NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 KA 0105

STATE OF LOUISIANA

VERSUS

JIMMY WOODROW MAGEE

Judgment Rendered: JUN 05 2015

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Case No. 12 CR8 119574

The Honorable Scott Gardner, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

THERIOT, J.

The defendant, Jimmy Woodrow Magee, was charged by bill of information with forcible rape, a violation of La. R.S. 14:42.1 (count one), and second degree kidnapping, a violation of La. R.S. 14:44.1 (count two). He entered a plea of not guilty and, following a jury trial, was found guilty as charged on both counts. The defendant filed motions for new trial and post-verdict judgment of acquittal, both of which were denied. He was sentenced on each count to twenty-five years without the benefit of parole, probation, or suspension of sentence, and the district court ordered the sentences to run concurrently. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, arguing that the district court erred in denying his motion to reconsider sentence and that the sentences imposed were excessive. For the following reasons, we affirm the defendant's convictions. We amend the defendant's sentences to provide that they are to be served at hard labor and affirm as amended.

FACTS

The victim and the defendant met in September 2005 and began a relationship soon thereafter. They maintained their relationship off-and-on until August 2012. Over the course of their relationship, the defendant physically abused the victim by throwing a chair at her, pulling a mole off her chest, and hitting and slapping her. The instant offenses arise from the abuse that took place August 3-5, 2012, at the defendant's trailer located in a wooded area off Woodrow Magee Road in Franklinton, Louisiana.[1] On Friday, August 3, 2012, Slick Seals, a friend of the victim, drove the victim and the defendant to the defendant's trailer because neither had a vehicle. Once the victim and defendant were alone, and she refused to have sex with

[1] According to the victim, the defendant's trailer was a FEMA trailer, had no interior walls, and had only one door.

him, he hit her in her head twice. The defendant then pulled down the victim's pants and underwear and vaginally raped her. As the victim tried to "squirm" away, the defendant hit her again, pushed her to the floor, and demanded that she perform oral sex on him. The victim told the defendant that she wanted to leave his trailer, but he refused to let her do so. He took the victim's cellular phone, put it in his pocket, and sat by the locked trailer door. He threatened to kill the victim if she attempted to leave. That night, the two slept on the defendant's bed, which was pushed against the wall. The victim was positioned in between the wall and the defendant. The defendant kept his leg on top of the victim while they slept, and the victim could not get out of the bed without crawling over the defendant.

According to the victim's testimony, on the following day, the defendant told her that she would "obey him" or "face the penalty." The defendant beat the victim and vaginally raped her. He told the victim that she was not going anywhere until she healed. According to the victim, her eyes, lips, and the side of her face were swollen; her lip was busted; and she was bleeding. At some point that day, the electricity went out, and a lineman reported to the trailer. The victim exited the trailer and attempted to get the lineman's attention but was unsuccessful. When the defendant saw that the victim was trying to leave, he grabbed her and dragged her back into the trailer. The defendant spit in the victim's face and hit her several times with a crutch. He held a butcher knife to the victim's throat and told her, "I could kill you. I could really, really kill you." The defendant choked the victim with a rag, and when she "came to her senses," he told her, "You ain't going to sleep, [J.B.]. Wake up, b----. You are going to remember all of it." To prevent being beaten further, the victim performed oral sex on the

defendant, and the defendant vaginally raped her. That night, the victim and the defendant slept in the same manner as the night before.

The lineman who was on the scene on Saturday, Darrel Cooper, testified at trial. According to Cooper, he heard a male voice cussing and hollering when he drove up to the trailer's transformer. The defendant walked out of the trailer, told Cooper to "get [his] f'ing lights on," and slammed the trailer door shut. Cooper heard a female voice say, "Go ahead and get it over with." He then heard what sounded like someone tearing the inside of the trailer apart. Once the electricity was turned back on, the defendant exited the trailer and walked out to Cooper's truck. Cooper saw a woman walking out of the trailer holding some bags. When the defendant noticed her, he told Cooper that Cooper "better get out of here," and he needed "to take care of this." Cooper then saw the woman push the defendant. Cooper testified that the woman looked like she was trying to get away and appeared to be in trouble. He attempted to call for help but could not get cellular phone service. He drove to a house nearby and reported the matter to the sheriff's office.

