NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 0129

STATE OF LOUISIANA

VERSUS

CHRISTOPHER M. SPIEHLER

RHB
JEW
by RHB

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 491,497, Division "D"
Honorable Peter J. Garcia, Judge Presiding

Walter P. Reed
District Attorney
Covington, LA

and

Kathryn Landry
Special Appeals Counsel
Baton Rouge, LA

Attorneys for Appellee
State of Louisiana

Frederick Kroenke
Louisiana Appellate Project
Baton Rouge, LA

Attorney for
Defendant-Appellant
Christopher M. Spiehler

Christopher M. Spiehler
Angola, LA

In Proper Person

BEFORE: PARRO, HUGHES, AND WELCH, JJ.

Judgment rendered SEP 21 2012

PARRO, J.

The defendant, Christopher M. Spiehler, was charged by grand jury indictment with aggravated rape (count one), aggravated kidnapping of a child (count two), and multiple counts of pornography involving juveniles (counts three through twenty-two), violations of LSA-R.S. 14:42, LSA-R.S. 14:44.2, and LSA-R.S. 14:81.1.[1] The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged on counts one and three through twenty-two, and found guilty of the lesser and included offense of simple kidnapping on count two (a violation of LSA-R.S. 14:45). The trial court sentenced the defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count one, five years of imprisonment at hard labor on count two, and five years of imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on counts three through twenty-two. The trial court ordered that counts one and three through twenty-two be served consecutively to each other, and that count two be served concurrently with count one. The trial court denied the defendant's motion to reconsider sentence.

The defendant now appeals, challenging in his counseled brief the constitutionality of the aggravated rape sentence and the non-unanimous verdicts. In a supplemental pro se brief, the defendant further assigns error to the trial court's failure to rule on his pro se motions to quash the indictment. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

When the victim, K.A., was eleven years old, she began communicating with the defendant while visiting a website called vampirefreaks.com, a website described by the victim as a Facebook for outcasts.[2] The defendant told the victim that he was eighteen years old and the victim represented her age as fourteen on her profile page. At some

[1] The indictment includes additional counts of pornography involving juveniles (counts twenty-three through one hundred twenty-three) that were severed from the above noted charges for purposes of trial.

[2] The victim's date of birth is August 22, 1998. In this opinion, the victim will be referenced by initials only. See LSA-R.S. 46:1844(W).

point, while the victim was still eleven years old, the defendant and the victim made arrangements to meet in person. As planned, during the middle of the night, the victim met the defendant down the block from her home in Abita Springs, Louisiana, and got into his vehicle. The defendant had sexual intercourse with the victim when he parked at a recreational vehicle (RV) park. The victim did not remember consenting to the act and testified that it made her feel awkward and uncomfortable. The victim asked the defendant to take her home and he complied.

The victim continued to interact with the defendant on the website and, in April of 2010, texted the defendant to inform him that she wanted to go to Orlando, Florida to visit another male with whom she had been interacting on the website. The defendant told the victim that he would take her to Florida and agreed to meet the victim in the middle of the night. The victim packed a bag of her belongings and, accompanied by her nephew of the same age (the son of the victim's much older sister), met the defendant near her home. The victim's nephew did not want the victim to leave with the defendant and tried to talk her out of it. When the defendant arrived, the victim's nephew informed him that the victim was only eleven years old and could not make decisions on her own.

While the defendant still drove away with the victim, her nephew partially memorized the license plate of the vehicle in which they were travelling and went back to his grandmother's home to alert his family. The defendant took the victim to Mississippi and while pulled over in a strip mall parking lot, had sexual intercourse with her again. The defendant then drove to a gas station, gave the victim some money, and instructed her to go in and buy a bag of chips and a soda. The victim complied, and when she came out of the store, the defendant was gone. She ultimately contacted her father, and her parents took her to the police station. The victim was also taken to the hospital and to the Children's Advocacy Center, where she was interviewed.

The police were able to identify the defendant's vehicle with the partial license

plate information, used the vehicle's Onstar system to disable it, and located the defendant in Slidell, Louisiana. The defendant's laptop computer and hard drive were seized and searched during the execution of search warrants by the police. During the trial, the defense stipulated that images obtained from the computer contained child pornography.

