

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1497

STATE OF LOUISIANA

VERSUS

IRVINE DIRK BILLIOT

Judgment Rendered: March 23, 2012.

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On Appeal from the
32nd Judicial District Court,
in and for the Parish of Terrebonne
State of Louisiana
District Court No. 544,308

The Honorable George J. Larke, Jr., Judge Presiding

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Bertha M. Hillman
Thibodaux, La.

Counsel for Defendant/Appellant,
Irvine Dirk Billiot

Joseph L. Waitz, Jr.
District Attorney
Juan Pickett
Ellen Daigle Doskey
Assistant District Attorneys
Houma, La.

Counsel for Appellee,
State of Louisiana

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BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C.J.

The defendant, Irvine Dirk Billiot, was charged by bill of information with one count of indecent behavior with a juvenile, a violation of Louisiana Revised Statutes section 14:81, and one count of pornography involving juveniles, a violation of Louisiana Revised Statutes section 14:81.1. Subsequently, the bill of information was amended, and the defendant was charged with one count of indecent behavior with a juvenile. The defendant entered a plea of not guilty. Following a jury trial, the defendant was found guilty as charged. The trial court sentenced the defendant to serve seven years at hard labor. The defendant filed a motion to reconsider the sentence, which was denied. The defendant now appeals, urging two assignments of error. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On February 11, 2009, fourteen-year-old A.S.¹ showed up for evening services at her church in a highly intoxicated state. The minister called local police who took A.S. to the emergency room at Chabert Medical Center. Deputy Jason Pelligrin of the Terrebonne Parish Sheriff's Office was dispatched to Chabert Medical Center to interview A.S.

When Deputy Pelligrin arrived at the hospital, the officer who transported A.S. to the hospital advised Deputy Pelligrin that A.S. mentioned she had received some text messages on her cell phone that were sexual in nature. During the interview, Deputy Pelligrin asked A.S. who had provided her with the alcohol, and she told the deputy that the defendant had

¹ In accordance with Louisiana Revised Statutes section 46:1844W, the initials for the crime victim will be used.

given it to her. A.S. also told the deputy that the defendant had sent her the text messages, and she described some of the sexually-explicit text messages.

The subsequent investigation revealed that A.S.'s cell phone contained over two hundred text messages, most of which were sexual in nature, from a cell phone number belonging to the defendant. The defendant sent these text messages to A.S. from January 1, 2009, through February 11, 2009. With a few exceptions, the texts became more sexually explicit over time. Many of the text messages referred to the alcohol the defendant was providing to A.S.

Several of the text messages referred to nude and semi-nude pictures of A.S. The forty-three-year-old defendant requested the fourteen-year-old girl to take these pictures and even directed her how to pose. A.S. then sent these pictures to the defendant from her cell phone. The defendant sent text messages to A.S., commenting on the nude and semi-nude pictures and telling A.S. that he would masturbate while looking at her pictures. The defendant also sent text messages asking A.S. if she would allow him to kiss and lick certain parts of her body. The text messages also pressed A.S. to be alone with the defendant.

DISCUSSION

Challenge for Cause

In his first assignment of error, the defendant contends the trial court abused its discretion by refusing to sustain his challenge for cause to potential juror, G. Hebert. The defendant argues that Hebert's voir dire responses, when considered as a whole, establish his inability to be a fair and

impartial juror. Specifically, the defendant urges that Hebert's voir dire responses reveal a bias in favor of law enforcement officers and an inability to give his full attention to the trial because, as the owner and sole employee of an oilfield supply business, he would be distracted by the sales he would be losing during the trial. The defendant contends he was prejudiced by the trial court's ruling. He specifically alleges the defense had to use a peremptory challenge to excuse Hebert and that the defense exhausted all of its peremptory challenges.

Conversely, the state points out that Hebert came up for selection as an alternate after six jurors had been selected. The trial court allowed the state and the defendant one peremptory challenge each for the selection of an alternate juror. The state asserts, and the record reveals, that the state used its peremptory challenge to excuse Hebert before the defendant used his peremptory challenge. Thus, the state contends the defendant was not prejudiced by the trial court's adverse ruling on the defendant's for-cause challenge of prospective juror Hebert.

