NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1458

STATE OF LOUISIANA

VERSUS

WILLIAM D. POWELL

Judgment rendered March 23, 2012.

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Appealed from the
22nd Judicial District Court
in and for the Parish of Washington, Louisiana
Trial Court No. 10 CR3 110833
Honorable William J. Crain, Judge

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WILLIAM POWELL

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

Defendant, William D. Powell, was charged by bill of information with one count of sexual battery of a victim under the age of thirteen years, a violation of La. R.S. 14:43.1. He pled not guilty. After a trial by jury, defendant was found guilty of the responsive offense of attempted sexual battery of a victim under the age of thirteen years, in violation of La. R.S. 14:43.1 and La. R.S. 14:27. The trial court denied defendant's motion for new trial and motion for post verdict judgment of acquittal. Defendant was sentenced to eighteen years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals. In his only assignment of error, defendant argues that the trial court imposed an excessive sentence. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

During the summer of 2008, T.T.[1] and her brother, D.T., spent a period of time residing with their step-grandmother, C.T., at defendant's camp in Enon, Louisiana. At the time, due to their mother's incarceration, T.T. and D.T. were under the legal guardianship of C.T. and their grandfather, P.T., who was estranged from C.T.

On December 17, 2009, T.T. and D.T. were visiting their mother, S.T. and their half-sister, T.F., at their great-grandparents' house. S.T. had recently been released from jail following her successful completion of a drug court program, and she was attempting to reacquaint herself with her children. During a playful conversation with her half-siblings and mother, T.F. asked D.T. whether he had any girlfriends and whether he had ever kissed a girl. D.T. responded no to both questions, and T.F. then asked T.T. whether she had a boyfriend and whether she had ever kissed a boy. T.T. also responded negatively to both questions, but S.T. and T.F. noticed a change in T.T.'s demeanor. T.F. then asked T.T. whether anyone had ever hurt her or touched

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[1] At the time of the offense, the victim was 8 years old. In accordance with La. R.S. 46:1844(W), the victim herein is referenced only by her initials, or referred to as "the victim." To further protect the identity of the victim, her family members are also referenced by their initials.

her. T.T. responded that someone had, and she began to cry. At that time, S.T. had D.T. and T.F. leave the room so that she could talk to T.T. alone. T.T. told her mother that defendant had used his hand to touch her "private" area when she visited his camp at a time when C.T. was away at work. In addition, T.T. drew a picture for her mother which indicated that defendant had forced her to touch his penis. On the following day, S.T. took T.T. to the Washington Parish Sheriff's Office to report the abuse.

After taking the initial complaint, Detective Anthony Stubbs, of the Washington Parish Sheriff's Office, arranged for T.T. to be interviewed by forensic interviewer JoBeth Rickles, of the Children's Advocacy Center (CAC) for St. Tammany and Washington Parishes. During a videotaped interview, T.T. stated that one day in the summer of 2008, she was at defendant's camp sitting in a recliner and watching television while her brother was outside chopping wood with a hatchet. According to T.T., defendant approached her from behind and placed his hand under her blanket and through the waistband of her shorts and underwear to touch her private area on its bare skin. T.T. indicated on some standard drawings provided by the CAC that defendant had touched her vagina. T.T. stated in the interview that after defendant touched her, she ran into a vacant bedroom and hid under a blanket. At that time, defendant followed her into the bedroom and unzipped his pants. Having heard defendant unzip his pants, T.T. pleaded from under the blanket for defendant to stop, and defendant complied. T.T. went back to the recliner to watch television, and defendant again approached her and touched her vaginal area, but this time he did so on top of T.T.'s clothing. T.T. also stated during the interview that another incident occurred outdoors at defendant's camp where defendant made her touch his penis over his shorts. According to T.T., that incident occurred when she went down from the camp to tell defendant that dinner was ready, but she could not remember whether this incident occurred before or after the recliner incident.

