NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

STATE OF LOUISIANA

FIRST CIRCUIT

2008 KA 0489

STATE OF LOUISIANA

VERSUS

DANNY GRAVES

Judgment rendered: SEP 12 2008

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On Appeal from the 22nd Judicial District Court
Parish of Washington, State of Louisiana
Docket Number 06 CR10 94826; Division: Criminal
The Honorable William J. Knight, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

DOWNING, J.

Defendant, Danny Graves, was charged by bill of information with three counts of contributing to the delinquency of a juvenile, violations of La. R.S. 14:92(A)(7), and with one count of molestation of a juvenile, a violation of La. R.S. 14:81.2(C). Defendant entered a plea of not guilty; he was tried before a jury. The jury determined defendant was guilty of one count of attempted contributing to the delinquency of a juvenile and of one count of attempted molestation of a juvenile. The jury acquitted defendant of the remaining two counts of contributing to the delinquency of a juvenile.

The trial court sentenced defendant to a term of one year at hard labor for his conviction for attempted contributing to the delinquency of a juvenile and to nine years at hard labor for his conviction of attempted molestation of a juvenile. The trial court ordered these sentences to be served concurrently.

Defendant appeals, asserting the following assignments of error:

> 1. The evidence was legally insufficient to convict the defendant of [these offenses], both of which require proof that the defendant was over the age of seventeen at the time of the commission of these alleged offenses, where no evidence was put forth regarding the defendant's age.
>
> 2. The trial court erred in refusing to grant the defendant's motion for a post-verdict acquittal, where the evidence was legally insufficient.
>
> 3. The trial court abused its discretion in giving the defendant an excessive sentence and in refusing to reconsider the sentence.

We affirm defendant's convictions and his sentence for his conviction of attempted contributing to the delinquency of a juvenile. However, due to the existence of sentencing error, we vacate defendant's sentence for his conviction of attempted molestation of a juvenile and remand this matter for resentencing.

FACTS

By February 14, 2006, defendant was living with R. S. in her residence at 14105 McBeth Road in Bogalusa. R.S.'s fifteen-year-old daughter, E.S., also

resided at the residence, along with defendant's two daughters, K.G., who was twelve years old, and J.G., who was nineteen years old.

On the morning of February 14, 2006, E.S. stayed home from school because she was not feeling well. R.S. was not home because she had a doctor's appointment. Sometime that morning, a friend of E.S.'s called her cell phone to check on her. As E.S. hung up, defendant entered her bedroom. E.S. pretended to be asleep as she lay on her stomach in bed. Defendant approached her, raised her shirt, and began to rub E.S.'s back. Defendant then placed his hand underneath E.S.'s pants and began to rub her buttocks. Defendant suddenly stopped and left the room when a phone in another area of the house rang. E.S. then phoned her mother and indicated that she wanted to attend school that day. A short time later, defendant drove E.S. to school; however, some type of argument occurred between them when defendant told E.S. she could not take her cell phone to school with her.

Following her arrival at school, E.S. told a friend about what defendant had done to her in her bedroom. E.S.'s friend immediately suggested E.S. speak with the school's guidance counselor, K.K. Warner and brought her into the office.

Warner was the guidance counselor for Bogalusa High School. Prior to becoming a guidance counselor, Warner worked as a social worker and was employed by the Office of Child Services. Warner noted that E.S. was upset and crying when she entered her office. Although E.S. appeared initially reluctant to speak to Warner, E.S. eventually disclosed that defendant had been inappropriately touching her.

E.S. described how two months earlier, defendant began rubbing her breasts and buttocks and different areas of her body. When Warner inquired about the last time defendant had done something to her, E.S. described what had occurred

earlier that day. E.S. also told Warner that during this incident, defendant was kissing her breasts.

Prior to E.S.'s revelations, Warner had already noticed a change in her behavior. Beginning approximately two months earlier, E.S. began coming into the school health center with symptomatic illnesses, such as headaches and stomachaches, and her grades began dropping.

Warner reported E.S.'s allegations to the Washington Parish Office of Child Services (OCS). Warner provided counseling to E.S. following this disclosure. According to Warner, E.S. never indicated that she fabricated her allegations out of any anger directed at defendant, nor did Warner have any reason to suspect E.S.'s allegations were less than truthful.

