***** NOT DESIGNATED FOR PUBLICATION *****

STATE OF LOUISIANA	*	**NO. 2011-KA-1446**
VERSUS	*	
		COURT OF APPEAL
ADAM L. GALBRAITH	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 501-715, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *

PAUL A. BONIN
JUDGE

* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Paul A. Bonin, Judge Rosemary Ledet)

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AFFIRMED
FEBRUARY 27, 2013

Adam "Rook" Galbraith, thirty years old, was found guilty as charged of five counts of felony carnal knowledge of a girl who was thirteen years old. *See* La. R.S. 14:80. He assigns two errors pertinent to his conviction: introduction of a poster-sized blow-up of his partially nude MySpace page photograph and refusal to instruct the jury on inferences from character evidence and on influencing by sympathy, passion, or prejudice. He also assigns one error pertinent to his sentence, arguing that the ten-year concurrent sentences on the five counts are constitutionally excessive.

Having reviewed the admissibility of the blown-up photograph under an abuse-of-discretion standard, we cannot find that the trial judge abused her discretion or that the guilty verdicts were attributable to the admission of the exhibit. With respect to the defense specially requested jury instructions, we find no error. Because the concurrent sentences do not shock the sense of justice, we conclude that they are not excessive and that the trial judge did not abuse her considerable sentencing discretion.

Accordingly, we affirm the convictions and concurrent sentences. We turn in the Parts below to provide a fuller explanation of our decision.

I

In this Part we review the facts as developed at trial.

Mr. Galbraith met the young girl outside of a bookstore in Uptown New Orleans. She approached Mr. Galbraith, asked for a cigarette, and a conversation ensued. Inside the bookstore, they walked around for about ten minutes looking at and talking about books. They exchanged telephone numbers and he contacted the girl a short while later and asked if they could hang out the rest of the day. She agreed.

She testified, without contradiction, that at first she told him she was fourteen years old, but a short while later when she arrived at his house she told him the truth: that she was thirteen years old.

While at his house, they drank vodka and began kissing. She got sick and vomited from the alcohol. But about thirty minutes later they engaged in sexual intercourse on the bathroom floor in what she described at trial as the missionary position. She returned to her father's house that night.

Not long after, they again had a rendezvous; this time, at her suggestion, on the stairs of a burial monument or tomb in the cemetery near to his home. Another time they engaged in intercourse in the backyard of Mr. Galbraith's house. Their sexual encounters included anal and oral as well as vaginal intercourse. The girl consented on each of the many occasions which extended from late June or early

July until the end of August. She estimated that they had engaged in sexual intercourse around eight times, including once in a car at the Clearview Mall in Metairie.

The relationship came to an abrupt end one morning when the girl's mother, having returned from an out-of-town trip, began searching for her daughter and left frantic messages on the daughter's mobile telephone. When she heard her mother's messages, the girl asked Mr. Galbraith's mother to bring her to her mother's home in Jefferson Parish, to which his mother agreed.

Mr. Galbraith's mother testified that the girl previously had told her that she was nineteen years old and enrolling in Tulane University. Only while en route to Jefferson Parish did his mother learn the truth about the girl's age and then only because the girl had asked her to lie to the girl's mother and say she was the mother of a girlfriend. Sheriff's office investigators awaited their arrival at the girl's mother's home, and the details of Mr. Galbraith's relationship with the girl were readily apparent.

As soon as Mr. Galbraith learned that the police were aware of the relationship he sent a message to the girl which said: "now I'm fucked. … I didn't mean to hurt you or anyone else." He told the NOPD detective who arrested him that "I shouldn't have never, never bought her them cigarettes at the bookstore."

II

With that factual background, we turn to address Mr. Galbraith's first assignment of error and to explain why we do not find any reversible error.

Mr. Galbraith argues that the trial judge erred in admitting over his objection a poster-sized blow-up (about 35 inches by 23 inches) of a postage-stamp-sized photograph from his MySpace page. The photograph depicts Mr. Galbraith shirtless, pulling down the front of his trousers to expose pubic hair and the base of his penis. The detail obvious from the poster enlargement is barely apparent from the MySpace site, which at best allows the viewer to observe something dark below defendant's waistline, but not to actually see pubic hair, much less the base of defendant's penis. In evaluating this assignment of error, we need to remark that there were other, somewhat larger photographs on two other of the defendant's MySpace page exhibits which were also introduced at trial by the prosecution; on the larger of these two, one can clearly see defendant's pubic hair and part of his penis.

