NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0373

STATE OF LOUISIANA

VERSUS

SHAWN BURTIS

Judgment Rendered: SEP 2 3 2008

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Appealed from the
18th Judicial District Court
In and for the Parish of Iberville, Louisiana
Case No. 976-06

The Honorable William C. Dupont, Judge Presiding

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

GAIDRY, J.

The defendant, Shawn Burtis, was indicted on two counts of violation of La. R.S. 14:81.2, molestation of a juvenile when the offender has control or supervision over the juvenile. Defendant entered a plea of not guilty. After a trial by jury, he was found guilty as charged on both counts. On each count, the trial court imposed a $10,000.00 fine and fifteen years imprisonment at hard labor, the sentences to be served consecutively. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, raising the following assignments of error:

(1) It was error [to permit] Detective Eppinette to testify that the defendant committed the crimes of molestation of a juvenile.

(2) It was error [to permit] the victims' mother to testify that the victims were not lying when they accused the defendant of molesting them.

(3) It was error for the trial court to allow the hearsay testimony of J.H. [the victims' grandmother].

(4) The trial court erred in denying the defendant's motion to reconsider sentence.

For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

The victims, C.T. and A.T., [1] made statements prior to and during the trial as to acts by defendant when he was their stepfather. According to C.T., defendant began touching her inappropriately when she was nine or ten years old. C.T. testified that defendant would rub her breasts, on top of her clothes at times and under her clothes (touching her skin) at other times. C.T. also testified that the defendant would sometimes "put his mouth on me and start sucking my breasts." About three or four times, when the victim

[1] In accordance with La. R.S. 46:1844(W), the victims herein are referenced only by their initials. We have also referenced the minor victims' immediate family members by initials to protect their privacy.

was eleven years old, defendant touched her below the waist both on top of and beneath her clothing. Defendant placed his hand "down my pants and start rubbing me there, around my area down there." C.T. cried as she testified that the defendant put her hand down his pants and told her to rub him "down there." C.T. stated that she complied with defendant's request and added that this particular act occurred more than once. C.T. also complied with defendant's instructions to get on her knees and lick his penis like she would lick a lollipop.

A.T. testified that defendant began touching her private parts when she was nine or ten years old. Defendant would rub her chest sometimes on top of her clothing and sometimes beneath her clothing. Defendant also rubbed "between my legs" over and under her clothing. On one occasion, defendant attempted to place A.T.'s hand on his "private part" and she pulled her hand away. That particular incident took place at the home of the victims' cousin.

At the time of the trial C.T. was fourteen years old and A.T. was thirteen years old. Both girls testified that defendant told them he loved them during the acts. The acts typically took place in isolation in the dining room of their home. The acts began when the family lived in Kenner, Louisiana, and continued when they moved to Plaquemine, Louisiana, after Hurricane Katrina. Both girls also testified that they delayed telling anyone of the incidents because they were afraid.

Defendant testified at trial, denying the girls' allegations. He claimed that there was tension among the family members after Hurricane Katrina.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, defendant argues that testimony of Detective Tammy Eppinette as to the ultimate question of guilt was

prejudicial. Defendant notes that while the trial court sustained the defense objection to the testimony, it denied the defense request to instruct the jury to disregard the testimony. Citing a lack of physical evidence, defendant argues that admission of the testimony constituted prejudicial error. Arguing that the testimony of the non-expert officer was prejudicial and inadmissible, defendant emphasizes that expert witnesses cannot testify as to credibility, guilt, or ultimate issues. Finally, defendant contends that Detective Eppinette was in no better position than the jury to determine the credibility of the victims.

The contested testimony took place when the state asked Detective Eppinette, the investigating officer, if defendant committed the offenses. Immediately prior to the defense objection, Detective Eppinette responded positively. After the trial court sustained the objection, the state replied, "Strike that." We note that the trial court not only sustained the defense objection to the testimony in question, the trial court also stated for the record, in the jury's presence, that the question was for the jury to decide. In an effort to rephrase the question, the state asked Detective Eppinette if she believed the victims were lying. After Detective Eppinette's negative response, the defense renewed its objection. The defense asked that the jury be instructed to disregard the answer and the trial court stated, "It's a question for the jury to decide." Defense counsel then responded, "Thank you, Your Honor."

On appeal, defendant cites La. C.E. arts. 701, 704, and 403 in support of his position. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, risk of misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403. Louisiana Code of Evidence art. 704

provides that "in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused." Since Detective Eppinette was not qualified and accepted as an expert witness, art. 704 is inapplicable. *See State v. Hubbard*, 97-916, p. 16 (La. App. 5th Cir. 1/27/98), 708 So.2d 1099, 1106, *writ denied*, 98-0643 (La. 8/28/98), 723 So.2d 415. Louisiana Code of Evidence art. 701 limits a lay witness's testimony in the form of opinions or inferences to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue. A law officer may testify as to matters within his personal knowledge acquired through experience without first being qualified as an expert. *See State v. LeBlanc*, 05-0885, p. 7 (La. App. 1st Cir. 2/10/06), 928 So.2d 599, 603. A reviewing court must ask two pertinent questions to determine whether the trial court properly allowed lay opinion testimony: (1) Was the testimony speculative opinion evidence or simply a recitation of or inferences from fact based upon the witness's observations; and (2) If erroneously admitted, was the testimony so prejudicial to the defense as to constitute reversible error. *LeBlanc*, 05-0885 at pp. 7-8, 928 So.2d at 603. Lay opinion testimony relating to the credibility of a witness is controlled by La. C.E. art. 608, which permits evidence to attack or support a witness's credibility in the form of general reputation only, subject to certain additional limitations specified in the article.