Chris Herrington, a child protection investigator with the Washington Parish OCS, received Warner's report on February 15, 2006. After receiving the report, Herrington went to Bogalusa High and interviewed E.S. After E.S. reiterated the allegations of sexual abuse by defendant, Herrington then went to speak with Rebecca Smith at her residence. Upon Herrington's arrival, defendant left.

Herrington and Smith walked next door to R.S.'s mother's residence where Herrington explained E.S.'s allegations to R.S. and emphasized the need to protect E.S. Through Herrington, R.S. first learned of her daughter's revelations about defendant. R.S. testified that she had previously "caught" defendant coming out of E.S.'s bedroom one night and he appeared startled to see her. She and defendant had "words" about the episode because she felt defendant should not have been in E.S.'s room.

According to Herrington, R.S. initially appeared very angry at the prospect she had allowed someone into her home that would harm her daughter. R.S. then stated that defendant would not be allowed back into the home. As part of his

investigation, Herrington spoke with defendant's two daughters, who also resided in the residence. Herrington then contacted law enforcement authorities.

During the course of the investigation, E.S. revealed that defendant had been touching her on top of her clothing for several months. According to E.S., defendant's behavior had been escalating, with him placing his mouth on her breast and attempting to place his mouth on her vaginal area during the latest episode.

Detective Rochelle Hartmann, a juvenile investigator for the Washington Parish Sheriff's Office, was contacted by Herrington. Herrington provided a copy of E.S.'s videotaped interview given on February 20, 2006, at the Children's Advocacy Center. Detective Hartmann contacted E.S. and her mother, who came into her office for another interview. During this interview, E.S. indicated that defendant had spoken to her about masturbation and showed her and his two daughters pornography. E.S. also told Detective Hartmann that defendant, on more than one occasion, had encouraged her to "flash," i.e., raise her shirt and reveal her breasts, to his friends. E.S. discussed the February 14 incident and another previous incident where she and defendant had gone to feed the horses, and defendant tried to stick his hands down her pants.

Following her interview with E.S., Detective Hartmann contacted defendant, who was aware there was some type of complaint against him. On February 24, 2006, defendant participated in a preliminary interview with Detective Hartmann.

During the February 24 interview, defendant denied the allegations regarding inappropriate touching of E.S. Defendant explained that just before he would go to sleep, he would go through the house and check all the bedroom doors to make sure everyone was in their beds. Detective Hartmann spoke with other members of the household, none of whom could confirm this practice by defendant. Detective Hartmann asked defendant if he would submit to a voice stress test, and he agreed. The test was scheduled for March 1.

During the March 1 interview, defendant volunteered that he and E.S. had a disagreement over her cell phone on February 14, 2006. Detective Hartmann found this information significant because in the first interview, she purposely avoided discussing events of any particular day with defendant. According to Detective Hartmann, defendant's unsolicited comment about the cellular phone incident of February 14th indicated he had time to think about E.S.'s allegations and was trying to make excuses for E.S.'s complaint and create an alibi.

During defendant's second interview, defendant stated that E.S. and his daughters had been asking him if they could "flash" his friends, but he had told them no. Defendant denied showing E.S. pornography, and claimed he caught one of his daughters and E.S. looking at one of his pornographic magazines in the kitchen and he took it away from them. Defendant also indicated that E.S. had been recently skipping school and smoking marijuana.

During the trial, defendant presented several witnesses on his behalf who testified they saw E.S. "flash" her breasts at them. These witnesses included D.M., J.P., S.G., and A.P. All of the witnesses testified that E.S.'s actions of flashing her breasts were not done at the direction of defendant.

Defendant did not testify.

SUFFICIENCY OF THE EVIDENCE

Through his first two assignments of error, defendant contends that the evidence against him is insufficient to support his convictions for attempted contributing to the delinquency of a juvenile and attempted molestation of a juvenile. Defendant's arguments of insufficient evidence are based solely on his contention that the State failed to prove defendant was over the age of seventeen at the time of the commission of these offenses. Defendant maintains that because the record lacks proof of this essential element of both offenses, his convictions must be reversed.

We disagree. Our review of the record indicates there was sufficient evidence that defendant was over the age of seventeen at the time of the commission of these offenses. First, we note that in defendant's February 24, 2006 statement, which was played before the jury, he provided his date of birth as November 14, 1962. Moreover, the fact that defendant was over the age of seventeen at the time of the commission of these offenses can also be inferred from the evidence that defendant was residing with E.S.'s mother, had a nineteen-year-old daughter, and was being tried as an adult rather than a juvenile. Finally, we note that the trier of fact was allowed to observe defendant's physical appearance in making its factual determination. See **State v. Hawkins**, 633 So.2d 301, 304 (La. App. 1 Cir. 1993).

