NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0261**
VERSUS	*	**COURT OF APPEAL**
ANTHONY JOHNSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-576, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge David S. Gorbaty)

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AFFIRMED

STATEMENT OF THE CASE

Defendant Anthony Johnson was charged by bill of information on December 28, 1999 with molestation of a juvenile, a violation of La. R.S. 14:81.2. Defendant pleaded not guilty at his January 13, 2000 arraignment. On July 25, 2001, at the close of two-day trial, a six-person jury found defendant guilty as charged. On October 23, 2001, the trial court sentenced defendant to fifteen years at hard labor, to run concurrently with any other sentence. The trial court denied defendant's written motion to reconsider sentence, and granted defendant's motion for appeal.

FACTS

New Orleans Police Department Detective Omar Diaz was assigned to the Child Abuse Unit. On March 15, 1999, he received a molestation complaint from R.A. concerning defendant, her ex-husband, and her juvenile daughter. Detective Diaz met with the victim, her mother, and brother, D.G, and interviewed a pediatrician. He referred the case to New Orleans Child Protection and to a forensic pediatrician, Dr. Scott Benton. Detective Diaz

ultimately arrested defendant. No physical evidence was seized in the case. Detective Diaz stated the victim said she felt pain in her vagina on at least two occasions.

R.A., the victim's mother, was married to defendant for approximately one year in 1995 and 1996. Defendant lived with her and her family in Monticello, Mississippi and New Orleans from 1992 until 1996. The couple divorced in 1996 or 1997. They had one son together, A.J. In 1997, R.A. was told by her son of something that occurred between defendant and the victim while they were living in Mississippi. She contacted the New Orleans Police Department, which advised her to contact Mississippi authorities. She eventually traveled with the victim to Mississippi and spoke to authorities there in the presence of a social worker. To her knowledge, the investigation in Mississippi went no further than what transpired that day.

In 1999, R.A. took her daughter to a pediatrician in New Orleans. There, the victim related the molestation that happened in New Orleans. The victim related that defendant would put grease on his penis and put his private part between her legs. The victim remembered that it happened often. After learning of the abuse in New Orleans, R.A. contacted the New Orleans Police Department.

R.A. replied in the negative when asked whether she had ever fought with defendant. She indicated that she had stopped her son from visiting defendant in 1999 at the time she telephoned police about the abuse that occurred in New Orleans. Defendant introduced a copy of a return of personal service on R.A.'s attorney dated March 2, 1999, along with defendant's rule for visitation. R.A. said she knew nothing about the citation or rule. R.A. conceded that no one mentioned anything to her about the abuse in New Orleans as she was pursuing the Mississippi complaint. R.A. did not take the victim to Dr. Riley, the pediatrician, in connection with the Mississippi complaint because she was told that defendant had not penetrated the victim. She admitted that her son told her about the Mississippi occurrence before the victim said anything about it. R.A. admitted that there was never any allegation of penetration. R.A. replied in the negative when asked on redirect examination whether she had ever denied defendant visitation of his "children," or whether he ever sought custody. She claimed that she had been planning to let defendant adopt her other son.

Dr. Scott Benton was qualified by the court as an expert in the field of forensic pediatrics, specifically involving the sexual abuse of children. He examined the victim at Children's Hospital when she was nine years old, on

a complaint of sexual abuse. Dr. Benton identified copies of photographs of the victim's vaginal area. The major finding on the physical examination was that the victim's hymen had been injured to the point where it was scarred down to the bottom of the vagina. Dr. Benton said it was abnormal to have such scarring, and confirmed that his finding was vaginal penetration by either a penis or some instrumentality. He said it would have been rare for such an injury to have necessitated medical treatment. He noted that in an average case he would not examine a child for many months after the event causing the injury, due to the delayed reporting by the child victims. He referred to the phenomenon as "delayed disclosure" or "delayed sequential disclosure," the latter referring to children disclosing bit by bit, at different times. He said children might talk about touching, but may be less likely to talk about penis touching. Dr. Benton admitted that he never interviewed the victim in this case. He could not recall why, but noted that he refused to see people who showed up late for appointments.

