NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 KA 1232

STATE OF LOUISIANA

VERSUS

DARREL HUDSON, JR.

Judgment Rendered: NOV - 3 2006

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On Appeal from the 23rd Judicial District Court
In and for the Parish of Ascension, State of Louisiana
Trial Court No. 14234, 14235, & 14239, Division "D"

Honorable Pegram J. Mire, Jr., Judge Presiding

* * * * * * * * * *

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Darrel Hudson, Jr.

* * * * * * * * * *

BEFORE: PARRO, McDONALD, AND HUGHES, JJ.

HUGHES, J.

The defendant, Darrel Hudson, Jr., was charged by separate grand jury indictments with forcible rape, a violation of La. R.S. 14:42.1 (district court docket number 14234), aggravated incest, a violation of La. R.S. 14:78.1 (district court docket number 14235), and aggravated rape, a violation of La. R.S. 14:42 (district court docket number 14239). He pled not guilty to all charges. Prior to trial, the state moved to consolidate the indictments for trial. The trial court granted the motion over the defendant's objection. Following a jury trial, the defendant was convicted as charged. The defendant moved for a new trial and for post-verdict judgment of acquittal. The trial court denied the motions. The defendant was sentenced to imprisonment for forty years at hard labor for forcible rape, twenty years at hard labor for aggravated incest, and life at hard labor without benefit of probation, parole or suspension of sentence for aggravated rape. The trial court ordered that the sentences run consecutively. The defendant moved for reconsideration of the sentences. The trial court denied the motion. The defendant now appeals, urging the following assignments of error:

> 1. The trial court erred in denying the defendant's **Batson** objection to the state's peremptory challenge of venire members Crocker and Aikens.
>
> 2. The trial court erred in granting the state's motion to consolidate the bills of indictment on the day of trial.
>
> 3. The trial court erred in not granting a mistrial when a state witness twice testified to matters which the court had previously ruled were highly prejudicial and inflammatory.
>
> 4. The trial court erred in imposing a sentence herein which is unconstitutionally excessive.

We affirm the convictions and sentences.

FACTS

The victim, who was a fourteen-year-old eighth grader at the time of trial, testified that the defendant, her stepfather, repeatedly raped her for several years.

The defendant began dating the victim's mother, D.J., when the victim was approximately three years old. The couple later married. When the victim was very young, the defendant began to sexually abuse her. The abuse began with what the defendant called the "Feel Good" game. The defendant would rub his penis against the victim's vagina until he ejaculated. The defendant performed the "Feel Good" game on the victim on numerous occasions, "like a couple of times a week." The defendant also taught the young victim how to masturbate him. When the victim was approximately seven or eight years old, the abuse escalated. The defendant began inserting his penis into the victim's vagina. According to the victim, the defendant did not fully penetrate her initially. She explained, "each time we did it, he would go – do it a little deeper each time until he got it all the way in, and then he just started having intercourse." The defendant continued having intercourse with the victim. The victim did not tell anyone about the abuse because the defendant threatened to kill her and her family if she did.

On July 13, 2001, D.J. took the victim to see Dr. Dawn Vick, her pediatrician. D.J. made the appointment to see the pediatrician after she discovered the defendant in the victim's bedroom with the door locked. D.J. found the defendant's presence in the girl's room suspicious and suspected that the defendant might have sexually abused the victim. A urine test at Dr. Vick's office confirmed that the twelve-year-old victim was pregnant. When asked who impregnated her, the victim first indicated that it was a boy she met at the skating rink. Later that same day, however, the victim disclosed that the story about the boy at the skating rink was untrue. The victim told her mother that the defendant impregnated her and that he had been sexually abusing her for many years.

On November 21, 2001, approximately three months after she turned thirteen, the victim gave birth to a baby boy who was placed for adoption. DNA testing confirmed that the defendant was the father of the baby.

ASSIGNMENT OF ERROR NUMBER ONE
BATSON CHALLENGE

In his first assignment of error, the defendant, a Caucasian male, contends the trial court erred in overruling his objection to the prosecutor's racially discriminatory use of peremptory challenges to exclude prospective African-American jurors in violation of **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).[1] More specifically, the defendant argues that the purported race-neutral reasons provided by the prosecutor for excusing prospective jurors Rita Crocker and Don Aikens were pretextual. The defendant asserts that the peremptory exclusion of these two prospective jurors, which represents 100% of the African-American prospective jurors not challenged for cause, proves a pattern of racial discrimination by the state. In response, the state contends legitimate race-neutral reasons were provided for the exclusion of the prospective jurors in question, and thus, the trial court correctly denied the defendant's **Batson** challenge.

