NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1655

STATE OF LOUISIANA

VERSUS

JAMES R. DAVIS

Judgment Rendered: May 2, 2012

* * * * * *

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 441,059

Honorable Allison H. Penzato, Judge Presiding

* * * * * *

Walter P. Reed
District Attorney
Covington, LA

Kathryn Landry
Special Appeals Counsel
Baton Rouge, LA

Counsel for Appellee
State of Louisiana

Jane L. Beebe
Appellate Attorney
New Orleans, LA

Counsel for
Defendant/Appellant
James R. Davis

* * * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

Defendant, James R. Davis, was charged by grand jury indictment with one count of aggravated incest, a violation of La. R.S. 14:78.1. After a jury trial, defendant was found guilty as charged. The trial court denied defendant's motions for post-verdict judgment of acquittal and new trial. Defendant was sentenced to ten years at hard labor. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, alleging three assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On October 6, 2007, the victim, O.L.,[1] assisted her adoptive parents, E.L. and F.L., in moving a new refrigerator into their Folsom home with the help of defendant, who is F.L.'s biological brother. After the refrigerator had been put in place, O.L. went with defendant to his nearby home so that she could help him either clean or perform maintenance on his ceiling fan. According to O.L.'s trial testimony, as she entered the front of defendant's home, defendant entered it from the rear. In doing so, defendant locked the rear door and proceeded to chase O.L. into his living room. O.L. stated that defendant forced her onto his loveseat, pulled her pants down, and began to have vaginal sexual intercourse with her. After a short time, defendant removed his penis from O.L.'s vagina and placed a condom on himself. Defendant then continued to have vaginal sexual intercourse with O.L. as he held her down. According to O.L., after defendant had finished having sex with her, he told her thank you and sent her home. O.L. stated that defendant also told her that he would kill her if she told anyone what happened. At the time of this incident, O.L. was seventeen years old.

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

O.L. returned home from defendant's house, and her father, E.L., eventually noticed that O.L. seemed upset. After some prodding, O.L. told her father that defendant had engaged in sexual intercourse with her. O.L. then took a bath and put the clothes that she had been wearing in a bag on her bed. As her parents attempted to make contact with defendant, O.L. left her home and began walking down Louisiana Highway 25 toward Covington.

Almore "Chico" James noticed O.L. as she was walking in the street, and he pulled his car over to help because he noticed that O.L. was crying. Although he did not initially recognize O.L., when she introduced herself, Mr. James realized that he had counseled O.L. when she was a young girl. O.L. told Mr. James about what happened at defendant's house, but she stated that she did not want to tell the police because defendant was a St. Tammany Parish Sheriff's officer. Instead, O.L. asked Mr. James to bring her to the Covington fair. Mr. James complied with O.L.'s request, but he then immediately reported O.L.'s story to two St. Tammany Parish Sheriff's officers who were eating dinner at a local fast food restaurant. Mr. James then gave an official statement to Corporal Hugh Davis of the St. Tammany Parish Sheriff's Office. At the direction of the sheriff's officers, Mr. James contacted O.L., picked her up from the fair, and brought her to St. Tammany Hospital for an examination.

At the hospital, O.L. spoke with two sheriff's deputies and recounted her story to them. O.L. repeated her story to Detective Brian O'Cull at headquarters. At trial, Corporal Davis and Detective O'Cull both testified that O.L.'s recounting of the incident remained consistent throughout multiple interviews.

Based on O.L.'s report, Detective O'Cull secured a search warrant for defendant's house in order to seize the items of clothing that O.L. described that he had worn during the incident. In addition, the two sheriff's deputies who were initially dispatched to O.L.'s home were able, with the consent of O.L.'s parents, to

seize the bag of clothing that O.L. had left on her bed. Detective O'Cull conducted an initial interview of defendant, and defendant said that he had asked O.L. to come to his house so that she could steady a stepladder while defendant worked on his ceiling fan. Defendant denied that he had any sexual contact with the victim.

