NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 2008

STATE OF LOUISIANA

VERSUS

ST. CLAIR HILLS

Judgment Rendered: NOV 14 2008

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Criminal Court Docket No. 05-04-0295

Honorable Louis R. Daniel, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

Defendant, St. Clair Hills, was charged by bill of information with one count of second degree kidnapping, a violation of LSA-R.S. 14:44.1. Defendant entered a plea of not guilty and was tried before a jury. The jury determined that defendant was guilty. The State instituted habitual offender proceedings seeking to have defendant adjudicated as a second felony habitual offender. Following a hearing, the trial court adjudicated defendant a second felony habitual offender. Defendant was sentenced to twenty-five years at hard labor, without benefit of probation, parole, or suspension of sentence.

Defendant appeals, citing the following assignments of error:

1. The evidence is insufficient to support the verdict.

2. The trial court erred in imposing a sentence which is unconstitutionally excessive.

3. The failure of trial counsel to file a motion to reconsider the sentence should not preclude this court from considering the constitutionality of the sentence; and in the event that it does, the failure of trial counsel constitutes ineffective assistance of counsel.

We affirm defendant's conviction, habitual offender adjudication, and sentence.

FACTS

A few weeks prior to Easter in 2004, Jermillar Carey (the victim) moved in with defendant at his mother's residence. The couple had been together for approximately five months and planned to get their own apartment. In the meantime, the victim's three children remained living with her mother, Cornelia Carey. Despite their plans to move into an apartment with her children, the victim testified that the longer she stayed at defendant's mother's residence, the more uncomfortable she became.

On April 10, 2004, the Saturday before Easter, the victim and defendant returned from shopping. The victim testified that defendant appeared upset and asked her to go into their bedroom so they could talk. Once inside the bedroom, the victim and defendant began arguing and defendant punched the victim in the mouth, causing her lip to bleed. Defendant apologized, and then the couple returned to a common room of the house and watched television.

Later that evening, defendant once again became violent towards the victim and accused her of having a sexual relationship with his brother. Defendant grabbed the victim by the arms, then placed his hands around her neck. The victim denied being unfaithful to defendant and attempted to leave, but defendant prevented her from leaving. Later that evening, the victim reiterated her desire to leave, but defendant would not let her. The victim testified that defendant would not let her out of his sight and even accompanied her to the bathroom.

The following morning, the victim threatened defendant with pepper spray and told him that she wanted to leave. Defendant responded that he did not want her to leave until the wounds he had inflicted on her healed. The victim managed to leave their bedroom and go across the hall to defendant's mother's bedroom, where she knocked on the door and asked permission to use the telephone. The victim then called her mother and told her that she wanted to go home. The victim's mother could tell something was wrong and told her that she would send a cab for her.

After speaking with her daughter, Cornelia Carey contacted the police to complain that her daughter was being held against her will at defendant's residence. As a result of her complaint, two officers from the Baton Rouge City Police Department were dispatched to defendant's residence.

After the victim ended her conversation with her mother, defendant got a gun from his bedroom. Defendant told the victim that if she left, he would kill her. According to the victim, the gun appeared to be a .38 revolver.

Within five minutes of the call to the victim's mother, Officer Elvin Howard of the Baton Rouge City Police Department arrived at defendant's residence. Officer Howard testified that there was no initial response to his knock. However, the door to the residence eventually opened and the victim ran out of the residence. Officer Howard testified that the victim was frightened, crying, and had a swollen eye and various bruises on her neck and arms.

The victim identified and described defendant as the person responsible for her injuries. Officer Howard alerted other officers in the area of defendant's description after he fled the residence by using a rear window. A short time later, defendant was apprehended a few blocks from the residence; however, the police were unable to locate the weapon the victim described. Defendant's mother, Mary Hills, refused to consent to a search of her residence.

The police took the victim to her mother's residence where her mother contacted EMS to evaluate whether the victim required further medical attention. Cornelia Carey also photographed the victim in order to make a record of the injuries her daughter had sustained.

Mary Hills testified on behalf of her son. Mary Hills testified that she was not in her residence from approximately 9:00 p.m. on Saturday night until 1:00 a.m. on Sunday. Mary Hills acknowledged that the victim had asked permission to use her telephone to call her mother Sunday morning, but testified that she did not seem upset or bothered. Mary Hills admitted to seeing the bruises on the victim's face on Sunday morning, but had no recollection of a fight occurring while she was home. Mary Hills further testified that defendant had never owned a gun, nor was there ever a gun in her residence. Finally, Mary Hills denied that she had refused

consent for the police to search her residence Easter Sunday morning.

Defendant did not testify.

SUFFICIENCY OF THE EVIDENCE

Defendant filed a pro se brief challenging the sufficiency of the evidence used to support his conviction. Specifically, defendant argues that the victim's trial testimony reflects that she could have left the residence if she wanted.

In reviewing claims challenging the sufficiency of the evidence, this court must consider whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. LSA-C.Cr.P. art. 821(B); **Jackson v. Virginia**, 443 U.S 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Second degree kidnapping is the imprisoning of any person wherein the victim is physically injured. LSA-R.S. 14:44.1(A) (3) & (B) (3). For a conviction, LSA-R.S. 14:44.1(B) (3) requires neither movement of the victim, nor that the imprisonment exists for any minimum period of time. **State v. Tabor**, 2007-0058, p. 12 (La. App. 1 Cir. 6/8/07), 965 So.2d 427, 434.

