**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1081

STATE OF LOUISIANA

VERSUS

KENDALL RAY SMITH

**Judgment rendered December 21, 2011.**

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Appealed from the
21st Judicial District Court
in and for the Parish of Livingston, Louisiana
Trial Court No. 24337
Honorable Brenda Bedsole Ricks, Judge

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HON. SCOTT M. PERRILLOUX
DISTRICT ATTORNEY
PATRICIA PARKER
ASSISTANT DISTRICT ATTORNEY
LIVINGSTON, LA

ATTORNEYS FOR
STATE OF LOUISIANA

FRANK SLOAN
MANDEVILLE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
KENDALL RAY SMITH

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**BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.**

**PETTIGREW, J.**

Defendant, Kendall Ray Smith, was charged by bill of information with two counts of sexual battery, violations of La. R.S. 14:43.1. He pled not guilty. After a trial by jury, he was found guilty as charged on count one and not guilty on count two. The trial court sentenced defendant to ten years at hard labor, without the benefit of parole, probation, or suspension of sentence. Defendant now appeals, alleging as his sole assignment of error that the sentence imposed was excessive. For the following reasons, we affirm defendant's conviction and sentence.

## FACTS

W.H., the victim in the instant case, is the sister of defendant's wife, and was seventeen years old at the time of the offense.[1] On June 13, 2009, W.H. was at defendant's home swimming with her sister, her niece, and defendant. Initially, the group was playing a game that involved defendant pushing them around the pool. When defendant began grabbing W.H. on her rear end, she became nervous and attempted to evade him. After her sister grew tired and left the pool, defendant touched W.H.'s vagina with his hand. When he asked if it hurt and she responded affirmatively, he stopped. However, defendant later grabbed W.H.'s hand and forcibly placed it on the outside of his clothing over his penis.

## EXCESSIVE SENTENCE

In his sole assignment of error, defendant contends the sentence imposed was unconstitutionally excessive. Specifically, he contends that the trial court abused its discretion in imposing a maximum sentence, because he is not the most egregious type of offender for whom maximum sentences were intended. Defendant further complains that the trial court failed to adequately consider the sentencing criteria of La. Code Crim. P. art. 894.1 or to give any sentencing reasons. Defendant suggests that the trial court imposed the maximum sentence as punishment for defendant exercising his constitutional right to a jury trial, rather than accepting a plea bargain that was offered by the State.

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[1] Pursuant to La. R.S. 46:1844W, the initials of the victim will be used to protect her identity.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Even when a sentence falls within statutory limits, it may be unconstitutionally excessive. See **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 grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 454. A trial court has wide, although not unbridled, discretion in imposing a sentence within statutory limits. **State v. Trahan**, 93-1116, p. 25 (La. App. 1 Cir. 5/20/94), 637 So.2d 694, 708. The sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion. **Andrews**, 94-0842 at 9, 655 So.2d at 454.

For the crime of sexual battery, defendant was exposed to a term of imprisonment, with or without hard labor, for not more than ten years, without the benefit of parole, probation, or suspension of sentence. See La. R.S. 14:43.1C(1). He received the maximum sentence of ten years at hard labor, without the benefit of parole, probation, or suspension of sentence. This court has stated that maximum sentences 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.[2] **State v. Hilton**, 99-1239, p. 16 (La. App. 1 Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that should be considered by the trial court before imposing sentence. Although a trial court need not

[2] Defendant asserts that this standard as generally applied is inconsistent with the general standard of appellate review of sentences providing that a trial court has wide discretion in imposing a sentence, which will not be set aside as excessive absent an abuse of that discretion. We disagree, finding no inconsistency in the standards. While a trial court has wide discretion in imposing sentence, that discretion must be exercised in light of the requirement that maximum sentences are to be imposed only for the worst offenders and the worst offenses. In reviewing a sentence on appeal, an appellate court remains mindful of this requirement.

recite the entire checklist of Article 894.1, the record should reflect that it adequately considered the criteria. **State v. Wilkinson**, 99-0803, p. 3 (La. App. 1 Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631. However, the goal of Article 894.1 is the articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). Therefore, even in the absence of adequate compliance with Article 894.1, it is not necessary to remand the matter for resentencing when the sentence imposed is not apparently severe in relation to the particular offender or the particular offense. Even when a trial court assigns no reasons, the sentence will be set aside on appeal and remanded for resentencing only if the record is either inadequate or clearly indicates that the sentence is excessive. See La. Code Crim. P. art. 881.4D; **State v. Harris**, 601 So.2d 775, 778-779 (La. App. 1 Cir. 1992).

In sentencing defendant, the trial court stated that, having heard the testimony of the witnesses and all the evidence, defendant was sentenced to ten years at hard labor. Therefore, the trial court presumably considered the particular circumstances of the instant offense in imposing sentence. Moreover, immediately prior to sentencing, defense counsel informed the trial court of mitigating factors he believed were applicable in this case, including the lack of a prior criminal record. Thus, the trial court clearly was aware of the alleged mitigating circumstances. See **State v. Morgan**, 97-997, pp. 4-5 (La. App. 3 Cir. 2/4/98), 706 So.2d 1084, 1087. Nevertheless, as alleged by defendant, the trial court failed to specifically articulate its reasons for the sentence imposed.

