NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1568

STATE OF LOUISIANA

VERSUS

CARL DEAN BOSWELL

Judgment Rendered: APR 26 2013

* * * * *

On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne,
State of Louisiana
Trial Court No. 572,577

Honorable Randall L. Bethancourt, Judge Presiding

* * * * *

Joseph L. Waitz, Jr.
District Attorney
Houma, LA

Attorneys for Plaintiff-Appellee,
State of Louisiana

Ellen Daigle Doskey
Assistant District Attorney
Houma, LA

Bertha M. Hillman
Thibodaux, LA

Attorney for Defendant-Appellant,
Carl Dean Boswell

* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Carl Dean Boswell, was charged by grand jury indictment with sexual battery, a violation of La. R.S. 14:43.1. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant was sentenced to fifty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Following sentencing, the defendant objected to the sentence as being excessive and made an oral motion to reconsider sentence. The trial court denied the motion. The defendant now appeals, designating one counseled assignment of error and two pro se assignments of error. We affirm the conviction and sentence.

FACTS

The defendant's wife had a daughter, seven-year-old A.A., from a previous relationship. Between January 3 and January 9 of 2010, while the defendant's wife was in the hospital giving birth to her and the defendant's child, the defendant was taking care of A.A., his stepdaughter, at their home in Houma. At some point during his wife's absence, the defendant, while sitting in a recliner in the living room, had A.A. stroke his penis until he ejaculated. A few weeks later, A.A. recounted the incident to her mother, who went to the police the following day.

COUNSELED ASSIGNMENT OF ERROR

In his counseled assignment of error, the defendant argues the trial court erred in denying his motion to reconsider sentence, which he asserts is excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and

suffering. A sentence is considered 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. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code of Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. Code Crim. 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. Code Crim. P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

In the instant matter, the defendant, facing a maximum sentence of ninety-nine years at hard labor, was sentenced to fifty years at hard labor. See La. R.S. 14:43.1(C)(2). The defendant argues in his brief there were not sufficient

aggravating circumstances to warrant imposition of such a harsh sentence; and further argues the trial court failed to give adequate consideration to the mitigating circumstances of his age (thirty-three years old) and the lack of evidence of a prior criminal history.

While the trial judge did not refer to La. Code Crim. P. art. 894.1 by name, it is clear he considered aggravating and mitigating circumstances. In sentencing the defendant, the trial judge noted his familiarity with the case, and further stated that he had reviewed the record and his notes. Moreover, even had there not been full compliance with Article 894.1, remand would be unnecessary because the record before us clearly established an adequate factual basis for the sentence imposed on the defendant for the sexual battery of his seven-year-old stepdaughter, the one person he was supposed to protect from such evils, but instead exploited his position of trust. See **State v. Kirsch**, 2002-0993 (La. App. 1st Cir. 12/20/02), 836 So.2d 390, 395-96, writ denied, 2003-0238 (La. 9/5/03), 852 So.2d 1024.

Considering the trial court's review of the circumstances, the nature of the crime, and the fact the defendant was sentenced to about half of the maximum sentence allowable under the law, we find no abuse of discretion by the trial court. Accordingly, the sentence imposed by the trial court is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. The trial court did not err in denying the motion to reconsider sentence.

The assignment of error is without merit.

PRO SE ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related pro se assignments of error, the defendant argues, respectively, ineffective assistance of counsel, and the trial court erred in not informing him of, and granting him, the right to waive trial by jury.

Alexander Doyle was the defendant's first counsel. Later, Robert Pastor took over as defense counsel and tried the defendant's case. In his first pro se

assignment of error, the defendant lists specific alleged instances of ineffective assistance of counsel, namely: both Doyle and Pastor misinformed and/or misled the defendant regarding the requirement of a jury trial; Pastor did not request a recess to further investigate Louisiana Constitutional Article I, Section 17(A), which requires a defendant to waive his right to a jury trial at least forty-five days before trial; and Doyle failed to provide the State with an alibi defense. In his second assignment of error, the defendant argues the trial court erred in not informing him at arraignment of his right to waive trial by jury; the trial court erred in denying the defendant's motion to waive trial by jury; and the trial court erred in denying his pro se motion for new trial, which made the same argument that the trial court erred in denying his motion to waive trial by jury.

We address the second pro se assignment of error first. A review of the transcript and the minutes indicate the trial court did not comply with the La. Code Crim. P. art. 780 requirement that it inform the defendant of his right to waive trial by jury. However, in **State v. Sharp**, 338 So.2d 654, 660 (La. 1976), the Louisiana Supreme Court held that when a defendant is not informed by the trial judge at arraignment of his option to waive his right to a jury trial, as required by Article 780, the defendant's conviction will not be reversed absent a showing of prejudice. See **State v. Cappel**, 525 So.2d 335, 336 (La. App. 1st Cir.), writ denied, 531 So.2d 468 (La. 1988).

