NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0728

STATE OF LOUISIANA

VERSUS

KIAN TATE

Judgment rendered December 27, 2013.

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 09-09-0319
Honorable Donald R. Johnson, Judge

* * * * * *

HON. HILLAR C. MOORE, III
DISTRICT ATTORNEY
DALE R. LEE
ASSISTANT DISTRICT ATTORNEY
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

BERTHA M. HILLMAN
THIBODAUX, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
KIAN TATE

* * * * * *

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J.

Defendant, Kian Tate, was charged by amended bill of information with second degree battery, a violation of La. R.S. 14:34.1 (count one), and forcible rape, a violation of La. R.S. 14:42.1 (count two). He pled not guilty and waived his right to counsel, electing to represent himself at trial. After a jury trial, defendant was found guilty as charged on both counts. The trial court subsequently sentenced him to consecutive terms of five years without hard labor (count one) and twenty years at hard labor, without the benefit of parole, probation, or suspension of sentence (count two). Defendant subsequently filed a pro se "Motion for Reduction of Sentence," which the trial court denied. He now appeals, asserting one assignment of error related to the trial court's denial of his "Motion for Reduction of Sentence." For the following reasons, we affirm defendant's convictions and sentences.

FACTS

In the early morning hours of July 25, 2009, W.T.[1] and her boyfriend, defendant, returned to W.T.'s trailer on Plank Road in Baton Rouge. They had been visiting neighbors. When they arrived in front of the trailer, W.T. and defendant began to argue because W.T. did not want to go inside. Defendant forced W.T. into the trailer, pushed her up against the stove, and punched her twice – once in her face and once in her back. W.T.'s left eye immediately began to bleed, and she suffered extreme pain. Defendant locked the trailer door and told W.T. not to do anything stupid. He then ordered W.T. to remove her clothes and to lie down on her bed. Defendant also disrobed and threatened W.T. with further abuse if she did not perform oral sex on him. W.T. complied with defendant's demand out of fear and performed oral sex on him, twice stopping to go to the bathroom to get a glass of water. Defendant accompanied her each time. W.T. was eventually able to escape the trailer when defendant fell asleep while she was still performing oral sex on him. She made contact with a neighbor, who called the police.

[1] In accordance with La. R.S. 46:1844(W), the victim herein is referred to only by her initials.

Officer Derek Burns, of the Baton Rouge Police Department, arrived on the scene to find W.T. holding her face and covered in blood. W.T. reported to him that defendant had struck her with a closed fist and that he was asleep in her trailer. Officer Burns and other officers entered W.T.'s trailer and found bloodstains throughout the residence. They also located defendant, who was naked and asleep in W.T.'s bed. After a brief struggle, they were able to apprehend him. The next morning, W.T. found out that she had permanently lost sight in her left eye as a result of the blow to her face.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant argues that the trial court erred in denying his motion to reconsider sentence.[2] Specifically, he contends that his sentences are excessive because there is no particular justification for his consecutive sentences and because many of the aggravating factors under La. Code Crim. P. art. 894.1 do not apply to him.

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. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is 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. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in

[2] As stated above, we note that this motion was actually titled "Motion for Reduction of Sentence," but it sought essentially the same relief as a motion for reconsideration of sentence. We also recognize that this motion was filed well after the time limitations set forth in La. Code Crim. P. art 881.1(A), but the trial court apparently considered this motion despite the tardiness of its filing. Therefore, we will address the merits of defendant's assignment of error.

the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that 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 guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir.), writ denied, 565 So.2d 942 (La. 1990). 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. Watkins**, 532 So.2d 1182, 1186 (La. App. 1 Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

Whoever commits the crime of second degree battery shall be fined not more than two thousand dollars or imprisoned, with or without hard labor, for not more than five years, or both. La. R.S. 14:34.1(C). Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than five nor more than forty years. At least two years of the sentence imposed shall be without the benefit of probation, parole, or suspension of sentence. La. R.S. 14:42.1(B). In the instant case, defendant was sentenced to five years without hard labor for his second degree battery conviction, and to twenty years at hard labor, without the benefit of parole, probation, or suspension of sentence, for his forcible rape conviction. The trial court ordered these sentences to be served consecutively.

We note initially that defendant's pro se "Motion for Reduction of Sentence" did not raise the specific grounds for relief that defendant now raises on appeal. Instead, that pro se filing merely listed some inapplicable codal authority and appears to have asked the trial court to reduce his total term of imprisonment to a two-year suspended sentence. Technically, then, defendant's failure to include specific assertions regarding the consecutive nature of his sentences and the Article 894.1 factors precludes him from raising these issues for the first time on appeal. See La. Code Crim. P. art.

881.1(E). However, even considering the merits of the arguments defendant makes on appeal, we find that the trial court did not impose excessive sentences and, therefore, did not err in denying defendant's "Motion for Reduction of Sentence."

In general, if a defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. See La. Code Crim. P. art. 883. Even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive. See **State v. Breland**, 97-2880, p. 4 (La. App. 1 Cir. 11/6/98), 722 So.2d 51, 53. However, the imposition of consecutive sentences in such a context requires particular justification. See **State v. Spradley**, 97-2801, p. 19 (La. App. 1 Cir. 11/6/98), 722 So.2d 63, 73, writ denied, 99-0125 (La. 6/25/99), 745 So.2d 625.

In the instant case, the trial court stated as follows in sentencing defendant:

> As to the offense of forcible rape, I hereby sentence the defendant to a period of twenty years ... without benefit of probation, parole, or suspension of sentence. As to the offense of second-degree battery, I hereby sentence the defendant to a period of five years ... the five-year sentence will run consecutive to the twenty-year sentence. I make this sentence consecutive because of the nature of the event. ... I specify that I believe consecutive sentences are warranted ... because ... the conduct of the oral rape was severely aggravated by [defendant's] actions of punching this young lady and by the loss of her eye.

Thus, the trial court clearly set forth its justification for imposing consecutive sentences for defendant's convictions. We also note that in imposing consecutive sentences, the trial judge sentenced defendant to far less time than he was eligible for as a result of his forcible rape conviction.

With respect to the Article 894.1 factors, defendant asserts in his brief that sixteen of the twenty aggravating factors listed do not apply to him. However, the trial court need not recite the entire checklist of Article 894.1; the record must merely reflect that it adequately considered the guidelines. See **Herrin**, 562 So.2d at 11. In addition, a trial court is entitled to consider a defendant's entire criminal history in determining the appropriate sentence to be imposed. See **State v. Ballett**, 98-2568, pp. 25-26

(La. App. 4 Cir. 3/15/00), 756 So.2d 587, 602, writ denied, 2000-1490 (La. 2/9/01), 785 So.2d 31.

Prior to sentencing defendant, the trial court considered the contents of a presentence investigation ("PSI") report, a written statement by the victim, and an oral statement by defendant. The trial court noted that defendant's PSI report indicated multiple previous instances of violent behavior and an allegation of carnal knowledge of a juvenile. The trial court further stated that a suspended or probated sentence would deprecate the seriousness of defendant's conduct and that a period of institutionalized treatment or incarceration was warranted for an extended period of time. The trial court also found that society could not be protected from defendant until he learned to control his behavior or to regulate it within the confines of the criminal code.

Considering the record as a whole, as well as defendant's history of repeated criminality, we conclude that the sentences imposed by the trial court are not constitutionally excessive. As a result, the trial court did not err or abuse its discretion in denying defendant's "Motion for Reduction of Sentence."

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.