The victim's half-brother, thirteen-year-old D.G., testified that one night he was telling the victim about a rap CD belonging to his aunt he had overheard, concerning a man who raped his daughter. The victim told him at this point that when they were living in Mississippi and their mother would leave for work, defendant would call her into his room, put grease on

his private part, and rub it between her legs. Their mother overheard them and asked them what they had been discussing. D.G. said he told the victim that if she did not tell their mother he would. D.G. said his sister was scared, and so he told his mother the story. D.G. said his mother started crying.

D.G. said the victim had not said anything on this occasion about abuse occurring in New Orleans. However, approximately one year later, he told his mother that he suspected that similar abuse might have occurred in New Orleans. His mother subsequently asked the victim to tell her what had happened, and took her to a doctor for an examination. D.G. recalled one occasion in New Orleans when they were watching "Fresh Prince" on television, and defendant called the victim into "the room." Defendant closed the door and refused to allow D.G. and his brother to enter. D.G. admitted that he never had any suspicions until the victim told him about the abuse. D.G. agreed that defendant took care of them like he was their father.

The victim, eleven years old at the time of trial, testified that she was then in the eighth grade, having been "skipped" to that grade. She responded in the affirmative when asked whether defendant had ever touched her in a way that made her feel bad. She said he would make her take off her clothes and lie down on the bed, on her side, facing the wall. Defendant would put Vaseline on his private part, get behind her, and rub it

between her legs. She said she was scared and felt uncomfortable. She said she remembered it happening three times. The victim detailed the circumstances when she first told her brother of the abuse. She said they heard the rap tape about a man molesting his daughter. She told her brother that that the same thing had happened to her in Mississippi. She did not mention anything about New Orleans, and had not mentioned the New Orleans abuse to anyone at that time.

The victim said the New Orleans abuse occurred the same way, except she noted that she was facing a television during the act—as opposed to a wall in Mississippi. The victim recalled the incident her brother testified to, when she said she and her brothers were in her room and defendant called her in a room to watch "Fresh Prince" on television. Her brothers came and asked defendant if they could watch, and he told them they could not. On that occasion, defendant molested her in the same fashion as he had done before. When she was asked why she never told her mother about the New Orleans abuse, she answered that she was afraid her mother would shoot defendant, because she was a security guard and had a gun.

On cross examination, the victim explained that she had not actually heard the rap song, but that her brother had and told her about it at their home. The victim acknowledged that after defendant and her mother

separated/divorced, defendant used to take his son, A.J., and another son of R.A.'s. The victim confirmed that before the claims of abuse ever came to light defendant had stopped taking the other boy, and just took his son, A.J. The victim responded in the negative when asked whether her mother was unhappy about this, or whether she ever expressed any opinion about that change. The victim said that when she met with a police officer after her brother first revealed the Mississippi abuse to her mother, she told the officer about both the Mississippi and New Orleans abuse. However, when she was first asked about this, she said she did not remember whether she told the police about New Orleans at that time. The victim did not recall telling Mississippi authorities about the New Orleans abuse. The victim responded in the affirmative when asked whether everything she had testified to was the truth.

Defendant testified on his own behalf. He said "they" were living in New Orleans when he met his ex-wife, R.A.. However, in his answer to the next question he stated that that they were living in Mississippi at first, where he met R.A. Defendant said the last time he saw his and R.A.'s son A.J. was in 1996, the same year they stopped living together. He later reiterated that he had not seen his son for nearly five years. He also stated that the post-breakup relationship between him and R.A. was fine until he

decided that he did not want to take R.A.'s other son, Ryan, out on visitation when he took his son A.J. He said R.A. would not let him take his own son without taking Ryan along. He claimed that R.A. reacted by refusing to let him take A.J.