Just prior to the prospective jurors being called to begin the voir dire process, Pastor had the defendant take the stand to testify that he had declined the plea bargain offered by the State. Following this brief testimony, the following exchange took place:

> The Court: All right. And you're choosing to have a trial by jury?
> [Defendant]: Yes, sir.
> The Court: Do you understand that you have the right to waive a trial by jury; do you understand that?
> [Defendant]: No, I didn't know it. I thought it was a mandatory trial

by jury. I wasn't aware of it. I thought because it was a capital offense it had to be a jury trial.
Mr. Pastor: It's not a capital offense and my notes indicate that we discussed that. Do you want to have a few minutes to discuss that some more?
[Defendant]: Yes.

The trial court then allowed Pastor to discuss the issue with his client. During this interlude, the prosecutor informed the trial court that the defendant wished to waive a trial by jury. The prosecutor pointed out to the trial court that the Louisiana Constitution had been recently amended to provide that a jury trial waiver had to be made no later than forty-five days prior to the trial date. Accordingly, the prosecutor objected to the waiver of jury trial. Pastor informed the trial court that he had read the "codal article" and asked the trial court to note his objection. The trial court then read the applicable law and noted the following:

No. 1) This matter has been set for trial, good Lord, a long time ago.
No. 2) To the Court's knowledge, from having pretrial conferences, there was never, ever a mention of any possibility that this might even be a trial by a judge without a jury. That wasn't even mentioned by the defendant or his lawyer at any stage of this case.

Next, a jury panel was summoned to come to the courthouse today. We have approximately 50 or 100 people downstairs who have taken time off from work, school, family, etcetera, to serve as jurors.

Next, the DA and indeed I would suppose Defense Counsel is ready to have a trial by jury and a trial by jury necessitates certain strategies, planning, witness calling, the arrangements of witnesses, the various strategies in getting evidence in, and in what order evidence would be presented. And to have a defendant on the morning of a trial say oh, no, no, I'm going to waive a trial by jury and go with a judge, certainly is inappropriate, untimely, unconstitutional, and there are probably two or three other things I could mention because I don't want to get too upset. So for those reasons I'm denying the defendant's motion to have this matter tried by a judge without a jury, in other words, the defendant's motion to waive a trial by jury as being woefully too late, so there.

We see no reason to disturb the trial court's denial of the defendant's motion to waive jury trial. Although it remains the preferred method for the trial court to advise a defendant of the right to a jury trial in open court before obtaining a waiver, that practice is not statutorily required; further, it is preferred but not necessary for the defendant to waive the right to a jury trial personally. See **State**

v. McCloud, 2004-1112 (La. App. 5th Cir. 3/29/05), 901 So.2d 498, 503, writ denied, 2005-1450 (La. 1/13/06), 920 So.2d 235; **State v. Quest**, 2000-205 (La. App. 5th Cir. 10/18/00) 772 So.2d 772, 784, writ denied, 2000-3137 (La. 11/2/01), 800 So.2d 866. As the trial court pointed out, there had been no oral or written motions by the defendant to waive his right to a jury trial. It appeared to be a dilatory tactic by the defendant to wait until the day of trial to suggest that he knew nothing of his right to waive a jury trial, and that he desired a bench trial. Moreover, it appears from the record that Pastor, in referring to his notes, discussed the issue of jury trial waiver with the defendant. See **State v. Weeks**, 345 So.2d 26, 27 (La. 1977). See also **State v. Buchanan**, 439 So.2d 576, 584-85 (La. App. 1st Cir. 1983). In any event, the record does not reflect the defendant has been sufficiently prejudiced in this case to warrant reversal of his conviction. See **Sharp**, 338 So.2d at 660.

We address now the defendant's claims of ineffective assistance of counsel. In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the

ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

In the instant matter, the allegations of ineffective assistance of counsel at trial cannot be sufficiently investigated from an inspection of the record alone. As noted, the defendant maintains that he was misinformed by both Doyle and Pastor regarding the requirement of a jury trial. According to the defendant, he was advised that the crime he was being charged with was a capital offense and, as such, a trial by jury was mandated. The defendant further alleges Pastor was ineffective for not requesting a recess to further investigate Louisiana Constitutional Article I, Section 17(A) after the trial court denied his motion to waive a jury trial. Finally, the defendant alleges Doyle failed to provide the State with an alibi defense. According to the defendant, if Doyle had subpoenaed the security video from Terrebonne Parish Medical Center, then it could have been shown that he was at the medical center instead of at home during the time of the alleged offense.

Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant

record, could these allegations be sufficiently investigated.[1] Accordingly, the allegations are not subject to appellate review. See **State v. Albert**, 96-1991 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-64. To the extent the defendant is alleging ineffective assistance of counsel for Pastor's failure to inform him of his right to waive a jury trial, and that had he exercised this right the outcome of his trial would have been different, he may raise this claim, as well, at the evidentiary hearing for post-conviction relief. That is, the defendant must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

These assignments of error are meritless or otherwise not subject to appellate review. For the above and foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

[1] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.