NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2012-KA-0673**
VERSUS	*	
		COURT OF APPEAL
JEREMIAH STRICKLAND	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 504-173, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
SANDRA CABRINA JENKINS
JUDGE
* * * * * *

(Court composed of Judge Max N. Tobias, Jr., Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

POWELL MILLER
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AFFIRMED
JULY 3, 2013

A notice of appeal was filed on behalf of the defendant, Jeremiah Strickland, and the Louisiana Appellate Project was assigned as the defendant's counsel on appeal. However, appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and *State v. Jyles,* 96–2669 (La.12/12/97), 704 So.2d 241, stating that after close review of the record, he is unable to find any non-frivolous issues subject to argument and, therefore, requesting that the court conduct an errors patent review and allow him to withdraw from representation of the defendant in this appeal. The defendant subsequently filed a timely *pro se* brief, asserting two assignments of error: (1) the trial court imposed an excessive sentence; and (2) trial counsel was ineffective for failure to timely object to the excessive sentence and to file a timely motion to reconsider sentence as mandated by La. C.Cr.P. art. 881.1.

After an independent thorough review of the record as mandated by *State v. Benjamin*, 573 So.2d 528 (La.App. 4 Cir.1990) (interpreting *Anders*), we affirm the defendant's sentence and conviction. Appellant counsel's motion to withdraw is granted.

STATEMENT OF CASE

The defendant was initially charged by bill of information with attempted forcible rape, La. R.S. 14:42.1. Prior to trial the state amended the bill of information to charge the defendant with sexual battery, La. R.S. 14:43.1. The jury found the defendant guilty of attempted sexual battery. The trial court denied defendant's motion for new trial and a motion for post-verdict judgment of acquittal. After waiving all legal delays, the trial court sentenced the defendant to a term of imprisonment of four years. It is from this conviction and sentence that the defendant now appeals.

STATEMENT OF FACT

On the evening of January 7, 2011, Officer Shantia McCormick responded to a complaint of a sexual battery occurring in the 800 block of Hillary Street in New Orleans, Louisiana. When she arrived at the location, the victim, M.L., was hysterical and crying. Officer McCormick learned from interviewing the victim that her house guest, the defendant, Jeremiah Strickland, touched her vaginal area and her breasts, without her consent and took her cell phone upon fleeing the scene. Officer McCormick subsequently notified NOPD sex crimes of the incident.

M.L. testified that at one point in time the defendant rented a room from her mother, who lives in Sulphur, Louisiana. She stated that the defendant arrived at her mother's house for a visit in November 2011. In early January, M.L. visited her mother in Sulphur. Her mother complained to her that she could not get the defendant to leave. Eventually, M.L.'s mother purchased the defendant a plane ticket for him to travel home to California. For logistical reasons, M.L. booked the defendant a flight leaving from New Orleans. He traveled back to New Orleans

with her on January 2, 2012, and she allowed him to sleep at her apartment on her sofa, until his flight was scheduled to leave on January 7, 2012.

M.L. stated that the night before the defendant was scheduled to leave, the two went to the French Quarter together. M.L. related getting a drink when they arrived and ordering one more later, of which she only drank half. The two walked around the French Quarter for a while and went to one club. M.L. stated that she became tired and they returned to her apartment.

M.L. stated that, upon returning to the apartment, the defendant used M.L.'s computer which was in her bedroom. M.L. showered and changed into some sleepwear in the bathroom. When she came out, she told the defendant that he needed to turn the computer off because she was going to bed.

The defendant was using the computer to play music and instead of turning it off, he put on a different song to play. M.L. was already in bed. The defendant at this point pulled the covers back. M.L. stated that, at first, she thought he was joking and she pulled the covers back up. But the defendant pulled the covers off again and then got on top of the victim in her bed.

M.L. testified that the defendant kissed her on the face as he lay on top of her. She explained that he was massive and that she was unable to get him off of her. He continued to try to kiss her as she tried to push him off unsuccessfully. Then he began pushing his hands under her clothes. He stuck his hand under her panties, touched her vagina, stuck his hand under her shirt, and grabbed her breasts. She stated to him that "this is not happening," and he just "kind of laughed."

The defendant kept trying to take her pants off. In doing so, he would reposition himself so he could get a better hold on her. At first, he used his hand to

hold her down and then he placed his forearm against her throat. Eventually, the defendant grabbed her pants and stood up in an effort to remove them. When he did, M.L. was able to kick him off of her.

M.L. stated that she pulled her pants up and was able to get out of the room. When she left, she grabbed her cell phone from her purse and tried to enter the code to unlock it. She ran into the kitchen, and he followed. The two wrestled over the phone. Eventually, she threw the phone away from herself and the defendant retrieved the phone and put it in his pocket.