Defendant said the couple were separated when he met another woman and decided to get a divorce from R.A. They were divorced in 1997, and he said the molestation charge arose right after the divorce. The visitation arrangement at that time was supposed to be that he would get his son A.J. every weekend and they would share him on the child's birthday. When asked how regularly that happened, defendant said it never happened. He said he once went to the home with Christmas presents for his son, and an adult male told him he could not give them to him. Defendant said his wife was with him and witnessed that exchange.

Defendant said he talked to R.A.'s attorney about the visitation issue, who advised him to procure his own counsel. Defendant identified a March 1999 rule for visitation filed on his behalf. Defendant said the Mississippi allegation was made during the visitation proceedings. He said he was never arrested on any charge in Mississippi, although he had been to that state since the allegations were made. Defendant testified that of all R.A.'s children, the only one he had problems with was D.G.—the one who

testified against him. He claimed D.G. never liked him, and always wanted R.A. to be with his father, not defendant. Defendant denied ever taking the victim into his room and locking the door, and denied ever molesting the victim.

Defendant claimed on cross examination that he was being framed out of spite because he was not giving R.A. money like he used to, because he got re-married when he had once told R.A. that he would never divorce her, and because R.A. wanted their son. Defendant conceded that there was no problem between him and R.A. at the time of the March 1997 divorce and an April 1997 consent judgment.

Eula Johnson, defendant's wife, said she began seeing defendant in November 1996, when he was living at his then-father-in-law's residence. She said defendant filed for visitation rights and within five months he was listed in the newspaper as being wanted for the molestation. She also claimed that the Mississippi allegations were made right after R.A. noticed that her and defendant had moved to live in Mississippi with defendant's mother. Mrs. Johnson said she had three children of her own, one girl and two boys, ages twelve, fourteen and fifteen. She said there were no problems, inferring that there had been no problems with defendant molesting any of her children. Mrs. Johnson testified that when R.A.

allowed defendant visitation, she and defendant would have to take R.A.'s son, Ryan, along with defendant's son. Mrs. Johnson recalled the incident when defendant attempted to deliver the Christmas presents, and she heard what R.A. said to him. She did not recall what year it was, but said that at the time defendant had not seen his son in four years.

Dr. Judy Riley, a physician, treated the victim. Dr. Riley testified that R.A. gave a history of sexual abuse to the doctor when she took the victim to her office in September 1997 with an ear infection. Dr. Riley could not recall anything independently of what she had written down.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant claims that the trial court erred in permitting the mother and brother of the victim to testify concerning what the victim told them about the abuse in New Orleans, because such testimony did not meet the requirement of any exception to the hearsay rule. Counsel for defendant objected to the admission of hearsay testimony by R.A. and D.G. prior to the start of trial.

Defendant bases his argument on the supposition that the trial court admitted hearsay testimony on the ground that it was admissible under the

'first report' exception set out in La. C.E. art. 804(B)(5). Under the hearsay exception provided by La. C.E. art. 804(B)(5), a statement made by a person under the age of twelve years which is one of initial or otherwise trustworthy complaint of sexually assaultive behavior is not excluded by the hearsay rule, if the declarant is unavailable as a witness. Defendant points out that the victim was not unavailable, and in fact testified at trial. Defendant submits that the testimony was not admissible under this hearsay exception nor any other.

Defendant is correct that the hearsay exception provided by La. C.E. art. 804(B)(5) was not applicable in this case because the victim was available as a witness. State v. Harris, 99-2845, p. 13 (La. App. 4 Cir. 1/24/01), 781 So. 2d 73, 82. Defendant is also correct that the evidence was not admissible under any other hearsay "exception." However, under La. C.E. art. 801(D)(1)(d), a statement is not hearsay if the declarant testified at trial, is subject to cross examination concerning the statement, and the statement is "[c]onsistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior."