The prosecution set up the poster-board display in the view of the jury. The prosecution concedes in its appellate argument that posting a semi-nude photograph of one's self on one's private webpage is not a crime, and it states that it did not introduce the photo as evidence of other crimes or bad acts under La. C.E. art. 404(B) (for proof of motive, opportunity, intent, or preparation) or as evidence that the defendant had a lustful disposition toward children under La. C.E. art. 412.2. Rather, the prosecution argues that it introduced the photograph "to present defendant to the jury in the same manner in which he presented himself to the internet community every day in order to counter the image of a suited, all-American presented to the jury by the defense at trial."

Mr. Galbraith argues that the blown up photo was irrelevant and that even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice. Mr. Galbraith's counsel stated in a bench conference that he had

objected to the blow-up on the ground that it was irrelevant and that the prosecution was using it to insinuate that the kind of person who would post this type of photo on his webpage is the kind of person who would have sex with a thirteen-year-old girl.

A trial court's ruling as to the admissibility of evidence, as a general rule, will not be disturbed absent a clear abuse of discretion. *See State v. Cyrus,* 11-1175, p. 20 (La. App. 4 Cir. 7/5/12), 97 So. 3d 554, 565, citing *State v. Richardson*, 97-1995, p. 14 (La. App. 4 Cir. 3/3/99), 729 So. 2d 114, 122. A trial court's discretion extends to determining whether the probative value of relevant evidence is substantially outweighed by its prejudicial effect. *See State v. White*, 09-0025, p. 9 (La. App. 4 Cir. 9/16/09), 22 So. 3d 197, 204. Further, a trial court's ruling admitting/permitting the introduction of evidence carries with it an implicit conclusion that the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under La. C.E. art. 403. *Cf. State v. Magee,* 11-0574, p. 49 n. 37 (La. 9/28/12), 103 So. 3d 285, 320 n..37.

While we have no doubt that this enlarged display was wholly unnecessary to the presentation of the prosecution's case, and may well have suggested to the jury the bad taste and poor judgment of Mr. Galbraith for posting such a photograph and of the prosecution for unnecessarily enlarging it, we cannot say that the trial judge abused her discretion. This is especially so because the much smaller, but still very clear, photo of the same image on Mr. Galbraith's MySpace page, which was viewed by the victim, was properly admitted into evidence.

In any event, we are satisfied beyond a reasonable doubt that the jury's verdict in this case of overwhelming guilt is surely unattributable to this poster-

sized exhibit. *See State v. Robertson,* 06-1537, p. 9 (La. 1/16/08), 988 So. 2d 166, 172, rehearing granted in part, denied in part,[1] (La. 3/14/08) (An error is harmless if it can be said beyond a reasonable doubt that the guilty verdict rendered in the case was surely unattributable to that error.); *State v. Barbour,* 09-1258, p. 14 (La. App. 4 Cir. 3/24/10), 35 So. 3d 1142, 1150.

III

In this Part we turn to a consideration of Mr. Galbraith's assignments of error relative to the trial judge's refusal either to give two special jury instructions which he had requested or to instruct the jury with content similar to the requested instructions.

A trial judge is obliged to charge the jury on the law applicable to the case. *See* La. C.Cr.P. art. 802. A requested special jury charge shall be given by the judge if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. *See* La. C.Cr.P. art. 807. But the special charge need not be given if it is included in the general charge or in another special charge to be given. *See State v. Segers,* 355 So. 2d 238, 244 (La. 1978). And, most importantly, failure to give a requested jury instruction constitutes reversible error *only* when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *See State v. Hollins,* 08-1033, pp. 3-4 (La. 6/26/09), 15 So. 3d 69, 71, citing to *State v. Marse*, 365 So.2d 1319, 1322-24 (La. 1978); La. C.Cr.P. art. 921.

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[1] "Rehearing granted for the limited purpose of transferring this case to the Third Circuit Court of Appeal for their consideration of the assignments of error previously assigned by defendant to the court of appeal and pretermitted by the court of appeal.

"The application for rehearing is otherwise denied."

A

Mr. Galbraith's first requested special jury instruction set forth:

> During the trial, you may have heard evidence introduced by the state of the character of the Defendant that may be in conformity with the alleged acts that the Defendant is currently charged with. Louisiana Code of Evidence Article 412.2 provides that when an accused is charged with a crime involving sexually assaultive behavior, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior may be admissible and may be considered for its bearing on any matter to which it is relevant. It is not to be considered for the purpose of deciding that the defendant is a "bad" person, and it is important to remember that the accused is on trial only for the offenses charged in this proceeding. You may not find him guilty of the offenses charged in the present bill of indictment merely because he may have committed another crime, wrong or act, or because the state alleges he may have "bad" character.
>
> The instruction is based upon La. C.E. art. 412.2, which states:
>
> > A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
> >
> > B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
> >
> > C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

But the prosecution never introduced "evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children." And Mr. Galbraith himself does not argue that the display of partially nude photographs of himself on his MySpace page constituted evidence of his "commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition

toward children." Because this requested special jury instruction is based on La. C.E. art. 412.2, which is not applicable to the evidence presented at trial, the requested instruction is not "wholly correct and pertinent." *See* La. C.Cr.P. art. 807. Accordingly, the trial judge properly declined to give it.