Accordingly, we reject defendant's contention that the evidence was insufficient to support his convictions. Rather, we conclude the trier of fact did not err in finding the essential elements of these offenses were proven beyond a reasonable doubt. See La. Code Crim. P. art. 821(B); **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

These assignments of error are without merit.

EXCESSIVE SENTENCE

In this assignment of error, defendant argues he was sentenced to the maximum sentence of one year at hard labor for his conviction for attempted contributing to the delinquency of a juvenile.[1] Defendant argues that he does not fit into the category of the worst offender and it was an abuse of the trial court's discretion to sentence him in such a manner.

The Eighth Amendment to the United States Constitution and Article I, section 20, of the Louisiana Constitution prohibit the imposition of excessive

[1] As noted later, due to the error in the sentence for attempted molestation of a juvenile, we vacate that sentence and remand for resentencing. Accordingly, we pretermit defendant's argument under this assignment of error that his nine-year sentence for that conviction was excessive.

punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). 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 one's sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1 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. 1 Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code of Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 02-2231, p. 4 (La. App. 1 Cir. 5/9/03), 849 So.2d 566, 569.

The trial court adequately considered the factors set forth in Article 894.1. In sentencing defendant, the trial court noted there was an undue risk defendant would commit another crime if he was allowed a suspended sentence or probation. The trial court observed that defendant has "taken very lightly" the criminal process during the course of the proceedings. The trial court further noted that just prior to the sentencing hearing defendant had been removed from the courtroom for corresponding with individuals in the courtroom. The trial court also noted defendant failed to show any remorse or understanding of his actions. In determining that defendant was in need of correctional treatment, the trial court stated that it felt defendant would engage in further activity consistent with his twenty-four-year history of criminal activity. Finally, the trial court placed

particular emphasis on the testimony of E.S. and how defendant had used his position of trust to commit these crimes against the young victim.

This Court has stated that maximum sentences permitted under statute may be imposed only for the most serious offenses and the worst offenders, 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, p. 16 (La. App. 1 Cir. 3/31/00), 764 So.2d 1027, 1037.

Considering the foregoing, we cannot say the trial court abused its discretion in sentencing defendant to one year at hard labor for his attempted contributing to the delinquency of a juvenile conviction. The assignment of error is without merit.

REVIEW FOR ERROR

Pursuant to our review under La. Code Crim. P. art. 920(2), we note a prejudicial sentencing error by the trial court concerning defendant's conviction for attempted molestation of a juvenile. *See* **State v. Price**, 05-2514, pp. 18-22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

In sentencing defendant for his conviction of attempted molestation of a juvenile, the trial court sentenced defendant to a term of nine years at hard labor. However, the penalty provision of La. R.S. 14:81.2(C) in effect at the time of the commission of this offense (January 1, 2005 to February 14, 2006) provided for a penalty provision of a fine of not more than five thousand dollars, or imprisonment with or without hard labor for not more than seven and one-half years, or both. La. R.S. 14:27(D)(3) & 14:81.2(C).[2]

[2] Following commission of the instant offense, La. R.S. 14:81.2(C) was amended by 2006 La. Acts No. 36, § 1, which increased the penalty provision. A defendant must be sentenced according to the sentencing provision in effect at the time of the commission of the offense. **State v. Sugasti**, 01-3407, p. 4 (La. 6/21/02), 820 So.2d 518, 520.

Accordingly, defendant was sentenced to a greater penalty than allowable under the statute in effect at the time of the commission of this offense. Defendant's sentence for his conviction of attempted molestation of a juvenile is, therefore, vacated and the matter is remanded for resentencing.

DECREE

For the foregoing reasons, we affirm the conviction and sentence for attempted contributing to the delinquency of a juvenile. We also affirm the conviction for attempted molestation of a juvenile; however, we vacate the sentence and remand for resentencing.

CONVICTION AND SENTENCE FOR ATTEMPTED CONTRIBUTING TO THE DELINQUENCY OF A JUVENILE AFFIRMED; CONVICTION AFFIRMED, BUT SENTENCE FOR ATTEMPTED MOLESTATION OF A JUVENILE VACATED; REMANDED FOR RESENTENCING.