Due to the fact that defendant was a St. Tammany Parish Sheriff's Office employee, Detective O'Cull asked defendant if he was willing to submit to an independent interview conducted by Special Agent Joel Icard of the Federal Bureau of Investigation's (FBI) New Orleans field office. Defendant agreed, and on October 16, 2007, he accompanied Detective O'Cull and Lieutenant Wharton Muller to the FBI's New Orleans office. Defendant was read his Miranda[2] rights and, after a short time, he dictated a statement to Special Agent Icard in which he admitted to having sexual intercourse with the victim. Several days later, defendant was arrested for the charge of aggravated incest.

SUFFICIENCY OF THE EVIDENCE

In cases such as this one, where the defendant raises issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should preliminarily determine the sufficiency of the evidence before discussing the other issues raised on appeal. When the entirety of the evidence, both admissible and inadmissible, is sufficient to support the conviction, the accused is not entitled to an acquittal, and the reviewing court must review the assignments of error to determine whether the accused is entitled to a new trial. State v. Hearold, 603 So. 2d 731, 734 (La. 1992); State v. Smith, 03–0917, pp. 3-4 (La. App. 1st Cir. 12/31/03), 868 So. 2d 794, 798. Accordingly, we will first address the defendant's second assignment of error, which challenges the sufficiency of the State's evidence. Specifically, defendant contends only that the State failed to prove any familial relationship between O.L. and defendant.

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

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether, 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. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C. Cr. P. art. 821(B); State v. Ordodi, 06-0207, p. 10 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-1309 (La. 1988). The Jackson standard of review, incorporated in Article 821(B), is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 01-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

At the time of the offense, La. R.S. 14:78.1 provided, in pertinent part:

> A. Aggravated incest is the engaging in any prohibited act enumerated in Subsection B with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following biological, step, or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew, or niece.
>
> B. The following are prohibited acts under this Section:
>
> (1) Sexual intercourse, sexual battery, second degree sexual battery, carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile, crime against nature, cruelty to juveniles, parent enticing a child into prostitution, or any other involvement of a child in sexual activity constituting a crime under the laws of this state.

The State must prove several elements to establish the offense of aggravated incest. First, the State must show that the victim was less than eighteen years of age. Second, the State must show that the offender knew that the victim was related to him within the specified degrees. The statute enumerates a list of

relatives who may be victims of the offense and specifies that the offender must be aware of his relationship to the victim. Finally, the State must prove that the defendant has engaged in one of the prohibited acts with the victim. See State v. Flores, 27,736, p. 5 (La. App. 2d Cir. 2/28/96), 669 So. 2d 646, 650.

The sole issue before us is whether the State proved that O.L. was the adopted niece of defendant.[3] In his brief, defendant argues that the State failed to adequately prove that O.L. was the adopted daughter of F.L., defendant's biological sister, because the State failed to introduce at trial any legal documentation that shows this adoptive relationship. Defendant raised this argument in his motion for post-verdict judgment of acquittal, and this issue was argued before the trial court. During that argument, the prosecutor admitted that she had, in fact, procured the adoption records pertaining to O.L. because she was concerned that O.L.'s adoptive parents might not admit to the adoptive relationship when they were called to testify at trial. However, the prosecutor opted not to introduce these records because O.L.'s relationship to defendant was freely admitted by all parties at trial. The issue of whether legal documentation is required to prove an adoptive relationship in a criminal case appears to be *res nova* in Louisiana.

Defendant cites in his brief several succession cases, which he asserts stand for the principle that "strict proof of adoption has always been required" in the area of successions. However, we find the cases cited by defendant do not stand for the proposition that legal documentation is the only manner in which an adoption may be proven. Defendant first cites Welch v. Jacobsmeyer, 216 La. 333, 43 So. 2d 678 (1949), as support for his contention that mere conclusions are not sufficient to prove an adoption. However, in that case, the Louisiana Supreme Court said merely that "[t]he allegation as pleaded in . . . plaintiffs' petition . . . is a conclusion

[3] Since defendant has only alleged that the State failed to prove his adoptive relationship to O.L., we need not address the sufficiency of the evidence with respect to the other statutory elements of aggravated incest.

of the pleaders, and becomes a mere brutum fulmen in the absence of supporting facts *or* documents and the law to sustain such conclusion." Welch, 216 La. at 337, 43 So. 2d at 679 (emphasis added). Thus, in Welch, the Supreme Court stated only that an unsupported allegation of an adoption in a petition is insufficient to prove that adoption without some additional supporting fact or document. Clearly, the Court's use of the disjunctive "or" indicates that a legal document is not the only manner in which an adoption may be proven.