B

The other requested special charge was "As jurors, you are not to be influence [sic] by mere sympathy, passion, prejudice, or public opinion. You are expected to reach a just verdict." The trial court's instruction did not explicitly caution jurors not to be influenced by mere sympathy, passion, prejudice, or public opinion. But the instructions did correctly charge the jurors that they must decide the facts from the testimony and other evidence and that in considering such evidence and applying to it the law as given by the court, it was the jurors' duty to give Mr. Galbraith the benefit of every reasonable doubt arising out of the evidence or lack thereof, and to find defendant not guilty if it was not convinced of his guilt beyond a reasonable doubt. Thus, implicit in these instructions and the instructions as a whole was that the jurors were to decide the case only on the testimony and evidence and not on any extraneous factors such as mere sympathy, passion, prejudice, or public opinion, and that they were to reach a just verdict.

While we would have found no fault in the requested instruction, Mr. Galbraith has not explained to us (other than in a generalized and conclusory manner) how the failure to instruct the jury as he requested resulted in a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of his constitutional or statutory rights. Therefore, the trial judge's failure to give this instruction could not result in a reversal of his convictions.

IV

In his third assignment of error, Mr. Galbraith argues that his maximum sentences of imprisonment, ten years at hard labor, on each of the five counts for which he was convicted, even though the sentences were to run concurrently, were unconstitutionally excessive.

A

Excessive sentences are prohibited. *See* La. Const. art. I, § 20. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. *See State v. Every*, 09-0721, p. 7 (La. App. 4 Cir. 3/24/10), 35 So. 3d 410, 417. But the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. *See State v. Cassimere,*09-1075, p. 5 (La. App. 4 Cir. 3/17/10), 34 So. 3d 954, 958. A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. *See State v. Ambeau*, 08-1191, p. 9 (La. App. 4 Cir. 2/11/09), 6 So. 3d 215, 221. 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. *See State v. Galindo*, 06-1090, pp. 15-16 (La. App. 4 Cir. 10/3/07), 968 So. 2d 1102, 1113.

In reviewing a claim that a sentence is excessive, we generally determine whether the trial judge has adequately complied with the statutory guidelines in La. C.Cr.P. art. 894.1 and whether the sentence is warranted under the facts established by the record. *See State v. Wiltz,* 08-1441, p. 10 (La. App. 4 Cir. 12/16/09), 28 So. 3d 554, 561. If adequate compliance with La. C.Cr.P. art. 894.1 is found, we then

determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious offenders. *See State v. Bell*, 09-0588, p. 4 (La. App. 4 Cir. 10/14/09), 23 So. 3d 981, 984.

Under La. R.S. 14:80 D, upon conviction of felony carnal knowledge of a juvenile defendant was subject to a fine of not more than five thousand dollars, or imprisonment with or without hard labor for not more than ten years, or both.

B

Before sentencing Mr. Galbraith the trial judge obtained a pre-sentence investigation report from the Division of Probation and Parole. During the sentencing hearing, the trial judge inquired whether there would be any witnesses and, importantly, no one testified on behalf of Mr. Galbraith and he declined to allocute.[2]

Relying upon the PSI, the trial judge noted that the victim's mother opposed probation because defendant refused a plea deal and forced both her, along with the victim, to testify, and because the victim was still in counseling because of the incident. The trial judge also remarked that Mr. Galbraith had refused a plea bargain for a sentence of four years which was offered so the victim could avoid the trauma and rigors of a trial. Explaining that she did not hold against Mr. Galbraith his exercising his right to go to trial, the trial judge emphasized that upon listening to the young girl's testimony and observing the tremendous emotional impact that the relationship and the trial had on her and her family, a sentence of four years of incarceration was not suitable. The victim was, in the trial judge's

[2] Mr. Galbraith's counsel stated that Mr. Galbraith's mother and pastor were in the courtroom "for support."

first-hand view, harmed because she still had feelings for Mr. Galbraith at the time of the trial and those feelings for him caused the victim emotional distress by having to go to trial and confront someone who was denying what she was honestly testifying to in front of the jury.