While we recognize that the victim initially indicated that she felt free to leave the defendant's residence on the Saturday evening before Easter Sunday, the victim subsequently explained that she threatened to use pepper spray on defendant in order to facilitate her departure. Further, the victim testified that at the time of trial she still had feelings for defendant and it was very difficult for her to testify against him. Finally, the victim clearly testified that she tried to leave the residence, but defendant prevented her from doing so.

This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole, or in part, the testimony of any witness. Moreover,

when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Tabor**, 2007-0058 at p. 13, 965 So.2d at 434.

After a thorough review of the record, we are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant was guilty of the second degree kidnapping of the victim. The verdict rendered against the defendant indicates that the jury accepted the testimony of the victim and took into consideration that certain inconsistencies about whether she felt free to leave were influenced by her feelings for defendant. The guilty verdict also reflects that the jury rejected the testimony of the defense witness, Mary Hills, who denied that defendant had a weapon in the residence. Viewing the evidence in the light most favorable to the prosecution, we find the guilty verdict is supported by the evidence.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his two counseled assignments of error, defendant complains that his sentence is excessive and that his trial counsel's failure to object to his sentence constitutes ineffective assistance of counsel.

At the outset, we note that the defendant's trial counsel failed to either object to the sentence at the time of sentencing, or to file a motion to reconsider sentence thereafter. A thorough review of the record reveals the absence of either a written or oral motion to reconsider sentence. The failure to file or make a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. LSA-C.Cr.P. art. 881.1(E); **State v. Duncan**, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc

per curiam). Accordingly, the defendant is procedurally barred from having the portion of the instant assignment of error regarding the constitutionality of the sentence reviewed. However, we will examine the sentence for excessiveness because it is necessary to do so as part of the analysis of the ineffective assistance of counsel issue raised in the defendant's supplemental brief. See **State v. Bickham**, 98-1839, pp. 7-8 (La. App. 1 Cir. 6/25/99), 739 So.2d 887, 891-92.

A claim of ineffective assistance of counsel is ordinarily raised in an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted.[1] However, where evidence of the alleged error is contained in the record, and the issue is raised by assignment of error on appeal, we may address the issue in the interest of judicial economy. **State v. Felder**, 2000-2887, p. 10 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Accordingly, we will address the defendant's claim of ineffective assistance of counsel.

Effective counsel has been defined to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. **U.S. v. Frugé**, 495 F.2d 557, 558 (5th Cir. 1974) (per curiam). See also **U.S. v. Johnson**, 615 F.2d 1125, 1127 (5th Cir. 1980) (per curiam). Whether the defendant's counsel's assistance was so defective as to require reversal of his sentence is subject to a two-part test established by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that this deficiency prejudiced the outcome of the trial. A failure to make the required showing of either deficient performance or sufficient prejudice defeats the

[1] Defendant's application for post-conviction relief must meet all requirements of LSA-C.Cr.P. arts. 924, et seq.

ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985).

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. **State v. Felder**, 2000-2887 at pp. 10-11, 809 So.2d at 370. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. **State v. Felder**, 2000-2887 at p. 11, 809 So.2d at 370. Thus, the defendant must show that but for his counsel's failure to file a motion to reconsider sentence, the sentence would have been changed, either in the district court or on appeal.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence falls within statutory limits, it may nevertheless violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). 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. **State v. Reed**, 409 So.2d 266, 267 (La. 1982).

As governed by LSA-C.Cr.P. art. 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. Watkins**, 532 So.2d 1182, 1186 (La. App. 1 Cir. 1988). The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir.), writ denied, 565 So.2d 942 (La. 1990). Where the record clearly demonstrates an adequate factual

basis for the sentence imposed, a remand for compliance with Article 894.1 is unnecessary. **State v. Robertson**, 94-1379, p. 5 (La. App. 1 Cir. 10/6/95), 671 So.2d 436, 439, writ denied, 95-2654 (La. 2/9/96), 667 So.2d 527.

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. Lanclos**, 419 So.2d 475, 478 (La. 1982). See also **State v. Savario**, 97-2614, p. 8 (La. App. 1 Cir. 11/6/98), 721 So.2d 1084, 1089, writ denied, 98-3032 (La. 4/1/99), 741 So.2d 1280.

Defendant was adjudicated as a second felony habitual offender based on his present conviction for second degree kidnapping and a 1997 conviction for simple robbery under docket number 6-96-668 in the Nineteenth Judicial District Court. Accordingly, this adjudication allowed for an enhanced penalty provision for his second degree kidnapping conviction to a minimum sentence of twenty years and a maximum sentence of eighty years. LSA-R.S. 15:529.1(A)(1)(a); LSA-R.S. 14:44.1(C).

In sentencing defendant, the trial court articulated that it had reviewed the presentence investigation, the evidence at trial, and the input from the victim. The trial court emphasized that it had also considered defendant's criminal history, which it characterized as "atrocious." The trial court noted that defendant had a "staggering" number of arrests that had begun when he was a juvenile, including a criminal history filled with crimes against the person. The trial court noted that defendant had been previously placed on probation and still continued to engage in unlawful behavior, and had not complied with the conditions of his probation. The trial court also acknowledged the death of defendant's father, his education, his family situation, and his age.

In sentencing defendant, the trial court specifically stated that there was an undue risk that defendant would commit another crime, that he was in need of a

custodial environment, and that his conduct in this case was "deplorable." The trial court went on to state that defendant's actions in the course of the instant offense caused great fear and harm to the victim.

Under the circumstances of this matter, we cannot say that the trial court abused its discretion in imposing a near-minimum sentence of twenty-five years at hard labor. Accordingly, the failure to object to the sentence, even if deficient performance by trial counsel, was not ineffective assistance of counsel.

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.