Defendant also cites Succession of Gussman, 288 So. 2d 665 (La. App. 3d Cir. 1974), as support for his contention that strict proof of adoption has always been required in succession cases. However, this case, too, says nothing that indicates a legal document is required to prove an adoption. In fact, the primary issue in Gussman was whether an instrument of adoption had ever existed. See Gussman, 288 So. 2d at 667-68. The appellate court agreed with the trial court's determination that there was insufficient proof to show that the instrument of adoption existed, and it approved the trial court's consideration of parol evidence to attempt to establish the existence of the document by a preponderance of the evidence. See Gussman, 288 So. 2d at 668-69. Although the appellate court did not ultimately address the question of the contents of the alleged instrument of adoption in Gussman, the court did recognize that parol proof of the contents of such an instrument would have been allowed from someone with firsthand knowledge of the instrument, at least in a situation where the instrument had been lost or destroyed. See Gussman, 288 So. 2d at 669. Thus, Gussman does not support defendant's argument that proof of an adoptive relationship may only be established by introducing the legal instrument of adoption into evidence.

We thus find that legal documentation is not required to prove an adoptive relationship beyond a reasonable doubt in a criminal trial. Further, we reject defendant's contention that proof of an adoptive relationship in a criminal case

must be made by a heightened standard that exceeds the general standard of beyond a reasonable doubt. Now, we must determine whether the evidence presented at trial, viewed in the light most favorable to the prosecution, was sufficient to support a finding that O.L. was defendant's niece by adoption.

Four people with direct knowledge of defendant's relationship to O.L. testified at trial. E.L. testified that he was married to F.L., defendant's biological sister, and that O.L. was his adopted daughter. O.L. testified that she was the adopted daughter of E.L. and F.L. and that defendant was F.L.'s brother. F.L. testified that she was O.L.'s adoptive mother and that defendant was her brother. Finally, defendant himself testified that O.L. is his niece and that his sister adopted O.L. Viewed in the light most favorable to the prosecution, this uncontroverted testimony from four separate witnesses provided sufficient evidence for the jury to conclude beyond a reasonable doubt that O.L. was defendant's adopted niece and that defendant was aware of this relationship. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See Ordodi, 06-0207 at p. 14, 946 So. 2d at 662.

This assignment of error is without merit.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant contends that the prosecutor made an improper remark during her rebuttal argument. Specifically, defendant argues that the prosecutor's reference to the "[h]alf an hour" that defendant spent being interviewed by Special Agent Icard was highly prejudicial and misleading to the jury because it prevented the jury from considering the argument that defendant only confessed due to the length and intimidating nature of this interview.

Throughout defendant's trial, the prosecutor and defense counsel had numerous sidebar conferences with the trial judge in order to address how to avoid disclosing the fact that Special Agent Icard had performed a polygraph

examination on defendant during defendant's interview in New Orleans. At one of these sidebar conferences, the prosecutor informed the judge and defense counsel that the only part of this larger interview she planned to introduce at trial involved a half-hour window wherein defendant actually dictated his confession to Special Agent Icard. During her redirect examination of Special Agent Icard, the prosecutor asked the following question and received the following response:

> Q: This interview that you did, and writing this statement down, how long did that take?
>
> A: Probably no more than about 30 minutes.

Defense counsel did not contemporaneously object to this question or answer. It is clear from the sidebar conferences that defendant spent more than thirty minutes total at the FBI office, but the total amount of time spent at the FBI office never came into the record because the trial judge did not want either the State or the defense to open the door to questions about the polygraph examination.

