

STATE OF LOUISIANA

NO. 17-KA-275

VERSUS

FIFTH CIRCUIT

FABIAN CELESTINE

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT
PARISH OF ST. CHARLES, STATE OF LOUISIANA
NO. 15,592, DIVISION "D"
HONORABLE M. LAUREN LEMMON, JUDGE PRESIDING

November 29, 2017

**FREDERICKA HOMBERG WICKER
JUDGE**

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson, and Hans J. Liljeberg

AFFIRMED

FHW

MEJ

HJL

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA

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FABIAN CELESTINE

Mary Constance Hanes

WICKER, J.

Defendant, Fabian Celestine, appeals his conviction and sentence for oral sexual battery in violation of La. R.S. 14:43.3(A)(1). On appeal, defendant challenges the sufficiency of the evidence presented against him at trial and further claims that his thirty-year sentence is excessive. For the following reasons, we affirm defendant's conviction and sentence.

STATEMENT OF THE CASE

On December 2, 2015, the St. Charles Parish District Attorney filed a bill of information charging defendant, Fabian Celestine, with oral sexual battery in violation of La. R.S. 14:43.3(A)(1).¹ Defendant pled not guilty at his arraignment.

On March 15, 2016, a unanimous twelve-person jury found defendant guilty as charged and, further specifically found that the victim had not attained the age of thirteen years at the time of the offense.² On September 13, 2016, defendant filed a motion for new trial and post-verdict judgment of acquittal, which the trial judge denied. After waiving delays, the trial court sentenced defendant to thirty years imprisonment, with the first twenty-five years to be served without the benefit of probation, parole, or suspension of sentence. Following sentencing, defendant moved for reconsideration of his sentence, which the trial judge denied. This appeal follows.

¹ The record reflects the bill of information was amended on the date trial began, March 15, 2016, to correct a typographical error in the date of the offense. The amendment of the date of the offense corrected a defect of form related to the date of the offense, as the original indictment reflected an impossible date, "3/21/21013". This Court has recognized when the date is not an essential element of the offense charged, a mistake respecting the date on which the offense occurred is only a defect as to form, which may be corrected at any time without leave of court. *State v. Jackson*, 04-306 (La. App. 5 Cir. 8/31/04), 882 So.2d 613, 618.

² The record reflects that the bill of information does not cite La. R.S. 14:43.3(C)(2), which is the enhanced sentencing provision that provides for a harsher penalty when the victim is under the age of thirteen and when the offender is seventeen years of age or older. Article I, § 13 of the Louisiana Constitution provides that an accused in a criminal prosecution has a right to be informed of the nature and cause of the accusation against him. Although the bill of information does not reference the enhanced penalty provision, the jury's verdict form and the jury instructions reference the additional age requirement of La. R.S. 14.43.3(C)(2) and thus the victim's age at the time of the offense was tried and proven beyond a reasonable doubt. The record shows that defendant was not misled to his prejudice. Defendant did not object to nor was he prevented from offering any defense to the applicability of La. R.S. 14:43.3(C)(2). See *State v. Sims*, 11-1876, 2012 La. App. Unpub. LEXIS 373 (La. App. 1 Cir. 5/2/12).

FACTUAL BACKGROUND

On January 28, 2015, Detective Walter Banks, a juvenile detective with the St. Charles Parish Sheriff's Office, received an anonymous call reporting that a female juvenile, J.S.³, disclosed sexual abuse by a family member. Because the anonymous caller did not provide a street address, Detective Banks contacted the local school and learned that J.S. was a student at the school. He proceeded to the school to meet with J.S.

Detective Banks took a recorded statement from J.S.⁴ When asked "what happened last year" at her home, J.S. became "somber" and described that she was in her bed sleeping, when she felt cold and wet. As she reached for her covers, she noticed her pants and underwear pulled down. She described that defendant, her mother's boyfriend, was in her room and "took his hands to open [her] butt and he was...sticking his tongue in it." J.S. immediately told her mother what happened, and her mother started crying and fighting with defendant. J.S. described that defendant took a fish tank and "busted it over his head" and then went into the kitchen and "took a pot top" and hit himself in the head with it. She stated that after the incident she "became a different person" and that she was "uncomfortable" around defendant and "couldn't stand him."