After witnessing T.T.'s CAC interview, which took place on January 11, 2010, Detective Stubbs attempted to contact defendant so that he could question him regarding this incident. However, defendant did not appear for questioning until August

3, 2010. After being advised of his **Miranda**[2] rights and signing a waiver of rights form, defendant gave two statements to Detective Stubbs. In the first, defendant denied that he had ever touched T.T. inappropriately. In the second, defendant stated that he had in fact touched T.T. on the skin of her vagina, but that he had only done so by accident. According to defendant, he lifted T.T. out of the recliner in order to get her to comply with "something" he had told her to do. Defendant stated that as he lifted T.T. by reaching over her shoulder and back, his hand slipped through the leg part of T.T.'s underwear and touched the skin of her vagina. According to defendant, he set T.T. down, and she went on with her everyday activities. After this interview, defendant was arrested and charged with sexual battery of a victim under the age of thirteen years.

At trial, T.T. testified and recounted a version of events that was substantially the same as the version recounted in her CAC interview. The only difference in T.T.'s trial testimony from her CAC interview is that at trial she said that defendant forced her hand to touch his bare penis, whereas she indicated in her CAC interview that she was forced to touch defendant's penis through his pants.

Defendant testified at trial and reiterated his version of the incident, stating that he had only touched T.T.'s vagina by accident and that he had immediately set her down upon his realization that his hand had slipped. Defendant stated that he had no sexual intent and that he never wanted to hurt T.T. Defendant also stated that he had never placed T.T.'s hand on his own genital area.

ASSIGNMENT OF ERROR

In defendant's sole assignment of error, he contends that the trial court's sentence of eighteen years at hard labor, without the benefit of parole, probation, or suspension of sentence, is excessive.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may fall within statutory limits, it may

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[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

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 constitutionally excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). 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). 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.

Article 894.1 of the Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. 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). 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. Watkins**, 532 So.2d 1182, 1186 (La. App. 1 Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **Lanclos**, 419 So.2d at 478.

For his conviction of attempted sexual battery of a victim under thirteen years of age, defendant was eligible to receive a sentence of up to forty-nine and one-half years at hard labor, all of which could potentially have been imposed without the benefit of parole, probation, or suspension of sentence. La. R.S. 14:27(D)(3) and 14:43.1(C)(2). The trial court sentenced defendant to a term of eighteen years at hard labor, without the benefit of parole, probation, or suspension of sentence.

In sentencing defendant, the trial judge noted that he listened to defendant's trial in its entirety and respected the jury's verdict of guilty of attempted sexual battery of a victim under thirteen years of age, even though he personally believed that the act that occurred in this case was not attempted, but accomplished. The trial judge further stated that defendant left the victim with a memory that she will have to live with for the rest of her life.

In addressing the Article 894.1 factors, the trial judge stated that he found no mitigating factors in this case. The trial judge found that, given the nature of the crime and the age of the victim, defendant presents an undue risk of committing another crime if he were to be released. The trial judge also found that defendant is in need of correctional treatment, or a custodial environment, and that any lesser sentence would depreciate the seriousness of his crime.

In addition to the Article 894.1 factors, the trial court considered an impact statement from the victim's mother and a letter from defendant's father before imposing defendant's sentence. Lastly, the trial court considered a presentence investigation (PSI) report, which recommended a sentence of twenty-five years at hard labor, without the benefit of parole, probation, or suspension of sentence.

Based on our review of the record, we cannot say the trial court abused its discretion. The only mitigating factor cited by defendant in his brief is his lack of a prior record of offenses. However, defendant's PSI report shows that defendant has a 1982 conviction for possession of marijuana with intent to distribute. We note that the trial court deviated downward from the recommendation of a twenty-five year sentence in the PSI report and imposed a mid-range sentence for defendant's offense. Based on the facts adduced at trial and at the sentencing hearing, we find that the trial court did not abuse its discretion in sentencing defendant to eighteen years at hard labor, without the benefit of parole, probation, or suspension of sentence.

This assignment of error is without merit.

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

CONVICTION AND SENTENCE AFFIRMED.