NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

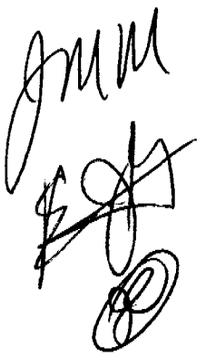
FIRST CIRCUIT

2011 KA 1876

STATE OF LOUISIANA

VERSUS

JOHN ERIC SIMS



Judgment Rendered: **May 2, 2012**

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 496720, DIVISION "H"

THE HONORABLE ALLISON H. PENZATO, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

The defendant, John Eric Sims, was charged by bill of information with one count of sexual battery, a violation of La. R.S. 14:43.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to twenty-five years at hard labor without benefit of parole. Additionally, the trial court noted the defendant was not eligible for diminution of sentence for good behavior. See La. R.S. 15:537(A). He moved for reconsideration of sentence, but the motion was denied. He now appeals, contending the trial court imposed an illegal sentence or, in the alternative, the sentence imposed was unconstitutionally excessive. For the following reasons, we affirm the conviction and sentence.

FACTS

The victim, L.G.,[1] testified at trial. Her date of birth was January 29, 1999. In the summer of 2010, she was living in a camper in Pearl River with her brother, her sister, her mother and the defendant. The defendant had been with the victim's mother for five or six years. The victim shared bunk beds in the camper with her brother and sister. Her brother had the top bunk, and the victim shared the bottom bunk with her sister. According to the victim, on the night of the incident, the defendant came into her room and touched her on her private parts on her skin. She indicated the defendant touched her in the front and in the back. She stated her brother and sister were asleep when the offense occurred.

The State also played a DVD of the victim's August 16, 2010 interview with the Child Advocacy Center at trial. In the interview, the victim indicated the offense occurred in either June or July of 2010. She also identified the vagina and

[1] The victim is referenced herein only by her initials. See La. R.S. 46:1844(W).

buttocks on a sketch of a girl as the area where the defendant had touched her.

The defendant also testified at trial. He claimed, during the summer of 2010, he was "having problems" with the victim. He stated she was failing fifth grade, and he told her if she did not pass, she would not be permitted to spend the night away from home, including at her grandmother's home. He testified the victim adored her grandmother. He also claimed the victim was aware he was having difficulties with her mother and that she had asked him to leave. He stated in August of 2010, the victim visited her grandmother and, while there, got a haircut. He indicated he was furious and told the victim she would never go back to her grandmother's house again. He claimed the victim's "little friend, Hannah" told her "[w]ell this happened to me with my uncle. We got him out of the picture for a few years by saying that he did this." He claimed the victim then made her allegations against him. According to the defendant, the incident related by the victim never happened.

ILLEGAL SENTENCE

In assignment of error number 1, the defendant contends the trial court imposed an illegal sentence in this matter by sentencing him under La. R.S. 14:43.1(C)(2), rather than La. R.S. 14:43.1(C)(1). He argues the bill of information failed to specify whether the prosecution was brought pursuant to La. R.S. 14:43.1(C)(1) or La. R.S. 14:43.1(C)(2) and failed to specify facts sufficient to conclude that it was under La. R.S. 14:43.1(C)(2).

Article I, § 13 of the Louisiana Constitution provides that an accused in a criminal prosecution has a right to be informed of the nature and cause of the accusation against him. Concomitantly, the Louisiana Code of Criminal Procedure requires that the indictment be a plain, concise, and definite written

statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice. La. C.Cr.P. art. 464. The indictment must contain all of the essential elements of the crime intended to be charged in sufficient particularity to enable the defendant to prepare for trial, to allow the court to determine the propriety of the evidence that is submitted at the trial, to allow the court to impose the correct punishment on a verdict of guilty, and finally to afford the defendant protection from prosecutions for the same offense. **State v. LeCompte**, 98-1159 (La. App. 1st Cir. 4/1/99), 734 So.2d 83, 88.

