

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1514

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STATE OF LOUISIANA

VERSUS

MICHAEL P. JACKSON

**On Appeal from the 20th Judicial District Court
Parish of West Feliciana, Louisiana
Docket No. 08-WFLN-260, Division "A"
Honorable George H. Ware, Jr., Judge Presiding**

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Defendant-Appellant
Michael P. Jackson**

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered March 25, 2011

PARRO, J.

The defendant, Michael P. Jackson, was originally charged by bill of information with simple rape, a violation of LSA-R.S. 14:43. He pled not guilty to this charge. Prior to trial, the bill of information was amended to charge molestation of a juvenile, a violation of LSA-R.S. 14:81.2. The defendant was not rearraigned on the amended bill of information, but entered upon the trial without objecting, and thus, waived the irregularity. See LSA-C.Cr.P. art. 555. Following a trial by jury, the defendant was convicted as charged. The defendant was sentenced to thirteen years of imprisonment at hard labor. He filed a motion to reconsider the sentence, but the trial court denied the motion. The defendant now appeals, urging a single assignment of error in which he challenges the sentence as excessive.

Finding no merit in the assignment of error, we affirm the defendant's conviction and sentence.

FACTS

On June 25, 2008, thirteen-year-old D.R.¹ informed her mother, O.R., that the defendant, O.R.'s live-in fiancé, raped her. According to D.R., the abuse occurred approximately five days earlier, on June 19, 2008, when she was home alone with the defendant while O.R. was away at work. O.R. immediately brought D.R. to the hospital and reported the matter to the police. Sergeant Ronald Welch, with the West Feliciana Parish Sheriff's Office, was assigned to investigate the rape report. Sgt. Welch spoke with D.R. and O.R. at the hospital. In response to information received from D.R., Sgt. Welch located the defendant at his residence, advised him of the allegations, read him his **Miranda** rights, and placed him under arrest.

During the police interrogation, the defendant initially denied any sexual contact with D.R. However, he later admitted to engaging in sexual activity with the child and signed a written statement detailing the incident. In the statement, which was introduced into evidence at the trial, the defendant claimed that on the night in question, he and D.R. were engaged in a conversation about sex when D.R. started

¹ In accordance with LSA-R.S. 46:1844(W), the victim is referenced only by her initials. To further protect the identity of the victim, her mother is also referenced by initials.

talking about her "hot spots" and asking for details about sex. The defendant claimed that he agreed to show D.R. how sexual intercourse was performed and she promised not to tell. D.R. undressed and the defendant kissed and fondled her breasts. The defendant also "fingered" and licked D.R.'s vagina. According to the defendant, he then asked D.R. if he could "put the head in" and she said "yes." The defendant then rubbed D.R.'s vagina with the head of his penis. D.R. told the defendant to stop, because it "didn't feel right." The defendant claimed that he discontinued the sexual encounter and told D.R. to go take a bath. The defendant took a bath and left the residence.

On July 1, 2008, D.R. was interviewed by Joelle Henderson, a forensic interviewer, at the Child Advocacy Center (the CAC). The interview was videotaped. During the interview, D.R. told Ms. Henderson that she and the defendant were sitting in the living room of their home on the night in question when the defendant started talking to her about sex. During the conversation, the defendant asked D.R. where her "hot spots" were located. D.R. told the defendant that because she was a virgin, she was unaware of the location of any "hot spots." The defendant then walked over to D.R., pulled down her pants and underwear, and started kissing her on her breasts and licking her vagina. D.R. stated that she started kicking and screaming and asked the defendant to stop. The defendant then asked D.R. to let him "stick the head in." D.R. said no, but the defendant then attempted to penetrate D.R.'s vagina with what D.R. believed was his penis. D.R. explained that she was not absolutely certain that the defendant used his penis, because his hands were also in her vaginal area. D.R. stated that the defendant "stuck it in" only once and the penetration was painful. The defendant got up and told D.R. to go take a bath. He told D.R. not to tell her mother what had occurred. The defendant washed off and then left to pick up O.R. from work. D.R. stayed at home, crying and confused.