When a defendant makes a **Batson** challenge, claiming the state has used peremptory challenges in a manner that violates the Equal Protection Clause, the defendant must first make a prima facie case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on account of race. See **Batson**, 476 U.S. 79; see also La. Code Crim. P. art. 795(C). If the defendant fails to make such a showing, then the **Batson** challenge fails. However, if a prima facie case of discrimination is successfully established, the burden of production then shifts to the state to come forward with a race-neutral explanation for its peremptory challenges. This step need not demand an explanation that is persuasive, or even plausible, and unless a discriminatory intent is inherent in the prosecutor's

[1] A white defendant has standing to challenge the use of peremptory challenges to exclude black jurors. **Powers v. Ohio**, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

explanation, the reason offered will be deemed race neutral. **Purkett v. Elem**, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam). Once a race-neutral explanation is tendered, then the trial court must determine whether the defendant has established purposeful racial discrimination. **Purkett**, 514 U.S. at 767, 115 S.Ct. at 1770-71; **State v. Hobley,** 98-2460, p. 17 (La. 12/15/99), 752 So.2d 771, 782, cert. denied, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed.2d 61 (2000). The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. **Hernandez v. New York**, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991).

During voir dire in this case, two panels of prospective jurors were questioned. The first panel did not contain any African Americans. On the second panel, five African Americans were examined.[2] The first African American, Rosa Morris, was accepted by the state but challenged for cause by the defense. The trial court granted the cause challenge. The state then exercised a peremptory challenge against Rita Crocker, the second African American. Thereafter, the state challenged the third African American, Mark Sharper, for cause. The trial court granted the cause challenge. The state's second peremptory challenge against an African-American prospective juror was against Don Aikens. At this point, the defense urged a **Batson** objection alleging that the state was utilizing its peremptory challenges in a discriminatory manner to exclude African Americans from the jury.[3]

Thereafter, without a ruling on whether a pattern of racial discrimination had been established, the trial court asked the prosecutor to provide explanations for the peremptory challenge against Aikens. The prosecutor explained that Aikens was excluded because he has no kids, was not working, and was "equivocal and wishy-washy" in his responses during voir dire. In response, counsel for the

[2] Rosa Morris, Rita Crocker, Mark Sharper, Don Aikens, and Ernest Allen.
[3] The twelve-person jury and one alternate were selected before prospective juror Ernest Allen was considered.

defendant objected to the use of a peremptory challenge against Aikens and requested that the prosecutor also provide an explanation for the exclusion of prospective juror Crocker. The prosecutor explained that prospective juror Crocker had been excluded because she stated that she was the primary caretaker of numerous young children and because she was nonverbal in many of her answers during voir dire. The trial court accepted the state's reasons as race-neutral justifications for both challenges. The court noted the defendant's objection to the ruling and proceeded with voir dire. No further **Batson** objections were urged.

The defendant now argues that because the state peremptorily challenged 100% of the African-American prospective jurors not challenged for cause, and the state failed to exclude other prospective jurors who possessed some of the same characteristics provided in the reasons for exclusion of Crocker and Aikens, the trial court erred in concluding that a pattern of race-based exclusions did not exist.

Our careful review of the entire record of the voir dire proceedings fails to disclose any error in the trial court's ruling as to the **Batson** objection. Since the preliminary issue of whether the defendant made a prima facie showing is moot as the prosecutor offered race-neutral reasons for the peremptory challenges and the trial court ruled on the ultimate question of intentional discrimination, we will begin with the second step under the **Batson** analysis.

The reasons given by the state for exercising the peremptory challenges of the prospective jurors in question are facially race neutral. Thus, we find that the state sustained its burden of articulating race-neutral reasons for the exercise of the peremptory strikes at issue. In the third step of the **Batson** analysis, we must next determine whether the reasons are substantial and whether they are substantiated by the record. See **State v. Green**, 94-0887, p. 27 (La. 5/22/95), 655 So.2d 272, 289. The proper inquiry in this final stage of the **Batson** analysis is not whether the

state has disproved the existence of purposeful discrimination suggested by a defendant's prima facie case; rather, the question is whether a defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, is strong enough to persuade the trier of fact that such discriminatory intent is present. **State v. Woods**, 97-0800, p. 5 (La. App. 1st Cir. 6/29/98), 713 So.2d 1231, 1235, writ denied, 98-3041 (La. 4/1/99), 741 So.2d 1281.