After taking J.S.'s statement, Detective Banks contacted the Department of Children and Family Services (DCFS) and briefed a DCFS case worker on his investigation. Detective Banks testified that the DCFS worker took J.S.'s statement and confirmed that J.S.'s statement to DCFS was consistent with the one J.S. provided to him.

³ In the interest of protecting minor victims and victims of sexual offenses as set forth in La. R.S. 46:1844(W)(3), "the judges of this Court have adopted a policy that this Court's published work will use only initials to identify the victim and any defendant or witness whose name can lead to the victim's identity (i.e., parent, sibling, or relative with the same last name as the victim)." *State v. Wilmot*, 13-994 (La. App. 5 Cir. 5/14/14) 142 So.3d 141, 144, n.1.

⁴ The state introduced a copy of the recorded statement into evidence at trial and the audio recording was published to the jury.

Sergeant Clint Patterson with the St. Charles Parish Sheriff's Office Juvenile Division testified that he met with J.S. and conducted a forensic interview on January 30, 2015.⁵ In her forensic interview, J.S. discussed that, before this incident happened, defendant would come into her room "every time he drank" to talk to her about "sex and boys," which made her uncomfortable. She recalled that during one of these conversations, defendant tried to put his hand down her pants, but she swatted his hand away.

In the forensic interview, J.S. described the incident consistently with the statement she gave to Detective Banks. J.S. identified defendant as her mother's boyfriend and stated that the incident happened during the summertime when she was twelve years old. She stated that during that time, she and her five siblings were living with defendant and her mother. She explained that four of her siblings are half-siblings, and that defendant is the father of those siblings. J.S. recalled that when the incident happened, she was in bed with her three younger half-sisters who were asleep.

J.S. told Sergeant Patterson that the day before the forensic interview, while defendant was collecting his things to leave the home, defendant profusely apologized to her, claiming that although he could not "take it back," he was on "a lot of drugs" the night of the incident. J.S. also reported that defendant pleaded with her, asking her to "please have a heart" and explaining that he "could not go to jail."

Detective Banks interviewed defendant and described him as "soft spoken and apologetic." After advising defendant of his *Miranda*⁶ rights, Detective Banks took two recorded statements from defendant.⁷ In his first statement, defendant

⁵ Sergeant Patterson explained that he is a trained, nationally advanced certified forensic interviewer. The video-recorded forensic interview was introduced into evidence and published to the jury.

⁶ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁷ Detective Banks testified that he contacted defendant to schedule an interview but defendant did not show up for his first scheduled interview. Thereafter, he obtained an arrest warrant for defendant. Shortly thereafter, a second interview was scheduled and defendant arrived on his own and provided a statement.

told Detective Banks that he was a father-figure in J.S.'s life since she was approximately two or three years old. While he did recall an incident during which he broke a fish tank over his head after a night of drinking, he could not remember when he did so. In his first statement to Detective Banks, defendant denied the allegations against him, saying that he "never touched her."

After defendant gave this initial statement, Detective Banks advised defendant that he was under arrest and explained that he needed to process paperwork. Detective Banks left the room and, upon his return, defendant asked if they could remain in the room "for a minute" because he "needed to talk [] some more." In his second statement, defendant stated that he arrived home from a night of drinking when J.S.'s mother told him he "made a terrible mistake" and explained that J.S. told her that defendant had inappropriately touched her and "kissed her butt." Defendant told Detective Banks that he felt "terrible" hearing what J.S. said he did, and he wanted to "hurt" himself, so he "cracked" himself over the head with the fish tank. Defendant denied talking to J.S. about the incident "after it all came out" but indicated that he wanted to apologize to her. Detective Banks asked defendant if he thought he was in his right mind when "that happened," and defendant indicated that he was not. Defendant further stated that, had he been in his right mind, it would not have happened. While he did not explicitly admit touching J.S. inappropriately, he indicated that he regretted what he did, he had not forgiven himself, and that he could not "take back what happened." Detective Banks recalled that while transporting defendant to the jail, defendant thanked him and told him that he "needed to get this out."

After his arrest, defendant placed a phone call in jail to a relative.⁸ In that phone call, defendant expressed that he was going to "catch time" and that he was

⁸ The recorded phone call was played for the jury and introduced into evidence.

“not coming home.” In the call, he also expressed that he hoped he could avoid Angola and remain “down here...in the parish,” and that “a lot of stuff [had] been eating [him] alive for a long time.”