COUNSELED ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant argues that the trial court erred in imposing an unconstitutionally excessive sentence. The defendant notes that he is a thirty-year-old college graduate. He contends that he has no adverse criminal history. The defendant concludes that it is an injustice to impose a life sentence on him. The defendant does not contest the remaining sentences.[3]

The Eighth Amendment to the United States Constitution and Article I, Section 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 one's sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454.

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 LSA-C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 02-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. Under LSA-R.S. 14:42(D)(1), a person convicted of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or

[3] The motion to reconsider sentence also notes that the trial court imposed consecutive sentences on counts three through twenty-two. On appeal the defendant only challenges one sentence, the mandatory life sentence imposed on count one, citing **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672.

suspension of sentence. The failure to articulate reasons for the sentence as set forth in Article 894.1 when imposing a mandatory life sentence is not an error, as articulating reasons or factors would be an exercise in futility since the court has no discretion. **State v. Felder**, 00-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 371, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that the determination and definition of acts that are punishable as crimes is purely a legislative function. It is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. **Dorthey**, 623 So.2d at 1278.

In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from a mandatory minimum sentence, albeit in the context of the Habitual Offender Law. The court held that, to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this 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.

State v. Johnson, 709 So.2d at 676. 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 LSA-R.S.

15:529.1. See **State v. Fobbs**, 99-1024 (La. 9/24/99), 744 So.2d 1274 (per curiam); **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 760 n.5, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235; **State v. Davis**, 94-2332 (La. App. 1st Cir. 12/15/95), 666 So.2d 400, 408, writ denied, 96-0127 (La. 4/19/96), 671 So.2d 925.

After imposing the mandatory life sentence on count one, the trial court noted that the eleven-year-old victim in this case had to undergo the strenuous task of testifying and further suffering due to the defendant's actions. The defendant has not presented any particular facts regarding his family history, or special circumstances that would support a deviation from the mandatory sentence provided in LSA-R.S. 14:42(D)(1). Based on the record before us, we find that the defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we find that a downward departure from the mandatory life sentence was not required in this case. The mandated life sentence imposed is not excessive and assignment of error number one lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that the trial court erred in not finding that LSA-C.Cr.P. art. 782 and LSA-Const. art. I, § 17 violate the Fourteenth Amendment's Equal Protection Clause and in failing to instruct the jury that they had to render unanimous verdicts. The defendant notes that the Louisiana Supreme Court has cited the United States Supreme Court's plurality decision in **Apodaca v. Oregon**, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), in determining that the non-unanimous verdicts allowed in Louisiana meet constitutional muster and do not offend the United States Constitution. See **State v. Bertrand**, 08-2215, 08-2311 (La. 3/17/09), 6 So.3d 738. The defendant further notes that since a majority of the United States Supreme Court has not definitively ruled on the constitutional validity of non-unanimous verdicts, he is raising the issue on appeal to

preserve it, in the event that reconsideration presents a different result than was reached in **Apodaca v. Oregon**.

Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases in which punishment is necessarily confinement at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**, 406 U.S. at 406, 92 S.Ct. at 1630; **State v. Belgard**, 410 So.2d 720, 726-27 (La. 1982); **State v. Shanks**, 97-1885 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

In **Andres v. United States**, 333 U.S. 740, 748, 68 S.Ct. 880, 884, 92 L.Ed. 1055 (1948), the United States Supreme Court recognized that the Sixth Amendment guarantees a right to a unanimous jury verdict in federal criminal trials. However, in its subsequent pronouncement on the unanimous jury question, in the companion cases of **Johnson v. Louisiana**, 406 U.S. 356, 358-60, 92 S.Ct. 1620, 1623-24, 32 L.Ed.2d 152 (1972), and **Apodaca v. Oregon**, 406 U.S. at 406, 92 S.Ct. at 1630, the Supreme Court specifically held that while the Sixth Amendment requires a unanimous verdict in a federal criminal trial, the Sixth Amendment, applicable to the states through the Fourteenth Amendment under **Duncan v. Louisiana**, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), does not impose a similar requirement on state criminal proceedings.