We reject the defendant's claim that the state's reasons for striking the jurors in question were pretextual because the state did not exclude every other juror who possessed characteristics similar to those cited as reasons for the challenges. It is well settled that the fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person, does not in itself show that the prosecutor's explanation was a mere pretext for discrimination. The accepted jurors may have exhibited traits which the prosecutor reasonably could have believed would make these individuals desirable as jurors. See **State v. Leagea**, 95-1210, pp. 4-5 (La. App. 1st Cir. 5/10/96), 673 So.2d 646, 649-50, writ denied, 96-1507 (La. 11/22/96), 683 So.2d 287. The trial judge was in the best position to observe the entire voir dire and make the most informed decision as to whether the state used its peremptory challenges in a discriminatory manner. It is apparent from the record before us that the trial court weighed the defendant's **Batson** claims against the state's race-neutral reasons for excluding the prospective jurors in question, and concluded that the peremptory challenges exercised against these jurors were not motivated by race. A trial judge's determination pertaining to purposeful discrimination rests largely on credibility evaluations and so his or her findings are entitled to great deference by the reviewing court. **Batson**, 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21; **State v. Neal**, 2000-0674, p. 5 (La. 6/29/01), 796 So.2d 649, 654, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231

(2002). We find no error in the trial court's ruling denying the defendant's **Batson** objection. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO
CONSOLIDATION OF OFFENSES

In this assignment of error, the defendant argues the trial court erred in granting the state's motion to consolidate the indictments on the day of trial. The defendant argues his counsel was unfairly taken by surprise by the consolidation of the offenses. The defendant further argues that by consolidating the offenses, the state was allowed to present highly inflammatory evidence concerning the birth of a child, which would not have otherwise been allowed if the matters were tried separately. In response, the state first argues that the defendant, when informed of the state's intent to consolidate, "objected only for the record" and did not urge any grounds upon which the consolidation would prejudice his defense. (State's brief p. 17). The state notes that during the pretrial proceedings all three offenses were always heard together. The state further argues that consolidation of the offenses for trial purposes did not affect the jury's ability to separate the charges and render a verdict based upon the evidence presented on each charge.

La. Code Crim. P. art. 706 provides:

> Upon motion of a defendant, or of all defendants if there are more than one, the court may order two or more indictments consolidated for trial if the offenses and the defendants, if there are more than one, could have been joined in a single indictment. The procedure thereafter shall be the same as if the prosecution were under a single indictment.

Thus, Article 706 does not provide for the consolidation of separate indictments for trial without consent of the affected defendant(s). The record before us reflects that in this case, the state moved to consolidate the three indictments for trial. The trial court ordered the matters consolidated over the defendant's objection. In his motion for a new trial, the defendant reiterated his

objection to the consolidation of the offenses. Because it is clear that the defendant did not consent, the offenses should not have been consolidated.

The rules governing misjoinder of offenses and improper consolidation of offenses for trial are grounded on the possible prejudice arising from a single trial on two or more offenses. The defects are not jurisdictional nor do they constitute a denial of due process. Hence, misjoinder of offenses may be waived by the failure to timely assert it by a motion to quash, and improper consolidation of offenses for trial may be waived by the failure to object. See La. Code Crim. P. art. 495; **State v. Mallett**, 357 So.2d 1105, 1109 (La. 1978), cert. denied, 439 U.S. 1074, 99 S.Ct. 848, 59 L.Ed.2d 41 (1979).

The record before us reflects that, on the day of trial, after being informed of the state's intent to consolidate the offenses, the defendant entered an objection. The following colloquy transpired:

> THE COURT:
>
> Okay. I understand that there are some preliminary matters that we would like to clean the record up on prior to starting the venire.
>
> [COUNSEL FOR THE STATE]:
>
> That's correct, Your Honor. The State in this matter since our last hearing date has filed several motions. One of those motions is a Motion to Consolidate the "Bill of Information" and "Indictment " for trial and to amend those indictments.
>
> THE COURT:
>
> Mr. Boshea, do you have any objection to the consolidation?
>
> [COUNSEL FOR THE DEFENDANT]:
>
> I note an objection just for the record.
>
> THE COURT:
>
> Let the record so reflect, and let it so be ordered that all three matters will be consolidated for trial purposes today.

We note that the defendant's objection, which contained no elaboration and was noted as being "just for the record," was not the most vigorous objection.

