NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1677

STATE OF LOUISIANA

VERSUS

EDWARD F. BENOIT

DATE OF JUDGMENT: APR 2 6 2013

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 512649, DIVISION A, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE RAYMOND S. CHILDRESS, JUDGE

* * * * * *

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Edward F. Benoit

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.,

The defendant, Edward F. Benoit, was charged by bill of information with two counts of indecent behavior with juveniles (L.N. and M.B.), violations of La. R.S. 14:81 (counts 1 and 4), one count of oral sexual battery (of L.N.), a violation of La. R.S. 14:43.3 (count 2), and one count of sexual battery (of M.B.), a violation of La. R.S. 14:43.1 (count 3). He pled not guilty and, following a jury trial, was found guilty as charged on all counts. The trial court sentenced the defendant to seven years imprisonment at hard labor on his conviction for indecent behavior with a juvenile (L.N.) (count 1); to ten years imprisonment at hard labor on his oral sexual battery conviction (count 2); to forty years imprisonment at hard labor, with the first twenty-five years of the sentence to be served without benefit of parole, probation, or suspension of sentence, on his conviction for sexual battery (count 3); and to twenty-five years imprisonment at hard labor, with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence, on his indecent behavior with a juvenile (M.B.) conviction (count 4). All sentences were made consecutive. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating one assignment of error. For the following reasons, we affirm the convictions and sentences.

FACTS

The defendant, who was in his seventies at the time, lived in a trailer on Beech Street in Slidell, Louisiana. The trailer was next door to a house where several young children lived, including siblings seven-year-old M.B., a boy, and thirteen-year-old L.N., a girl. L.N. and M.B. often visited the defendant in his trailer. L.N. and M.B. would always go together when visiting the defendant, so their mother became suspicious when L.N. went one day by herself to visit the

defendant. When L.N. returned home, her mother asked her why she had visited the defendant alone. L.N. told her mother that the defendant had been molesting her and M.B.

Disclosure by both children revealed that from 2010 to 2011, the defendant would spank L.N. and M.B. when they visited. Sometimes the children were clothed and sometimes their buttocks were exposed when the defendant spanked them. The defendant used either his bare hand or a paddle to spank them. The defendant would give them gifts, like a lamp or money, for spanking them. On two separate occasions, the defendant licked L.N.'s vagina. On one occasion, the defendant had M.B. touch the defendant's penis over his pants.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues his sentences are excessive. Specifically, the defendant contends the sentences are excessive as imposed individually and as imposed consecutively.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel 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. C.Cr.P. art. 894.1 need not be recited, the record must reflect that the trial court adequately considered the criteria therein. ***State v. Brown***, 02-2231 (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. 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, 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).

The defendant, who was 78 years old at the time of sentencing, asserts in brief that the eighty-two-year aggregate total of his four consecutive sentences effectively constitutes a life sentence. On counts 1, 2, and 4, he received the maximum possible sentences. The defendant argues that he did not use force or threats of force and that his behavior was clearly not the most egregious and blameworthy of such offenses. Further, according to the defendant, there was no indication that either M.B. or L.N. suffered any lasting harm from his actions. Therefore, the defendant argues that he should not have received maximum sentences and that the sentences should have been made concurrent, rather than

consecutive. Finally, the defendant cites to ***State v. Johnson***, 97-1906 (La. 3/4/98), 709 So.2d 672, 676-77, where the Louisiana Supreme Court found that to rebut the presumption of the constitutionality of a mandatory minimum sentence, the defendant must clearly and convincingly show that he is exceptional, which means that because of unusual circumstances, the defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct, at least for a defendant without a prior criminal record. See La. C.Cr.P. art. 883; ***State v. Crocker***, 551 So.2d 707, 715 (La. App. 1st Cir. 1989). However, even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified where an offender poses an unusual risk to public safety. ***State v. Breland***, 97-2880 (La. App. 1st Cir. 11/6/98), 722 So.2d 51, 53.

In the instant matter, the defendant's criminal conduct of sexually abusing young children clearly makes him a threat to the safety of the community. Moreover, his convictions did not arise out of a single course of criminal conduct. The defendant's sexual abuse of L.N. and M.B. occurred at different times over a period of several months. Under these circumstances, the imposition of consecutive sentences did not render these sentences excessive. See ***Crocker***, 551 So.2d at 715. The sentences imposed for these offenses were within the statutory limits and did not constitute an abuse of discretion by the trial court. See ***State v. Palmer***, 97-0174 (La. App. 1st Cir. 12/29/97), 706 So.2d 156, 160.

