STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 KA 0471

STATE OF LOUISIANA

VERSUS

DOUGLAS MATTHEW FORD

Judgment Rendered: SEP 27 2017

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 684,045

The Honorable David W. Arceneaux, Judge Presiding

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McC/ondon, J. Concurs and Assigns Reasons.

THERIOT, J.

The defendant, Douglas Matthew Ford, was charged by grand jury indictment with aggravated rape (of a victim under the age of thirteen years), a violation of La. R.S. 14:42 (prior to amendment, which redesignated aggravated rape as first degree rape). The defendant pled not guilty. The defendant filed a motion to suppress his medical records. A hearing was held on the matter and the motion to suppress was denied. Following a jury trial, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating three assignments of error. We affirm the conviction, amend the sentence, and affirm as amended.

FACTS

On September 17, 2013, Detective Trey Lottinger of the Houma Police Department was assigned to an aggravated rape complaint. He was contacted by Detective Leif Haas of the Lafourche Parish Sheriff's Office, who stated earlier that month he was dispatched to Bayou Boeuf Elementary School where it was reported that one of the students claimed she was sexually abused. The victim, J.L.,[1] born November 7, 2006, reported to the school counselor that a man named Douglas touched her underneath her clothes. Detective Haas interviewed J.L. at the school, and she told him that someone had hurt her. Detective Haas stopped the interview at that point. Detective Haas scheduled J.L. for a forensic interview with Shannon Gros of the Lafourche Children's Advocacy Center (CAC).

On September 5, 2013, the CAC interview was conducted. Although J.L. was hesitant to give information at first, she stated in the interview that a

[1] The victim is referred to by her initials. See La. R.S. 46:1844(W).

man named Douglas had put his penis into her vagina while they were lying in bed with no clothes on, that it hurt her, and that he had gotten "white stuff" on her face. J.L. also stated that the incident happened at Douglas's grandmother's house, which was later confirmed to be 403 Elysian Drive in Houma. Detective Hass interviewed J.L.'s mother, L.G., who stated she was dating Joseph Siano, who was a friend of the defendant, and the defendant often visited their home, and vice versa. After receiving all the aforementioned information from Detective Haas, Detective Lottinger obtained an arrest warrant for the defendant, who was arrested on June 17, 2014.

The video of the CAC interview was played at trial. Evidence was introduced that in 2015, J.L. was taken to Children's Hospital, where she tested positive for chlamydia, a sexually transmitted disease. The CAC interview and other testimony at trial revealed that during the summer months of 2013, the defendant took J.L. to different places, including in Houma, and vaginally raped her.

The defendant testified at trial. He had convictions for second degree battery and theft of a motor vehicle. The defendant denied that he ever had sex with J.L. or behaved inappropriately with her in any way.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to suppress his medical records. Specifically, the defendant contends that after the State improperly obtained his medical records through the issuance of subpoenas duces tecum, the State should not have been permitted to cure this defect by subsequently filing search warrants to obtain his records, as required by the law.

Prior to trial, the State had information that J.L had contracted chlamydia. In August of 2015, the State filed a motion for medical examination and testing for sexually transmitted diseases, seeking to determine if the defendant also had chlamydia. The trial court ordered that the defendant submit to a medical examination for sexually transmitted diseases.

Several days after filing its motion for a medical examination of the defendant, the State filed a motion to show cause why the medical records should not be produced. In this show cause motion, the State listed thirteen medical providers. Along with this show cause motion, the State served a subpoena duces tecum on each of the medical providers listed in this show cause motion.

At the show cause motion hearing on November 12, 2015, the trial court found the defendant's medical records relevant and authorized the release of all the requested medical records to the State. The first day of trial was December 8, 2015. On this date, the trial court held a pretrial motions hearing regarding the medical records. The attorney for the medical department of Terrebonne Parish Criminal Justice Complex (TPCJC) attended the hearing. The State indicated at the hearing that it had the defendant's medical records from TPCJC, not only because of the subpoena duces tecum it had sent, but because the former defense counsel for the defendant had also subpoenaed those medical records and turned over a copy of them to the State. The State noted that these medical records from the TPCJC indicated there was a ten-day regimen of minocycline administered to the defendant.[2] The State also noted that, according to the defendant's

[2] Minocycline is an antibiotic often used to treat chlamydia.

medical records from Terrebonne General Medical Center (TGMC), the defendant had a history of chlamydial infections since 2010.