Detective Eppinette interviewed the victims and several family members, and consulted with psychologists at the Children's Advocacy Center in Baton Rouge, Louisiana, where the victims were interviewed. We find that Detective Eppinette's lay opinion testimony was based on her experience, observations, and interviews conducted and that it was helpful to

the determination of a fact in issue. *See Hubbard*, 97-916 at pp. 16-17, 708 So.2d at 1106. Pursuant to article 701, Detective Eppinette was entitled to give her opinion as a lay witness as to her perception of the veracity of the victims' statements.

To the extent that Detective Eppinette expressed an opinion as to defendant's guilt or presented testimony precluded by La. C.E. art. 608, we conclude that any such improper testimony constituted harmless error, as it was cumulative and corroborative of other testimony establishing the acts committed by defendant. The victims presented detailed, consistent accounts of defendant's actions. Absent internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony is sufficient to support a defendant's conviction of a sex offense, even where the state does not introduce medical, scientific, or physical evidence to prove the commission of the offense. *State v. Darbonne*, 01-39, pp. 3-4 (La. App. 3d Cir. 6/6/01), 787 So.2d 576, 579, *writ denied*, 02-0533 (La. 1/31/03), 836 So.2d 64. Particularly, the testimony of the victim alone is sufficient to prove the elements of the offense. *State v. Hampton*, 97-2096, p. 3 (La. App. 1st Cir. 6/29/98), 716 So.2d 417, 418.

Based on our review of the record, we find that the verdicts actually rendered in this trial were surely unattributable to any error in the admission of the testimony in question. *See State v. Code*, 627 So.2d 1373, 1384-85 (La. 1993), *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994), citing *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). *See also* La. C.Cr.P. art. 921. Additionally, the trial court's post-objection remarks clearly cured or minimized any error. Thus, any error as to the testimony's admission was harmless beyond a reasonable doubt. The first assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, defendant complains of the state's questioning of the victims' mother (G.H.) on direct examination as to whether she believed her children were lying about defendant. The trial court overruled the defense objection to the question, and the state pursued that line of questioning. G.H. responded that she did not believe that her children were lying to her. Defendant argues that the state usurped the role of the jury by bolstering the victims' credibility with the assurances of their mother. Citing *State v. Foret*, 628 So.2d 1116, 1128 (La. 1993), defendant notes that the Louisiana Supreme Court has ruled the state invades the province of the jury when it solicits testimony from one witness about the credibility of another. During the trial, defendant himself in fact testified as to the factual issue of G.H.'s ability to assess the victims' credibility. He testified that G.H., in general, had the ability to discern whether her children were telling the truth or lying. On appeal, defendant emphasizes that G.H. testified that her children never gave her details as to what happened. Defendant argues that it was therefore impossible for G.H. to make a credibility assessment of the victims' descriptions of the crimes in this case, adding that there is a clear danger that the jury gave undue weight to her testimony. Defendant concludes that the trial court committed reversible error in overruling the initial defense objection to G.H.'s testimony.

We note that the reversal in *Foret* was based on testimony of an expert witness as to his expert opinion on the victim's credibility. *Foret*, 628 So.2d at 1130-31. The testimony at issue in this assignment of error is that of a lay witness. As earlier noted, lay opinion testimony relating to the credibility of a witness is controlled by La. C.E. art. 608, which permits evidence to attack or support a witness's credibility in the form of general reputation only,

subject to certain additional limitations specified in the article. Although we agree that it was error for the trial court to permit G.H.'s testimony on this point, in that it was precluded by article 608, we nevertheless find that defendant was not substantially prejudiced by the testimony. The jury was aware of the fact that the victims did not provide their mother with details of the incidents. Thus, her ability to assess their veracity as to the particular incidents at issue was quite obviously limited. G.H. specifically testified that the victims were afraid to discuss the incidents with her and confirmed that she would not force them to do so. We do not find that the jury unduly deferred to G.H.'s assessment of the truthfulness of the victims. The jury heard the victims' testimony and was able to independently assess their veracity. The verdicts actually rendered in this trial were surely unattributable to any error in the admission of the testimony in question. *Code*, 627 So.2d at 1384-85. *See also* La. C.Cr.P. art. 921. Thus, we find no merit in this assignment of error.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, defendant contends that the trial court erred in allowing hearsay testimony of J.H., the victims' grandmother. Defendant notes that J.H. testified that she was the recipient of A.T.'s initial complaint of this offense. Defendant contends that this testimony was inconsistent with A.T.'s testimony and not supported by the investigating detective's report. Defendant argues that A.T.'s statement to her grandmother and statements relayed to the police were not the victim's first report of sexual activity and constituted inadmissible hearsay. Noting that J.H.'s hearsay testimony was the only corroboration of A.T.'s testimony, defendant argues that this conviction should be reversed.

