STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 KA 1800

STATE OF LOUISIANA

VERSUS

MARTIN DYSON

Judgment rendered: SEP 21 2017

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 09-12-0727, Sec. VIII

The Honorable Trudy M. White, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

HOLDRIDGE, J.

The defendant, Martin Dyson, was charged by bill of information with two counts of sexual battery, violations of Louisiana Revised Statutes 14:43.1 (prior to amendment by 2011 La. Acts No. 67 §1 and 2015 No. 256 §1).[1] He entered a plea of not guilty and, following a bench trial, was found guilty on both counts. The defendant filed a motion for new trial, which was denied. On count one, the defendant was sentenced to twenty-five years at hard labor without the benefit of probation, parole, or suspension of sentence. On count two, the defendant was sentenced to five years at hard labor without the benefit of probation, parole, or suspension of sentence. 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 sentence imposed on count one is excessive. For the following reasons, we affirm the defendant's convictions and sentences.

FACTS

Count one:

During the first half of 2011, the defendant was living with his nephew on Dutton Street in Baton Rouge in order to help him renovate his home. Also living in the residence were the defendant's nephew's wife and her four children. One of the children, twelve-year-old T.H. was awakened in the middle of the night to someone lying on top of her and "riding" her. T.H. testified that the person put a pillow over her face and pulled up her nightgown. She was wearing underwear, but could feel the person's penis on her vagina. According to T.H., the person then ran out of her bedroom. The following night, someone entered her bedroom,

[1] Count one occurred between January 1, 2011, and June 30, 2011, and the victim, T.H., was twelve years old. Count two occurred between June 1, 2011, and July 31, 2011, and the victim, J.B., was thirteen years old.

pulled her shorts down, and inserted his penis into her vagina. T.H. explained that she could not see the person because he held a pillow over her head. However, when the person walked out of her room, T.H. followed him and identified the person as the defendant. The defendant told T.H., "You don't have to tell nobody" and threatened to hurt her family if she told. After returning to her bedroom, T.H. saw blood on her sheets. She washed them before school the next day "so nobody would know." T.H. did not disclose the incidents until May 2012.

Count two:

During June or July 2011, thirteen-year-old J.B.[2] was spending the night at her grandmother's house on Underwood Avenue in Baton Rouge. While asleep, she was awakened by her great-uncle, the defendant, who resided at the residence at the time. The defendant asked J.B. to help him find a bowl. The two looked for the bowl in the kitchen, and when they were unable to find it, the defendant asked J.B. to come into his room. Once in the room, the defendant told J.B. to get on the bed and lie on her stomach. The defendant, who was wearing only a white muscle shirt and boxer shorts, got on top of J.B. and began "dry humping" her. According to J.B., the defendant told her not to let another man "do this" to her. The defendant also told J.B. not to tell or he would kill her grandmother. Once J.B. was able to get up, she went into her grandmother's room and went back to sleep. The following day, the defendant gave J.B. $20. J.B. asked the defendant, "What I [sic] supposed to be, your slut[?]" According to J.B., the defendant responded, "No, not yet."

J.B. did not disclose the incident to her mother until October 2011. Thereafter, in February 2012, the defendant was placed under arrest and gave a

[2] Herein, the two victims will be referred to by initials only. See La. R.S. 46:1844W.

videotaped statement. In his statement, the defendant admits to "hunching" J.B., which he described as "humping."

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant contends that the district court imposed an excessive sentence. Specifically, he argues that although he was sentenced to the mandatory minimum sentence on count one, the district court should have deviated downward from that sentence because he is a "family man with two sons and two daughters. . . . two brothers and two sisters." The defendant also contends that he has no significant criminal history.[3]

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). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. 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. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A district court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the district court before imposing sentence. See La. Code Crim. P.

[3] The defendant does not challenge the sentence imposed on count two in his brief.

art. 894.1. The district court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir. 1990), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the district court's stated reasons and factual basis for its sentencing decision. **Herrin**, 562 So.2d at 11.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court opined that if a district court judge were to find that the punishment mandated by Louisiana Revised Statutes 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he has the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive. In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676-77, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. 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 La. R.S. 15:529.1. **State v. Fobbs**, 99-1024 (La. 9/24/99), 744 So.2d 1274 (per curiam); see **State v. Collins**, 2009-1617 (La. App. 1st Cir. 2/12/10), 35 So.3d 1103, 1108, writ denied, 2010-0606 (La. 10/8/10), 46 So.3d 1265.

Mandatory sentences have been repeatedly upheld as constitutional and consistent with the federal and state constitutional provisions prohibiting cruel,

unusual or excessive punishment. See **State v. Jones**, 46,758 (La. App. 2nd Cir. 12/14/11), 81 So.3d 236, 249, writ denied, 2012-0147 (La. 5/4/12), 88 So.3d 462. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which 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. **Johnson**, 709 So.2d at 676.

At the time of the offenses, La. R.S. 14:43.1C(2), provided: "Whoever commits the crime of sexual battery on a victim under the age of thirteen years when the offender is seventeen years of age or older shall be punished by imprisonment at hard labor for not less than twenty-five years nor more than ninety-nine years." Louisiana Revised Statutes 14:43.1C(2) also provided, "At least twenty-five years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence." On count one, the defendant was sentenced to the statutory mandatory minimum sentence of twenty-five years at hard labor without the benefit of parole, probation, or suspension of sentence.

The defendant contends that he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, gravity of the offense, and circumstances of the case because "unbeknownst to the legislature, [he] is a family man with two sons and two daughters. He also has two brothers and two sisters." At the hearing on the defendant's motion to reconsider sentence, the district court denied the motion and noted that the defendant was sentenced to the minimum sentences on both counts and that it ordered that the sentences on both counts to run concurrently. The defendant responded, "How do you put something on somebody that they didn't have anything happen? That's

what I don't understand. They had to keep me in this parish three years to put something on me, to find something, to try to find on me. Whatever. If you don't reconsider my – I just keep on doing my time, whatever, but that's it." Although the defendant presents himself as a "family man," the record clearly establishes that both victims were members of the defendant's family and step-family, and the defendant used those relationships to exploit the young female victims. The defendant also argues that he has "no significant criminal history." Contrary to the defendant's assertion, he admitted at trial that he was previously convicted of third and fourth offense driving while intoxicated. The record before us clearly establishes an adequate factual basis for the sentences imposed. The defendant, who was fifty-three years old at the time of the offense, used his status as a relative of the twelve-year old victim's step-father to gain access into her home, enter her room in the middle of the night, cover her face with a pillow, pull down her shorts, and insert his penis into her vagina. He presented no evidence that he was exceptional, such that the sentence imposed was not meaningfully tailored to his culpability, the gravity of the offenses, and the circumstances of the case. Accordingly, no downward departure from the presumptively constitutional mandatory minimum sentence was warranted. The sentence imposed was not grossly disproportionate to the severity of the offense and, therefore, was not unconstitutionally excessive. The assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.