Defendant directs his argument to R.A.'s testimony that the victim disclosed to her at the pediatrician's office that she had been molested by defendant in New Orleans. Defendant does not point to any testimony by

D.G. concerning anything the victim told him about New Orleans abuse. In fact, he testified that she told him nothing about any abuse occurring in New Orleans. Defendant does not dispute that the testimony by R.A. referred to anything other than an initial complaint of sexually assaultive behavior, or that the testimony was anything but consistent with the victim's testimony at trial.

There is some evidence, however, that what R.A. heard the victim say at the pediatrician's office in 1999 was not the victim's initial complaint about the New Orleans abuse. During cross-examination, the victim was asked whether she had reported anything about the New Orleans abuse during the investigation of the Mississippi abuse. The victim first said she did not remember. However, subsequently, the victim testified that she told "a man" about the New Orleans abuse at that time. This would have been in 1997. It is questionable whether she did, because there was no evidence that any such complaint was ever investigated by New Orleans police or a social services agency. Detective Diaz, the only New Orleans police officer to testify, investigated the New Orleans abuse after the allegation was made in 1999. It is unlikely that someone in New Orleans would look into R.A.'s complaint of abuse in Mississippi and refer her to Mississippi authorities, yet fail to investigate a complaint of abuse that occurred in New Orleans.

Defendant argues only that R.A.'s testimony was inadmissible hearsay because it did not fall under the hearsay exception provided by La. C.E. art. 804(B)(5) or any other exception. La. C.E. art. 801(D)(1)(d) is not a hearsay exception. Nevertheless, even assuming defendant's argument covers the issue, and further assuming that R.A.'s testimony was inadmissible hearsay because it did not refer to the victim's initial complaint, any error in admitting that was harmless error. It was harmless error because it was merely cumulative and corroborative of the victim's testimony. See State v. Bridgewater, 2000-1529 (La. 1/15/02), __ So. 2d __, 2002 WL 47169, rehearing granted on other grounds, (6/21/02), __ So.2d __, 2002 WL 1354211 (admitting hearsay evidence which is merely corroborative and cumulative of other properly introduced evidence is harmless, citing State v. Willie, 559 So.2d 1321, 1332 (La.1990)).

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, which overlaps the first one, defendant claims that the trial court erred in permitting R.A. and D.G. to give hearsay testimony concerning the molestation that occurred in Mississippi.

As to the testimony of D.G., who related the victim's initial complaint of the molestation in Mississippi, that evidence was not hearsay under La.

C.E. art. 801(D)(1)(d), and was properly admitted. As to R.A., she was asked whether D.G. told her what the victim had told him (about the Mississippi abuse). She replied in the affirmative, without repeating the substance of what D.G. told her. R.A. was then asked her reaction to what D.G. told her, and she said she was shocked and could not believe it, because she had trusted defendant. R.A. was asked what she did after receiving the information. She said she called the police. She was asked, with regard to what D.G. told her, where it happened. The only hearsay came at this point, when R.A. answered that she was told that it happened in Monticello (Mississippi). This last bit of testimony was the only hearsay. It was inadmissible. However, the admission of this hearsay statement that whatever happened occurred in Monticello, Mississippi was harmless error, as it was merely corroborative and cumulative of the testimony of both the victim and D.G. See Bridgewater, supra.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, defendant claims that the trial court erred in failing to give a more specific instruction to the jury as to the "other crimes" evidence, the molestation in Mississippi.

Defendant expressed concern that the jury might find the evidence

insufficient to convict him on the charged offense, but convict him based on evidence that he had molested the victim in Mississippi. The trial court stated that its instruction would inform the jury that if the State failed to prove what defendant was charged with, the jury must come back with a not guilty verdict. In denying defendant's request, the court noted that it had not requested special instructions in front of it, meaning that defendant had not submitted written special requested instruction on the issue. The court said there was nothing more specific in its bench book of jury instructions, and gave the following general instruction as to other crimes:

> Proof of other offenses. Evidence that the Defendant was involved in the commission of an offense other than the offense for which he is on trial is only for a limited purposes [sic]. The sole purpose for which such evidence may be considered is whether it tends to show motive, intent, preparation, plan and absence of mistake or accidents. Remember, the accused is only on trial for the offense charged. You may not find him guilty of this offense merely because he may have committed another offense.