D.R. explained that she did not immediately tell her mother, because she was afraid. D.R. later told her cousin, and eventually her mother, about the rape.

D.R. was fourteen years old (and pregnant)² at the time of trial in September 2009. D.R. recanted her prior allegations and statement and testified that the defendant never touched her. She claimed that the defendant only talked with her on the night in question. D.R. admitted that she told her mother the defendant raped her, but stated she did so only because the defendant was overprotective and never allowed her to do anything with her friends. D.R. further explained that she repeated the allegations during the CAC interview with Ms. Henderson to be consistent with what she told her mother. D.R. stated that none of the information she gave in the interview or information that she told her mother was true. D.R. testified that she previously met with her school guidance counselor and told her "everything," including her claim that the allegations were not true. D.R.'s CAC interview was introduced into evidence and played for the jury at trial.

The state called O.R. to testify at the trial. O.R. testified that she and the defendant had been together for approximately nine to ten years and were planning to get married. The defendant acted as a father figure and assisted her in raising D.R. and her other daughter. O.R. explained that the defendant was a strict parent and did not allow D.R. to do whatever she wanted to do. O.R. testified that when D.R. made the initial disclosure, she did not say the defendant had sex with her. She claimed D.R. simply said "something happened." O.R. then took D.R. to the hospital "to make sure nothing happened." O.R. testified that, after the incident, D.R. recorded information in her diary in which she initially indicated that the sexual abuse incident did, in fact, occur with the defendant, but later wrote an entry indicating that the rape allegations were not true.³

O.R. admitted that, at some point after the defendant's arrest, she prepared an affidavit requesting that the charge against the defendant be dismissed. O.R. provided the following reason for the dismissal request:

² D.R. denied that the defendant fathered the child she was carrying.

³ When questioned about the location of the diary, O.R. claimed it was at their home. The diary was not introduced into evidence at the trial.

The reason being I do not want to pursue this matter any further. The reason being is that I don't want to put my child thru this with having to go to court and with what having happen to her or to relive what she has gone thru. But by doing this I want a sworn statement by Mr. Michael that he will no longer try and contact my family nor my daughter in any way.

However, at trial, O.R. testified that she requested to dismiss the charge against the defendant, because she did not know what happened since she "wasn't there." She was uncertain whether D.R. was telling the truth. O.R. further testified that once the results of the rape examination performed at the hospital did not result in any physical findings, she concluded nothing happened. O.R. sent D.R. away to stay with relatives and the defendant eventually returned to the home. O.R. explained that she allowed the defendant back into the home because she depended on him financially. O.R. admitted that the defendant was still staying at the residence when D.R. and her other daughter returned.

Nicole Pinson, a guidance counselor at D.R.'s school, testified that she spoke with D.R. on several occasions during the spring of 2009, while the defendant was awaiting trial. According to Ms. Pinson, D.R. stated that she had been raped by her mother's boyfriend and expressed concerns about the upcoming trial. During at least five counseling sessions, Ms. Pinson and D.R. focused on reducing D.R.'s anxiety regarding the trial. They did not discuss any details of the sexual abuse. Ms. Pinson testified that D.R. never stated that the sexual abuse did not occur.

The defendant took the stand and testified on his own behalf. He denied ever having any sexual contact with D.R., who he considered to be his daughter. He claimed that, on the night in question, he and D.R. only engaged in general conversation about her dating before he left to pick up O.R. The defendant hypothesized that D.R. made the sexual-abuse allegations because she did not like how strict he was.

The defendant further testified that he told the investigating detective that he was not guilty of the things alleged. He admitted that he signed the waiver of rights form and the written statement, but explained that the detective drafted the statement and none of the contents were true. The defendant claimed that he only signed the

statement because he was tired and wanted to go to sleep.