Nevertheless, it was an objection. This objection was sufficient to place the trial court on notice that the defendant did not wish to have the matters tried jointly. Thus, we find the trial court erred in ordering the consolidation in this case.

However, our inquiry does not stop here. In **State v. Lewis**, 489 So.2d 1055 (La. App. 1st Cir.), writ denied, 493 So.2d 1218 (La. 1986), this Court applied a harmless error analysis to an improper consolidation issue. In **Lewis**, the defendant was charged by separate bills of information with the aggravated burglary of two separate residences. The two cases were consolidated for trial. Prior to trial, the defendant moved to sever the offenses. The trial court denied the motion. In determining whether prejudice resulted from the consolidation, this Court applied, by analogy, the same considerations enunciated by the Supreme Court in **State v. Williams**, 418 So.2d 562 (La. 1982), to determine whether prejudice may result from improper joinder. These considerations include: (1) whether the jury would be confused by the various counts; (2) whether the jury would be able to segregate the various charges and evidence; (3) whether the defendant could be confounded in presenting his various defenses; (4) whether the crimes charged would be used by the jury to infer criminal disposition; and (5) whether, especially considering the nature of the charges, the charging of several crimes would make the jury hostile. See **State v. Williams**, 418 So.2d at 564. This Court determined that the defendant was not prejudiced by the improper consolidation of the two offenses. The state's evidence in each case was simple, consisting of eyewitness testimony by each victim. The defendant in **Lewis** did not argue he was confounded in presenting his defenses or that the jury was confused in any way. The **Lewis** jury was told by the trial court that it was required to render a verdict as to each of the two offenses. Moreover, this Court determined that the return of a not guilty verdict in one of the bills suggested the

jury was not confused by the consolidation and was able to compartmentalize the evidence as to each offense. **State v. Lewis**, 489 So.2d at 1059.

In **State v. Crochet**, 2004-0628 (La. App. 1st Cir. 12/17/04), 897 So.2d 731, writ granted, 2005-0123 (La. 4/29/05), 901 So.2d 1044, this Court, also applying a harmless error analysis, found reversible error in the consolidation of offenses over the defendant's objection. The defendant in **Crochet** was charged by bill of information with one count of molestation of a juvenile (his daughter). The defendant was also indicted by a grand jury for five counts of aggravated incest of his son and one count of aggravated rape of his son. The offenses were consolidated for trial on motion of the state and over the defendant's objection. On appeal, this Court reversed, finding the improper consolidation was not harmless.

> [A]lthough the jury was given separate verdict sheets for each offense, we find the crimes charged and the other crimes evidence used by the State presented many opportunities for the jury to infer criminal disposition and resulted in unfair prejudice to defendant. All of the crimes involved allegations of sexual abuse by defendant towards his children. The State was allowed to introduce other crimes evidence indicating defendant had also sexually abused two of his stepchildren. Such a scenario created a danger of making the jury hostile and illustrates why consolidation is at the discretion of the defendant and not the State.

State v. Crochet, 2004-0628 at p. 7, 897 So.2d at 736. Upon review, the supreme court reversed this court's decision, finding the defendant was not prejudiced by the consolidation. **State v. Crochet**, 2005-0123, pp. 8-10 (La. 6/23/06), 931 So.2d 1083, 1088-1089. Applying the five factors enumerated above, the supreme court noted that the facts of each incident were simple and easily distinguishable from each other; the evidence against the defendant, which consisted of the victims' testimony, was not complex and was presented in an orderly fashion, allowing the jury to segregate the charges and the evidence; the defense was not stymied by the consolidation of the offenses; and consolidation of the cases did not expose the

jury to evidence that was admissible to one or more of the counts but inadmissible as to other counts. **State v. Crochet**, 2005-0123 at p. 7, 931 So.2d at 1087.

Likewise, applying the aforementioned factors herein, we find the improper consolidation in this case to be harmless error. The state's evidence on each of the charges, which included the testimony of the victim, as well as medical and scientific evidence, was straightforward and simple. Despite the jury's verdict of guilty as charged on all of the offenses, it does not appear that the jury was confused or unable to segregate the charges and the evidence. The record reflects that, prior to dismissing the jury for deliberations, the trial court took measures to limit any prejudice to the defendant. The court discussed the elements of the offenses charged in each indictment and thoroughly advised the jury of the need to segregate the charges. The court instructed:

> The defendant at bar is charged with three different indictments. Each count charges the defendant with a separate and distinct offense under Louisiana law. In deliberating, you, the jury, should consider the defendant's guilt or innocence as to each individual count independently and separately from all other counts. Thus, it would be possible to render a verdict on one count and returning a verdict of innocent (sic) on the other. It would also be possible to return a verdict of guilt on all counts or the verdict of innocent (sic) on all counts if you so find.