Louisiana Code of Evidence art. 801(D) provides in pertinent part:

> **D. Statements which are not hearsay.** A statement is not hearsay if:
>
> **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> . . .
>
> (d) Consistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior.

At trial, A.T. testified that her aunt and uncle were the first adults whom she told about the incidents. However, when asked which child actually spoke to her and her husband regarding acts by defendant, the victim's aunt, L.D., specifically named C.T. L.D. testified that she and her husband spoke to C.T. after L.D.'s sister-in-law overheard comments that were made between the victims and other children. Likewise, C.T. testified that her aunt and uncle were the first adults whom she informed about the incidents. C.T. told L.D. that defendant was touching her. C.T. gestured that defendant had touched her upper body, and when asked if he had also touched her lower body, she replied that she did not remember but added, "I think so." J.H., the witness at issue, testified that she talked to A.T. after L.D. and her husband came to her crying after they had spoken to C.T. J.H. specifically testified that A.T. informed her that defendant touched her and that A.T. pulled the front of her pants down to demonstrate how defendant had touched her.

The trial court permitted the testimony in question over defense hearsay objections as the first report by A.T. for purposes of La. C.E. art. 801(D)(1)(d). That codal provision reflects a longstanding jurisprudential rule exempting the initial report of a child rape victim from the hearsay rule. *State v. Kennedy*, 05-1981, p. 29 (La. 5/22/07), 957 So.2d 757, 778, *reversed on other grounds*, ___ U.S. ___, 128 S.Ct. 2641, 171 L.Ed2d 525 (2008).

Considering the testimony presented during the trial, it was reasonable for the trial court to conclude that while L.D. and her husband (the victim's aunt and uncle) were the first adults spoken to by C.T., A.T. initially spoke to J.H. We find no error in the admission of the testimony in question. Thus, this assignment of error lacks merit.

FOURTH ASSIGNMENT OF ERROR

In his fourth and final assignment of error, defendant argues that the trial court imposed excessive sentences herein. Defendant specifically contends that the trial court failed to give adequate consideration to the fact that he had no prior criminal record and failed to adequately consider the sentencing guidelines provided in La. C.Cr.P. art. 894.1. Defendant further contends that there were insufficient aggravating circumstances in the instant case to warrant the imposition of maximum sentences. Defendant argues that the sentences are excessive because he is not the worst type of offender and the offenses are not the worst type of offense. While conceding that the trial court is not bound as such, defendant notes that the state recommended a sentence of ten years in a plea offer that defendant did not accept.

Article I, section 20 of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. *See State v. Guzman*, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167. The trial court has wide discretion in

imposing a sentence within the statutory limits and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Loston*, 03-0977, pp. 19-20 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 210, *writ denied*, 2004-0792 (La. 9/24/04), 882 So.2d 1167.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of art. 894.1, but the record must reflect that it adequately considered the criteria. *State v. Leblanc*, 04-1032, p. 10 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, *writ denied*, 05-0150 (La. 4/29/05), 901 So.2d 1063, *cert. denied*, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); *State v. Faul*, 03-1423, p. 4 (La. App. 1st Cir. 2/23/04), 873 So.2d 690, 692. Maximum sentences are reserved for cases involving the most serious offenses and the worst offenders. *State v. Easley*, 432 So.2d 910, 914 (La. App. 1st Cir. 1983).

As noted, the trial court imposed maximum sentences -- a $10,000.00 fine and fifteen years imprisonment at hard labor on each count, to be served consecutively. La. R.S. 14:81.2C (prior to its 2006 amendment).[2] In imposing the sentences, the trial court noted that it had heard all of the evidence of the offenses and told defendant, "You're probably lucky that they only charged you with two counts." The trial court further noted that defendant had not shown any remorse and concluded that defendant was incorrigible as to his behavior in the case. Based on the record before us, we do not find that the trial court abused its discretion in imposing consecutive, maximum sentences. Defendant knew that the victims were vulnerable due to their ages and his status as their stepfather. Further, defendant repeatedly

[2] We note that in accordance with the current law, twenty years is the maximum term of imprisonment allowed by statute for these offenses.

committed these heinous acts against two victims, both his stepchildren, over an extended period of time. Defendant's acts will have permanent effects on the victims. Considering the nature and extent of the offenses, the sentences are not shocking or grossly disproportionate to defendant's behavior. This assignment of error is also without merit.

CONVICTIONS AND SENTENCES AFFIRMED.