NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 0233

STATE OF LOUISIANA

VERSUS

CHARLES S. PURSELL

Judgment Rendered: September 15, 2006

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 345,593

Honorable William J. Knight, Judge

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant, Charles S. Pursell, was charged by bill of information with molestation of a juvenile when the offender has control, care, custody, and supervision, a violation of La. R.S. 14:81.2. He pled not guilty and the matter proceeded to trial by jury. A jury found the defendant guilty as charged. The defendant was sentenced to fifteen years at hard labor, and the State informed the trial court of its intent to pursue a multiple offender hearing based on the allegations contained in the multiple offender bill of information. Following his conviction and sentence, the defendant filed a motion to reconsider sentence, a motion for new trial, and a motion for post-verdict judgment of acquittal. After a hearing on the multiple offender bill, the defendant was adjudicated a fourth felony habitual offender.[1] Subsequently, the trial court vacated the defendant's previous sentence and, pursuant to La. R.S. 15:529.1, sentenced the defendant to life imprisonment without benefit of parole, probation, or suspension of sentence. Before the close of the multiple offender hearing, the trial court denied the defendant's motion to reconsider sentence and his motion for new trial. The trial court did not rule on the defendant's motion for post-verdict judgment of acquittal. The defendant appealed to this court, challenging his sentence on several grounds. In **State v. Pursell**, 2004-1775 (La. App. 1st Cir. 5/6/05), 915 So.2d 871, we affirmed the conviction, vacated the habitual offender adjudication and sentence, and remanded with instructions.[2]

On remand, the trial court denied the defendant's motion for post-verdict

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[1] One of the prior offenses entered into evidence at the multiple offender hearing was case number 7502-2 from the Pearl River County Circuit Court in Mississippi. Under case number 7502-2, the defendant's last name is spelled "Purcell" instead of "Pursell."

[2] We specifically held as follows: (1) the trial court was required to rule on the defendant's motion for post-verdict judgment of acquittal before pronouncing sentence; (2) the trial court was required to rule on the motion for new trial and wait twenty-four hours after denying the motion before imposing sentence; and (3) the trial court was required to provide written reasons for imposing a life sentence without benefit of probation, parole, or suspension of sentence in sentencing the defendant as fourth felony offender.

judgment of acquittal. After a second hearing on the multiple offender bill, the defendant was adjudicated a fifth felony habitual offender. The defendant was sentenced to life imprisonment at hard labor without benefit of probation or suspension of sentence. The defendant now appeals, assigning error as follows:

> 1. The trial court failed to provide written reasons for adjudicating the defendant a multiple offender;
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> 2. The trial court failed to rule on the motion for post-verdict judgment of acquittal or, alternatively, failed to wait the required twenty-four hours before sentencing the defendant;
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> 3. The defendant was given a life sentence for exercising his constitutional right to a trial;
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> 4. The sentence imposed is excessive.

For the following reasons, we affirm the habitual offender adjudication and sentence.

STATEMENT OF FACTS

The defendant inappropriately touched the victim, his nephew, age nine at the time, by placing his (the defendant's) hand on the victim's penis over the victim's clothing.[3] According to the victim's trial testimony, this occurred three or four times during a time period in which the defendant lived with the victim and his family.[4] Only the victim and the defendant were present in the home at the time of the abuse.

In November of 2001, after watching a sexual abuse film, the victim reported the abuse to his teacher and his counselor at school. An investigation by the Office of Community Services (OCS) and the St. Tammany Parish Sheriff's

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[3] The bill of information alleges that the date of the instant offense was between September 1, 2001, and November 30, 2001. No testimony was presented during the trial as to the specific date(s) of the incident(s).

[4] When initially asked, during direct examination, whether the abuse occurred once or more than once, the victim stated that he did not remember. However, during cross-examination, when asked to state to the best of his memory how many times the abuse occurred, the victim stated that it happened three or four times.

Office led to the defendant's arrest.[5]

PATENT ERROR

This court routinely reviews the record for errors patent. Under La. C.Cr.P. art. 920(2), our patent error review is limited to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. Before addressing the defendant's assignments of error (regarding the propriety of the sentence imposed by the trial court), we note the following patent sentencing error. The transcript indicates that the trial judge did not impose the enhanced sentence without benefit of parole as mandated by La. R.S. 15:529.1A(1)(c)(ii).