TPCJC argued that the statute under which the State normally subpoenas medical records, La. R.S. 13:3715.1, was held unconstitutional by **State v. Skinner**, 2008-2522 (La. 5/5/09), 10 So.3d 1212. Under **Skinner**, a search warrant is required to obtain medical records. **Id.**, at 1218-19.

On the following day, prior to the jury being sworn, the trial court ruled consistently with **Skinner**, finding that in the absence of a warrant, the State could not legally obtain the medical records of the defendant, and given that the defendant objected to the State's obtaining his medical records, the trial court required the State to obtain a warrant to procure them and use them as evidence in the trial. The State requested to continue the trial date so that it could obtain the medical records with search warrants. The defendant objected to the continuance. The trial court granted the State's motion for continuance and dismissed the jury.

On December 14, 2015, the State produced three search warrants, with applications to the trial court, which, finding probable cause, signed the warrants and applications. The State sought the medical records from three of the defendant's medical providers: the medical department at TPCJC, Terrebonne General Medical Center, and Chabert Medical Center (Chabert). The State made one application for the records at TPCJC, and another application for the records at TGMC and Chabert.

The defendant filed a motion to suppress the medical records, arguing that his medical records were illegally seized without a search warrant and that the State could not cure its initial warrantless seizure of the medical records "by filing a second subpoena." The State argued that the affidavit submitted in support of the warrants did not reference the information

obtained initially by way of the subpoenas duces tecum. According to the State, the search warrant for TGMC was confined to only those records concerning sexually transmitted diseases.

The trial court reasoned that the medical records obtained by the warrants were not "fruit of the poisonous tree," as the defendant argued, but were rather constantly available to be legally obtained from the health care providers by way of a warrant. Since the State narrowed its search in its application to only records concerning sexually transmitted diseases, the records that were unconstitutionally seized by way of the subpoena were no longer at issue. As such, the trial court denied the defendant's motion to suppress.

A trial court's legal findings on a motion to suppress are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751. We find no reason to disturb the ruling of the trial court. As noted, the State's search warrants and search warrant applications were carefully drafted so as not to include any facts or information that the State may have obtained when it possessed the defendant's medical records prior to filing the search warrants. Thus, the search warrants were based on a completely independent source of information, and the probable cause obtained therein was predicated on those facts alone, *i.e.*, the six-year-old victim reporting sexual intercourse with the defendant and *only* the defendant; the victim was examined and treated at Children's Hospital, and it was determined that she was infected with chlamydia; the defendant's test results at Chabert were negative for chlamydia; and it was, therefore, necessary to examine the defendant's medical records from local providers to determine if he had ever been diagnosed with or treated for chlamydia.

The Louisiana Supreme Court in **Skinner** found that the defendant had a reasonable expectation of privacy in her medical records such that a warrant was required for a search and seizure of those records for criminal investigative purposes. **Skinner**, 10 So.3d at 1218. In **Skinner**, the State received a tip from a pharmacist that the defendant was obtaining medication with multiple overlapping prescriptions. Based on that tip, the State filed motions for production of prescription and medical records in district court. The district court issued an order requiring eight pharmacies to produce the defendant's records. The State then prosecuted the defendant based on information derived from those records. **Skinner**, 10 So.3d at 1213-14. See **May v. Strain**, 55 F.Supp.3d 885, 897-98 (E.D. La. 2014).