The victim testified that on Sunday morning, the defendant beat her, spit on her, and forced her to have sexual intercourse against her will, despite her "clawing" him with her fingernails. The defendant also threatened to tie the victim up so that he could leave to purchase cigarettes and marijuana. According to the victim, the defendant did not feel well and was "hung over." She offered the defendant one of her "nerve pills," and the defendant took two. The defendant began to sleep but kept waking up and telling the victim not to go anywhere. When the defendant fell into a deep sleep, the victim grabbed her purse, eased out of the trailer door, and ran as fast as she could to the nearest residence, which was a house belonging to

the defendant's aunt. She was allowed to use the phone and called Seal. Seal picked up the victim. Once at Seal's apartment, the victim called for assistance and emergency medical services responded to her call and transported her to the hospital. At the hospital, a rape kit was used to preserve evidence and photographs were taken of the victim's injuries. The photographs depicted the victim's injuries, including bruises and red marks on her head and body as well as scratch marks on her feet.

Washington Parish Sheriff's Department Detective Anthony Stubbs reported to the hospital and took the victim's statement. Detective Stubbs also spoke with the defendant at the sheriff's office and took a recorded statement from the defendant that was played for the jury at trial. In his statement, the defendant claimed that everything was fine until the victim took some medicine. He claimed that after the victim took a pill, she "went crazy," jumped on him, scratched him, and broke his toe.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In related assignments of error, the defendant argues that the district court erred in denying his motion to reconsider sentence and that the sentence imposed was excessive. In support of his argument, the defendant complains that the district court did not state whether a presentence investigation ("PSI") was conducted. The defendant also contends that the district court failed to consider any mitigating evidence, including whether the defendant had a criminal record or the defendant's ability to be rehabilitated.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. *State v. Sepulvado*,

367 So.2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. *State v. Reed*, 409 So.2d 266, 267 (La. 1982).

Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the district court to consider when imposing sentences. While the entire checklist of Article 894.1 need not be recited, the record must reflect that the district court adequately considered the criteria. *State v. Brown*, 2002-2231 (La. App. 1 Cir. 5/9/03), 849 So.2d 566, 569. A district court judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982). On appellate review of a sentence, the relevant question is whether the district court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. *State v. Thomas*, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

The defendant was convicted of forcible rape (count one) and second degree kidnapping (count two). On each conviction, pursuant to La. R.S. 14:42.1 and 14:44.1, the defendant was exposed to terms of imprisonment for not less than five nor more than forty years at hard labor with at least two years of the sentence imposed without the benefit of parole, probation, or suspension of sentence. The defendant was sentenced, on each count, to twenty-five years without the benefit of parole, probation, or suspension of sentence.

Prior to imposing the sentences, the district court stated that it heard the entire case and had reviewed Article 894.1. The court found that there was an undue risk that the defendant would commit another crime during a period of suspended sentence or probation; the defendant was in need of correctional treatment or a custodial environment provided most effectively by his commitment to an institution; and that a lesser sentence would deprecate the seriousness of the crimes. See La. C.Cr.P. art. 894.1A(1), (2), & (3). The district court also took notice of the "long duration of this crime, and evidence towards the victim that was expressed in this courtroom and in the medical records that supported the jurors' determination[.]" See La. C.Cr.P. art. 894.1B(21).

Having reviewed the record, we find no merit to the defendant's contention that the district court should have ordered preparation of a PSI. We note that the defendant does not contend that he requested preparation of a PSI, as he could have. In any event, the ordering of a PSI lies within the discretion of the district court. La. C.Cr.P. art. 875A(1); *State v. Johnson*, 604 So.2d 685, 698 (La. App. 1 Cir. 1992), *writ denied*, 610 So.2d 795 (La. 1993). The record adequately supports the sentences imposed. Considering the reasons given by the district court, we find no abuse of discretion in the sentences imposed. For the same reasons, we find that the district court did not err or abuse its discretion in denying the defendant's motion to reconsider sentence.

These assignments of error are without merit.

SENTENCING ERROR

The statutes for both forcible rape and second degree kidnapping provide that whoever commits the offenses "shall be imprisoned at hard labor." See La. R.S. 14:42.1B & 14:44.1C. In sentencing the defendant, the

district court failed to provide that the sentences on both counts were to be served at hard labor.[2] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. C.Cr.P. art. 882A authorizes correction by the appellate court.[3] We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentences. See *State v. Price*, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112 (en banc), *writ denied*, 2007-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, since sentences at hard labor were the only sentences that could be imposed, we correct the sentences by providing that the sentences be served at hard labor. The sentences are affirmed in all other aspects

CONVICTIONS AFFIRMED; SENTENCES AMENDED AND AFFIRMED AS AMENDED.

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[2] The minutes and commitment order reflect that the defendant was sentenced at hard labor on both counts.

[3] "An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." La. C.Cr.P. art. 882A.