Defendant cites La. C.Cr.P. art. 807 as applicable to this assignment of error. However, the statute applies to special written charges. In denying the defendant's request for a special jury charge, the trial court essentially noted that defendant had not presented a requested charge in writing. "By its own terms, [La. C.Cr.P. art. 807] requires written submission of requested 'special charges.'" State v. Simmons, 2001-0293 (La. 5/14/02), __ So. 2d

__, 2002 WL 983396 (noting the distinction between special charges, which must be requested, and general ones, which the trial court is required to give). When a requested special jury charge is not reduced to writing, a trial court may refuse to give such a charge to the jury. State v. Woolens, 570 So. 2d 111, 112 (La. App. 4 Cir. 1990); State v. Davis, 2000-278, p. 11 (La. App. 5 Cir. 8/29/00), 768 So. 2d 201, 210, writ denied, 2000-2730 (La. 8/31/01), 795 So. 2d 1205; State v. Domino, 97 0261, p. 6 (La. App. 1 Cir. 2/20/98), 708 So. 2d 1143, 1146. But see State v. Haddad, 99-1272, pp. 4-5 (La. 2/29/00), 767 So. 2d 682, 685-686 (acknowledging the writing requirement of La. C.Cr.P. art 807, but recognizing that a trial court can tacitly waive the writing requirement by "repeatedly" noting counsel's objection to the trial court's failure to give an orally requested special instruction).

The record does not reflect that the trial court "repeatedly" noted defendant's objection to the trial court's failure to give the instruction. The trial court denied defendant's request for a special charge prior to giving its instructions to the jury, and when defendant reiterated the objection after the jury retired, the trial court noted the objection. Moreover, even assuming defendant can raise on review the failure to give a purported requested special jury charge when such charge was not submitted to the court in

writing, in actuality, defendant did not articulate any such special charge. The colloquy evidences that defendant essentially wanted the court to formulate an instruction to satisfy his concerns. In light of defendant's failure to articulate a specific charge, it cannot be said that the trial court erred in failing to formulate a charge for defendant and instruct the jury with it.

In addition, the trial court gave a general instruction on other crimes, informing it that any evidence of crimes other than the one with which defendant was charged was only admitted for a limited purpose, and that it could not convict him merely because he committed another offense. The jury knew defendant had been charged with and was being tried for an offense committed in Orleans Parish. Even assuming some error here, it was harmless. State v. Snyder, 98-1078, p. 15 (La. 4/14/99), 750 So. 2d 832, 845 (to determine whether an error is harmless, the proper question is whether the guilty verdict actually rendered in this trial was surely unattributable to the error).

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, defendant claims that the trial court erred in denying his motion for a mistrial based on an alleged improper

remark by the prosecutor during rebuttal argument. The prosecutor was rebutting defense counsel's closing argument wherein defense counsel noted that defendant had testified and matched up the allegations of molestation with his incidents involving his civil custody battle with R.A. The prosecutor remarked that defendant had the opportunity to sit through the entire trial, listen to everyone else testify, and make his story match each piece of the puzzle, something none of the other witnesses had the opportunity to do.

After the trial court gave its jury instructions and the jury retired, defense counsel moved for a mistrial based upon the prosecutor's commenting "upon Mr. Johnson and his testifying in the case." However, defendant's argument on appeal is that he was prejudiced because the comment infringed on his right under the Sixth Amendment to the U.S. Constitution "to attend his own trial." Defendant's objection at trial was not based on this ground.