Defense counsel argues that the maximum sentence was not justified in this case because he is not the worst type of offender. In support of this claim, he notes that he has no prior criminal record, that imprisonment would be a hardship upon him and his dependents, that the offense involved no violence or threats, and that it resulted from circumstances unlikely to reoccur. He further asserted that he did not contemplate the harm that would be caused. Defendant further claims that the instant crime did not involve the worst type of offense, noting in brief that it consisted of a very brief digital penetration of the victim and forcing her hand onto the clothing covering his penis.

We do not agree with defendant's contentions. Despite the absence of sentencing reasons, our review of the record reveals that the sentence imposed is not apparently severe in relation to the particular offender or the particular offense. At the time of the offense, the victim was seventeen years old, and defendant was forty, over twice her age. Even more significant, defendant was the victim's brother-in-law and, as such, occupied a unique position of trust as a family member. In fact, the victim grew up knowing defendant as a member of her family, since she was approximately five years old when defendant married her sister. Nevertheless, defendant heinously abused the position of trust he enjoyed as a family member to perpetrate a sexual battery upon the victim. The resulting consequences to both the victim and her family have been devastating. The unique circumstances involving this violation of trust distinguishes the instant case from the typical case of sexual battery, rendering it more egregious. See **State v. Penn**, 633 So.2d 337, 339 (La. App. 1 Cir. 1993). See also **State v. Badeaux**, 2001-406, pp. 9-10 (La. App. 5 Cir. 9/25/01), 798 So.2d 234, 239-240, writ denied, 2001-2965 (La. 10/14/02), 827 So.2d 414. Under the circumstances, it is difficult to credit the defense's assertion that defendant did not contemplate the level of harm his actions would cause.

The devastation caused by the instant offense is illustrated by the victim's written impact statement, which was read to the court by the prosecutor prior to sentencing. W.H. indicated that the sexual assault by defendant has resulted in her formerly close family being torn apart, and has affected her relationships with her entire family, particularly her sister. She has recollections of the sexual assault on a daily basis, and it has affected her outlook on men. Even though W.H. made no mention of professional counseling, she indicated that the assault has caused her to suffer hurt, fear, depression, insecurity, and self-esteem problems, and she believes these feelings would remain with her forever.

Finally, we note that defendant has not acknowledged his full culpability in this matter. At trial, he admitted committing the acts constituting sexual battery, but claimed that the conduct was consensual, which undoubtedly inflicted additional pain upon the

victim. As such, defendant has failed to accept full responsibility for his actions and the resulting harm to the victim and her family.

Given the circumstances, we find the instant offense to be among the most serious and defendant to be among the worst type of offender. An appellate court will not set aside a sentence for excessiveness if the record supports the sentence imposed. La. Code Crim. P. art. 881.4D. On appellate review of a sentence, the relevant question is whether the trial court abused its sentencing discretion, and not whether another sentence might have been more appropriate. **State v. Cook**, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959, cert. denied, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). We find that, despite the trial court's failure to articulate sentencing reasons, the sentence in this case is not apparently severe in relation to the particular offender or the particular offense and is supported by the record. Accordingly, a remand for full compliance with Article 894.1 is not necessary. Even in light of the mitigating factors urged by defendant, we cannot find that the trial court abused its wide discretion in imposing sentence. The sentence imposed was not unconstitutionally excessive.

Additionally, we reject defendant's position that the trial court's failure to order a presentence investigation ("PSI") supports his contention that the court imposed the maximum sentence possible as punishment for his decision to reject the State's plea bargain offer and proceed to trial. Defendant also contends that the lack of a PSI indicates the trial court was not open to considering mitigating factors. First, it is well established that the ordering of a PSI lies within the discretion of the trial court; there is no duty that the trial court do so. La. Code Crim. P. art. 875A(1); **State v. Johnson**, 604 So.2d 685, 698 (La. App. 1 Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). Moreover, following defendant's argument regarding the PSI to its logical conclusion would require that a trial court always order a PSI lest it be accused of failing to fulfill its duty to consider relevant mitigating circumstances. No legal or rational basis exists for such a conclusion. We further note that defendant does not contend that he requested the preparation of a PSI, as he could have done.

Secondly, the record does not support defendant's contention that the trial court imposed the maximum sentence as punishment for defendant exercising his right to a jury trial. Defendant bases this contention on the fact that the trial court, after being advised that defendant had declined a plea bargain from the State, had defendant face the deputy clerk and be sworn in before warning him that if he went to trial, he faced a potential maximum sentence of ten years on each of the two counts against him, which could also be made consecutive for a total of twenty years.

Our examination of the record reveals that the State offered a plea bargain to defendant whereby he would plead guilty in exchange for receiving a sentence of five years, two of which would be suspended, and five years active probation. Upon learning that defendant had declined the offer, the trial court had him sworn and questioned him as to his understanding of the consequences of his decision. Rather than having some ominous purpose for having defendant sworn as suggested by defendant, it appears that the trial court merely wished to ascertain on the record that defendant fully comprehended the potential consequences of declining what the court obviously considered a very favorable plea bargain. There is no indication in the record that the trial court imposed the maximum sentence as punishment for defendant exercising his right to a jury trial.

For the above reasons, this assignment of error is without merit.

**CONVICTION AND SENTENCE AFFIRMED.**