NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 1479

STATE OF LOUISIANA

VERSUS

JACK K. NELSON

Judgment rendered: APR 20 2017

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 07-15-0430 Sec. V

The Honorable Louis R. Daniel, Judge Presiding

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

The defendant, Jack Nelson, was charged by bill of information with second degree battery, a violation of La. R.S. 14:34.1. The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant was sentenced to five years imprisonment. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On April 11, 2015, Anthony Morris went to Speedy Cash (a loan business) on Florida Boulevard. Sarah Nelson was also in the store with her three-year-old daughter. As Sarah was at a cashier window filling out paperwork for a loan, her daughter was near her on the floor, writing on paper. Anthony walked toward Sarah's daughter; he touched the girl's back and greeted her. Sarah became upset and told Anthony not to touch her daughter and that he could be a pervert. Anthony walked back to his cashier window.

According to Sarah, who testified at trial, Anthony called her a "rude bitch" after he walked away. At this, Sarah left her daughter on the floor, went outside, and spoke to her husband, the defendant, who had been waiting in a vehicle outside of Speedy Cash. Moments later, the defendant walked in the store, approached Anthony and, without warning, punched him in the face. The defendant continued to attack Anthony with a barrage of punches until the final strike knocked Anthony unconscious, sending him sprawling to the floor on his back. During the attack, Sarah grabbed her daughter and they left the store. The defendant left moments later and they drove home.

Anthony lay unmoving on the floor for over two minutes. A surveillance camera in Speedy Cash recorded the entire incident, and the video was played for

the jury. Anthony did not remember anything about the attack. Since the altercation, Anthony has had vision and memory problems.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues his sentence is unconstitutionally 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 that 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).

The defendant argues in his brief that his sentence is excessive because it is clear in this case he was not looking for trouble. He further argues that at the time of the offense, a five-year sentence constituted the maximum sentence allowable under the law, and that he is certainly not the "most egregious defendant." La. R.S. 14:34.1 was amended in 2014, extending the maximum sentence from five years to eight years. See 2014 La. Acts. No. 722. The defendant committed the second degree battery on April 11, 2015 and, as such, the five-year sentence he received was not the maximum sentence.

The trial court ordered a presentence investigation report of the defendant, which revealed an extensive criminal history. In arriving at the appropriate sentence, it is clear the trial court considered La. Code Crim. P. art. 894.1, as well as the defendant's criminal history. In its reasons for sentence, the trial court stated in pertinent part:

> I ordered a presentence report to find out more about you, sir. . . I have considered, however, what is in the presentence report in this case. I have considered the victim's statement both in the presentence report and what is in court today in the sentencing. I have reviewed, with great detail, your criminal history which is a lengthy criminal

history. It goes on in the presentence report for basically four pages and what is most disturbing in the report is the number of battery arrests.

You were arrested back in 2000 for a simple assault and aggravated oral sexual battery which charges were dismissed in 2001. You were arrested in 2001 for simple battery, those charges were nol prossed. You were arrested for simple battery in 2003 and that, those charges were nol prossed. You were arrested in 2004 with aggravated battery, it appears, and those charges were dismissed in 2007, that was in Hammond.

You were arrested by the Tangipahoa Sheriff's Office for simple criminal damage and simple battery in 2005, those charges were nol prossed. You were arrested in 2008 for domestic abuse battery, you pled no contest which is a conviction in that case. In 2009, you have another simple battery arrest which you pled no contest which is a conviction also. Then you have the instant offense. That's just the battery offenses which I've gone over. There are many, many more numerous arrests on your criminal history.

That being said, you also have felony convictions on your record. You had a possession of Schedule II conviction which your probation was eventually revoked in 2012. It appears you also have a forgery conviction which you were sentenced to one year consecutive to the Schedule II sentencing.

Your arrest record is disturbing. And according to the Office of Probation and Parole, you're classified as a third felony offender, therefore, you are not eligible for probation.

