dr. Quinn found that the victim's hymen was not intact.

Dr. John Knapp also testified at trial. He examined the victim approximately one month after the alleged molestation. She told him that, at her grandmother's house, the defendant had touched her between her legs, had told her to shut up, had shown her his private parts, had grabbed and shaken his private parts, and had touched her backside. Upon examining the victim, Dr. Knapp found bilateral redness involving the labia and that the hymen was disturbed, but no evidence of recent trauma.

On March 22, 2007, the victim was interviewed at the Child Advocacy Center in Gonzales. She indicated that "Chester Leon" had given her touches that were not okay. She indicated that in her aunt's room, he had touched her between her legs with his hand and had touched her "backside" with his penis. She indicated that she was wearing pink nightclothes with angels on them. She indicated that he pulled her pants down, she cried, and he told her to shut up. She indicated that in the "middle room," he had asked her to touch his penis. She indicated that she told him to leave her alone, and he told her that she would get into trouble if she did not touch his penis. She indicated that her mother then

arrived to pick her up.

The State introduced into evidence the victim's birth certificate, indicating that her date of birth was December 25, 2000, and the defendant's marriage certificate, indicating that his date of birth was May 1, 1970.

OTHER CRIMES EVIDENCE

In assignment of error number 1, the defendant contends the trial court erred in denying the motion for mistrial after the State elicited other crimes evidence and erred in failing to admonish the jury to disregard the other crimes evidence.

Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by La. Code Crim. P. arts. 770 or 771. La. Code Crim. P. art. 775. The determination as to whether or not a mistrial should be granted under La. Code Crim. P. art. 775 is within the sound discretion of the trial court, and a denial of a motion for mistrial will not be disturbed on appeal absent an abuse of discretion. **State v. Young**, 569 So.2d 570, 583 (La. App. 1st Cir. 1990), writ denied, 575 So.2d 386 (La. 1991).

La. Code Crim. P. art. 770(2) provides for a mandatory mistrial when a remark, within the hearing of the jury, is made by the judge, the district attorney, or a court official, and such remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. However, remarks by witnesses fall under the discretionary mistrial provisions of La. Code Crim. P. art. 771.

La. Code Crim. P. art. 771, in pertinent part, provides:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a

nature that it might create prejudice against the defendant, or the state, in the mind of the jury:

. . .

(2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.

In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

A mistrial pursuant to the provisions of Article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. See **State v. Dixon**, 620 So.2d 904, 911 (La. App. 1st Cir. 1993). The jurisprudence interpreting La. Code Crim. P. art. 771(2) has held that unsolicited and unresponsive testimony is not chargeable against the State to provide a ground for mandatory reversal of a conviction. **State v. LeBlanc**, 618 So.2d 949, 960 (La. App. 1st Cir. 1993), writ denied, 95-2216 (La. 10/4/96), 679 So.2d 1372.

During the presentation of its case, the defense called the victim to the stand and asked her if she always told the truth. The victim stated, "[n]ot so much." She indicated, however, that she had told the truth about everything the defendant had done to her.

The defense then called Tawana Dupard to the stand. In response to questioning by the defense, Dupard indicated she was the defendant's girlfriend, that the defendant lived with her in her mother's house, that she kept her bedroom door locked when she was not home, that the defendant had never been alone with the victim, and that the victim's father watched pornographic movies. On cross-examination, the following colloquy occurred between the State and Dupard:

> Q. And prior to this, [the victim] has no reason to make something up about [the defendant], nor does [the victim's father] or [the victim's mother]; right?
>
> A. I wouldn't know, ma'am.
>
> Q. Well, you had a good relationship, so you don't know of anything that would cause [the victim], [the victim's mother] or [the victim's father] to make this up about [the defendant], prior to this happening, except for the fact that it happened?
>
> A. Well, you see, on February, I think it might be a Monday, I don't know if it's the 18th or the 19th, my – it was a Sunday, I think, and [the defendant] had went out. And Trisha Cox said that [the defendant] had broke into their home, and so the police come to the house and when they come, my cousin said he had dropped [the defendant] off already, and we didn't hear him knock on the door, so the police come and we opened the door, we told them they could come in. I only remember one police officer then, cause I didn't remember the other one, was Dwayne Gibson. And he said there was no need to come in and she told my sister the next morning, "keep your children from [the defendant], cause he's a molester." So, not a month later –[.]

The defense objected and demanded a mistrial, arguing that the witness had referred to another crime. The State replied that it had expected a "no" response from the witness, and had even asked a leading question, i.e., "there's no reason that she knew of why [the victim's father], [the victim], or [the victim's mother] would make up anything about [the defendant][,]" to obtain that response. The defense again demanded a mistrial, and the court denied the demand. The defense objected to the court's ruling, and the court noted the objection and stated, "It will be addressed on closing argument."