J.S. testified at trial and recanted her previous statements to investigating officers. When questioned concerning the incident at issue, J.S. initially testified at trial, “[t]hat was sad....” However, she quickly proceeded to testify that “nothing” happened to her when she was twelve. She testified that she spoke to a detective about “a story that [she] made up” that her mother’s boyfriend “played with [her].” J.S. confirmed that the morning before trial she sent one of the prosecutors a text message, recanting her story and stating that she was sorry that she lied but that she could not “do this anymore.” She stated that it did not “feel right at all to put an innocent man in jail.”⁹ J.S. explained in the text message that she lied because she wanted to live with her aunt and cousins in Texas and did not want to live with her mother anymore. She confirmed that the text message the morning before trial began was the first time she informed prosecutors she was not telling the truth about the allegations against defendant.

S.S., J.S.’s paternal grandmother, testified at trial that she learned about the incident from J.S. after Detective Banks spoke with J.S. at school. S.S. explained that J.S. called her on the phone and was very upset. She further testified that J.S. told her that she previously attempted to tell S.S. about the incident with defendant but could not. S.S. testified that she “could tell [J.S.] was scared.” The prosecutor asked S.S. whether she believed J.S. made up the allegations against defendant, referencing J.S.’s trial testimony, to which S.S. replied that she thought “it was [J.S.’s] momma just got in her head.” She testified that she saw defendant at J.S.’s mother’s house “occasionally” after the police became involved, including the

⁹ The printed text message was introduced into evidence at trial.

evening before trial began, and that defendant had been to the house when J.S. was present.

T.N., J.S.'s best friend, also testified that in 2013, J.S. disclosed to her that defendant had inappropriately touched her. T.N. testified that J.S. was crying when she told T.N. that defendant was "sexually touching her."

LAW AND ANALYSIS

On appeal, defendant claims that the evidence presented against him was insufficient to support his conviction for oral sexual battery, pointing to the fact that J.S. recanted her prior testimony at trial. He further claims that his thirty-year sentence is excessive, arguing that the trial judge incorrectly increased his sentence based upon a finding that he intimidated J.S. to recant her story at trial. For the reasons below, we find defendant's assignments of error lack merit and we affirm his conviction and sentence.

In his first assignment of error, defendant challenges the sufficiency of the evidence presented against him at trial. To support his argument of insufficiency of the evidence, defendant points to the fact that the state failed to present any DNA evidence or eyewitness testimony at trial. He further relies on J.S.'s trial testimony that she previously lied to investigating officers and made up the allegations against him.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. *State v. Bone*, 12-34 (La. App. 5 Cir. 09/11/12), 107 So.3d 49, 58, *writ denied*, 12-2229 (4/1/13), 110 So.3d 574, *citing Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. King*, 06-554 (La. App. 5 Cir. 1/16/07), 951 So.2d 384, 390, *writ denied*, 07-0371 (La. 5/4/07), 956 So.2d 600.

An appellate court's primary function is not to redetermine the defendant's guilt or innocence in accordance with its appreciation of the facts and credibility of the witnesses. Rather, our function is to review the evidence in the light most favorable to the prosecution and determine whether there is sufficient evidence to support the jury's conclusion. *State v. Banford*, 94-883 (La. App. 5 Cir. 3/15/95), 653 So.2d 671. Evidence may be direct or circumstantial. Circumstantial evidence consists of proof of collateral facts and circumstances from which the existence of the main fact can be inferred according to reason and common experience. *State v. Bone, supra*. All evidence, both direct and circumstantial, must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. *Id.*

When the trier of fact is confronted by conflicting testimony, fact findings rest solely with the judge or jury, who may accept or reject, in whole or in part, the testimony of any witness. *State v. Watson*, 08-214 (La. App. 5 Cir. 8/19/08), 993 So.2d 779, 785. In the absence of internal contradiction or irreconcilable conflicts with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient to support a conviction. *State v. Dixon*, 07-915 (La. App. 5 Cir. 3/11/08), 982 So.2d 146, 153, *writ denied*, 08-0987 (La. 1/30/09), 999 So.2d 745. This Court has held that, “[s]pecifically in sex offense cases, the testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even where the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense.” *State v. Alfaro*, 13-39 (La. App. 5 Cir. 10/30/13), 128 So.3d 515, 523.