In **Skinner**, 10 So.3d at 1218, the supreme court opined:

> Because we find a warrant was required for an investigative search of the defendant's prescription and medical records, the trial court erred in finding the remedy was for the State to comply with requirements of La. Code Crim Proc. art. 66 and La Rev. Stat. 13:3715.1, which the State had admittedly failed to comply with in obtaining the defendant's prescription and medical records, in order for these records to be admissible at trial. The trial court's ruling essentially permits the State to re-subpoena the prescription and medical records, allowing the State to introduce them at trial if the State has followed all the procedural requirements of La. Rev. Stat. 13:3715.1 and/or La. Code Crim. Proc. art. 66 in procuring these records a second time. However, because we find the Fourth Amendment and La. Const, art. I, § 5 require a search warrant before a search of prescription and medical records for criminal investigative purposes is permitted, the State cannot cure its warrantless search and seizure of the records by a second subpoena of these records.

The facts of the instant case are different from **Skinner**. The State in the instant case did not institute criminal proceedings against the defendant based on any medical records. A true bill for the crime of aggravated rape was returned against the defendant on August 12, 2014. Thus, according to the indictment filed on that date, the unexplained and uncontradicted

evidence considered by the grand jury warranted a conviction. See La. Code Crim. P. art. 443. The State did not seek the defendant's medical records for more than a year after the defendant had been indicted. Pursuant to **Skinner**, the State cured its initial defect of a warrantless search and seizure of medical records, not by a second subpoena of these records, but by properly filed and executed search warrants. Cf. **State v. Pounds**, 2014-1063 (La. App. 1st Cir. 3/9/15), 166 So.3d 1037, 1039-40 writ denied, 2015-0696 (La. 2/19/16), 186 So.3d 1173 (where the defendant's medical records were obtained without a search warrant).

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant makes several arguments: his motion for mistrial should have been granted; insufficient evidence of the defendant's identity; the State did not prove the rape or rapes occurred in Terrebonne Parish; and the State's amendment to the indictment "made it difficult for him to present a credible defense or alibi for the time period in question."

Regarding the alibi issue, the defendant argues in brief that he "was restricted from arguing before the jury that the prosecution's amendment to the indictment made it difficult for him to present a credible defense or alibi for the time period in question." The defendant cites no jurisprudence to support this argument. The indictment, as originally handed down, charged that the dates of the offenses were on or between May 1, 2013 and May 31, 2013. On July 29, 2015, the State amended the May 31, 2013 date to August 31, 2013. At the defendant's pretrial motion in limine, the State told the trial court that it had learned of new information after the indictment had been handed down.

The State is allowed to amend the dates of the offense in an indictment. Further, the dates when the crime occurred are not elements of aggravated rape. See La. Code Crim. P. arts. 468 & 487; **State v. McCoy**, 337 So.2d 192, 194-95 (La. 1976). Moreover, from the amendment to the indictment to the first day of trial, the defendant had almost seven months to provide an alibi to the State, which he never did. The defendant made no showing of surprise or prejudice resulting from the amendment. **Id.** at 195.

Next, the defendant argues the State did not prove that an aggravated rape occurred in Terrebonne Parish. According to the defendant, "the criminal statute makes it *mandatory* for the State to prosecute a defendant in the parish where the offense took place."

Venue is not an essential element of the offense; rather, it is a jurisdictional matter. See La. Code Crim. P. arts. 611(A) & 615. Objections to venue must be raised by a motion to quash to be ruled on by the court in advance of the trial. **State v. Roblow**, 623 So.2d 51, 55 (La. App. 1st Cir. 1993). The defendant did not file a pretrial motion to quash, objecting to venue. Accordingly, this issue is not properly before this court. See **State v. Rideout**, 42,689 (La. App. 2nd Cir. 10/31/07), 968 So.2d 1210, 1212-13, writ denied, 2008-2745 (La. 9/25/09), 18 So.3d 87; **State v. Matthews**, 632 So.2d 294, 296 (La. App. 1st Cir. 1993).

Following the trial, the defendant sought to argue the venue issue in a post-trial motion in arrest of judgment. Louisiana Code of Criminal Procedure article 859, which provides the exclusive grounds for an arrest of judgment, provides: "Improper venue may not be urged by a motion in arrest of judgment." Accordingly, this argument is baseless.