The defendant in the instant matter was adjudicated a fifth felony habitual offender.[6] In adjudging the defendant as such, the trial court noted the following predicate guilty plea convictions: (1) obscenity, in violation of La. R.S. 14:106(G)(1), in the Twenty-Second Judicial District Court, bearing case number 315057 on April 10, 2000; (2) aggravated assault, in violation of Mississippi Code 1972 Section 97-3-7(2)(b), in Pearl River County Circuit Court, bearing case number 7502-2 on August 23, 1993; (3) simple burglary (two counts), in violation of La. R.S. 14:62, in the Twenty-Second Judicial District Court, bearing case number 118621 on June 7, 1984; and (4) receiving stolen things with a value of more than one hundred dollars but less than five hundred dollars (two counts), in violation of La. R.S. 14:69, in the Twenty-Second Judicial District Court, bearing case number 88815 on April 29, 1982.[7] Louisiana Revised Statutes 15:529.1(A)(1)(c)(i) states, "[t]he person shall be sentenced to imprisonment for

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[5] The victim was interviewed at the Children's Advocacy Center. The videotaped interview was filed into evidence during the trial and played for the jury, but is not included in the instant record before us.

[6] We note that a defendant should be sentenced pursuant to the version of La. R.S. 15:529.1 in effect at the time of the commission of the charged offense. **State v. Parker**, 2003-0924 (La. 4/14/04), 871 So.2d 317, 326.

[7] The exhibits admitted by the State actually reflect guilty pleas to five counts of receiving stolen things (as opposed to two) and three counts of burglary (as opposed to two).

the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life...." When the instant offense was committed, La. R.S. 15:529.1(A)(1)(c)(ii) provided:

> (ii) If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(13), a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more or of any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

Herein, the trial court concluded that the defendant should be sentenced under La. R.S. 15:529.1(A)(1)(c)(i). However, the instant offense and at least two of the prior felonies (the simple burglary convictions) constitute crimes punishable by imprisonment for twelve years or more.[8] See La. R.S. 14:81.2(C) and La. R.S. 14:62. Accordingly, the defendant was subject to a mandatory habitual offender sentence of life imprisonment at hard labor without benefit of *parole*, probation, or suspension of sentence. La. R.S. 15:529.1(A)(1)(c)(ii). As mandated, the trial court imposed a life sentence herein. The sentence was imposed without the benefit of probation or suspension of sentence, but with parole eligibility. Thus, the trial court erred in failing to impose the instant enhanced sentence without benefit of parole.

Nonetheless, as **State v. Williams**, 2000-1725 (La. 11/28/01), 800 So.2d 790, 799 and La. R.S. 15:301.1(A) provide, the "without benefits" provision is

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[8] Based on the instant offense and the simple burglary convictions, the defendant should have been sentenced pursuant to La. R.S. 15:529.1(A)(1)(c)(ii). Thus, we need not determine whether the Mississippi offense, aggravated assault, would constitute a felony and/or a crime of violence under Louisiana law. According to the bill of information in case number 118621 in the Twenty-Second Judicial District Court, the simple burglary offenses were committed January 1, 1984 (count one), January 3, 1984 (count two), and January 19, 1984 (count three). The offenses involved three different residences. The defendant pled guilty to the simple burglary offenses on June 7, 1984. We can safely assume that at least two of the simple burglary offenses were not part of the same criminal episode. The sequence of the offenses is not an issue under **State v. Johnson,** 2003-2993 (La. 10/19/04), 884 So.2d 568, 578-579.

self-activating. Thus, we need not take corrective action to cure this patent error.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant avers that the trial court failed to provide written reasons for re-adjudicating the defendant a multiple offender. The defendant notes this court's earlier instructions to the trial court regarding habitual offender adjudication.