Moreover, the consolidation did not result in the jury being exposed to any irrelevant or inadmissible evidence. Because the charged sexual offenses were all committed against the same victim, the evidence as to each count was admissible at the trial of the other counts. See **State v. Kennedy**, 2000-1554, pp. 6-7 (La. 4/3/01), 803 So.2d 916, 921 (holding that "evidence of prior sex crimes against the prosecuting victim is admissible under an exception to the general rule excluding evidence of other crimes similar to the charged offense."). See also **State v. Acliese**, 403 So.2d 665 (La. 1981). The evidence of the defendant's repeated sexual abuse of his stepdaughter was also admissible to show his lustful disposition towards the young girl. La. Code Evid. art. 412.2.

Finally, although he generally asserts that his counsel was taken by surprise by the consolidation, the defendant fails to specifically assert or offer any evidence that the consolidation of the offenses hindered him in presenting defenses to these charges.

Considering the foregoing, we find it highly improbable that the jury was confused by the multiple counts involving the same victim or that the improper consolidation resulted in any unfair prejudice to the defendant. The guilty verdicts rendered in this case were "surely unattributable" to the consolidation error. See **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

ASSIGNMENT OF ERROR NUMBER THREE
DENIAL OF MOTION FOR A MISTRIAL

In his third assignment of error, the defendant asserts the trial court erred in failing to grant his motion for a mistrial when the victim testified that the defendant discussed with her the possibility of an abortion, evidence that had been expressly excluded by the court after a pretrial hearing. In the pretrial ruling, the trial court ruled that the state could not use evidence of any reference to abortion by the defendant since this evidence would constitute impermissible other crimes evidence.

At trial the victim testified as follows:

> Q. Did he talk about the pregnancy, the fact that you were pregnant?
>
> A. Yes. He said that – he talked about getting an abortion, and ---
>
> Q. What did you say?
>
> A. I didn't really know what that meant, so I didn't really – like I knew what it meant, but I didn't really know about it, so I didn't tell him "yes" or "no," and – like joked about punching me in the stomach and stuff, and –
>
> Q. That was him that said that he wanted to do that to you?
>
> A. Yes.

At this point, counsel for the defendant entered a contemporaneous objection. A bench conference was held but not recorded. Thereafter, during further direct examination, the victim testified:

> Q. Did he try and talk to you again about the fact that you were pregnant?
>
> A. Yes.
>
> Q. What do you remember about that?
>
> A. I was baby-sitting at my aunt's house, and he like got off for his lunch break or something and came over there, and he talked to me about getting a – like he found out on the computer or something that they have like a home abortion thing where he could do it hisself (sic) so that nobody would have to ever find out, and I think – I don't know if he was going to actually do it or not, but then, later he found out that it could kill me, so he didn't do it.

At this point, counsel for the defendant again objected and moved for a mistrial at a bench conference outside the hearing of the jury. The court denied the motion, but cautioned that the testimony was coming "close" to warranting a mistrial. The defendant did not request that the jury be admonished to disregard the remarks.

Louisiana Code of Criminal Procedure article 770(2) provides, that, upon the motion of a defendant, a mistrial is mandatory when a remark, within the hearing of the jury, is made by the judge, the district attorney, or a court official, and such remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. Remarks by witnesses fall under the discretionary mistrial provisions of La. Code Crim. P. art. 771, which, in pertinent part, provides as follows:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or 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, or the state, in the mind of the jury:

> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.
>
> * * * *
>
> In such cases, 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.

