NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1605

STATE OF LOUISIANA

VERSUS

CURTIS LEE JOHNSON

Judgment Rendered: April 26, 2013

Appealed from the
Sixteenth Judicial District Court
In and for the Parish of St. Mary, State of Louisiana
Trial Court Number 2008-176475

Honorable Lori A. Landry, Judge Presiding

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Curtis Lee Johnson

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

WHIPPLE, C.J.

The defendant, Curtis Lee Johnson, was charged by grand jury indictment with aggravated incest, a violation of LSA-R.S. 14:78.1.[1] He pled not guilty and, following a jury trial, was found guilty as charged. The state subsequently filed a multiple offender bill of information, and the defendant denied the allegations of the bill. The multiple offender proceedings were not concluded at that time. The defendant was sentenced to thirty-five years at hard labor with twenty-five years to be served without benefit of probation, parole, or suspension of sentence. The defendant appealed, and this court affirmed his conviction and sentence. See State v. C.L.J., 2011-0972 (La. App. 1st Cir. 12/29/11), 2011 WL 6916529 (unpublished), writ denied, 2012-0677 (La. 9/14/12), 98 So. 3d 821.

After a hearing, the defendant was adjudicated as a second-felony habitual offender. The district court vacated the sentence previously imposed and resentenced the defendant to fifty years at hard labor. The defendant now appeals, arguing that the district court erred in sentencing him under LSA-R.S. 14:78.1D(2). For the following reasons, we affirm the habitual offender adjudication and sentence.

FACTS

The victim of this offense is the defendant's daughter, who was seven years old at the time of the offense. The investigation began in February 2008 after the victim's mother noticed blood in the victim's panties. The victim's mother and grandmother took her to a pediatric clinic for an evaluation, and the treating physician referred the victim to the emergency room of a local hospital for further examination and laboratory work.

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[1]The indictment did not specify whether the defendant was being charged under Subsection D(1) or D(2) of LSA-R.S. 14:78.1. However, the defendant was originally charged by a bill of information which set forth his date of birth as October 5, 1974, and was amended to set forth the victim's date of birth as November 6, 2000.

While the victim, her mother, and her grandmother waited at the hospital, the victim's aunt called to speak with her. During the telephone conversation with her aunt, the victim disclosed that her father had touched her inappropriately. Police were promptly notified of the allegations of sexual abuse. In a videotaped interview with a child protection examiner, the victim disclosed that her father had been touching her "private" under her clothing since she was about six years old, sometimes using lotion, and that recently she was scratched by his fingernail and bled. The victim also testified at trial that her father had touched her "in [her] private[,]" which she identified as her vaginal area, numerous times.

DISCUSSION

In his sole assignment of error, the defendant argues that the district court erred in sentencing him under LSA-R.S. 14:78.1D(2).[2] Specifically, the defendant contends that the applicable sentencing range for his multiple offender sentence should have been ten to forty years pursuant to LSA-R.S. 14:78.1D(1).[3] See LSA-R.S. 15:529.1A(1). In support of his argument, the defendant contends that the state failed to prove that he was seventeen years of age or older and that the victim was under the age of thirteen at the time of the offense.

The defendant raised a similar argument in his original appeal, wherein he assigned error to the district court's denial of his motion in arrest of judgment. The motion claimed that the bill of information was deficient because, among other things, it did not allege that the victim was under the age of thirteen and the

[2]At the time of the defendant's offense, LSA-R.S. 14:78.1D(2) provided, in pertinent part: "[w]hoever commits the crime of aggravated incest on a victim under the age of thirteen years when the offender is seventeen years of age or older shall be punished by imprisonment at hard labor for not less than twenty-five years nor more than life imprisonment." Subsection D(2) was subsequently amended, changing the maximum penalty to ninety-nine years at hard labor. See 2008 La. Acts No. 33, § 1.

[3]Louisiana Revised Statute 14:78.1D(1) provides: "[a] person convicted of aggravated incest shall be fined an amount not to exceed fifty thousand dollars, or imprisoned, with or without hard labor, for a term not less than five years nor more than twenty years, or both."

defendant was over the age of seventeen. This court found no merit to the defendant's argument and noted that the defendant failed to file a request for a bill of particulars or a motion to quash the indictment. This court also pointed out that while the original bill of information did not identify the victim, the amended bill both identified the victim and set forth her date of birth. Although the grand jury indictment obtained by the state thereafter did not identify the victim, her identity and date of birth had already been revealed to the defendant through the amended bill. See C.L.J., 2011-0972 at p.5.