M.L. explained that she did not want to leave the house because her fourteen year old son was still inside asleep. But she was able to get her front door open, and she stood nearby hoping that someone would walk past. She explained that the defendant had her backed up against the front door and was ranting. She kept telling him that he needed to leave.

Approximately fifteen to twenty minutes passed before M.L. saw some college students getting into their car and screamed to them that she needed help. As soon as she called to them, they started coming towards her. At this point, the defendant got down on his knees and begged her to forgive him. Meanwhile, M.L. told the people that he was trying to rape her and asked them to call the police. The defendant then told the people that everything was okay, grabbed his things, and left. He still had M.L.'s phone. The students called Tulane Security who arrived on the scene and then notified the New Orleans Police Department.

Detective Vernon Hayes of the New Orleans Police Department Sex Crimes Unit testified that he responded to the call in the 800 block of Hillary Street. When he arrived at the residence he spoke to the victim, M.L., who was still very shaken and crying. After interviewing the victim, Detective Hayes applied for a warrant

of arrest for the defendant. He then contacted a sergeant with the Jefferson Parish Sherriff's Office who was on staff at Louis Armstrong International Airport. Hayes informed the sergeant that he had obtained a warrant to arrest the defendant, and that the defendant was scheduled to fly out of the airport that day. Hayes provided the defendant's flight information to the sergeant on duty at the airport. Law enforcement officers located the defendant at the airport and arrested him.

The defendant testified on his own behalf at trial. He denied having sexual contact with the victim on the night in question. The defendant stated that they shared a bottle of wine at dinner, he had a small glass of the wine, and M.L. consumed the rest of it. While he was working on the computer, M.L. came into the room, she asked if he wanted to go to the French Quarter, and he agreed. The defendant stated that during the night they went to several clubs, and M.L. became quite intoxicated.

The defendant testified that M.L. refused to let him drive home and had difficulty operating the vehicle. The defendant stated that after they returned to M.L.'s house she changed, went to bed, and fell asleep while he worked on the computer. As he was leaving the room, he bumped the bed and woke her. The defendant stated that M.L. jumped out of the bed and started repeatedly telling him that he needed to leave. She was calling him "Joe," the name of her son's father, who the defendant claimed had been abusive to her. Then M.L. tried to strike him, and he blocked her hand.

The defendant packed his things and then went into the kitchen where he saw that M.L. was attempting to make a phone call. She stated that she was calling the police because he was still in her house. The defendant grabbed the phone from

her, and he explained that there was an old warrant for his arrest which was why he did not want the police to be called.

The defendant stated that when M.L. went to the front door he followed her, got on his knees, and he did everything he could to make her believe that he was not a threat to her. He explained that he hoped to bring peace to what otherwise was an escalating situation.

The defendant stated that M.L. was nearly calm until she saw the people approaching and became hysterical. She began crying and told them that she needed help. She repeated to Strickland that he needed to leave, and he grabbed his things and left.

The defendant stated that he went around the corner where he got a ride to a laundromat where he washed some clothes. Later, he went to the airport where he was arrested.

In his trial testimony, the defendant admitted having prior misdemeanor convictions for resisting an officer, battery on a police officer, and simple criminal damage.

ERRORS PATENT

A review of the record for errors patent reveals that the defendant was not arraigned after the bill of information was amended to charge him with sexual battery, La. R.S. 14:43.1. However, the defendant waived his right to object to this error when he proceeded with the trial on the merits. La. C.Cr.P. article 555.[1]

[1] La. C.Cr.P. article 555 provides that "[a]ny irregularity in the arraignment, including a failure to read the indictment, is waived if the defendant pleads to the indictment without objecting thereto. A failure to arraign the defendant or the fact that he did not plead, is waived if the defendant enters upon the trial without objecting thereto, and it shall be considered as if he had pleaded not guilty."

Further review of the record reveals that the trial court failed to impose statutory restrictions in sentencing the defendant. The defendant was sentenced to four years imprisonment for attempted sexual battery. The penalty provision for sexual battery, La. R.S. 14:43.1(C)(1), provides for imprisonment with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not more than ten years. The attempt statute, La. R.S. 14:27, requires that a person convicted under that statute be sentenced "in the same manner as for the offense attempted." The trial court did not specifically state the sentencing provisions within the criminal statute of La. R.S. 14:43.1. However, the error does not require corrective action. La. R. S. 15:301.1(A) self-activates the correction and eliminates the need to remand for ministerial correction of the sentences.[2] *State v. Williams*, 00-1725, p.10 (La. 11/28/01), 800 So.2d 790, 799. Therefore, no remand is necessary to correct this error.