A mistrial under the provisions of Article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. **State v. Tran**, 98-2812, p. 4 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1280, writ denied, 99-3380 (La. 5/26/00), 762 So.2d 1101. Unsolicited and unresponsive testimony is not chargeable against the state to provide a ground for mandatory reversal of a conviction. **State v. Jack**, 554 So.2d 1292, 1296 (La. App. 1st Cir. 1989), writ denied, 560 So.2d 20 (La. 1990). The proper remedy for inappropriate remarks by a witness is an admonishment directing the jury to disregard the remark. The trial court should order a mistrial under Article 771 only if it determines that an admonition is not adequate to assure the defendant a fair trial. As previously noted, mistrial is a drastic remedy which is warranted only if substantial prejudice results that would deprive the defendant of a fair trial, and the ruling of the trial court will not be disturbed absent an abuse of discretion. **State v. Welch**, 448 So.2d 705, 710 (La. App. 1st Cir.), writ denied, 450 So.2d 952 (La. 1984); **State v. Clay**, 441 So.2d 1227, 1231 (La. App. 1st Cir. 1983), writ denied, 446 So.2d 1213 (La. 1984). The trial judge is given wide discretion to determine whether a fair trial is impossible, or if an admonition is adequate to assure a fair trial. **State v. Belgard**, 410 So.2d 720, 724 (La. 1982).

In the instant case, the victim's testimony regarding the defendant's suggesting an abortion and/or performing an at-home abortion was impermissible,

especially in light of the pretrial hearing where the trial court specifically ruled that such evidence could not be introduced. However, we find the introduction of the testimony, which cannot be said to have been deliberately obtained by design of the prosecutor to prejudice the rights of the defendant, to be harmless error. In **State v. Corley**, 93-1934, pp. 5-6 (La. 3/11/94) (per curiam), 633 So.2d 151, 154, cert. denied, 513 U.S. 930, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994), the Louisiana Supreme Court discussed the harmless error rule, as follows:

> This Court has both the authority and the obligation to review the record *de novo* to determine an error's harmfulness. In doing so, we must begin with the premise that the other, lawfully admitted evidence is sufficient to support the jury's verdict. The task of a reviewing court conducting a harmless error analysis is to determine whether the error contributed to the verdict or whether "the force of the evidence presumably considered by the jury in accordance with the instructions [of the court] is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [error]. (Citations omitted).

We have carefully reviewed the entire transcript in this case and find that the evidence produced by the state indicates beyond a reasonable doubt that the guilty verdicts rendered in this case would have been the same without the abortion references. The record shows that the trial as a whole was conducted fairly and the evidence of the defendant's guilt of the offenses charged was overwhelming. The victim provided a detailed description of the sexual abuse repeatedly inflicted upon her by the defendant. DNA evidence confirming that the defendant impregnated the twelve-year-old victim was also introduced as proof of the commission of the offenses. Furthermore, while defendant was entitled to an admonishment for the victim's improper testimony, the defendant did not request it. Thus, the victim's testimony, while objectionable, did not deprive the defendant of a fair trial. The guilty verdicts on these offenses were surely unattributable to the abortion references. See **Sullivan v. Louisiana**, 508 U.S. at 279, 113 S.Ct. at 2081. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR
EXCESSIVE SENTENCE

In his final assignment of error, the defendant contends the trial court erred in imposing excessive sentences. The defendant does not challenge the length of the individual sentences as excessive. Instead, he specifically argues that the consecutive, rather than concurrent, nature of the sentences renders them unconstitutionally excessive. He argues that his conduct, "in the broad sense," should be deemed a continuing scheme or transaction and thus, warrants concurrent sentences. (Defendant's brief p. 15).

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is unconstitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). 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. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); **State v. Lanieu**, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The imposition of consecutive sentences is governed by La. Code Crim. P. art. 883, which provides, in pertinent part:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme

> or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively.

This article specifically excludes from its scope sentences that the court expressly directs to be served consecutively. **State v. Rogers**, 95-1485, p. 11 (La. App. 1st Cir. 9/27/96), 681 So.2d 994, 1000, writs denied, 96-2609, 96-2626 (La. 5/1/97), 693 So.2d 749. Thus, it is within a trial court's discretion to order sentences to run consecutively rather than concurrently. **State v. Rollins**, 32,686, p. 13 (La. App. 2nd Cir. 12/22/99), 749 So.2d 890, 899, writ denied, 2000-0549 (La. 9/15/00), 768 So.2d 1278. The imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct. **State v. Johnson**, 99-0385, p. 7 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 221, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. However, even if the convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive if the trial court considers appropriate factors when imposing sentence. **State v. Ferguson,** 540 So.2d 1116, 1123 (La. App. 1st Cir. 1989). Some of those factors include defendant's criminal history, the dangerousness of the offense, the viciousness of the crimes, the harm done to the victim, the potential for defendant's rehabilitation, and the danger posed by the defendant to the public safety. **State v. Parker**, 503 So.2d 643, 646 (La. App. 4th Cir. 1987). Additional factors that may serve as justification for consecutive sentences include multiplicity of acts, lack of remorse, and risk to the public safety. **State v. Lewis,** 430 So.2d 1286, 1290 (La. App. 1st Cir.), writ denied, 435 So.2d 433 (La. 1983).