After the defense presented testimony from another witness, the court recessed the case for lunch, but allowed the defense to argue its motion for mistrial outside the presence of the jury. The defense argued "it was obvious" from the line of questioning used by the State in examining Tawana Dupard that the State wanted her to disclose the fact that the defendant was a registered sex offender. The State

replied it had not questioned Tawana Dupard concerning any prior crimes or offenses by the defendant, but had asked if there was any reason for the victim, the victim's father, or the victim's mother to "make this up" about the defendant. The State argued that rather than answer the question, Tawana Dupard began talking about Trisha Cox, who was not a witness in the trial. The defense argued that, based on the State's line of questioning of Tawana Dupard, "[t]here's no question" the State wanted the witness to say that the defendant was a sex offender. The court denied the motion for mistrial, noting that there was no evidence before the jury of the defendant being a registered sex offender or of his having been convicted of any offense, and "the [c]ourt will address that during the jury instructions[.]"

In charging the jury, the court stated that the defendant was presumed innocent until each element of the crime necessary to constitute his guilt was proven beyond a reasonable doubt and that the jury was only to consider evidence admitted during the trial. The court did not reference the fact that the defendant was a registered sex offender.

There was no abuse of discretion in the court's refusal to grant a mistrial. Tawana Dupard's reference to the defendant being a molester was unsolicited and unresponsive testimony, and thus, was not chargeable against the State. Further, there was no error in the court's not admonishing the jury to disregard the challenged testimony. Although defense counsel objected, he failed to ask the trial court to admonish the jury to disregard the unresponsive testimony. La. Code Crim. P. art. 771 mandates a request for an admonishment. **State v. Jack**, 554 So.2d 1292, 1296 (La. App. 1st Cir. 1989), writ denied, 560 So.2d 20 (La. 1990).

This assignment of error is without merit.

EXCESSIVE SENTENCE; LA. CODE CRIM. P. ART. 894.1; INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant combines assignments of error numbers 2, 3, and 4. He argues the trial court imposed an excessive sentence on him; the trial court failed to specify why it sentenced him so harshly; and trial defense counsel was ineffective because he failed to move for reconsideration of sentence.

We will address the defendant's claim of excessive sentence, even in the absence of a timely motion to reconsider sentence or a contemporaneous objection, because it would be necessary to do so as part of the analysis of the ineffective assistance of counsel claim. See **State v. Bickham**, 98-1839, pp. 7-8 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891-92.

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. 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. Hurst**, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

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. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly

disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **Hurst**, 99-2868 at pp. 10-11, 797 So.2d at 83.

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that, but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. 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, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Whoever commits the crime of molestation of a juvenile when the victim is under the age of thirteen years shall be imprisoned at hard labor for not less than

twenty-five years nor more than life imprisonment. At least twenty-five years of the sentence imposed shall be served without benefit of probation, parole, or suspension of sentence. La. R.S. 14:81.2(E)(1) (prior to amendment by 2008 La. Acts, No. 33, § 1). The trial court sentenced the defendant to fifty years at hard labor, with twenty-five years of the sentence without benefit of probation, parole, or suspension of sentence.

In sentencing the defendant, the trial court stated that this was the case of a thirty-nine-year-old black male, who was officially classified as a third-felony offender. The court noted it had ordered a presentence investigation report (PSI), had received that report, had made that report available to the defendant through his attorney, and would attach the report and make it a part of the court's reasons for sentence. The court noted that the PSI indicated: the defendant had two previous felony convictions for crimes against the person; on February 22, 1999, he was convicted of second degree battery and sentenced to eighteen months at hard labor; on July 29, 2003, he was convicted of accessory after the fact to aggravated rape and was sentenced to five years at hard labor, but the sentence was suspended and he was given five years probation; while under probation supervision, he committed the instant offense of molestation of a juvenile; and the victim was six years old.

A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentence. See La. Code Crim. P. art. 894.1 (A)(1), (B)(2), & (B)(21). Further, the sentence imposed was not grossly disproportionate to the severity of the offense and thus, was not unconstitutionally excessive.

With regard to the defendant's ineffective assistance of counsel claim, we note, even assuming arguendo that defense counsel performed deficiently in failing to timely move for reconsideration of the sentence, the defendant suffered no prejudice from the deficient performance, because this court considered the defendant's excessive sentence argument in connection with the ineffective assistance of counsel claim.

These assignments of error are without merit.

PROTECTIVE ORDER

La. R.S. 15:440.6 requires a videotape of a child's statement admitted under La. R.S. 15:440.5 be preserved under a protective order of the court to protect the privacy of the child. Accordingly, it is hereby ordered that the videotaped statement of the victim be placed under a protective order. See **State v. Ledet**, 96-0142, p. 19 (La. App. 1st Cir. 11/8/96), 694 So.2d 336, 347, writ denied, 96-3029 (La. 9/19/97), 701 So.2d 163.

CONVICTION AND SENTENCE AFFIRMED; PROTECTIVE ORDER ISSUED.