The defendant now claims that the district court's sentencing under Subsection D(2) was in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), because there was not sufficient proof that he was over the age of seventeen and that the victim was under the age of thirteen at the time of the offense. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond reasonable doubt." Apprendi, 530 U.S. at 476, 120 S. Ct. at 2355 (citing Jones v. United States, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 1224 n.6, 143 L. Ed. 2d 311 (1999)). The statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004).

In response, the state contends that the defendant's argument is a "thinly veiled attempt to re-litigate the issue of whether there is sufficient evidence to convict the defendant." The state further contends that the defendant should be precluded from raising this sufficiency argument because he failed to raise it in his original appeal. The defendant presented a brief sufficiency argument in his original appeal by assigning error to the district court's denial of his postverdict

judgment of acquittal. However, he did not claim that the state failed to prove his and the victim's ages in that assignment of error. We agree that the defendant should have raised this argument in his original appeal to the extent that he challenges the sufficiency of the evidence presented in support of his conviction.[4]

Nevertheless, before us now are the defendant's habitual offender adjudication and sentencing. Sentencing the defendant to a new sentence under LSA-R.S. 14:78.1D(2) is supported by the facts in the record and reflected in the jury verdict. In charging the jury, the district court stated, "if you are convinced beyond a reasonable doubt that: (1) The Defendant was over the age of seventeen . . . (3) When the child is under the age of thirteen at the time of the event . . . Then your verdict should be guilty of Aggravated Incest as charged." The record clearly reflects that the jury returned a verdict of guilty accompanied with the following language: "[w]e, the Jury, find [the victim] was seven years old on the date of the offense. We, the Jury, find the defendant, Curtis Johnson, guilty of aggravated incest as charged[.]"

There was also sufficient evidence that the defendant was seventeen years of age or older at the time of the offense. The bill of indictment provided that the defendant's date of birth is October 5, 1974. The victim's grandmother testified that the victim's mother and the defendant had been in a relationship since the victim was born, for approximately nine years at the time of trial. The victim testified that she was nine years old at the time of trial and was seven years old at the time of the offense. The defendant was being tried as an adult rather than a juvenile. See State v. Hawkins, 633 So. 2d 301, 304 (La. App. 1st Cir. 11/24/93). Furthermore, the defendant was charged by grand jury indictment, as required

[4]We note that the defendant had notice that he was being sentenced under Subsection D(2) after his original sentence of thirty-five years at hard labor was imposed, as the maximum penalty under Subsection D(1) is twenty years. See LSA-R.S. 14:78.1D(1).

when punishment for the offense would be under LSA- R.S. 14:78.1D(2) (prior to amendment by 2008 La. Acts No. 33, § 1) ("an offense punishable by life imprisonment") rather than under LSA-R.S. 14:78.1D(1). See LSA-C.Cr.P. art. 382A. Therefore, the state's evidence was clearly sufficient prove that the defendant was seventeen years of age or older and that the victim was under the age of thirteen at the time of the offense. Thus, the defendant was properly sentenced as a habitual offender under LSA-R.S. 14:78.1D(2).

SENTENCING ERROR

Under LSA-C.Cr.P. art. 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. See State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277. After a careful review of the record, we have found a sentencing error.

After the multiple offender hearing, the defendant was adjudicated a second-felony offender and sentenced to fifty years at hard labor. LSA-R.S. 14:78.1D(2) provides that at least twenty-five years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence. The district court failed to specify how many years of the defendant's fifty-year sentence were to be served without the benefit of parole.[5] Thus, the defendant's sentence is illegally lenient. However, because the sentence is not inherently prejudicial to the defendant, and neither the state nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See Price, 952 So. 2d at 123-25.

[5]The minutes also reflect that the district court failed to specify how many years of the defendant's fifty-year sentence were to be served without parole.

CONCLUSION

For these reasons, the defendant's habitual offender adjudication and sentence are hereby affirmed.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.