Another aspect of the offense was, as the trial judge stated, that a lot of alcohol was involved, which in her opinion Mr. Galbraith used to "perhaps facilitate" the commission of the offenses with the under-aged child.[3] The trial judge said she felt that a person of that age deserved the full protection of the law.

Importantly, the trial judge noted that she had observed the victim testify in the case and stated that anyone the defendant's age would know (and thus would have known at the time of the offenses) that the young girl was not a college freshman, or even a mid-teen, no matter what she had said; the victim's affect and the way she related things showed that she was under age and quite vulnerable.

By way of some mitigation, the trial judge credited Mr. Galbraith that he had no prior juvenile history, and that his sole prior felony conviction was for carrying a concealed weapon in Michigan (which is a misdemeanor in Louisiana). Also, as a mitigating circumstance, the trial judge mentioned that Mr. Galbraith exhibited no cruelty toward the victim.

Finally, the trial judge explicitly stated that had taken into account the sentencing guidelines of La. C.Cr.P. art. 894.1 and was rejecting the prosecution's request for her to impose a sentence of fifteen years (which would have required consecutive sentencing in some fashion The trial judge then imposed , as

[3] The PSI reports that Mr. Galbraith told the investigator that his use of alcohol with the girl prevented his being able to consummate any sexual act with her.

described by her, "the maximum sentence available at law," ten years at hard labor on each of the five counts, to run concurrently with each other.[4]

C

Although the trial judge may not have expressly gone through each of the aggravating and mitigating factors of La. C.Cr.P. art. 894.1, we are well-satisfied that she had considered the factors, and especially the mitigating factors. She is entrusted in the first instance of imposing an appropriate sentence that takes into sufficient consideration the individualizing characteristics of both the offender and the offense.

We have reviewed other decisions which share *some* of the characteristics of this offender and this offense.

In *State v. Fuller*, 42,971 (La. App. 2 Cir. 2/13/08), 975 So. 2d 812, the appellate court found that an eight-year sentence at hard labor imposed on a first-felony offender convicted of felony carnal knowledge of a juvenile was not unconstitutionally excessive. The defendant's social history indicated no grounds tending to excuse or justify his conduct or indicating that his incarceration would cause an excessive hardship on dependents. The court noted that the defendant had a misdemeanor history including driving under the influence and drug possession, and that he received substantial benefit as a result of a plea bargain agreement down from the more serious charged offense, forcible rape. In *Fuller*, the female victim was slightly over thirteen and one-half years old at the time of the offense, while the defendant was twenty-six. The victim became pregnant as a result of the vaginal intercourse and underwent an abortion.

[4] The prosecution argues that the sentence is not the maximum sentence available under the law because the trial judge did not run the sentences consecutively.

In *State v. Wyant*, 42,338 (La. App. 2 Cir. 8/15/07), 962 So. 2d 1165, the defendant pleaded guilty to felony carnal knowledge of a juvenile and was sentenced to ten years at hard labor, with two years suspended and five years active probation after service of the sentence. The defendant was also ordered to pay for the victim's counseling. The appellate court rejected the defendant's sole assignment of error that the sentence was unconstitutionally excessive. The defendant was twenty-five years old at the time of the offense, while the female victim was twelve. The defendant, along with two other adults, gave the victim alcoholic beverages and led her to engage in sexual behavior, culminating in the defendant having sexual intercourse with the victim. The defendant expressed his regret, but also questioned why he was solely to blame when two other individuals were involved in the incident. The trial court felt that the defendant seemed to sincerely regret his actions. The defendant was a first-felony offender and apparently had no other criminal history. He was employed, married with two children, and argued that his incarceration would be a hardship on his family. The appellate court rejected all these arguments and stated that, considering the great disparity between the ages of the defendant and the victim, the apparent deliberate use of alcohol to induce the twelve-year old child's "consent" to sexual intercourse, and the severe effects of the incident on the child, as testified to by her mother, the sentence did not shock the conscience or appear to be a needless imposition of pain and suffering on the defendant.

Considering the trial judge's sufficient compliance with Article 894.1, especially in light of the defendant's failure to point out any other mitigating factors, we cannot find that the concurrent sentences imposed make no measurable contribution to acceptable goals of punishment, are nothing more than the

purposeless imposition of pain and suffering, or are grossly out of proportion to the severity of the crime and the offender's conduct. After a full review, we conclude that the concurrent sentences do not shock the sense of justice. We also find that the trial judge did not abuse her considerable sentencing discretion.

DECREE

We affirm the convictions of Adam Galbraith and the concurrent sentences imposed upon him.

AFFIRMED