

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0777

STATE OF LOUISIANA

VERSUS

MICHAEL THOMAS MARSHALL

*DATE OF JUDGMENT:* OCT 31 2016



ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
NUMBER 527237, DIVISION H, PARISH OF ST. TAMMANY  
STATE OF LOUISIANA

HONORABLE ALLISON H. PENZATO, JUDGE

\* \* \* \* \*

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BEFORE: HIGGINBOTHAM, THERIOT AND CHUTZ, JJ.

**Disposition: CONVICTIONS AND SENTENCES AFFIRMED.**

CHUTZ, J.

The defendant, Michael Thomas Marshall, was charged by grand jury indictment with aggravated rape (of D.G.), a violation of La. R.S. 14:42<sup>1</sup> (count 1); sexual battery (of victim, A.M., under the age of thirteen), a violation of La. R.S. 14:43.1 (count 2); aggravated incest (of J.M.), a violation of La. R.S. 14:78.1<sup>2</sup> (count 3); aggravated rape (of victim, J.M., under the age of thirteen), a violation of La. R.S. 14:42 (count 4); aggravated incest (of J.M.), a violation of La. R.S. 14:78.1 (count 5). The defendant pled not guilty to all charges and, following a jury trial, was found not guilty on counts 1, 2, and 3. On count 4 (aggravated rape of a victim under the age of thirteen), the defendant was found guilty of the responsive offense of sexual battery (of a victim under the age of thirteen). On count 5 (aggravated incest), the defendant was found guilty as charged. The defendant was sentenced on count 4 to forty-five years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; he was sentenced on count 5 to ten years imprisonment at hard labor. The sentences were ordered to run consecutively. The defendant filed a motion to reconsider sentence(s), which was denied. The defendant now appeals, designating two assignments of error. For the following reasons, we affirm the convictions and sentences.

### **FACTS**

Michelle is the biological mother of J.M.<sup>3</sup> Michelle divorced her husband and married the defendant in 1994 when J.M. was approximately one month old. Michelle, J.M., the defendant (J.M.'s stepfather), and several other of Michelle's young children, all lived together in a trailer on Orange Street in Pearl River.

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<sup>1</sup> Pursuant to the amendment of La. R.S. 14:42 by 2015 La. Acts, No. 256, § 1, aggravated rape is now referred to as first degree rape. See La. R.S. 14:42(E).

<sup>2</sup> In 2014, the Legislature repealed former La. R.S. 14:78.1 and amended La. R.S. 14:89.1 to subsume the crime of aggravated incest under the broader crime of aggravated crime against nature. See La. R.S. 14:89.1(A)(2)(a); 2014 La. Acts, No. 177, §§ 1 & 2.

<sup>3</sup> The victim is referred to herein by her initials. See La. R.S. 46:1844(W).

According to J.M.'s testimony at trial, the defendant began inappropriately touching her when she was four years old and continued sexually abusing her until she was seventeen years old. She described one incident that occurred when she was very young where the defendant touched her vagina with his hands while she was sitting on his bed. As J.M. grew older, the defendant would remove her pants and touch her vaginal area with his penis. By approximately the time she was in the sixth grade, the defendant began having vaginal sex with J.M. When J.M. was seventeen, she told her mother the defendant had been touching her since she was four years old. Michelle divorced the defendant in 2012.

The defendant did not testify at trial.

### **ASSIGNMENTS OF ERROR NO. 1 and NO. 2**

In these related assignments of error, the defendant argues the trial court erred in denying his motion to reconsider sentence and his combined total sentence of fifty-five-years is unconstitutionally excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive 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 the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). 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 La. Code Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. Code Crim. P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. Code Crim. P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial 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).

Under La. R.S. 14:43.1(C)(2) (at the time the defendant committed the crime), the sentencing range for sexual battery of a victim under the age of thirteen was not less than twenty-five years imprisonment at hard labor nor more than life imprisonment, with at least twenty-five years of the sentence to be served without benefit of parole, probation, or suspension of sentence. Under La. R.S. 14:78.1(D)(1) (at the time the defendant committed the crime), the sentencing range for aggravated incest was a term not less than five years nor more than twenty years, with or without hard labor. The defendant, therefore, faced a maximum sentence (assuming consecutive sentences) of life imprisonment plus twenty years at hard labor.

The defendant, who is now sixty years old, suggests in brief that he has received essentially a life sentence. The defendant argues that the trial court did not

know anything about him, and that “the record contains no information as to his criminal history or lack thereof.” As such, he argues the consecutive sentences imposed upon him totaling fifty-five years (consecutive sentences of forty-five-years and ten-years, respectively) are excessive.

It is clear in its reasons for sentence that the trial court adequately considered La. Code Crim. P. art. 894.1. In arriving at appropriate sentences, the trial court was cognizant of the vulnerability of the defendant’s young victim. The trial court stated in pertinent part:

The defendant is now being sentenced in accordance with the sentencing provisions of Louisiana Code of Criminal Procedure Article 894.1, and at this time I will list the factors that I have considered in connection with those provisions:

The Court finds that there is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime. The Court also finds that the defendant is in need of correctional treatment or a custodial environment that can be most effectively provided by his commitment to an institution. The Court finds that a lesser sentence will deprecate the seriousness of the defendant’s crime.

The Court also finds that the offender knew or should have known that the victim was particularly vulnerable due to her youth. The Court also finds that the offender used his position of trust to facilitate the commission of the offense.

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The Court finds that based upon the testimony of the victim that the two offenses were not based on the same act or transaction, nor did they constitute part of a common scheme or plan. Therefore, pursuant to Article 883 of the Code of Criminal Procedure, the sentences will run consecutively.

The record clearly established an adequate factual basis for the sentences imposed. The defendant lived together for several years with J.M. and her mother, and ostensibly took on the roles of guardian and caretaker. The defendant used this parental relationship to exploit J.M.’s trust and sexually abuse her. See State v. Kirsch, 2002-0993 (La. App. 1st Cir. 12/20/02), 836 So.2d 390, 395-96, writ denied, 2003-0238 (La. 9/5/03), 852 So.2d 1024.

Considering the trial court's review of the circumstances and the nature of the crimes, we find no abuse of discretion by the trial judge. Accordingly, the sentences imposed by the trial judge are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive. The trial judge did not err in denying the motion to reconsider sentence(s).

These assignments of error are without merit.

**CONVICTIONS AND SENTENCES AFFIRMED.**