The Court has considered the sentencing guidelines of Code of Criminal Procedure Article 894.1. The Court does find that there is an undue risk that you would commit another crime if probated even if you were eligible for probation which you are not. The Court finds any lesser sentence than the sentence I'm about to impose in this case would deprecate the seriousness of this offense and that you are in need of custodial or correctional environment best served by commitment to an institution.

Your actions in this case, sir, and I understand what your lawyer was arguing. I don't agree with everything your lawyer said, but I do remember and I don't think I'll ever be able to forget the video of what you did, sir, and I do know that you were reacting in the heat of the moment. I take that into consideration of what was told to you, probably told to you by -- is she your wife or girlfriend, sir?

* * *

She's your wife, okay. And I watched the video as to what the interaction with the victim, Mr. Morris, and your child in this case. You saw the video more than once in the court. It appears he went over and touched your child on the head and was simply talking to your child, perhaps playing in a playful manner. There did not appear to be anything threatening. Of course, you may not have been told that when your wife went to the car but your wife also appeared to be more upset at to what was said to her perhaps, perhaps, than what was said or done to the child.

There's no doubt that that incited you in some way, but you have a history of battery. You have a history of solving things, it appears, when you are upset about something with the use of force and that was certainly to come in and come up behind somebody, as you did in this case, and take the actions you did was inappropriate and it was wrong, just flat out wrong. And then you had the opportunity numerous times during it -- and I see you shaking your head in agreement and I'm glad you're shaking your head in agreement when I said it was wrong because it was. And there were times during the incident in the video that clearly you could have stopped even after one or two strikes, but you didn't. And chose not to stop until the victim, Mr. Morris, was laying on the ground and although your lawyer has argued from the beginning as far as evidence of unconsciousness, there is, if ever there is evidence of unconsciousness, that video shows that you simply continued hitting until you knocked the victim, Mr. Morris, unconscious in this case. Fortunately, he is still alive or you would be here on more serious charges than you are.

It was another needless act in this parish of violence, unfortunately. And I'm not in any way suggesting that a person should not protect their family. But in this situation when you walked in no one was being threatened and it doesn't appear anyone was being threatened before that. Although I don't disagree at all with your wife's actions as far as stopping the contact as she did in the manner, as parents have a duty and a right to be protective of their children. However, when you come in and you see a person in no way threatening anyone in there at that point whatever had happened before was over and it should have been handled by the authorities if there was a problem and simply calling the authorities, law enforcement would have been the reasonable thing to do in that case. But, instead you chose to take the action that you took and it was criminal action, it was violent action in the case.

The Court takes into account the actions you took in this case which is the definition of the crime for which you were charged and convicted. The Court takes into account the impact that it has had on the victim, the medical problems that the victim continues to have until this day because of your actions.

You played, obviously, a major role in the commission of this offense. Your conduct showed an absolute disregard for the safety and well-being of the victim in this case. As you chose to take matters into your own hand and affect your own form of punishment for whatever you thought that the victim did in this case. That is not the way our system and our society works, sir, in a civilized society. It is to go through the law enforcement authorities and through courts if there is to be any retribution or punishment or the civil courts.

You played a major role in the commission of this offense, as I said. I've taken into account your age, educational level, work history, social history, family history, and especially your criminal history which is extensive. And the Court has taken into account the severity of the acts in this case and the resulting injuries to the victim

in this case who, according to the presentence report, was in intensive care unit for about a week in this case.

Considering the trial court's careful review of the circumstances, the defendant's criminal history, and the defendant's unprovoked, vicious attack of Anthony Morris, we find no abuse of discretion by the trial court. The trial court provided, and the record more than reveals, sufficient justification in imposing a five-year sentence. Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

The assignment of error is without merit.

CONCLUSION

For all of the foregoing reasons, we affirm the defendant's sentence and conviction.

CONVICTION AND SENTENCE AFFIRMED.