ASSIGNMENT OF ERROR
EXCESSIVE SENTENCE

In his sole assignment of error in this case, the defendant contends that the trial court erred in imposing an excessive sentence. Specifically, he notes that the trial court failed to consider, as a mitigating factor, D.R.'s request for leniency at sentencing. The defendant further argues that the trial court erred in citing, as an aggravating factor, that the defendant used his position of control or supervision over D.R. to facilitate the commission of the crime. The defendant argues that because he was charged and convicted under the molestation of a juvenile statute that provides for an increased penalty when the molestation was committed by an offender who had control or supervision over the juvenile, the aforementioned aggravating factor was a necessary element of the offense and should not have been considered by the court during sentencing.

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. LSA-C.Cr.P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

Article I, Section 20, of the Louisiana Constitution 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. **Hurst**, 797 So.2d at 83.

Whoever commits the crime of molestation of a juvenile, when the victim is thirteen years of age or older but has not yet attained the age of seventeen, and when the offender has control or supervision over the juvenile, shall be fined not more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than five nor more than twenty years, or both. The defendant shall not be eligible to have his conviction set aside or his prosecution dismissed in accordance with Code of Criminal Procedure article 893. LSA-R.S. 14:81.2(C). In this case, the defendant was sentenced to thirteen years of imprisonment at hard labor.

At the sentencing hearing, D.R. took the stand and again denied that the abuse occurred. She also requested that the court "be very lenient" when sentencing the defendant.

In sentencing the defendant, the court considered the sentencing guidelines set forth in LSA-C.Cr.P. art. 894.1 and concluded that, during any period of suspended sentence or probation, there was an undue risk that the defendant would commit another crime. The court found that the defendant was in need of correctional treatment or a custodial environment, and any lesser sentence would deprecate the seriousness of the offense. In further compliance with Article 894.1, the court noted that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resisting due to extreme youth; the defendant used his position or status to facilitate the commission of the offense; and the defendant was previously convicted of a peeping tom offense, which the court viewed as a sexual-type offense.

Contrary to the defendant's claim in his brief, the record reflects that the trial court considered D.R.'s recantation of her allegations and her request for leniency at sentencing. The court specifically noted that there appeared to be a joint effort between the defendant and the victim's mother that caused the victim to recant her allegations and

original statement. In finding D.R.'s and O.R.'s trial testimony to be "less than truthful," the court observed that the contents of the defendant's written confession were consistent with what the victim initially told her mother. The court stated:

[T]he Court really finds it difficult to believe that Mr. Jackson's confession or statement would match up with everything else and then all of a sudden, when we're at trial in front of a jury, all of the stories change. That shows a very persistent pattern of Mr. Jackson's lack of contrition, lack of remorse, inability to face up to the fact that he did something wrong, and actually goes beyond lack of contrition or remorse but a concerted effort to influence the jury through perjured testimony.

From the foregoing, it is clear that the court considered D.R.'s testimony and found it to be not credible. We find no error or abuse of discretion in this finding. We likewise find no error in the court's observation that the defendant used his position of control or supervision over D.R. to facilitate the commission of the offense. As the state correctly notes, in doing so, the court was merely reciting the facts of this case and acknowledging how they fit within the sentencing guidelines provided in LSA-C.Cr.P. art. 894.1.

Although the presentence investigation report reflects that the defendant was a first felony offender, we note that the egregious nature of this sexual offense and the circumstances of this case clearly support the thirteen-year sentence. As the trial court properly reasoned, the defendant abused his position of trust and responsibility to the daughter of his live-in fiancée without any regard to the lifelong harm that his reprehensible conduct would cause the young victim. Not only did he commit this socially repulsive act of sexual abuse upon the minor victim, he failed to accept responsibility for his actions, and also managed to convince the victim and her mother to assist him in his efforts to avoid suffering any consequences for his actions. Considering the circumstances of the offense and the obvious perpetual effect the abuse will have on the young victim (who indicated she was a virgin when the abuse occurred, but was pregnant by the time of the defendant's trial), our sense of justice is in no way shocked by the sentence imposed. This assignment of error is without merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.