**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2006 KA 2419**

**STATE OF LOUISIANA**

**VERSUS**

**MICHAEL NICK**

**Judgment Rendered: May 4, 2007**

**Appealed from the**
**Nineteenth Judicial District Court**
**in and for the Parish of East Baton Rouge, State of Louisiana**
**Trial Court Number 08-05-0057**

**Honorable Louis Daniel, Judge Presiding**

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

**WHIPPLE, J.**

Michael Nick, defendant, was indicted by a grand jury and charged with two counts of aggravated rape, violations of LSA-R.S. 14:42.[1] Defendant pled not guilty and was tried before a jury. On Count 1, the jury returned a verdict of guilty of the responsive offense of forcible rape, a violation of LSA-R.S. 14:42.1. On Count 2, the jury returned a verdict of guilty as charged. The trial court sentenced defendant to forty years at hard labor without benefit of probation, parole, or suspension of sentence for his conviction of forcible rape (Count 1). For defendant's conviction for aggravated rape (Count 2), the trial court sentenced defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence, with the sentences to be served concurrently. We affirm.

**FACTS**

On July 17, 2005, M.W. was walking along Florida Boulevard near the Alamo Plaza Motel in Baton Rouge, Louisiana. Defendant stopped his vehicle and began conversing with M.W. Eventually, M.W. agreed to accompany defendant to obtain some drugs. M.W. drove defendant's vehicle to her friends' apartment, where she was staying at the time. M.W. knew her friends would have drugs at the apartment and proceeded there to buy some for defendant.

M.W. and defendant then went to a convenience store, where defendant purchased gasoline, cigarettes and alcohol. M.W. agreed to accompany defendant to his apartment. According to M.W., defendant showed her his driver's license in an effort to assure her he was a safe person

[1]Count 1 of the indictment charged defendant with the July 17, 2005 aggravated rape of M.W. Count 2 of the indictment charged defendant with the July 21, 2005 aggravated rape of D.J.

to be around. When they arrived at defendant's apartment, defendant opened the door for her and allowed her to walk around the residence to make sure no one else was there and it was safe.

According to M.W., she went to defendant's apartment to "chill out." Defendant offered M.W. something to eat and after she ate, they began watching a movie and talking. Defendant left for a brief period. When he returned, they continued talking. M.W. subsequently consented to allowing defendant to shave her pubic hair and to perform oral sex on her. Thereafter, they returned to the living room where M.W. observed defendant smoking crack cocaine while they both consumed alcohol.

After about an hour, defendant turned everything off and began walking around the apartment with a knife. M.W. asked to leave, but defendant told her that she "wasn't going anywhere." Defendant then became angry and made M.W. go into his bedroom where he removed her clothes and raped her. M.W. told defendant to stop and tried to get up. Defendant then anally raped M.W. and forced her to perform oral sex on him. M.W. testified that defendant raped her in various manners seven to nine times over the next four or five hours.

As defendant was anally raping M.W., he used duct tape to tape her arms and mouth. M.W. testified that defendant also stuck something else into her, which she could not identify. Defendant then removed the tape from M.W. and led her into the bathroom where he tried to remove the tape residue on her by using a Windex-type cleaner.

While M.W. was in the tub, defendant told her that he was going to let her go, but instead raped her again in his bedroom. By this time, it was daylight outside. M.W. testified that defendant also took her into another room in his apartment where he tied her up with rope and raped her again.

Sometime after daylight, defendant fell asleep and M.W. ran out of defendant's apartment naked. M.W. went to another apartment in the complex seeking help, but the residents did not speak English. A Spanish-speaking woman gave her a skirt. M.W. then began walking along Florida Boulevard.

Amber Bradley was driving along the Florida Boulevard Service Road and noticed M.W. walking and wearing what appeared to be a sheet. Bradley stopped and asked M.W. if she needed help. M.W. reported that she had been raped. Bradley phoned the police, then transported M.W. to a nearby convenience station to meet with the police.

On July 21, 2005, D.J. encountered defendant as she was walking down Christy Drive shortly after dark. Defendant was trying to buy drugs. D.J., who admitted at trial to being addicted to crack cocaine, voluntarily got into defendant's vehicle and accompanied him when he purchased some crack cocaine. D.J. testified that both she and defendant consumed the crack cocaine in his vehicle. D.J. agreed to return to defendant's apartment to have sex with defendant's roommate for $30.00.

When D.J. and defendant arrived at his apartment, defendant's roommate, later identified as Rudolph Karapetov, was there. Defendant introduced D.J. to Karapetov, who spoke no English. Defendant left the apartment for a while, and D.J. and Karapetov had sex. When defendant returned, Karapetov paid defendant and they all drank beer and watched television. D.J. never received any money for having sex with Karapetov.

Defendant was drinking beer and vodka. After a while, D.J. told defendant that she wanted to go home. Defendant told D.J. to go into his room; when D.J. refused, defendant became violent. Defendant pushed D.J.

into his room where he raped her vaginally, anally, and orally. D.J. tried to push defendant off, but he kept beating her with his fists.