Defendant's conviction is for oral sexual battery, which is defined in pertinent part as “the intentional touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender...when...the victim, who is not the spouse of the offender, is under the age of fifteen years and is at least three years younger than the offender.” La R.S. 14:43.3(A)(1). Further, La. R.S.

14:43.3(C)(2) provides for a harsher penalty when the victim is under the age of thirteen and the offender is seventeen years of age or older.

The evidence presented at trial showed that the Jefferson Parish Sheriff's Office received an anonymous call that a juvenile, J.S., had reported sexual abuse by a relative. Detective Banks and Sergeant Patterson took J.S.'s recorded statements, in which J.S. detailed the sexual abuse she endured from defendant when she was twelve years old. The jury heard and considered the recorded statements, in which J.S. stated that defendant spread her "butt cheeks" and stuck "his tongue in it" while she slept. In her statements, J.S. also recalled that her mother and defendant fought after J.S. told her mother about the incident, resulting in defendant smashing a fish tank over his head. Although J.S. recanted her allegations at trial, the evidence showed that J.S. also reported the incident to her grandmother, S.S., her best friend, T.N., and to the anonymous individual who initially contacted the police to report the incident.

Further, although defendant never confessed to the crime, his two recorded statements to investigating detectives show that he expressed remorse and apologized that he could not "take back what happened." Although he could not recall under which circumstances, he did admit that he "cracked" a fish tank over his head during an argument with J.S.'s mother after he came home late from a night of drinking—which is consistent with J.S.'s pre-trial statements. Moreover, the recorded jail call introduced into evidence and played for the jury, in which defendant stated that "a lot of stuff [had] been eating [him] alive for a long time," corroborates defendant's feelings of remorse related to the crime.

Based on the above, and viewing the evidence in the light most favorable to the prosecution, we find the evidence sufficient to support defendant's conviction for oral sexual battery.

In his second assignment of error, defendant claims that his sentence is constitutionally excessive and, further, that the trial judge improperly added five years to his sentence after she found that he intimidated J.S. to force her to recant her previous statements to investigating officers.

Prior to sentencing, the state indicated that J.S. expressed her desire that defendant receive the minimum sentence for his conviction. The state further informed the court that the state took no position as to defendant's sentencing. In sentencing defendant to thirty years imprisonment, the trial judge stated that thirty years is "half of the presentence investigation [recommendation]" and further that an "extra five years" was supported by "the threats that the victim received in this case."

Following sentencing, defendant filed a motion to reconsider sentence, in which he argued that the additional five years was improper as the jury failed to make any factual determination that defendant intimidated J.S. to recant her allegations against him. The trial judge conducted a hearing on defendant's motion to reconsider sentence. At the hearing, the trial judge stated her opinion on the record that the evidence showed that defendant influenced or intimidated J.S. to recant her testimony at trial. Nevertheless, the trial judge stated that defendant's influence or intimidation toward J.S. was only "one of the reasons" she imposed a thirty-year sentence.

In brief to this Court, defendant argues that "there is no evidence that [defendant] pressured [J.S.]" to recant her allegations against him. First, the evidence at trial reflects that defendant pleaded with J.S. to "please have a heart" and to consider the fact that he "can't go to jail"—referencing that he faced jail time and that he did not want his other children to grow up with a father in prison,

similar to J.S.'s father.¹⁰ Nevertheless, in denying defendant's motion to reconsider sentence, the trial judge made clear that defendant's influence on or intimidation toward J.S. was only one of the many reasons she imposed a thirty-year sentence, pointing out that the thirty-year sentence is well within the statutory range and only half of the sixty-year sentence recommended in the presentence investigation report.¹¹

