NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0834

STATE OF LOUISIANA

VERSUS

MICHAEL J. BOUDREAUX

Judgment Rendered: FEB 18 2014

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston, State of Louisiana
Trial Court Number 26435

Honorable Ernest G. Drake, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WHIPPLE, C.J.

Defendant, Michael J. Boudreaux, was charged by grand jury indictment with two counts of aggravated rape, violations of LSA-R.S. 14:42 (counts one and three), and three counts of aggravated incest, violations of LSA-R.S. 14:78.1 (counts two, four, and five). He pled not guilty. Following a jury trial, defendant was found guilty as charged on all counts. The trial court subsequently denied defendant's motions in arrest of judgment, for new trial, and for postverdict judgment of acquittal.

On counts one and three, the trial court imposed concurrent sentences of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. On count two, the trial court imposed a sentence of twenty years at hard labor, consecutive to the sentences on counts one and three.[1] On count four, the trial court imposed a sentence of twenty-five years at hard labor, without benefit of parole, probation, or suspension of sentence, consecutive to the sentence on count two. On count five, the trial court imposed a sentence of twenty years at hard labor, without benefit of parole, probation, or suspension of sentence, consecutive to the sentences on counts two and four. The trial court subsequently denied defendant's motion to reconsider his sentences.

On appeal, defendant raises two assignments of error related to his sentencing. For the following reasons, we affirm all of defendant's convictions and sentences on counts one through four. We amend defendant's sentence on count five and affirm that sentence as amended.

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[1]We note that the minute entry of sentencing indicates that this sentence was imposed without benefit of parole, probation, or suspension of sentence. However, the sentencing transcript reveals that the trial court did not impose any such restriction of benefits on this sentence. Where there is a discrepancy between the minutes and the transcript, the transcript prevails. See State v. Lynch, 441 So. 2d 732, 734 (La. 1983).

FACTS

Defendant is the stepfather of the victim, C.H.,[2] who was born on July 18, 1995. At trial, the victim testified that she lived in Walker with her mother and defendant for a substantial portion of her childhood, until shortly after she turned thirteen.[3] The only time periods in which the victim did not reside with her mother and defendant were occasional summers when she would visit her paternal grandparents in Texas. C.H. testified that from the time she was very young until she moved in with her biological father at age thirteen, defendant repeatedly engaged in oral, vaginal, and anal sexual intercourse with her. According to C.H., defendant would engage in this behavior only when her mother was away from the household, or when all of her other family members were asleep. The state played a videotaped children's advocacy center interview of the victim which corroborated her trial testimony.

Dr. Jamie Jackson, a child abuse pediatrician from Children's Hospital in New Orleans, testified that she conducted an interview and an examination of the victim in May of 2011. Dr. Jackson stated that the victim disclosed to her a very clear and detailed history of her childhood sexual abuse. Specifically, Dr. Jackson testified that C.H. had described how defendant began to fondle her genitals when she was approximately three years old. He escalated his behavior to engaging in anal sex with C.H. around the time she was in kindergarten or first grade. Defendant began to force C.H. to have vaginal sex with him when she was in approximately sixth grade. Dr. Jackson noted that C.H. told her that the defendant would engage in this behavior when her mother was at work or sleeping.

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[2]In accordance with LSA-R.S. 46:1844(W), the victim herein is referred to only by her initials, or as "the victim."

[3]The victim testified that she had lived in several different cities, and even another state, with her mother and defendant, but the facts that she described at trial all occurred in Walker.

REVIEW FOR ERROR

Initially, we point out that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and error that is discoverable by a mere inspection of the pleadings and proceedings, without inspection of the evidence. After a careful review of the record, we have found one such error with regard to defendant's sentence on count five.

By the state's own admission at defendant's sentencing hearing, defendant's conviction for aggravated incest on count five implicated the sentencing provision of LSA-R.S. 14:78.1(D)(1) because C.H. was thirteen years old at the time of that offense. Under that provision, a person convicted of aggravated incest shall be fined an amount not to exceed fifty thousand dollars, or imprisoned, with or without hard labor, for a term of not less than five years nor more than twenty years, or both. See LSA-R.S. 14:78.1(D)(1). In the instant case, the trial court imposed a sentence of twenty years at hard labor, without benefit of parole, probation, or suspension of sentence. However, the restriction of parole is only appropriate for an aggravated incest offense committed on a victim under thirteen years of age by a person seventeen years of age or older, as with defendant's conviction on count four.[4] See LSA-R.S. 14:78.1(D)(2). Therefore, defendant's sentence on count five is illegal.