Under La. R.S. 14:42.1(B), the penalty for forcible rape is imprisonment at hard labor for not less than five nor more than forty years, with at least two years of the sentence to be served without benefit of probation, parole, or suspension of sentence. La. R.S. 14:78.1(D) provides that a person convicted of aggravated incest shall be fined an amount not to exceed fifty thousand dollars, or imprisoned, with or without hard labor, for a term not less than five years nor more than twenty

years, or both. The penalty for aggravated rape, as set forth in La. R.S. 14:42(D), is life imprisonment at hard labor without benefit of parole, probation or suspension or sentence. The defendant was sentenced to imprisonment at hard labor for forty years for forcible rape, twenty years at hard labor for aggravated incest, and life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence on the aggravated rape conviction. The trial court ordered that these sentences be served consecutively.

At the sentencing hearing in the instant case, the trial court provided extensive reasons as justification for the consecutive sentences. The court stated:

> This is the case of a 39-year-old, white male, officially classified as a first felony offender, who was found guilty at trial on May 22nd, 2003 of Aggravated Rape, Forcible Rape, and Aggravated Incest. Sentencing was deferred and a "Presentence Investigation Report" was ordered and is filed herein, attached hereto, and made a part hereof by reference, and has been made available to the defendant and his counsel.
>
> The defendant was charged with one count of Aggravated Incest in violation of Louisiana Revised Statute 14:78.1, one count of Aggravated Rape in violation of Louisiana Revised Statute 14:42, and one count of Forcible Rape in violation of Louisiana Revised Statute 14:42.1 in the parish of Ascension. Mr. Hudson did perform lewd fondling and touching of his stepdaughter from the time she was 9 years old until the time she was 12 years of age. Shortly after her twelfth birthday, he began having sexual intercourse with her, and she became pregnant.[4]
>
> This child in this case has suffered extreme adverse effects from this traumatic experience caused by the defendant. As reflected from the letters and the reports contained in the "Presentence Investigation Report," the emotional damage that was done to this child and to this family will continue for a long time.
>
> According to the "Presentence Investigation Report," this defendant is classified as a first felony offender. This Court has received numerous letters from friends and family of the defendant, which all seem to portray the defendant as a giving person and a family man. The "Presentence Investigation Report" also contains letters from the defendant whereby he readily admits to crossing a line with his stepdaughter.
>
> The Court has decided to incarcerate this defendant and will state for the record its reasons therefor (sic) as mandated by Article

[4] We note that this statement by the trial court differs from the testimony given by the victim. The victim indicated the defendant began having sexual intercourse with her when she was seven or eight years old.

894.1 of the Code of Criminal Procedure. The Court believes that there is an undue risk that during the period of a suspended sentence or probation this defendant would commit another crime, that he is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution, and that any lesser sentence than the one to be imposed herein would deprecate the seriousness of this offense. Aside from the very serious nature of the crime perpetrated by this defendant upon this unsuspecting child is the fact that he exploited his position as an adult, who supervises this child, i.e., a stepfather, and betrayed this trust, as well as to the parents of the victim.

Obviously, the scarring effects of the defendant's actions upon the victim is of monumental proportion, and it is quite possible that the life of this victim will never be the same. The totality of the circumstances in this case persuades this Court that there is an undue risk that this defendant may become involved in similar crimes in the future and that he may have been involved in similar crimes in the past as such and if he were placed on probation would be a risk to the precious lives of our community, and this risk is not one that this Court is prepared to take.

Considering the factors relative to the suspension of sentence or probation, the Court makes the following findings: As previously mentioned, the defendant's conduct caused, as well as threatened, serious harm, not only to the individual victim involved, but also to the community as a whole and to the parents and family members. It must be assumed that he contemplated the harm his conduct would cause. It would be hard for this Court to convince itself that the defendant was not aware of the serious harm inflicted upon this young child, and the only justification or provocation which this Court finds is the defendant's desire to satisfy his own feelings of lust. Therefore, there are no grounds tending to excuse or justify this conduct.

Regarding the victim's inducement or facilitation, the Court is of very strong opinion that the fault herein does not lie with the victim but with the defendant totally. The Court has not been made aware of any compensation to the victim in this case.