The defendant's appellate counsel has filed a motion to withdraw as counsel of record after reviewing the entire appellate record and finding no trial court error to provide a basis for appeal. Counsel filed a brief asserting compliance with *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So.2d 241. Counsel moved to withdraw because he believes, after a conscientious and thorough review of the record, that there are no non-frivolous issues for appeal. Counsel submits that he reviewed the trial court record and found no trial court ruling that arguably supports the appeal. A copy of the brief was forwarded to the defendant, and this court informed him that he had the right to file a brief in his own behalf which he has done.

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[2] La. R.S. 15:301.1(A) provides, in pertinent part, "The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence."

Pursuant to *Benjamin*, this court has performed an independent thorough review of the pleadings, minute entries, bill of information, and the transcripts in the appeal record. The defendant was properly charged by bill of information. He was originally charged with attempted forcible rape which was later amended to sexual battery in violation La. R.S. 14:43.1. The jury returned a responsive verdict of attempted sexual battery.

The defendant was present for his March 11, 2011 arraignment on the charge of attempted forcible rape. As noted, the record does not reflect that the defendant was ever formally arraigned for the amended charge of sexual battery; however, he waived that error by proceeding to trial.

The defendant was present for selection of the jury and rendering of judgment on September 27, 2011. The record shows that the correct number of jurors – six – sat on the jury. Furthermore, a review of the trial transcript shows that the state provided sufficient evidence to prove beyond a reasonable doubt that the defendant was guilty of attempted sexual battery. The defendant's sentence was within statutory limits. Although there is no reference to the prohibition on parole, the sentence is otherwise legal. An independent review reveals no non-frivolous issue(s) and no trial court ruling that arguably supports the appeal. Accordingly, counsel's motion to withdraw is granted.

PRO SE ASSIGNMENTS OF ERROR NUMBERS 1 & 2

The defendant argues that his four-year sentence is excessive. However, the defendant acknowledges that his claim of excessive sentence has not been preserved for review because his attorney failed to either file a motion to

reconsider sentence or object to the sentence imposed.[3] Accordingly, the defendant argues that his lawyer's failure to do so constituted ineffective assistance of counsel.

In *State v. Mims*, 97-1500, pp. 44-45 (La. App. 4 Cir. 6/21/00), 769 So.2d 44, 72, this court discussed the standard to be used to evaluate an ineffective assistance of counsel claim:

> The defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See State v. Fuller, 454 So.2d 119 (La.1984). The defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove counsel was so ineffective as to require reversal. State v. Sparrow, 612 So.2d 191, 199 (La.App. 4 Cir.1992). Counsel's performance is not ineffective unless it can be shown that he or she made errors so serious that he or she was not functioning as the "counsel" guaranteed to the defendant by the 6th Amendment of the federal constitution. Strickland, supra, at 686, 104 S.Ct. at 2064. That is, counsel's deficient performance will only be considered to have prejudiced the defendant if the defendant shows that the errors were so serious that he was deprived of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 693, 104 S.Ct. at 2068.

See also *State v. Crawford*, 2002-2048, p. 26 (La. App. 4 Cir. 2/12/03), 848 So.2d 615, 631-32.

In order to establish prejudice, the defendant must show that he would have been entitled to relief had counsel taken steps to preserve the issue on appeal. Thus, in order to determine if the ineffective assistance of counsel claim has merit, this court must look to see if the appellant's excessive sentence claim has merit.

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[3] La. C.Cr.P. art. 881.1 mandates that a defendant file a motion to reconsider sentence within thirty days of sentencing in order to preserve for appeal any claim as to sentencing. This Court has held that the failure to file a motion to reconsider sentence or to object to the sentence at the time it is imposed precludes a defendant from

In *State v. Smith*, 2001-2574, pp. 6-7 (La.1/14/03), 839 So.2d 1, 4, the court set forth the standard for evaluating a claim of excessive sentence:

> Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o law shall subject any person to ··· excessive ···punishment." (Emphasis added.) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. State v. Sepulvado, 367 So.2d 762, 767 (La.1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. State v. Bonanno, 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. State v. Cann, 471 So.2d 701, 703 (La.1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. State v. Walker, 00-3200, p. 2 (La. 10/12/01), 799 So.2d 461, 462; cf. State v. Phillips, 02-0737, p. 1 (La. 11/15/02), 831 So.2d 905, 906.