In the defendant's first assignment of error of his original appeal, he asserted that the imposed sentence was illegal because there was not a finding on the record as to whether the trial court adjudicated the defendant under La. R.S. 15:529.1(A)(1)(c)(i) or La. R.S. 15:529.1(A)(1)(c)(ii). The record showed that the defendant's sentence of life imprisonment was imposed without the benefit of probation, parole, or suspension of sentence. However, neither the multiple offender bill nor the transcript of the sentencing portion of the original multiple offender hearing specified that the defendant was adjudicated pursuant to La. R.S. 15:529.1(A)(1)(c)(ii), which, unlike La. R.S. 15:529.1(A)(1)(c)(i), provides for the imposition of sentence without benefit of parole. Thus, this court instructed the trial court as follows: "Therefore, on remand, in the event of an adverse ruling on defendant's motion for post-verdict judgment of acquittal, after a new habitual offender hearing and resentencing, we instruct the trial court to provide written reasons stating the basis for the adjudication." **Pursell**, 915 So.2d at 874 (citing La. R.S. 15:529.1(D)(3)).

On remand, the trial court adjudicated the defendant a fifth felony habitual offender. Prior to the re-adjudication, the trial court stated its findings regarding the predicate convictions. The trial court then stated that the defendant would be sentenced pursuant to section (A)(2)(c)(i) of the habitual offender law.[9] Finally,

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[9] The trial court inadvertently cited the habitual offender law as La. R.S. 15:529 as opposed to the correct citation, La. R.S. 15:529.1.

the court stated the sentencing range for this portion of the statute before imposing sentence. As previously noted, the trial court did not sentence the defendant under the correct section of the Habitual Offender Law. Nonetheless, the trial court imposed a life sentence as mandated by the appropriate section of the law. Given the statements made by the trial court during the second habitual offender hearing, we find that any failure to provide written reasons for this habitual felony offender re-adjudication constitutes harmless error. See La. C.Cr.P. art. 921; **State v. Smith**, 2000-0423 (La. App. 1st Cir. 11/3/00), 769 So.2d 1280, 1285, writ denied, 2001-0993 (La. 12/14/01), 804 So.2d 630.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant avers that the trial court again failed to rule on the motion for post-verdict judgment of acquittal. The defendant argues, in the alternative, that the trial court failed to wait the required twenty-four hours before sentencing him.

In our May 6, 2005 opinion, **Pursell**, 915 So.2d at 873, we noted the trial court's failure to rule on the defendant's motion for post-verdict judgment of acquittal as patent error. On remand, during the November 3, 2005 habitual offender re-adjudication hearing, the trial court stated that the motion for post-verdict judgment of acquittal was denied on that date (just prior to the commencement of the hearing). The following colloquy then took place:

MR. GARDNER [ASSISTANT DISTRICT ATTORNEY]:

I think it's very possible we did that in June.

MADAM CLERK:

It was June 15th, I'm pretty sure, Your Honor.

MS. WALL [ALSO ASSISTANT DISTRICT ATTORNEY]:

When we arraigned him on the multiple bill.

MADAM CLERK:

I'll check that minute entry to make sure. Let's see. Motion to reconsider sentence and motion for new trial, the Court denies both

motions. It said that the Court informed the defendant, the habitual sentence was given prior to the ruling on the motion to reconsider sentence and motion for new trial. Vacated habitual offender adjudication, and as to the motions, both were denied.

THE COURT:
To clarify that minute entry, I think, actually, that was one motion. The other motion was a motion for post-judgment verdict acquittal.

MADAM CLERK:
Okay.

THE COURT:
Post-verdict judgment of acquittal, pardon me. And that should be shown as denied on that same day.

MADAM CLERK:
Yes, sir.

The minute entry for June 15, 2005, was never formally amended. We ordered the record supplemented with the transcript for June 15, 2005. According to the transcript, the trial court did not deny the motion for post-verdict judgment of acquittal on June 15, 2005. Thus, the motion was only denied on November 3, 2005, just prior to the commencement of the second habitual offender hearing, re-adjudication, and sentencing. As stated in our prior opinion, La. C.Cr.P. art. 821(A) mandates the making and disposing of a motion for a post-verdict judgment of acquittal before sentence. **Pursell**, 915 So.2d at 873. Further, unless the defendant expressly waives the delay or pleads guilty, sentence shall not be imposed until at least twenty-four hours after the motion is denied. See La. C.Cr.P. art. 873. See also **State v. Augustine**, 555 So.2d 1331, 1333 (La. 1990); **State v. Coates**, 2000-1013 (La. App. 1st Cir. 12/22/00), 774 So.2d 1223, 1226; and **State v. Wilson**, 526 So.2d 348, 350 (La. App. 4th Cir. 1988), writ denied, 541 So.2d 851 (La. 1989), which recognize that the twenty-four-hour delay period following the denial of a motion for post-verdict judgment of acquittal is required under Article 873. Herein, the trial court failed to wait twenty-four hours to sentence the defendant after ruling on the motion for post-verdict judgment of acquittal, and no