The imposition of excessive punishment is prohibited by both the Eighth Amendment to the United States Constitution and Article I, § 20 of the Louisiana Constitution. *State v. Evans*, 09-477 (La. App. 5 Cir. 12/29/09), 30 So.3d 958, 966 (citing *State v. Lawson*, 04-334 (La. App. 5 Cir. 9/28/04), 885 So.2d 618, 622). A sentence is constitutionally excessive if it is grossly out of proportion to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Evans*, 09-477 (La. App. 5 Cir. 12/29/09), 30 So.3d 958, 966 (citing *State v. Lobato*, 603 So.2d 739, 751 (La. 1992); *Lawson*, 885 So.2d at 622). 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. *Evans, supra* at 966. An appellate court considers three factors in reviewing a trial court's sentencing discretion: 1) the nature of the crime, 2) the nature and background of the offender, and 3) the sentence imposed for similar crimes by the same court and other courts. *State v. McClure*, 15-237 (La. App. 5 Cir. 09/23/15), 176 So.3d 730, 733; *State v. Stewart*, 03-920 (La. App. 5 Cir. 1/27/04), 866 So.2d 1016, 1027-28, writ denied, 04-0449 (La. 6/25/04), 876 So.2d 832.

¹⁰ Further, S.S. testified at trial that, after his arrest and police involvement, defendant visited J.S.'s mother's home during the pendency of these proceedings and, on occasion, visited the home while J.S. was present.

¹¹ Defendant at the trial level argued that the trial judge's imposition of an "additional" five years imprisonment was in violation of *Apprendi v. New Jersey*, 530 U.S., 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). However, the Court in *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Defendant's thirty-year sentence in this case is well within the prescribed statutory range of twenty-five to ninety-nine years. Therefore, *Apprendi* is inapplicable and defendant's argument lacks merit.

Moreover, in sex offense cases, this Court has held that “the jurisprudence indicates that maximum, or nearly maximum terms of imprisonment may not be excessive when the defendant has exploited a position of trust to commit sexual battery or indecent behavior with a juvenile.” *State v. Wilmot*, 13-994 (La. App. 5 Cir. 5/14/14), 142 So.3d 141, 149, *citing State v. Badeaux*, 01-406 (La. App. 5 Cir. 9/25/01), 798 So.2d 234, *writ denied*, 01-2965 (La. 10/14/02), 827 So.2d 414.

At the time of defendant’s conviction, La. R.S. 14:43.3(C)(2) provided that an individual convicted of oral sexual battery on a victim under the age of thirteen years old when the offender is seventeen years of age or older shall be imprisoned for not less than twenty-five years nor more than ninety-nine years. Further, the statute provided that the first twenty-five years of the sentence shall be served without the benefits of probation, parole, or suspension of sentence. Thus, defendant’s thirty-year sentence, with the first twenty-five years ordered to be served without benefit of probation, parole, or suspension of sentence, is well within the statutorily prescribed sentencing range and is consistent with similar sentences for similar crimes. *See State v. Brenckle*, 14-883 (La. App. 5 Cir. 5/14/15), 170 So.3d 1141, 1156; *State v. Redfearn*, 44,709 (La. App. 2 Cir. 9/23/09), 22 So.3d 1078, 1087, *writ denied*, 09-2206 (La. 4/9/10), 31 So.3d 381.

The evidence presented at trial showed that defendant, who had been a father-figure in J.S.’s life since she was approximately two years old, took advantage of J.S. while she slept in her own bed. The presentence investigation report, which the trial judge considered, recommended that defendant receive a sixty-year sentence based upon his criminal history as well as the allegations against him in this case. Moreover, although defendant implicitly expressed remorse in his statements to investigating officers, he also pleaded with J.S. to withhold information from police to avoid conviction. Under the facts of this case and given the trial judge’s broad discretion in sentencing, we find the trial judge

did not abuse her discretion in imposing defendant's thirty-year sentence for his oral sexual battery conviction.

ERRORS PATENT

This Court has reviewed the record for errors patent in accordance with La. C.Cr.P. art. 920, *State v. Oliveaux*, 312 So.2d 337 (La. 1975), and *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990). The record reflects that the trial judge failed to advise defendant of the time period within which he may seek post-conviction relief. Accordingly, we advise defendant, by way of this opinion, that no applications for post-conviction relief, including an application which seeks an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C.Cr.P. arts. 914 and 922. See *State v. Ross*, 14-84 (La. App. 5 Cir. 10/15/14), 182 So.3d 983, 991; *State v. Brooks*, 12-226 (La. App. 5 Cir. 10/30/12), 103 So.3d 608, writ denied, 12-2478 (La. 4/19/13), 111 So.3d 1030.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 29, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-275

E-NOTIFIED

29TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE M. LAUREN LEMMON (DISTRICT JUDGE)
LOUIS G. AUTHEMENT (APPELLEE)

MAILED

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