An accused in a criminal case is constitutionally entitled to a full voir dire examination and to the exercise of peremptory challenges. La. Const. Ann. art. I, § 17(A). The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality, and for discovering bases for the intelligent exercise of for-cause and peremptory challenges. *State v. Burton*, 464 So. 2d 421, 425 (La. App. 1st Cir.), *writ denied*, 468 So.2d 570 (La. 1985). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from

which bias, prejudice, or inability to render judgment according to law may be reasonably implied. *State v. Martin*, 558 So. 2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So. 2d 318 (La. 1990). A trial court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. *Id.*

To prove there has been an error warranting reversal of the conviction, the defendant need only show: (1) the erroneous denial of a challenge for cause, and (2) the use of all his peremptory challenges. *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1281. Moreover, the defendant must show that he objected at the time of the ruling to the court's refusal to sustain a challenge for cause of the prospective juror. La. Code Crim. Proc. Ann. art. 800A.

The record shows that the defendant did not make a contemporaneous objection to the trial court's ruling. Because the defendant did not make the required objection, he may not assign that ruling as error. Even if we were to conclude that the reasons the defendant gave for challenging Hebert were sufficient to apprise the trial court of the action the defendant wanted the trial court to take, the record does not support a finding that the defendant was prejudiced. Not only was the jury panel completed before Hebert was called, but when the state exercised a peremptory challenge to excuse Hebert, the defense still had remaining its one peremptory challenge for the alternate juror. Accordingly, this assignment is without merit.

Excessive Sentence

In his second assignment of error, the defendant urges that the trial court's imposition of the maximum sentence for this offense, seven years at hard labor, is an unconstitutionally-excessive sentence. Specifically, the defendant argues that eighteen of the twenty aggravating circumstances listed in Article 894.1 of the Louisiana Code of Criminal Procedure do not apply to him. Moreover, the defendant contends the trial court failed to give adequate consideration to the mitigating circumstances. The defendant submits that he had a steady work history; was employed at the time of the offense; it had been some time since his prior felony convictions; and he never threatened, touched, or exhibited any violence or cruelty to A.S. The defendant argues that the maximum sentence should only be imposed where these elements are present.

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 unconstitutionally excessive. *State v. Sepulvado*, 367 So. 2d 762, 767 (La. 1979). A sentence is considered unconstitutionally excessive if it is grossly disproportionate to the seriousness of the offense or if it is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Andrews*, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So. 2d 448, 454. 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. *Andrews*, 655 So. 2d at 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); *see also* La. Code Crim. Proc. Ann. art. 881.4D.

Article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 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. 1 Cir. 5/9/03), 849 So. 2d 566, 569. The goal of Article 894.1 is the articulation of the factual basis for a sentence. *State v. Lanclos*, 419 So. 2d 475, 478 (La. 1982). 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 Article 894.1. *Lanclos*, 419 So. 2d at 478.

In the instant matter, the defendant was sentenced to the maximum sentence for his conviction. *See* La. Rev. Stat. Ann. § 14:81H(1). As a general rule, maximum or near-maximum sentences are to be reserved for the worst offenders and the worst offenses. *State v. James*, 02-2079 (La. App. 1 Cir. 5/9/03), 849 So. 2d 574, 586-87. Also, maximum sentences permitted under a statute may be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. *See State v. Hilton*, 99-1239 (La. App. 1 Cir. 3/31/00), 764 So. 2d 1027, 1037, *writ denied*, 00-0958 (La. 3/9/01), 786 So. 2d 113.

At sentencing, the trial court articulated the factual bases for its sentencing decision. The trial court stated it had carefully studied the offense involved, the mitigating circumstances urged by the defense, the aggravating circumstances, and the defendant's two prior felony convictions,

which included: a 1987 conviction for unauthorized entry to an inhabited dwelling and a 1992 conviction for indecent behavior with a juvenile. The trial court noted, with particular importance, the defendant's prior felony conviction for indecent behavior with a juvenile. The trial court also found aggravating circumstances existed in this matter. Specifically, the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance due to her extreme youth. Moreover, the defendant used his position or status to facilitate the commission of this offense.

In light of these findings and considering that the defendant's text messages to A.S. became increasingly sexually explicit, to the point where the defendant told A.S. he wanted to perform certain acts of a sexual nature on her and was pushing A.S. to be alone with him, we find that the trial court did not abuse its discretion in sentencing the defendant to the maximum sentence of seven years at hard labor. Based on the record before us, it is clear the defendant's prior felony conviction for this same offense did not deter him from once again seeking out a young, vulnerable girl for the purpose of arousing or gratifying his own sexual desires, which the defendant did without any concern for the permanent harm such actions would have on this young victim. Thus, we find no merit in this assignment of error.

CONCLUSION

For the reasons set forth above, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.