La. C.Cr.P. art. 841(A) requires that a defendant make known the grounds for his objection, and he is limited on appeal to those grounds articulated at trial. State v. Brooks, 98-0693, p. 9 (La. App. 4 Cir. 7/21/99), 758 So. 2d 814, 819; see also State v. Dean, 2000-0199, p. 8 (La. App. 4 Cir. 3/14/01), 789 So. 2d 602, 607, writ denied, 2001-1177 (La. 3/15/02), 811

So. 2d 897 ("As the defendant's argument on appeal is different from his basis for objecting at trial, the defendant is precluded from raising the issue on appeal.").

Even assuming defendant's trial objection preserved the issue for review, the claim of error has no merit. Defendant cites La. C.Cr.P. art. 775, which provides in pertinent part that a mistrial shall be ordered when prejudicial conduct in the courtroom makes it impossible for the defendant to obtain a fair trial. "Mistrial is an extreme remedy and, except for instances in which the mandatory mistrial provisions of La. C.Cr.P. art. 770 are applicable, should only be used when substantial prejudice to the defendant is shown." State v. Castleberry, 98-1388, p. 22 (La. 4/13/99), 758 So. 2d 749, 768. "The determination of whether actual prejudice has occurred, and thus whether a mistrial is warranted, lies within the sound discretion of the trial judge, and this decision will not be overturned on appeal absent an abuse of that discretion." State v. Wessinger, 98-1234, p. 24 (La. 5/28/99), 736 So. 2d 162, 183.

The State's rebuttal shall be confined to answering the argument of the defendant. La. C.Cr.P. art. 774. However, prosecutors have wide latitude in choosing closing argument tactics. State v. Casey, 99-0023, p. 17 (La. 1/26/00), 775 So.2d 1022, 1036, citing State v. Martin, 539 So. 2d

1235, 1240 (La. 1989) (closing arguments that referred to "smoke screen" tactics and defense as "commie pinkos" inarticulate but not improper). Further, the trial judge has broad discretion in controlling the scope of closing arguments. Id. Even if the prosecutor exceeds the bounds of proper argument, a reviewing court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. State v. Ricard, 98-2278, p. 4 (La. App. 4 Cir. 1/19/00), 751 So. 2d 393, 397. Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fair-mindedness of the jurors who have heard the evidence. State v. Williams, 96-1023, p. 15 (La. 1/21/98), 708 So.2d 703, 716; Ricard, supra.

In the instant case the prosecutor was properly rebutting defense counsel's closing argument in which defense counsel stressed the connection between defendant's civil litigation against R.A. and the molestation allegations. The prosecutor properly attacked defendant's credibility, stating the obvious—that because defendant heard the other witnesses testify, he could have tailored his testimony to support his defense. Defendant cites no authority for the proposition that the prosecutor's argument impermissibly infringed upon defendant's Sixth Amendment right to trial. Defendant has failed to show that the prosecutor did anything improper. Consequently, it

cannot be said that the trial court erred in denying the motion for a mistrial.

Even assuming the prosecutor's remarks exceeded the scope of proper rebuttal, the jury was aware that in fact defendant had instituted civil proceedings against R.A. to assert his visitation rights, and of the dates R.A. received citation and service. The jury was also aware of the dates when the allegations of molestation arose. It cannot be said that the trial court would have abused its discretion in denying the motion for mistrial on the ground that defendant was not substantially prejudiced by any comment insinuating that defendant concocted his defense.

There is no merit to this argument.

ASSIGNMENT OF ERROR NO. 5

In this last assignment of error, defendant claims that the trial court imposed an unconstitutionally excessive sentence. Defendant filed a written motion to reconsider sentence, alleging as one ground that the sentence was constitutionally excessive. The trial court denied the motion to reconsider.