An appellate court is authorized to correct an illegal sentence pursuant to LSA-C.Cr.P. art. 882(A). Ordinarily, when correction of such an error involves sentencing discretion, an appellate court should remand to the trial court for correction of the error. See State v. Haynes, 2004-1893 (La. 12/10/04), 889 So. 2d 224 (per curiam). However, in the instant case it is clear that the trial court

[4]We note that the penalty provision in effect at the time defendant committed the acts relevant to count two did not restrict the benefits of parole, probation, or suspension of sentence. See LSA-R.S. 14:78.1(D) (prior to 2006 amendment). Thus, the trial court properly declined to restrict benefits on that sentence.

attempted to impose the maximum sentence possible for defendant's conviction on count five. In doing so, the trial court accidentally restricted the benefit of parole. Because the trial court's intentions are clear from the record, correction of this error does not involve sentencing discretion. Therefore, we amend defendant's sentence on count five to delete the restriction on parole.

ASSIGNMENTS OF ERROR

In related assignments of error, defendant argues that the trial court failed to follow proper procedures prior to sentencing defendant. First, defendant contends that the trial court erred in failing to articulate reasons for his sentences under LSA-C.Cr.P. art. 894.1. Secondly, he argues that the trial court abused its discretion in failing to order a presentence investigation report before sentencing.

Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or defense from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review. LSA-C.Cr.P. art. 881.1(E). Here, defendant filed a motion to reconsider his sentences. However, his motion simply listed the sentences imposed by the trial court for his convictions and requested reconsideration on the basis that defendant "is a first felony offender, [and] there was no evidence besides the testimony of the victim and her sister[,] and he is forty-one (41) years old." In addition to failing to raise either of the arguments now asserted by defendant on appeal, the motion to reconsider failed even to raise explicitly a bare claim of excessiveness. See State v. Mims, 619 So. 2d 1059, 1059-60 (La. 1993). Therefore, defendant is precluded from raising these issues on appeal.

Nonetheless, even if we were to consider the propriety of defendant's sentences, we would find that the record supports the sentences imposed by the trial court and the sentence modified by this court. At the time of defendant's

sentencing, the trial court explicitly considered two of the factors cited by defendant in his motion for reconsideration – his lack of a criminal history and his age. Further, the sentences for defendant's aggravated rape convictions on counts one and three were mandatory, and his sentence on count four was the minimum possible under the effective sentencing provision. See LSA-R.S. 14:42(D)(2)(b) & 14:78.1(D)(2) (after 2006 amendment). There is nothing in the record to show clearly and convincingly that defendant or his circumstances are exceptional as would warrant downward departures from these minimum mandatory sentences. See State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672, 676-677

Moreover, although defendant's sentence on count two and his modified sentence on count five are the maximum possible for those offenses, these sentences are likewise justified by the record. See LSA-R.S. 14:78(D) (prior to 2006 amendment) & 14:78(D)(1) (after 2006 amendment). While maximum sentences may only be imposed for the most serious offenses and the worst offenders, see State v. Miller, 96-2040 (La. App. 1st Cir. 11/7/97), 703 So. 2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So. 2d 459, we find that under the circumstances of the instant case, the trial court acted within its discretion in its determination that defendant or his offenses fell into either category. The evidence indicated that defendant engaged in a systematic pattern of sexual abuse against C.H. that went on for nearly a decade. The duration and nature of defendant's criminal acts and conduct were sufficient to allow the trial court to conclude that defendant or his offenses were of the worst class.

Finally, as to defendant's complaints regarding the failure to obtain a PSI, we note that the ordering of a PSI is discretionary with the trial court. See State v. Wimberly, 618 So. 2d 908, 914 (La. App. 1st Cir.), writ denied, 624 So. 2d 1229 (La. 1993); see also LSA-C.Cr.P. art. 875(A)(1). We find no abuse of discretion in the trial court's decision to cancel its earlier request for a PSI in this case.

DECREE

Accordingly, for the reasons set forth above, the defendant's convictions on counts one through five, and sentences on counts one through four are hereby affirmed. The defendant's sentence on count five is hereby amended and affirmed as amended.

CONVICTIONS ON COUNTS ONE THROUGH FIVE AFFIRMED; SENTENCES ON COUNTS ONE THROUGH FOUR AFFIRMED; SENTENCE ON COUNT FIVE AMENDED AND AFFIRMED, AS AMENDED.