The Court believes that the criminal conduct resulted from circumstances that would likely recur and that this defendant would possibly commit similar crimes in the future, and for these reasons, the Court feels that he may not likely respond to any kind of probationary treatment. Incarceration always entails hardship; however, the Court feels that the incarceration would not entail an excessive hardship to himself or to others. The Court firmly believes to inflict such serious physical, as well as psychological harm, upon this young woman is a crime of the magnitude that requires incarceration. It is hoped that this incarceration, together with whatever treatment this defendant may receive, will enable him to control his problem. The Court is keenly aware of the proportion of this problem in our country of sexual child abuse and molestation of children in general. Failure to incarcerate this defendant would seriously deprecate the seriousness of these crimes, as well as this

> crime in itself, be unfair to the victim, and in some reason would perpetrate this problem in general.
>
> One of the factors listed in Article 894.1 is that the offender knew or should have known that the victim of this offense was particularly vulnerable or incapable of resistance due to extreme youth. Clearly the factor applies in this case as the defendant, who had gained the trust of his stepdaughter and her family and knew this child very well, clearly took advantage of her and her vulnerability. As previously mentioned, this offense resulted in significant, permanent injuries, both physical and psychological, to the family and the victim.

Considering these reasons and the entire record before us, we find that the sentences imposed herein are not grossly disproportionate to the severity of the offenses, and thus, are not unconstitutionally excessive. The jurisprudence has consistently upheld the imposition of consecutive sentences where the misconduct occurred over a lengthy period of time. See **State v. Evans**, 27,183, pp. 3-4 (La. App. 2nd Cir. 9/27/95), 661 So.2d 600, 602; **State v. White**, 552 So.2d 553, 555 (La. App. 2nd Cir. 1989); **State v. Racine**, 480 So.2d 945, 948 (La. App. 2nd Cir. 1985). In **State v. F.A.R., Jr.**, 568 So.2d 238, 243 (La. App. 3rd Cir. 1990), the defendant, a first felony offender, was sentenced to three and one-half years at hard labor on each of five counts of attempted indecent behavior with a juvenile, three of the sentences to be served consecutively and the other two concurrently. The acts were committed against the same juvenile victim and occurred over a long period of time. The court found the sentences were not excessive. In **State v. Badeaux**, 2001-406, p. 11 (La. App. 5th Cir. 9/25/01), 798 So.2d 234, 241, writ denied, 2001-2965 (La. 10/14/02), 827 So.2d 414, the Fifth Circuit held that the trial court did not abuse its discretion by imposing consecutive sentences on a defendant who was convicted of sexual battery and indecent behavior with a juvenile. Although the events therein occurred on the same day as part of a common scheme or plan, and the offenses were part of the same transaction, the trial court noted the severity of the crimes, the vulnerability of the child victim, and the defendant's use of his position as an adult neighbor.

In the instant case, although defendant had no prior criminal history, the egregious nature of these sexual offenses clearly supports the imposition of consecutive sentences. As the trial court properly reasoned, the defendant abused the position of trust and responsibility to his stepdaughter without any regard to the lifelong harm that his reprehensible conduct would cause the young victim. He committed these socially repulsive acts of sexual abuse upon the minor victim repeatedly, over a lengthy period of time, stopping only after his behavior was exposed when she became pregnant. Considering the circumstances of the offenses and the perpetual effect the abuse will have on the young victim, our sense of justice is in no way shocked by the consecutive sentences imposed herein.

PATENT SENTENCING ERROR

As mandated by La. Code Crim.P. art. 920(2), a patent error review has been made of the record in this case, revealing a patent sentencing error.

The penalty for forcible rape, at the time of this offense, was provided in La.-R.S. 14:42.1(B), as follows: "[W]hoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than five nor more than forty years. At least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence."

The record herein reflects the trial court failed to order any portion of the defendant's forcible rape sentence to be served without benefit of probation, parole, or suspension of sentence.

We have "considered" this sentencing error pursuant to the mandate of La. Code Crim. P. art. 920 and this court's reasoning in **State v. Paoli**, 2001-1733 (La. App. 1 Cir. 4/11/02), 818 So.2d 795 (en banc), writ denied, 2002-2137 (La. 2/21/03), 837 So.2d 628, and decline to take further action, inasmuch as the issue was not raised on appeal and any action taken by this court at this juncture would be a vain and useless act, if not a counterproductive one, when the costs and

security risks involved in transporting the defendant back and forth for resentencing are weighed into the equation.

For the foregoing reasons, the convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.