D.J. testified that she was sexually assaulted by defendant five times within an hour. D.J. ran out of the apartment and downstairs, but defendant caught her and forced her into his vehicle. Defendant drove to a wooded area behind his apartment complex and told D.J. that he was going to kill her. While at the wooded area, defendant held a knife to D.J.'s throat as she begged for her life. D.J. testified that defendant continued to rape her "over and over again, anal, oral, just abusive, vaginal."

D.J. was able to get away from defendant, but he caught her again and forced her back into his vehicle. Defendant drove to a location along the Amite River. When they reached this location, defendant again beat her and attempted to drown her in the river. D.J. escaped from the river and climbed the bank near Florida Boulevard. Defendant again caught her and forced her into his vehicle. Defendant then drove to a Circle K, where D.J. jumped from his car and begged a man pumping gas for help. The man drove D.J. to her home.

Defendant testified at trial and claimed that all sexual relations he had with M.W. and D.J. were consensual because both women were prostitutes. Defendant testified that M.W. allowed him to use duct tape on her, but that he took it off when she told him it hurt. Defendant claimed to have "no idea" how D.J. got so bruised following their allegedly consensual sexual encounter. Defendant claimed he dropped D.J. off at the Circle K "because it was time for her to go."

## SENTENCING ISSUES

In his first assignment of error, defendant argues that the life sentence imposed is unconstitutionally excessive. Specifically, defendant contends,

"Considering the undisputed facts of this case, as testified to by both victims, as well as the defendant, some sentence substantially less than life at hard labor without the benefit of probation, parole, or suspension of sentence is called for in this case to be constitutional."

In his second assignment of error, defendant argues that the failure of trial counsel to file a motion to reconsider 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.

A review of the record indicates that defense counsel did not make a motion to reconsider sentences nor did he object to the sentences.[2] Under LSA-C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentences on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. However, we will examine the sentences for excessiveness because it is necessary to do so as part of our analysis of the ineffective-assistance-of-counsel issue raised in defendant's second assignment of error. State v. Scott, 2005-0325, p. 4 (La. App. 1st Cir. 11/4/05), 927 So. 2d 441, 444.

Although a claim of ineffective assistance of counsel is normally raised in an application for post-conviction relief, this court may address the merits of the claim when the record on appeal is sufficient. State v. Scott, 2005-0325 at p. 4, 927 So. 2d at 445. In the instant case, the record is sufficient, and we will address the defendant's claim.

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[2]Defendant's argument in support of his assertion that the sentence is excessive does not specifically challenge the forty-year sentence for his forcible rape conviction. In an abundance of caution, we will address both sentences.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentences resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry is whether counsel's assistance was reasonable under the circumstances. In making the determination of whether the specific error resulted in an improper sentence, the inquiry must be directed to whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. State v. Scott, 2005-0325 at p. 5, 927 So. 2d at 445.

The trial court sentenced defendant to the mandatory term set forth in LSA-R.S. 14:42(D)(1) of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for his conviction for aggravated rape (Count 2).

Article I, § 20, of the Louisiana Constitution prohibits imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. 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 not disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within the statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Craig, 2005-2323, pp. 6-7 (La. App. 1st Cir. 10/25/06), 944 So. 2d 660, 663.

It is well established that the sentencing provision for aggravated rape does not facially violate the state constitutional prohibition against excessive punishment. See State v. Davis, 94-2332, p. 13 (La. App. 1st Cir. 12/15/95), 666 So. 2d 400, 408, writ denied, 96-0127 (La. 4/19/96), 671 So. 2d 925.

In order to obtain a downward departure from a mandatory minimum sentence, a defendant has the burden of showing clearly and convincingly that he is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. State v. Craig, 2005-2323 at pp. 7-8, 944 So. 2d at 664 (applying the rationale found in State v. Johnson, 97-1906, p. 8 (La. 3/4/98), 709 So. 2d 672, 676, to determine if the mandatory sentence of life imprisonment for a first degree murder conviction was excessive.)

Other than asserting in brief that this court consider "the undisputed facts of this case, as testified to by both victims, as well as the defendant," defendant fails to make any argument that he is in any way exceptional, in order to justify a downward departure from the mandatory sentence of life imprisonment for his aggravated rape conviction. He makes no argument

(nor does the record disclose) that because of unusual circumstances, he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case.

The trial court also sentenced defendant to the maximum penalty allowed for his forcible rape conviction (Count 1), i.e., forty years at hard labor. See LSA-R.S. 14:42.1(B). As the defendant correctly notes, the maximum sentence permitted under a statute may be imposed only in cases involving the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. See State v. Hilton, 99-1239, p. 16 (La. App. 1st Cir. 3/31/00), 764 So. 2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So. 2d 113.

However, the facts surrounding defendant's instant convictions amply demonstrate his extremely violent and brutal treatment of the victims. Defendant clearly is among the worst offenders and deserving of the maximum penalty. Accordingly, even if there was deficient performance by trial counsel, defendant suffered no prejudice.

These assignments of error lack merit.

**CONCLUSION**

For the above and foregoing reasons, defendant's convictions and sentences are affirmed.

**CONVICTIONS AND SENTENCES AFFIRMED.**