waiver was given. However, since the defendant was sentenced to the mandatory sentence of life imprisonment, the failure to wait the twenty-four hours after the denial of the motion for post-verdict judgment of acquittal was harmless error. See **State v. Jones**, 40,652 (La. App. 2nd Cir. 1/25/06), 920 So.2d 941, 948-949; see also **State v. Seals**, 95-0305 (La. 11/25/96), 684 So.2d 368, 380, cert. denied, 520 U.S. 1199, 117 S.Ct. 1558, 137 L.Ed.2d 705 (1997).

ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR

In the third assignment of error, the defendant avers that he was given a life sentence for exercising his right to go to trial. In the fourth and final assignment of error, the defendant avers that the sentence imposed is excessive. The defendant argues that the facts of the instant offense should have mitigated the defendant's sentence. The defendant notes that he is alleged to have touched the victim on the outside of the victim's clothing and that the victim did not remember if this occurred more than once. The defendant avers that the instant offense was not severe. The defendant further avers that his criminal history indicates the exercise of poor judgment. The defendant contends that there is no indication that he poses an increasing risk to society. The defendant concludes that a sentence of less than life imprisonment would sufficiently punish him for his crime.

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Louisiana Code Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing a sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered

grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988).

The goal of La. C.Cr.P. art. 894.1 is the articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. C.Cr.P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981). On appellate review of a sentence, the relevant question is "'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.'" **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam) (quoting **State v. Humphrey**, 445 So.2d 1155, 1165 (La. 1984)).

A mandatory minimum sentence under the Habitual Offender Law may still be reviewed for constitutional excessiveness. **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672; see **State v. Dorthey**, 623 So.2d 1276, 1281 (La. 1993). A mandatory minimum sentence under the Habitual Offender Law is presumed to be constitutional. **Johnson**, 709 So.2d at 676. In order to rebut the presumption of constitutionality, the defendant must clearly and convincingly show that he is "exceptional, which ... 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." **Johnson**, 709 So.2d at 676. Given the legislature's constitutional authority to enact statutes such as the Habitual Offender Law, it is not the role of the sentencing court to question the wisdom of the legislature in requiring enhanced punishments for multiple offenders. Instead, the sentencing court is only allowed to determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates the constitution. Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations. **Johnson**, 709 So.2d at 677.

We first turn to the defendant's argument, presented in assignment of error number three, that he was punished for exercising his right to go to trial. The defendant notes the following language presented by the trial court in enhancing the original sentence herein (during the initial habitual offender adjudication hearing): "You'll probably look back one day in jail, Mr. Pur[s]ell, and remember when I was not familiar with your case and offered you 20 years, and wish you had taken it." The defendant argues that the above statement is an indication of the trial court's intent to punish him for exercising his right to trial.

In criminal cases, the defendant is given a constitutional right to have trial by jury if the punishment may be confinement at hard labor or confinement without hard labor for more than six months. La. Const. art. I, § 17(A). Thus, it is improper to punish a defendant for exercising that very basic constitutional right.

Herein, the argument presented by the defendant is flawed in that the original sentence imposed by the trial court for the instant offense was fifteen years imprisonment at hard labor, five years less than the noted plea offer. Thus, the trial court clearly did not punish the defendant for exercising his right to a trial. Louisiana Revised Statutes 15:529.1 treats a defendant with multiple felony

convictions as a recidivist who is to be punished for the instant crime in light of his continuing disregard for the laws of our state; he is subjected to a longer sentence because he continues to break the law. The life sentence imposed by the court was based not only on the defendant's instant offense, but also on his multiple prior felony convictions.

We now turn to the excessive sentence argument raised in the defendant's fourth assignment of error. Based on our careful review of the record and the arguments presented by the defendant herein, we find that the defendant has failed to produce any evidence to rebut the presumption of constitutionality of the minimum sentence. Based on the foregoing conclusions, assignments of error numbers three and four are without merit.

For the foregoing reasons, the habitual offender adjudication and sentence are affirmed.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.