NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2018-KA-0578**
VERSUS	*	
		COURT OF APPEAL
JORGE SANCHEZ-RODRIQUEZ	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 518-633, SECTION "D"
Honorable Paul A Bonin, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Dale N. Atkins)

LOBRANO, J., CONCURS IN THE RESULT AND ASSIGNS REASONS.
ATKINS, J., CONCURS IN THE RESULT

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CONVICTION AFFIRMED; REMANDED FOR RESENTENCING
DECEMBER 12, 2018

Jorge Sanchez-Rodriguez ("Mr. Rodriguez") appeals his conviction and sentence for sexual battery. We find the evidence submitted at trial is sufficient to support the conviction. However, while Mr. Rodriguez's sentence falls within the legal parameters of La. R.S. 14:43.1(C)(2), we find the trial court based the sentence, in part, on an incorrect interpretation of the facts and an impermissible sentencing consideration. Therefore, we affirm Mr. Rodriguez's conviction and remand the matter to the trial court for resentencing consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2013, the victim L.A.[1] lived with her mother, father, and older brother in New Orleans. At the time of the incident, the victim was four years old. Mr. Rodriguez, who L.A. and her family knew as "TeeTee," lived next door with his wife Melania Sanchez ("Mrs. Sanchez"), and their five-year old daughter. From time to time, Mr. Rodriguez's daughter A.S. and the victim would play

[1] The victim was four years old at the time of the offense and eight years old at the time of trial. Her initials, and those of certain family members and other minors, are used pursuant to La. R.S. 46:1844(W)(3) which allows the court to protect the identity of a crime victim, who is a minor or a victim of a sex offense, by using her initials.

together.

In early October 2013, Mrs. Sanchez, accompanied by her daughter, went to the victim's house seeking assistance from L.A.'s mother L.F., in translating some documents. L.F. allowed her daughter L.A. to visit Mr. Rodriguez's residence for a play date with A.S. Shortly thereafter, A.S. returned to the victim's residence crying and without the victim. When L.F. asked A.S. why she was crying she replied: "My dad sent me here." L.F. then learned her daughter was still with Mr. Rodriguez at his residence. L.F. subsequently sent her son J.A. next door to find his sister. When J.A. entered Mr. Rodriguez's residence, he saw L.A. naked and lying on the floor crying. J.A. testified that he also observed Mr. Rodriguez seated on the sofa "wrapped up in a blanket…all over his body." When he returned home with his sister, L.A. was crying.

L.A. eventually explained to her mother that "TeeTee" touched her "peepee," her breasts, called her "Mommy," and "put [his] thing on/in my mouth." L.F. observed red spots on the areas the victim mentioned. On the same date, L.A. was taken to Ochsner Hospital, where she was directed to Children's Hospital for an examination and testing.

Detective Nakeisha Barnes ("Detective Barnes") of the NOPD Child Abuse Unit was the lead investigator in this matter. Detective Barnes was notified of the incident involving L.A. by the responding patrol officer, who provided Detective Barnes with specifics of the incident. Detective Barnes relocated to Children's Hospital where she met with L.A. and her parents. She also spoke with the

victim's treating physicians and learned through her investigation that L.A. suffered a sexual assault by Mr. Rodriguez, her next-door neighbor. Detective Barnes arranged for L.A. to undergo a sexual assault/forensic examination, which included swabs of various parts of her body that were preserved for DNA analysis.

Ann Troy ("Nurse Troy"), a pediatric forensic nurse practitioner at Children's Hospital specializing in child abuse, conducted the forensic examination of L.A. on October 12, 2013, at the Child Advocacy Center (CAC). Prior to conducting the examination, Nurse Troy reviewed the victim's medical records which included an emergency room record. Nurse Troy obtained other medical and social history of the victim from the victim's mother L.F. and later authored a report of her examination of L.A. and the conclusion drawn from her observations. At trial, Nurse Troy testified that she performed a physical examination of L.A. and reviewed with L.A. an anatomically correct drawing of a child's body to ascertain the areas of L.A.'s body affected during the incident. She also identified the tape recording of her interview and examination of L.A. She testified that a translator was in the room to assist in bridging the language barrier as L.A. spoke in Spanish and English. The recording was played in court for the jury.[2] In the interview, L.A. explained to Nurse Troy that Mr. Rodriguez licked her breasts and digitally penetrated her vagina. Nurse Troy also testified that she did not detect any indications that L.A.'s testimony of the incident was coached. In fact, Nurse Troy stated that a four-year-old has no cognitive ability or frame of

[2] The jury was provided a transcript of the recording to follow along with as the tape was played.

reference to fabricate a story of sexual abuse.