Regarding the imposition of maximum sentences for three of the defendant's convictions, this Court has stated that maximum sentences permitted under statute may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. ***State v. Hilton***, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 00-0958 (La. 3/9/01), 786 So.2d 113. As noted, the defendant poses an unusual risk to the public safety. Further, the defendant's actions as a sexual predator among the youth in his community, coupled with his complete lack of remorse for his actions (as discussed below), makes him the worst type of offender. It is clear that the trial court provided sufficient justification for imposing maximum sentences. See ***State v. Mickey***, 604 So.2d 675, 679 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

In ***State v. Dorthey***, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court opined that if a trial judge were to find that the punishment mandated by La. R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he has the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive. In ***Johnson***, 709 So.2d at 676-77, the Louisiana Supreme Court reexamined the issue of when ***Dorthey*** permits a downward departure from a mandatory minimum sentence, although specifically within the framework of the Habitual Offender Law. While both ***Dorthey*** and ***Johnson*** involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in **Dorthey** are not restricted in application

to the penalties provided by La. R.S. 15:529.1. See ***State v. Fobbs***, 99-1024 (La. 9/24/99), 744 So.2d 1274 (per curiam); ***State v. Collins***, 09-1617 (La. App. 1st Cir. 2/12/10), 35 So.3d 1103, 1108, writ denied, 10-0606 (La. 10/8/10), 46 So.3d 1265.

The defendant contends in his brief that his consecutive sentences should not only shock the conscience, "but showcase how the failure of appellate courts to reverse sentences has emboldened trial courts to do as they please as long as they do not exceed the statutory maximum sentence." It is clear from the sentencing reasons that the trial court thoroughly considered La. C.Cr.P. art. 894.1, particularly the defendant's refusal to accept responsibility for his actions, in arriving at appropriate sentences. Following are the trial court's sentencing reasons and its exchange with the defendant during sentencing:

> The Court would note that we will be sentencing the defendant in accordance with the provisions of Louisiana Code of Criminal Procedure, Article 894.1.
>
> The Court would note that the victims of the defendant were of tender years. I believe the girl was 12 --
>
> [Defense Counsel]:
>
> She was 13, Your Honor, at the time.
>
> The Court:
>
> All right. And the boy was 7 at the time of the incident, if my memory serves me correctly.
>
> Needless to say, the descriptions of the --
>
> [The Defendant]:
>
> I'd like to speak, Sir.
>
> The Court:
>
> Go ahead.
>
> [The Defendant]:

I'd like for you and the District Attorney to know that I did not corrupt those young children. They were corrupted a long time before they met me.

And I could go into details as to why I know that they were corrupt because they were indecent.

The Court:

Okay.

[The Defendant]:

And they approached me numerous times before I ever said a word.

The Court:

Okay. So let me see if I understand this:

They asked you to spank them on their bare bottoms and they asked you to perform oral sex on the little girl and they asked you if the little boy could touch your privates?

[The Defendant]:

No. She made him do that.

The Court:

Oh, okay.

[The Defendant]:

The young lady tucked his hands behind him--

The Court:

Okay; fine.

[The Defendant]:

-- and tried to force him --

The Court:

Is that it?

[The Defendant]:

Yes, sir.

The Court:

Do you have anything else to say? Keep talking. If you want to keep talking, I'll be glad to answer. You're not making any points with me.

[The Defendant]:

I'm not trying to make points.

The Court:

Good.

[The Defendant]:

I'm just trying to let you know that I didn't corrupt those young children.

The Court:

Good. But you took advantage of their corruptness; is that the deal?

[The Defendant]:

It doesn't matter.

The Court:

I would imagine so. Needless, to say, the defendant has not exhibited any remorse about what has taken place here today.

And the testimony that I listened to and that the Jury listened to was, I thought, particularly heinous.

And at this point in time, to tell me that it is the fault of the children --

[The Defendant]:

I didn't say it was their fault.

The Court:

Okay. Good. And I don't want to hear any more out of you.

I think it's well in line with what I heard during the course of this subject.

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The Court:

> Let's just, for good measure, run all of these [sentences] consecutive with one another.
>
> And the Court is firmly convinced that, to impose a lesser sentence would deprecate the seriousness of the offenses before me here today.

Considering the trial court's careful review of the circumstances and the nature of the crimes, we find no abuse of discretion by the trial court. The trial court provided sufficient justification in imposing maximum and consecutive sentences. As the defendant noted, whether a mandatory minimum sentence is constitutional is determined by a review of each individual case and each individual defendant. To the extent that the defendant is suggesting he is exceptional, he has not proven by clear and convincing evidence that he is exceptional such that the sentences would not be meaningfully tailored to the culpability of the offender, the gravity of the offenses, and the circumstances of the case. See **Johnson**, 709 So.2d at 676. Accordingly, the sentences imposed by the trial court are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive.

The assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.