During her rebuttal argument, the prosecutor stated, "[l]et's talk about the confession. Half an hour in the room with Joel Icard." Defense counsel immediately objected to this statement. After brief sidebar arguments by the State and the defense, the trial judge privately told the prosecutor to "[s]tay away from the time[,]" but the defense did not request, nor did the trial judge issue, any admonition about the remark to the jury. The prosecutor never again mentioned the amount of time that defendant spent with Special Agent Icard. Defendant now argues that this remark during the prosecutor's rebuttal argument prevented the jury from considering that defendant confessed only because of the length of, and duress experienced in, his interrogation. Defendant contends that this remark should have resulted in a mistrial.

Arguments by counsel "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the State or defendant may draw therefrom,

and to the law applicable to the case." La. C. Cr. P. art. 774. The trial court, "upon the request of the defendant . . . shall promptly admonish the jury to disregard a remark or comment made . . . in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant . . . in the mind of the jury: (1) When the remark or comment is made by the . . . district attorney . . . and the remark is not within the scope of Article 770 . . . ." La. C. Cr. P. art. 771(1). In addition, "on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial." La. C. Cr. P. art. 771.

At trial, defendant testified on his own behalf, and he stated that he eventually confessed to Special Agent Icard only because he was tired and because he knew after the "third, fourth time" of denying his involvement that he was going to be charged anyway. In his brief, defendant cites the jury's question to the trial judge about the length of defendant's interview with Special Agent Icard as evidence that the jury found this fact to be determinative in its deliberations.

After conducting a thorough review of the record, we have determined that the prosecutor's reference to the half-hour length of defendant's interview with Special Agent Icard was not an improper subject of her rebuttal argument. This fact had been admitted into evidence through the testimony of Special Agent Icard, and defense counsel did not contemporaneously object to the prosecutor's questioning of Special Agent Icard with respect to this fact. See La. C.E. art. 103(A)(1); La. C. Cr. P. art. 841. Further, even if this remark was improperly made, we note that while defense counsel objected to the remark itself, he failed to request either an admonition or a mistrial from the trial court in connection with that objection. See La. C. Cr. P. art. 771.

This assignment of error is without merit.

ASSIGNMENT OF ERROR #3

In his final assignment of error, defendant contends that his sentence of ten years at hard labor 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 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. 1st 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. 1st 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. 1st 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 aggravated incest, defendant was subject to a sentence of not less than five nor more than twenty years, with or without hard labor, or a fine of up to $50,000.00, or both. See La. R.S. 14:78.1(D)(1). The trial court sentenced defendant to ten years at hard labor.

In sentencing defendant, the trial court addressed the Article 894.1 factors and found that defendant was in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution. Further, the trial court found that defendant was a law enforcement officer and a person in a position of trust relative to the victim in this crime and that defendant used his status and position of trust to facilitate the commission of the instant offense. Finally, the court found that subsequent to the offense, defendant used threats against the victim with the intent to affect the institution of proceedings in this case.

Based on our review of the record, we cannot say that the trial court abused its discretion in sentencing defendant to ten years at hard labor for the instant offense. Defendant cites as a mitigating factor in his brief the fact that he was a well-liked, eighteen-year veteran of the St. Tammany Parish Sheriff's Office who had never been charged with any untoward behavior. However, the trial court clearly considered defendant's law enforcement background and found that defendant abused this status in relation to this case. Defendant also attacks the credibility of O.L. in his brief, but the victim's credibility is irrelevant to defendant's sentence.

This assignment of error is without merit.

REVIEW FOR ERROR

Defendant asks that this court examine the record for error under La. C. Cr. P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See State v. Price, 05–2514, p. 18 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123 (en banc), writ denied, 07–0130 (La. 2/22/08), 976 So.2d 1277.

CONCLUSION

For the foregoing reasons, we find that the evidence presented to the jury fully supports the defendant's conviction for the crime charged and find no prejudicial error in the proceedings conducted before the jury. We further conclude, based on the evidence presented and in light of the circumstances, that the sentence imposed is proper. Accordingly, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.