After speaking with the victim, her family, the treating physicians and Nurse Troy, Detective Barnes obtained an arrest warrant for Mr. Rodriguez. Following his arrest, a search warrant was obtained for a buccal swab from Mr. Rodriguez. The reference sample was obtained and submitted into evidence.

Julia Naylor ("Ms. Naylor"), an expert in the field of DNA analysis employed by the Louisiana State Police Crime Lab, received and tested the contents of the sexual assault kit compiled in this case and authored a report on her findings. The sexual assault kit contained vaginal and oral swabs; two tubes of reference blood; left and right hand fingernail scrapings; and dried secretion gauze, all obtained from the victim on the day of the incident.

The test results from the dried secretion gauze indicated there was more than one contributor of DNA to the gauze. The major contributor was the victim, but the minor contributor was present at such a low concentration, that a valid DNA profile could not be obtained, except to note that the minor contributor was a male.

Testing of the genital swabbing gauze was consistent with a mixture of DNA from at least two male individuals, but again, there was such a limited profile generated, Ms. Naylor could neither include nor exclude Mr. Rodriguez, or any other male individuals in his biological paternal lineage, as the contributor of the DNA. When questioned how such an anomaly could occur, Ms. Naylor opined: "Two males came in contact with the genital area. One male came in contact with the genital area; one male came in contact with the genital swab. There are a

million different scenarios." Because there was not enough DNA present on the swab to obtain a valid profile of the contributor, the results were inconclusive.

L.A., eight years old at the time of trial, took the witness stand, but would not testify. Although she stated that she remembered the incident and recalled going to the hospital, L.A. would not talk about what happened to her. A.S., Mr. Rodriguez's daughter, was also called as a witness but was allegedly too frightened to testify.

Melania Sanchez, Mr. Rodriguez's wife, testified that she and Mr. Rodriguez had been together since 2007 and had two daughters. Mrs. Sanchez stated that the victim and the victim's family were neighbors at the time of the incident. Mrs. Sanchez stated that A.S. and the victim played together frequently at both homes. Mrs. Sanchez indicated that the girls were never alone when playing at her house because she was always present watching them. She recalled that whenever L.A. came to her house to play with A.S., L.A. was rebellious and would misbehave. Mrs. Sanchez said L.A. would jump on the beds and furniture, and spill baby powder in the house. On one occasion, Ms. Sanchez stated she went into the bedroom and found L.A. had removed A.S.'s clothes and both girls were lying next to one another naked. Ms. Sanchez testified that she chastised the girls and reported the incident to L.A.'s mother, but she did not seem concerned. According to Mrs. Sanchez, L.F. became very angry for accusing her daughter.

Mr. Rodriguez also testified in his defense at trial and denied harming L.A. He explained that he came to the United States from Honduras and worked as a

welder in Baton Rouge until the time of his arrest. He stated that L.A. would come to his house frequently to play with his daughter. He also said L.A., unlike his daughter, was not well-behaved. Additionally, he indicated that the victim was hyperactive and not an obedient child. Mr. Rodriguez also corroborated his wife's testimony about the two girls naked in the bedroom. He testified that his daughter told him that the victim had touched her (A.S.'s) "peepee." Mr. Rodriguez testified that he forbid his daughter to have anything more to do with the victim.

Conversely, L.F. testified that at no time before the day of the incident was the victim ever allowed to play at Mr. Rodriguez's residence. She also denied that Mr. Rodriguez complained to her about L.A.'s behavior. L.F. testified that following the incident, she and her family lived next door to Mr. Rodriguez and his family for the next two years and were subjected to threats and property damage on a regular basis.

As a result of the October 2013 incident, the State charged Mr. Rodriguez with aggravated rape of L.A. in violation of La. R.S. 14:42. Following a two-day trial, a unanimous jury found Mr. Rodriguez guilty of sexual battery, a violation of La. R.S. 14:43.1(A)(1). He was subsequently sentenced to 35 years at hard labor, the first 25 years to be served without the benefit of parole, probation, or suspension of sentence. Mr. Rodriguez files this timely appeal, seeking review of his conviction and sentence.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, Mr. Rodriguez complains the evidence is insufficient to support his conviction because there was no physical evidence linking him to the crime.

"The constitutional standard for testing the sufficiency of the evidence, enunciated in *Jackson v. Virginia*," 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), "requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt." *State v. Rosiere*, 488 So.2d 965, 968 (La. 1986). However, the reviewing court may not disregard this duty "simply because the record contains evidence that tends to support each fact necessary to constitute the crime." *State v. Mussall*, 523 So.2d 1305, 1311 (La. 1988). "The reviewing court must consider the record as a whole since that is what a rational trier of fact would do." *State v. Shaw*, 07-1427, p. 15 (La. App. 4 Cir. 6/18/08), 987 So.2d 398, 407, *quoting State v. Ragas*, 98-0011, p. 13 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, 107. "If rational triers of fact could disagree as to the interpretation of the evidence, the rational triers' view of all the evidence most favorable to the prosecution must be adopted." *State v. Egana*, 97-0318, p. 6 (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 228. "The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is

contrary to the weight of the evidence." *State v. Smith*, 600 So.2d 1319, 1324 (La. 1992).

Further, when circumstantial evidence forms the basis of the conviction, such evidence must consist of "proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience." *State v. Shapiro*, 431 So.2d 372, 378 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. *Id*.; La. R.S. 15:438. This is not a separate test from *Jackson v. Virginia*, but rather "an evidentiary guideline … [to] facilitate[] appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt." *State v. Wright*, 445 So.2d 1198, 1201 (La. 1984). All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs*, 504 So.2d 817, 820 (La. 1987). Additionally, the function of an appellate court is not to "evaluate the credibility of the witnesses and to overturn the [jury] on its factual determination of guilt." *State v. Richardson*, 425 So.2d 1228, 1232 (La. 1983). "In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness' testimony, if believed by the trier of fact, is sufficient support for the requisite factual findings." *State v. Turner*, 03-325, p. 8 (La. App. 5 Cir. 6/19/03), 850 So.2d 811, 816, *citing State v. Rivers*, 01-1251, pp. 6-7 (La. App. 5 Cir. 6/19/03), 817 So.2d 216, 219.

La. R.S. 14:43.1(A)(1) defines sexual battery, in pertinent part, as "the intentional touching of the anus or genitals of the victim by the offender using any

instrumentality or any part of the body of the offender ... without the consent of the victim."

In this case, the four-year-old victim immediately reported to her mother what Mr. Rodriguez had done to her. Likewise, L.A. reported to Nurse Troy that Mr. Rodriguez licked her breasts and digitally penetrated her vagina. The evidence also shows that L.A. was at Mr. Rodriguez's house, naked and crying on the floor when her brother found her. Her brother also testified that at the time he found his distraught sister, Mr. Rodriguez was seated on the sofa covered with a blanket. Additionally, Mr. Rodriguez's daughter returned to L.A.'s house in an emotional state and reported to L.A.'s mother that Mr. Rodriguez sent her to L.A.'s residence while L.A. remained with Mr. Rodriguez. Further supporting the victim's statement was the testimony of Nurse Troy that a child of L.A.'s age has no cognitive ability or frame of reference to fabricate a story of sexual abuse in such detail. Moreover, the jury heard and saw Mr. Rodriguez testify that he did not assault L.A. and never touched her. The jury, as the trier of fact, chose to accept the victim's testimony. The record contains sufficient evidence to support Mr. Rodriguez's conviction for sexual battery. This assignment has no merit.

EXCESSIVE SENTENCE

In his second assignment of error, Mr. Rodriguez argues his sentence is excessive considering he has no criminal history.

The transcript in this case does not indicate that Mr. Rodriguez filed a motion to reconsider sentence. *See* La. C.Cr.P. art. 881.1. In order to preserve for

appeal any claim as to sentencing, a defendant must file a motion to reconsider sentence within thirty days of sentencing. La. C.Cr.P. art. 881.1(E). This Court has held that "the failure to file a motion to reconsider sentence *or* object to the sentence at the time it is imposed precludes a defendant from raising a claim about his sentence on appeal." *State v. Stewart*, 04-2219, p. 9-10 (La. App. 4 Cir. 6/29/05), 909 So.2d 636, 641.

In this case, although Mr. Rodriguez did not file a motion to reconsider sentence, the record indicates that after the trial court imposed sentence, defense counsel objected to the sentence. This Court has found that "an objection lodged after sentencing is sufficient to preserve the claim of constitutional excessiveness." *State v. Robair*, 13-0337, p. 8 (La. App. 4 Cir. 1/15/14), 133 So.3d 96, 102. Given defense counsel's objection to the sentence and the trial court's acknowledgment of the objection, the issue of excessiveness of sentence has been preserved for review.

The Louisiana Supreme Court, in *State v. Smith*, 01-2574, pp. 6-7 (La. 1/14/03), 839 So.2d 1, 4 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.

Additionally, in its review of a claim of excessive sentence, "an appellate court must determine whether the trial court 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. *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, "the reviewing court must 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].'" *State v. Bell*, 09-0588, p. 4 (La. App. 4 Cir. 10/14/09), 23 So.3d 981, 984, *quoting State v. Ross*, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So.2d 757, 762. However, even where there has not been full compliance with La. C.Cr.P. art. 894.1, resentencing is unnecessary where the record shows an adequate factual basis for the sentence imposed. *State v. Stukes*, 08-1217, p. 25 (La. App. 4 Cir. 9/9/09), 19 So.3d 1233, 1250, *quoting State v. Major*, 96-1214, p. 10 (La. App. 4 Cir. 3/4/98), 708 So.2d 813, 819.

Pursuant to La. R.S. 14:43.1(C)(2), "[w]hoever 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. At least twenty-five years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence." The sentence imposed in this case is within the range provided by the legislature. "For legal sentences imposed within the range

provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e. when it imposed 'punishment disproportionate to the offense.'" *State v. Soraparu*, 97-1027 (La. 10/13/97), 703 So.2d 608, *quoting State v. Sepulvudo*, 367 So.2d 762, 767 (La. 1979).

In 2006 La. Acts No. 103, § 1, the sentencing provisions for sexual battery, La. R.S. 14:43.1(C); second degree sexual battery, La .R.S. 14:43.2(C); oral sexual battery, La. R.S. 14:43.3(C); pornography involving juveniles, La. R.S. 14:81.1(E); and molestation of a juvenile, La. R.S. 14:81.2(E), were amended or enacted to provide for a mandatory minimum sentence of twenty-five years at hard labor, with at least twenty-five years of the sentence to be served without benefit of parole, probation, or suspension of sentence, when the victim of the offense is under the age of thirteen and the offender is seventeen years of age or older. "The Louisiana Legislature has long recognized the need to protect our most innocent and defenseless citizens and has enacted statutory provisions to protect children from sexual offenders and predators." 2006 La. Acts No. 325, § 1.

In sentencing Mr. Rodriguez, the trial court noted:

> . . . the little victim's statements in the case that were heard by the jury and heard by me were very compelling on the charge for which the jury found you guilty, which was sexual battery of a child under 13 years old.
>
> The evidence which was not in any way challenged was that a male in your family had left DNA on the child who was under five years' old underwear. I think the jury listened very carefully to the evidence . . . that resulted . . . in the jurors, rejecting the far more serious charge which could have resulted in a life sentence.
>
> And I very much agree . . . with the jury's verdict, that rape was not proven but that sexual battery on a child under 13 was proved beyond a reasonable doubt. . . I think that any person such as yourself who exhibits this kind of behavior, touching such a small child in a sexual manner, is at a very high risk of reoffending and requires custodial incarceration or a custodial environment.

> What you did to the little girl, in my mind is, you destroyed her self-worth and her self-confidence. You have made her – found her – she was particularly vulnerable victim, and the damage that you have done to her is likely permanent.
>
> . . . you subjected her to trauma . . . it was wholly unnecessary to bring her before the jury, and in a way, retraumatizing her.
>
> I'm especially concerned about this because I find that you did it with your own daughter, who I don't believe had anything to say that would have been helpful to you. . . she didn't say anything that was helpful. And I think she was traumatized having to come through this process.
>
> . . . you had no prior [criminal] history and I'm unaware of any, and I have considered that. And I have . . . taken into consideration regrettably the hardship that this is going to cause to your family. . . it's very sad that your family must suffer along with you, but I consider you too much of a danger not to give you a long prison sentence.
>
> * * *
>
> I now sentence you to serve 35 years in the custody of the Department of Corrections, 25 of those years to be served without the benefit of probation, parole, or suspension of sentence. And that the sentence be credited for all time served to date. . .

While the trial court complied with La. C.Cr.P. art. 894.1 by articulating its reasons for sentencing, we find the factual basis upon which the trial court relied is unsupported by the record. The trial court relied on its incorrect interpretation of the facts presented at trial relating to the DNA analysis. Namely, the trial court stated that the DNA evidence demonstrated that a male in Mr. Rodriguez's family left DNA on the victim's underwear. There is no such evidence in the record.

The evidence presented at trial showed that vaginal and oral swabs taken from L.A. contained DNA consistent with L.A., but there was either no male DNA or insufficient male DNA to develop a profile from either swab. The genital swabbing gauze contained a mixture of DNA from at least two male individuals. However, Ms. Naylor testified due to the limited nature of the profile generated, she could neither include nor exclude Mr. Rodriguez or any other male in his biological paternal lineage. This evidence is not the same as finding DNA that

belonged to Mr. Rodriguez or one of his male family members on the victim's underwear. Likewise, the only mention of underwear by Ms. Naylor was in response to the State's question about DNA samples in general.[3] Further, the sample actually tested in this case was not taken from the victim's underwear, nor could Mr. Rodriguez be included or excluded as the contributor to the samples that were tested. Thus, to the extent the trial court's sentencing decision was based on the incorrect belief that a DNA match was made of Mr. Rodriguez and the victim's underwear, the trial court erred.

Additionally, the trial court considered as an aggravating circumstance the fact that the victim was called to testify at trial when the tape of her statement could have been used instead. At the sentencing hearing the trial court stated:

> I also cannot overlook in this case that you subjected her to trauma. You had given a statement in the case, and I think your attorney very ably exploited issues in the statement and that it was wholly unnecessary to bring her before the jury, and in a way retraumatizing her.
>
> I'm especially concerned about this because I find that you did it with your own daughter, who I don't believe had anything to say that would have been helpful to you. …

The fact that the victim was called to testify at trial is not one of the enumerated sentencing factors listed under La. C.Cr.P. art. 894.1. Moreover, the record shows it was the State who called the victim to testify in this case. After the victim indicated she did not want to talk about the incident, the State tendered the witness. Defense counsel stated that he had nothing to ask of the victim.

We find the evidence is sufficient to support Mr. Rodriguez's conviction, and the sentence imposed and falls within the sentencing guidelines of La. R.S.

[3] The State questioned Ms. Naylor regarding what constitutes an "intimate sample." Ms. Naylor testified that "…anything that would have skin cells that would be swabbed directly. We also consider a pair of underwear to be an intimate sample if they were removed from that person."

14:43.1(C)(2). However, the trial court relied on an incorrect interpretation of the facts presented at trial and impermissible sentencing considerations in the imposition of Mr. Rodriguez's sentence. Accordingly, the matter is remanded is for resentencing.

DECREE

We find the evidence submitted at trial is sufficient to support Mr. Rodriguez's conviction for sexual battery, in violation of La. R.S. 14:43.1. We also find that the sentence imposed falls within the legal parameters of La. R.S. 14:43.1(C)(2). However, the factual basis upon which the trial court relied to sentence Mr. Rodriguez was based, in part, on an incorrect interpretation of the facts and an impermissible sentencing consideration. Therefore, we affirm Mr. Rodriguez's conviction and remand the matter to the trial court for resentencing in line with this opinion.

CONVICTION AFFIRMED;
REMANDED FOR RESENTENCING