In this case, the guilty verdicts on counts one and two were non-unanimous, with a concurrence of ten jurors out of twelve on count one, and a concurrence of eleven jurors out of twelve on count two; the remaining verdicts were unanimous. As conceded by the defendant, this court and our Louisiana Supreme Court have previously rejected the argument raised in this assignment of error. See **State v. Bertrand**, 6 So.3d at 742-43; **State v. Smith**, 06-0820 (La. App. 1st Cir. 12/28/06),

952 So.2d 1, 16, writ denied, 07-0211 (La. 9/28/07), 964 So.2d 352. As explained in **Bertrand**, although the **Apodaca** decision was, indeed, a plurality decision rather than a majority one, the United States Supreme Court has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that the Supreme Court considered that **Apodaca's** holding as to non-unanimous jury verdicts represents well-settled law. **Bertrand**, 6 So.3d at 742. The **Bertrand** court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. Accordingly, LSA-Const. art. I, § 17(A) and LSA-C.Cr.P. art. 782(A) are not unconstitutional and, hence, not in violation of the defendant's federal constitutional rights. Assignment of error number two is without merit.

PRO SE ASSIGNMENT OF ERROR

In his sole pro se assignment of error, the defendant argues that the trial court erred in failing to rule on his pro se motions to quash the indictment. The defendant notes that, as opposed to ruling on his motions to quash, the trial court indicated that no action was necessary, the defendant was represented by counsel, and no order was attached to the motions. In arguing that the trial court should have ruled on his motions, the defendant notes that pro se filings are held to less stringent standards. The defendant further contends that it was not established at trial that any element of aggravated rape took place in St. Tammany Parish. In his pro se brief, he contends that the "sexual encounter happened in Mississippi." The defendant argues that the indictment failed to establish where the aggravated rape took place and that the bill of particulars did not cure the defective indictment. In essence, the defendant argues that the trial was held in a court of improper venue.

At the outset we note that, although the defendant now contends that he raised the issue of improper venue in the trial court, the motions to quash in the record before us do not raise that issue. Improper venue shall be raised in advance of trial by a motion to quash, and shall be tried by the judge alone. Venue shall not be considered

an essential element to be proven by the state at trial, rather it shall be a jurisdictional matter to be proven by the state by a preponderance of the evidence and decided by the court in advance of trial. LSA-C.Cr.P. art. 615. If the defendant fails to properly raise the issue prior to trial, the issue of venue is considered waived. **State v. Westmoreland**, 10-1408 (La. App. 3rd Cir. 5/4/11), 63 So.3d 373, 382, writ denied, 11-1660 (La. 1/20/12), 78 So.3d 140. See also **State v. Amato**, 96-0606 (La. App. 1st Cir. 6/30/97), 698 So.2d 972, 989, writs denied, 97-2626 and 97-2644 (La. 2/20/98), 709 So.2d 772; **State v. Matthews**, 632 So.2d 294, 296 (La. App. 1st Cir. 1993).

While the defendant argues that the indictment did not establish the location of the aggravated rape offense and that the bill of particulars did not cure the defect, the state's answer to the motions for discovery indicates that open file discovery was provided. Police affidavits in the record include the details and locations of the offenses. On September 15, 2011, the parties agreed that several motions, including the motion for discovery, were satisfied. Omission of essential facts from an indictment or bill of information is not necessarily prejudicial error, since the defendant's right to learn before the trial of the particulars of the offense for which he is to be tried can be adequately protected by the bill of particulars and other discovery devices. See **State v. Pichler**, 355 So.2d 1302, 1304 (La. 1978); **State v. Benedict**, 607 So.2d 817, 821 (La. App. 1st Cir. 1992). Moreover, the indictment specifically alleged the aggravated rape occurred between the first and twenty-eighth days of February 2010 in the Parish of St. Tammany.

We note that lower courts must accept and consider pro se filings from represented defendants in a pre-verdict context whenever doing so will not lead to confusion at trial. **State v. Melon**, 95-2209 (La. 9/22/95), 660 So.2d 466, 467.[4] Nonetheless, if the defendant proceeds to trial without complaining about the lack of a ruling on the pro se motions, the motions are waived. **State v. Gaddis**, 36,661 (La. App. 2nd Cir. 3/14/03), 839 So.2d 1258, 1267, writ denied, 03-1275 (La. 5/14/04), 872

[4] The **Melon** court also reaffirmed the rule that courts are required to accept and consider post-verdict pro se filings from represented defendants. **Melon**, 660 So.2d at 466-67.

So.2d 519, cert. denied, 544 U.S. 926, 125 S.Ct. 1649, 161 L.Ed.2d 487 (2005). Thus, because the record shows that the defendant permitted the trial to proceed without raising the issue of the lack of a ruling on the pending motions, they are waived. The defendant's pro se assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.