Any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 147 L.Ed.2d 435 (2000); **Jones v. United States**, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 1224 n.6, 143 L.Ed.2d 311 (1999). Elements of an offense must be charged in the indictment, submitted to a jury, and proven by the government beyond a reasonable doubt. **Jones,** 526 U.S. at 232, 119 S.Ct. at 1219. The statutory maximum for **Apprendi** purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. **Blakely v. Washington**, 542 U.S. 296, 303, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004). **State v. Hardeman**, 2004-0760 (La. App. 1st Cir. 2/18/05), 906 So.2d 616, 626.

Whoever commits the crime of 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. 14:43.1(C)(1). Whoever 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. La. R.S. 14:43.1(C)(2).

In the instant case, the bill of information set forth the defendant's date of birth ("01/03/1980"), charged he had violated "[La.] R.S. 14:43.1 SEXUAL BATTERY, by committing a sexual battery upon the person of LG DOB 1-29-1999[,]" and set forth that the offense occurred "June 01, 2010 through June 30, 2010."

Prior to the beginning of voir dire, the trial court stated, "I understand that there has been an agreement among counsel concerning the definition in the charges concerning this crime which will be provided to the jury." The State and defense answered affirmatively. The court continued, "It's my understanding that the parties have agreed that insofar as the alleged victim is concerned, that there is no dispute that she is under the age of 13; is that correct?" The State and defense again answered affirmatively. The court then stated:

> So for purposes of defining this crime for the jury and in connection with the jury charges which will be read to the jury at the close of the case, it's my understanding that both parties have conceded that the only definition concerning sexual battery which the jurors will be given in connection with this case will be one in (sic) which provides that the age of the offend – that the age of the victim is one where the victim has not yet attained 13 years of age and is at least three years younger than the offender; is that correct?

The State and defense answered affirmatively. Further, during voir dire, defense counsel advised the prospective jurors, "And so that we're clear, I will not ask you to come back with a lesser offense. It's all or nothing, okay?" Consistent with La. Const. Art. 1, § 17(A) and La. R.S. 14:43.1(C)(2), a twelve-person jury was selected. Thereafter, at trial, the court charged the jury on the offense in terms of the penalty under La. R.S. 14:43.1(C)(2) (where the victim has not yet attained 13 years of age), rather than the age range set forth in the definition of the offense in La. R.S. 14:43.1(A)(2) ("the other person, ... has not yet attained fifteen years of age") (prior to amendment by 2011 La. Acts No. 67, § 1). Additionally, the verdict form set forth the following options:

> GUILTY
> GUILTY OF ATTEMPTED SEXUAL BATTERY
> NOT GUITY

The sentence imposed was legal under La. R.S. 14:43.1(C)(2). It was imposed on the basis of the facts reflected in the jury verdict. While the better practice would have been to cite La. R.S. 14:43.1(C)(2) on the bill of information, the record indicates the defendant was not misled to his prejudice. He was not prevented from offering any defense to the applicability of La. R.S. 14:43.1(C)(2). Rather, at an early stage of the proceedings, the defense conceded the victim's age and pursued a strategy of attacking her credibility.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 2, the defendant contends the trial court imposed a constitutionally excessive sentence. He argues he was convicted of the momentary, one-time touching of the victim, and there was no evidence he

threatened her or that she needed counseling to recover from the offense. He also argues he had no prior criminal record.

Louisiana Constitution Article I, Section 20 prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Whoever 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. La. R.S. 14:43.1(C)(2). The defendant was sentenced to the minimum statutory sentence of twenty-five years at hard labor without benefit of parole. Additionally, the court noted the defendant was not eligible for diminution of sentence for good behavior. See La. R.S. 15:537(A).

The victim's aunt testified at the sentencing hearing. She stated God had blessed the defendant with an opportunity to guide two children through the trials and pitfalls of childhood and help them become healthy and productive adults. She indicated the defendant had thrown that blessing back into God's face and destroyed a young girl's innocence. She hoped the defendant would get "the maximum sentence possible."

In imposing sentence, the court noted the defendant had no prior criminal record, but found him to be in need of correctional treatment or a custodial environment that could be provided most effectively by his commitment to an institution.

A thorough review of the record reveals the sentence imposed was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive. The defendant failed to clearly and convincingly show that he was "exceptional." See **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676; see also **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 760, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.