

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2006 KA 1944**

**STATE OF LOUISIANA**

**VERSUS**

**RANDY DUPLESSIS**

**Judgment Rendered: March 23, 2007**

**Appealed from the  
Twenty-Third Judicial District Court  
in and for the Parish of Ascension, State of Louisiana  
Trial Court Number 13,976**

**Honorable Ralph Tureau, Judge Presiding**

**\* \* \* \* \***

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State of Louisiana**

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**Attorney for Defendant/Appellant,  
Randy Duplessis**

**\* \* \* \* \***

**BEFORE: CARTER, C. J., WHIPPLE AND McDONALD, JJ.**

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## **WHIPPLE, J.**

The defendant, Randy Duplessis, was charged by bill of information with one count of cruelty to juveniles, a violation of LSA-R.S. 14:93, and pled not guilty. Following a jury trial, he was found guilty of the responsive offense of attempted cruelty to a juvenile, a violation of LSA-R.S. 14:27 and LSA-R.S. 14:93. He was sentenced to five years at hard labor without benefit of probation, parole, or suspension of sentence.<sup>1</sup> He appeals, contending in his sole assignment of error that the sentence imposed is illegal. We affirm the conviction, amend the sentence, and affirm the sentence as amended.

### **FACTS**

The victim, J.D.,<sup>2</sup> was born on January 17, 1986 and is the defendant's child. According to J.D., on July 6, 2001, the defendant argued with the victim's mother outside of her home. The defendant then followed the victim's mother into her and the victim's home, stating, "I'm going to kill you, I'm going to kick your ass." The victim told the defendant to leave, calling him, "Randy." The victim told the defendant that he had never been a dad to the victim, only "Randy." The defendant grabbed the victim by his shoulders, picked him up off of his feet, and threw him against the couch. The couch broke into two pieces. After the victim stood up, the defendant slapped him on his right side with a backhand. The blow

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<sup>1</sup>The sentencing minutes indicate the defendant was sentenced to five years without benefit of probation. The sentencing transcript, however, indicates, the defendant was sentenced to five years without benefit of probation, parole, or suspension of sentence. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. State v. Lynch, 441 So. 2d 732, 734 (La. 1983).

<sup>2</sup>The victim is referred to herein only by his initials. See LSA-R.S. 46:1844(W).

left marks on the victim's face. The victim stood up again, and told the defendant if he did not leave, the victim would summon the police. The defendant "pinned" the victim against a wall, stating, "You're a no good mother f-----, never was a son to me. Get your ass outside you punk p----. Come outside and we'll get into it." The victim fled to a neighbor's house, and the defendant followed him into the house. The defendant left the neighbor's house, however, when the neighbor asked him to leave. The victim did not call the police because the defendant threatened to kill him if he did so.

The victim's mother also testified at trial. She married the defendant on January 1, 1985, and they had two children, the victim and his sister. She identified State Exhibit #1 as the victim's birth certificate indicating he was born on January 17, 1986. She testified that her marriage with the defendant ended in divorce on July 30, 1999, due to the defendant's manipulative behavior, his drinking, and his "severe, enormous temper[.]"

According to the victim's mother, on July 6, 2001, the defendant came to her home, broke through the door, and called her a "F-ing Bitch, a no good whore[.]" When the victim tried to help her, the defendant grabbed him underneath his shoulders and threw him against the couch, breaking the couch. As the victim got up, the defendant called him "all kinds of names." After the defendant called the victim a "No good M-F-er, a F-ing punk kid[.]" the victim told the defendant that the defendant was not his "dad[.]" and had never been his dad. The defendant "backhanded" the victim and then pinned him against a wall. The victim's mother indicated she did not report the incident to the police until July 24 or July 25 because she was afraid the defendant would retaliate against her.

The defendant also testified at trial. He claimed the incident occurred in the latter part of July. He claimed he had filed for divorce from the victim's mother in 1999 after she "cleared out" their savings and checking accounts. He claimed the victim's mother had him put into Oak Meadows Mental Institution so that she could take his money. He claimed the victim's mother had filed an aggravated assault and battery charge against him, falsely alleging that three years prior to the divorce, the defendant had tied her to a chair and had put a gun to her head. He claimed that after he was released from prison in late December of 2000, he lived with his parents. He claimed he took the victim and his mother to the "America House" on Government Street after the victim's mother contacted a friend of his and stated she needed help. He claimed that following five or six weeks at America House, the victim, the victim's mother, and he moved into the house where the incident allegedly occurred. He claimed he became angry with the victim's mother after she ignored the landlord's and his instructions not to spend money on the house. He claimed that on the date of the incident, he had collected his clothes and had told the victim's mother he was leaving. He denied throwing the victim against the couch. He denied striking the victim, but conceded he might have pushed him out of the way to get to the clothes he was taking with him. He also denied threatening the victim's mother, or the victim, but later conceded he had told the victim that he would "whip [the victim's] tale [sic][.]"

### **ILLEGAL SENTENCE**

In his assignment of error, the defendant argues only that imposition of the sentence "without benefit of probation, parole or suspension of sentence renders the sentence illegal." The State concedes that the sentence should not have been

imposed “without benefit of probation, parole or suspension of sentence[.]” On review, we agree and conclude that this assignment of error has merit.

Whoever commits the crime of cruelty to juveniles shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not more than ten years, or both. LSA-R.S. 14:93(D). Additionally, as pertinent hereto, LSA-R.S. 14:27(D)(3) provides that whoever attempts to commit an offense shall be fined or imprisoned or both, in the same manner as for the offense attempted; however, such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both. Here, the defendant was sentenced to five years at hard labor without benefit of probation, parole, or suspension of sentence.<sup>3</sup>

When the terms of the statute under which a defendant is sentenced do not prohibit parole, it is error for a trial court to usurp the function of the Department of Public Safety and Corrections by addressing eligibility for parole. State v. Francis, 97-0201, p. 11 (La. App. 1st Cir. 2/20/98), 709 So. 2d 834, 841, writs denied, 98-1054 (La. 5/8/98), 719 So. 2d 57, 98-0887 (La. 9/4/98), 723 So. 2d 961. This court may, however, correct the illegal sentence by amendment on appeal, rather than by remand for resentencing, because the trial court attempted to impose the maximum legal sentence in this matter, and thus, no exercise of sentencing discretion is involved. See LSA-C.Cr.P. art. 882(A); State v. Miller, 96-2040, p. 3 (La. App. 1st Cir. 11/7/97), 703 So. 2d 698, 701, writ denied, 98-0039 (La. 5/15/98),

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<sup>3</sup>See footnote #1, supra.

**DECREE**

For the above and foregoing reasons, the sentence imposed by the trial court is amended to five years at hard labor.

**CONVICTION AFFIRMED; SENTENCE AFFIRMED, AS AMENDED.**