La. Const. art. I, § 20 explicitly prohibits excessive sentences. State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272,

rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99); State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461, grant of post conviction relief on other grounds affirmed, 2001-1667 (La. App. 4 Cir. 2/6/02), 809 So. 2d 1132. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979, citing State v. Ryans, 513 So. 2d 386, 387 (La. App. 4 Cir. 1987). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; State v. Webster, 98-0807, p. 3 (La. App. 4 Cir. 11/10/99), 746 So. 2d 799, 801, reversed on other grounds, State v. Lindsey, 99-3256 (La. 10/17/00), 770 So. 2d 339. 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. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

Defendant was convicted of molestation of a juvenile, a violation of La. R.S. 14:81.2. Defendant was convicted and sentenced under Subsection (C) of the statute, providing for an enhanced penalty where the offender has

control or supervision over the juvenile. La. R.S. 14:81.2(C) provides that a person convicted of the offense "shall be fined not more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than one nor more than fifteen years, or both … ." The trial court sentenced defendant to the maximum term of imprisonment, fifteen years.

The trial court ordered a presentence investigation report. Although the report is not contained in the record, the transcript of sentencing reflects that the trial court considered it. The court noted that defendant had no juvenile history, one municipal arrest in 1997 for disturbing the peace (no mention of a conviction), and a 1998 misdemeanor marijuana charge that apparently was still pending. Thus, defendant was a first-felony offender. However, the court noted evidence presented at trial that there had been sexual penetration. Dr. Scott Benton testified that the victim's hymen was scarred, which in his opinion was the result of vaginal penetration by a penis or some other instrumentality. The court noted that defendant had not been charged with aggravated rape (an offense carrying a mandatory life sentence), but that the court was permitted to take into account what occurred. The court believed that something more happened than mere molestation of a juvenile. The court stated that it was struck by the incident when R.A. came home and defendant accused the victim of playing with

herself with Vaseline. The court contemplated the plight of the nine-year-old victim who was unable to reveal the horror to her mother, who spanked her. Based on the seriousness of the offense, the trial court stated that any lesser sentence than the maximum would deprecate the seriousness of the offense.

Defendant does not argue that the trial court failed to adequately consider the aggravating and mitigating factors listed in La. C.Cr.P. art. 894.1. Rather, he submits that the sentence is excessive under the circumstances of the case. Defendant cites no similar case in support of his claim of excessiveness.

In State v. Orgeron, 620 So. 2d 312 (La. App. 5 Cir. 1993), the defendant pleaded guilty and was sentenced to twenty years on one count of forcible rape, twenty years on one count of aggravated sexual battery, fifteen years on one count of molestation of a juvenile, and ten years for molestation of a juvenile, the sentences to run concurrently. Defendant perpetrated the crimes on his twelve-year old stepdaughter. Rejecting the defendant's claim that the sentences were excessive as a gross deviation from then-applicable sentencing guidelines, the court noted that the defendant was the child's stepfather, and caused her long-lasting emotional problems.

In State v. Green, 34,676 (La. App. 2 Cir. 5/9/01), 787 So. 2d 505, the defendant was originally charged with the aggravated rape of his four-year-old daughter, but pleaded guilty to molestation of a juvenile. In entering his plea, the defendant admitted penetrating the child's vagina. The probation and parole officer who prepared the presentence investigation report recommended that the defendant receive the maximum fifteen year-sentence, in compliance with an agency policy of no tolerance of sex crimes. The first-felony offender was sentenced to six years at hard labor. Noting all of the circumstances cited above, the appellate court found that the sentence was not excessive.

In the instant case, not only did defendant apparently escape prosecution for a rape offense, but he apparently molested the victim over several years. Unlike in Orgeron, supra, and Green, supra, defendant in the instant case never admitted his guilt. As appellate counsel did not request that the presentence investigation report be included in the record, it is not known what sentence was recommended. The sentence imposed in this case is much more severe than the one imposed in Green, involving a much younger victim and an initial charge of aggravated rape. However, it is consistent with the one imposed in Orgeron. Considering the evidence of vaginal penetration in the instant case, the fact that the molestation

apparently spanned several years, and the trial court's specific finding that any lesser sentence would deprecate the seriousness of this particular crime, it cannot be said that the maximum fifteen-year sentence makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, or is grossly out of proportion to the severity of the crime. Defendant will not be able to ruin the lives of any children while he is prison.

There is no merit to this assignment of error.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED