

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1169

STATE OF LOUISIANA

VERSUS

BRANDON DALE KING

Judgment Rendered: December 21, 2011

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 428484

THE HONORABLE ALLISON H. PENZATO, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

The defendant, Brandon Dale King, was charged by bill of information with aggravated incest (count one) and oral sexual battery (count two), violations of La. R.S. 14:78.1 and La. R.S. 14:43.3. He entered a plea of not guilty. After a jury trial, the defendant was found guilty as charged. The trial court denied the defendant's motion for post verdict judgment of acquittal and motion for new trial. On count one, the defendant was sentenced to ten years imprisonment at hard labor and a five thousand dollar fine. On count two, he was sentenced to ten years imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence, with the sentences to run concurrently. The trial court noted the requirements for the defendant to register as a convicted sex offender and the application of La. R.S. 15:537(A) (precluding eligibility for diminution of sentence for good behavior). The defendant now appeals, challenging the trial court's denial of his motion to introduce a police report of sexual battery made by the victim against another person, and the trial court's denial of his motion to reconsider sentence. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

According to M.K.¹ (the victim), on some unknown date in 2005, her friend's father committed suicide, and wanting to talk to someone about it, she confided in the defendant, her older stepbrother.² The defendant began to "tickle" her everywhere and grabbed her "private." The defendant then put the victim over his shoulder and took her into his bedroom, closed the door, and placed her on the

¹ Herein, the victim was eleven years old at the time of the offense and seventeen years old at the time of the trial. To protect her identity, initials will be used to reference the victim's name. See La. R.S. 46:1844(W).

² According to the victim, she was under the impression that the defendant, who was twenty-eight years old at the time, was her biological brother when the offense occurred and was subsequently informed by the defendant that she had been adopted by his father after he married her mother.

bed. The defendant pulled down his pants and made the victim perform oral sex on him. The victim specified that the defendant stuck his penis in her mouth and told her to “suck on it” and “white stuff came out.” Only the victim and the defendant were present in the home at the time of the offenses. The victim further indicated that the defendant at one point told her that she would get in trouble if she told anyone about the incident. The victim stated that she was afraid of the defendant and that she initially did not tell anyone about the incident because she was afraid of what people would think of her and that they would not believe her. The victim ultimately told her friend, her sister, and her mother about the incident.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues the trial court erred in denying his motion to introduce the victim’s April 10, 2010 police report of sexual battery that she alleged to have been committed on April 8, 2010 by another individual. The defendant notes the victim delayed reporting the alleged abuse in the instant case but immediately reported the apparently valid complaint of sexual abuse by another perpetrator.³ The defendant argues the delay by the victim in reporting the alleged acts of the defendant to her family members calls into question her credibility in light of the fact that she reported the other incident immediately to family members and law enforcement. The defendant also notes the introduction of past sexual behavior may be allowed for impeachment purposes. Noting that this case rested upon the trier of fact’s perception of the victim’s veracity, the defendant argues the trial court’s denial of the introduction of the victim’s immediate report of the other allegation was not harmless error. In a prosecution for sexually assaultive behavior, La. Code Evid. art. 412 prohibits the introduction of evidence of the victim’s past sexual behavior, with certain

³ As noted by the defendant in his brief, in the other case, the perpetrator made incriminating statements by text message contending that the victim consented to the act.

limited exceptions. "Past sexual behavior" is defined as sexual behavior other than the sexual behavior with respect to which the offense of sexually assaultive behavior is alleged. La. Code Evid. art. 412(F). If a defendant wishes to offer evidence of past sexual behavior pursuant to one of the exceptions, he must file a motion stating his intent to do so. La. Code Evid. art. 412(C). The trial court must then hold a closed hearing to determine whether the offered evidence is admissible. La. Code Evid. art. 412(E).

However, the Louisiana Supreme Court has held that a defendant may present evidence that a victim made prior false allegations regarding sexual activity for impeachment purposes pursuant to La. Code Evid. art. 607(C). **State v. Smith**, 98-2045 (La. 9/8/99), 743 So.2d 199. In **Smith**, the defendant was convicted of attempted indecent behavior with a juvenile. During trial, the defense counsel cross-examined the victim's mother's friend regarding similar accusations the victim had made against her cousin and then allegedly recanted. The State thereafter moved to prevent any further such questioning of the witness in accordance with La. Code Evid. art. 412. After a hearing outside the jury's presence, the trial court applied Article 412 and excluded any evidence of prior false allegations. The Supreme Court held that Article 412, the "rape shield statute" that prohibits the introduction of evidence of the victim's past sexual behavior, does not preclude the introduction of evidence of the victim's prior false accusations for impeachment purposes. The Supreme Court concluded that, when a defendant seeks to introduce evidence that the victim made prior false allegations of molestation, the issue is one of credibility, and Article 412 is inapplicable. **Smith**, 743 So.2d at 202-04.

Thus, two requirements exist before evidence of prior sexual activity can be admitted for impeachment purposes. First, the activity must be of a sexual nature.

Second, there must be evidence that the statement is false. **State v. Richard**, 01-1112 (La. App. 1st Cir. 2/15/02), 812 So.2d 737, 739, writ denied, 02-1264 (La. 11/22/02), 829 So.2d 1038. Assuming this initial burden is met, all other standards for the admissibility of evidence apply. **Smith**, 743 So.2d at 203-04.

Constitutional guarantees do not assure the defendant the right to the admissibility of any type of evidence, only that which is deemed trustworthy and has probative value can be admitted. **State v. Governor**, 331 So.2d 443, 449 (La. 1976). "Relevant evidence" is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than without the evidence. La. Code Evid. art. 401. The trial court in deciding the issue of relevancy must determine whether the evidence bears a rational connection to the fact at issue in the case. **State v. Williams**, 341 So.2d 370, 374 (La. 1976). Except as limited by the Code of Evidence and other laws, all relevant evidence is admissible and all irrelevant evidence is inadmissible. La. Code Evid. art. 402. Although relevant, evidence may nonetheless be excluded if the probative value is substantially outweighed by its prejudicial effect. La. Code Evid. art. 403. A trial court's determination regarding the relevancy and admissibility of evidence will not be overturned on appeal absent a clear abuse of discretion. **State v. Easley**, 432 So.2d 910, 912 (La. App. 1st Cir. 1983).

In the instant case, the defendant filed a pretrial "Code of Evidence Art. 412 Motion." As stated in the motion, noted by the defense at the hearing on the motion, and again conceded on appeal, the victim's other complaint of sexual abuse appears to be valid, and the defense is not making a claim that the complaint was false. Before denying the motion, the trial court reviewed **State v. Smith** and Article 412 and in pertinent part stated, "Well, you've admitted that the prior

allegation that you seek to introduce, and actually, it is a subsequent allegation ... but that that allegation, you contend, is true.” The defense responded, “Absolutely,” and the trial court added, “So based upon that fact, I don’t think *State versus Smith* is applicable, and you have not shown me any other exception to [Article] 412 which would allow for the admissibility of that evidence.”

In **Smith**, the victim admitted that she made prior accusations of improper sexual behavior, and two witnesses corroborated that fact. At least one independent witness testified that the victim recanted those accusations. **Smith**, 743 So.2d at 200-01, 203. As noted by the trial court, **Smith** is distinguishable from the instant case in that the defense herein did not claim or offer any evidence that the victim ever retracted the other allegation of abuse, and, in fact, conceded that the allegation was not false. Instead, the defense sought to introduce the evidence because the incident was reported immediately while the victim’s report of the instant offense was delayed. Obviously the defendant has not produced sufficient evidence from which a jury could reasonably conclude that the victim made a false accusation of sexual behavior. Moreover, the defense sought to introduce the evidence to support a highly speculative argument, lending the evidence minimal relevance, if any. Its probative value would be greatly outweighed by its prejudicial effect in violation of Article 403. Therefore, we find the trial court did not err or abuse its discretion in denying the defendant's motion and in excluding the evidence. Assignment of error number one lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant argues the trial court erred in denying his motion to reconsider an excessive sentence. The defendant notes that he was sentenced to the statutory maximum term of imprisonment for the oral sexual battery conviction on count two. The defendant contends the trial court

failed to adequately consider the following mitigating circumstances: he graduated from high school and had a solid work history; he was employed at the time of the arrest; and he had no prior criminal history. The defendant further contends the trial court failed to adequately consider the sentencing guidelines in La. Code Crim. P. art. 894.1. The defendant argues there were insufficient aggravating circumstances to warrant the sentences imposed, and the sentence constituted cruel and unusual punishment and a needless imposition of pain and suffering.

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. 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 the trial court must consider when imposing sentence. While the entire checklist of La. Code Crim. P. art. 894.1 need not be recited, the record must reflect that the trial court adequately considered the criteria. **State v. Brown**, 02-2231 (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 court 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).

Pursuant to the version of La. R.S. 14:78.1 in effect at the time of the offense, "A person convicted of aggravated incest shall be fined an amount not to exceed fifty thousand dollars, or imprisoned, with or without hard labor, for a term not less than five years nor more than twenty years, or both." And, "[w]hoever commits the crime of oral sexual battery shall be punished by imprisonment, with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not more than ten years." La. R.S. 14:43.3(C) (as denoted at the time of the offense). In the instant matter, the defendant was sentenced to ten years imprisonment at hard labor and a five thousand dollar fine for the aggravated incest conviction, and to the maximum sentence of ten years imprisonment at hard labor, without the benefit of probation, parole, or suspension of sentence for the oral sexual battery conviction. This court has stated that maximum sentences permitted by statute may be imposed only for the most serious offenses and the worst offender or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Hilton**, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 00-0958 (La. 3/9/01), 786 So.2d 113.

Before imposing sentence in this case, the trial court noted that the defendant has no prior convictions. The court also noted the victim's age and the circumstances of the case, including the fact that the defendant is the victim's stepbrother and that the victim went to the defendant for consolation at the time of the offenses. The significant negative impact the offenses had on the victim was also considered by the trial court. At the trial the victim testified that the incident caused conflict within her family. At the time of the offenses the victim was merely eleven years old while the defendant was twenty-eight years old. The defendant, whom the victim had revered and believed to be her biological brother, exposed the victim to acts of which she had no prior experience or knowledge. After the offenses, the victim was in turmoil and began cutting her arms with sharp objects in an effort to stop the pain and to feel "a different pain." The trial court noted the defendant knew or should have known that the victim was vulnerable or incapable of resisting due to her extreme youth. Further, the court noted the defendant used his position of trust with the victim to facilitate the offenses.

The trial court adequately considered the factors set forth in Article 894.1. Considering the trial court's careful review of the circumstances and the nature of the crimes, we find no abuse of discretion. The trial court provided ample justification in imposing the sentences, including the maximum sentence for the defendant's offense of oral sexual battery of his stepsister. The defendant exploited a position of trust he held with the victim; thus, the maximum sentence was not excessive. See State v. Kirsch, 02-0993 (La. App. 1st Cir. 12/20/02), 836 So.2d 390, 395-96, writ denied, 03-0238 (La. 9/5/03), 852 So.2d 1024. We find this to be the worst type of incident of oral sexual battery and the defendant to be the worst type of offender. See State v. Mickey, 604 So.2d 675, 679 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993); see also State v. Herrin, 562

So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). The sentences imposed are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive. This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.