See also *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672; *State v. Baxley*, 94-2982 (La. 5/22/95), 656 So.2d 973; *State v. Landry*, 2003-1671 (La. App. 4 Cir. 3/31/04), 871 So.2d 1235.

An appellate court reviewing a claim of excessive sentence must determine whether the trial court adequately complied with the statutory guidelines in La. C.Cr.P. art. 894.1, as well as whether the facts of the case warrant the sentence imposed. *State v. Landry*, at p.8, 871 So.2d at 1239; *State v. Trepagnier*, 97-2427, p.11 (La. App. 4 Cir. 9/15/99), 744 So.2d 181, 189. However, as noted in *State v. Major*, 96-1214, p. 10 (La. App. 4 Cir. 3/4/98), 708 So.2d 813, 819:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for

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raising a claim about his sentence on appeal. *State v. Rodriguez*, 2000-0519 (La. App. 4 Cir. 2/14/01), 781 So.2d 640, 647; *State v. Tyler*, 98-1667 (La. App. 4 Cir. 11/24/99), 749 So.2d 767, 775.

> excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D).

If the reviewing court finds adequate compliance with art. 894.1, it must then determine whether the sentence the trial court imposed is too severe in light of the particular defendant as well as the circumstances of the case, "keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged." *State v. Landry*, 2003-1671, at p. 8, 871 So.2d at 1239. See also *State v. Bonicard*, 98-0665, p.3 (La. App. 4 Cir. 8/4/99), 752 So.2d 184, 185.

The defendant was sentenced to four years at hard labor after he was convicted of attempted sexual battery. The maximum sentence the defendant could have received for his conviction was five years. The defendant argues that his sentence, which is near the maximum sentence available, is excessive given the fact that he is a first time felony offender.

Although the state did not allege that defendant had any convictions at his sentencing hearing, the state identified arrests for carjacking, possession of marijuana, illegal carrying of a weapon, simple battery of a police officer, unauthorized entry of an inhabited dwelling, possession of marijuana and drug paraphernalia. At trial, the defendant admitted to convictions for resisting an officer, battery on a police officer, and simple criminal damage, which may overlap with the defendant's arrest history.

Review of the record reflects that the trial court did not strictly comply with La. C.Cr.P. art. 894.1 as the court imposed sentence without comment. Nevertheless, the court was aware of the facts of the instant offense and the defendant's criminal history. Moreover, the record does not suggest that the sentence is grossly disproportionate to the seriousness of the offense committed or

that it constitutes needless infliction of pain and suffering. This is clear because the appellant's sentence does not appear to be excessive as compared to the sentences imposed and upheld in other sexual battery cases.

In *State v. Jones*, 45,450 (La. App. 2 Cir. 8/11/10), 46 So.3d 711, the defendant was convicted of the lesser included offense of sexual battery after being charged with simple rape. He was a first time felony offender. After the defendant was sentenced to eight years imprisonment, he argued on appeal that his sentence was excessive. In imposing the defendant's sentence, the trial court noted that the defendant acted without provocation and caused severe emotional and actual harm to the victim. The trial court also noted that the defendant's actions amounted to the higher charge of simple rape, which carried a potential sentence of twenty-five years. Thus, the trial court reasoned, the jury had already shown the defendant great leniency by finding him guilty of the lesser charge.

In affirming the defendant's sentence, the appellate court considered the nature of the defendant's actions and the impact of those actions on the victim, and it did not find that the sentence imposed by the trial court was so grossly disproportionate to the severity of the offense so as to shock the sense of justice.

Likewise, in *State v. Franklin*, 552 So.2d 1307 (La. App. 5 Cir. 1989), the defendant was charged with forcible rape, and the jury convicted the defendant of sexual battery, a responsive verdict. The trial court imposed the maximum sentence, ten years. The defendant was nineteen at the time of the offense and had two small children to provide for. The defendant's criminal history consisted of one prior misdemeanor conviction, which the trial court did not consider in imposing sentence. On appeal, the court found the sentence was not excessive despite the defendant's youth and first-offender status. The court noted that the

defendant could have been convicted of forcible rape, which carries a maximum penalty of forty years.

We find no abuse of the trial court's discretion in sentencing the defendant to a term of imprisonment for four years. The defendant has not established that he was prejudiced by his counsel's failure to preserve his sentencing claim for appeal. The defendant's claim of ineffective assistance of counsel lacks merit.

CONCLUSION

After an independent thorough review of the record as mandated by *State v. Benjamin,* 573 So.2d 528 (La.App. 4 Cir.1990) (interpreting *Anders),* we affirm the defendant's sentence and conviction. The appellant counsel's motion to withdraw is granted.

AFFIRMED