Next, the defendant argues his motion for mistrial should have been granted. Specifically, the defendant contends that the illegal seizure of his

medical records gave the State "an undue advantage against him at trial by allowing the jury to view information that was unconstitutionally obtained without a warrant." This issue has been fully addressed in the first assignment of error.

Finally, the defendant argues there was insufficient evidence to convict because his identity was not established at trial. According to the defendant, the State failed to prove that he was the person who sexually assaulted J.L. because J.L. did not identify the defendant in court "as her assailant." Further, according to the defendant, J.L. "was extremely positive that the person who raped her had a heart-shaped tattoo on his chest, but [he] clearly did not have such a tattoo."

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 or not, 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 La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

The **Jackson** standard of review, incorporated in Article 821, 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 factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051; **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

In 2013 (the applicable time period regarding the allegations against the defendant), La. R.S. 14:42 provided in pertinent part:

> A. Aggravated rape is a rape committed upon a person sixty-five years of age or older or where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> * * * *
>
> (4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

In 2013, La. R.S. 14:41 provided in pertinent part:

> A. Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent.
>
> B. Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime.

It is true that when J.L. testified, the State never asked her to point out the person in court who had raped her. This, however, had no impact on the positive identification of the defendant. At trial and in her CAC interview, J.L. referred to "Douglas" as the person who raped her. J.L. stated at trial that Douglas used to come around the house and that he was friends with Mr. Siano.

The defendant corroborated J.L. in his own testimony when he testified about how his friendship with Mr. Siano soured after he saw the

way Mr. Siano treated J.L., her brother, and L.G. The defendant admitted that he began flirting with L.G., which caused a further rift in his friendship with Mr. Siano. In her CAC interview, J.L. talked about being taken for a ride by the defendant in his black truck. J.L. added that, while the truck was black now, it used to be green. Detective Lottinger testified at trial that the defendant drove a black Dodge Ram, and that the truck was green before it was painted black.

Regarding the issue of the heart-shaped tattoo, J.L. was asked in her CAC interview if the defendant had any tattoos. She indicated he had a tattoo on his upper right arm. The defendant in fact had a tattoo on each of his arms. J.L. also seemed to suggest the defendant had a tattoo on his belly, possibly shaped like a heart. On cross-examination at trial, J.L. stated the defendant had a heart-shaped tattoo on his stomach. The defendant raised his shirt at trial to show the jury he did not have a tattoo on his stomach. At the CAC interview, J.L. stated: "The tattoo I wanted on his belly that I wanted a heart on his belly.... I wanted it heart on his belly."

The issues of the tattoo raised by the defendant are matters of credibility. The jury heard all of the testimony and believed the account of J.L. over the defendant's. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the

evidence, not its sufficiency. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83. The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

J.L. testified that the defendant raped her vaginally more than once and in different places, including in Houma. She also testified the defendant was the only person who raped her. At the CAC interview, J.L. was shown anatomical diagrams of a boy and a girl and identified the penis as the "thing down there" and the vagina as the "thing that you pee out of." J.L. indicated that the defendant's "thing" touched her "on the inside of her thing." When asked how she knew it was on the inside of her, J.L. replied, "Because he put it in."

Larry Naquin testified at trail that the defendant was his cellmate at Ashland jail during the time when the defendant had been jailed on the charge of the instant offense. Naquin testified that he and the defendant had been talking about the defendant's case. When asked what exactly the defendant told him, Naquin stated:

> He told me that he had brought [J.L.] to his grandmother's one night and that he brought her to the back bedroom, and he had her take off her clothes, and he had her get in the bed, and he had sex with her. And before he finished he ejaculated on her face and on the bed and made her clean it up with just soap.

Naquin added the defendant told him there was no one at home but them. When asked if the defendant seemed genuine about what he had told Naquin, Naquin testified: "He actually sounded pretty proud of what he had done because he kept telling me that he had alibis for so many days, that he was convinced that he was going to be able to get away with it and go home."

When J.L. went to Children's Hospital in February of 2015, she was eight years old. It was there that she tested positive for chlamydia. When, pursuant to a court order, the defendant was tested for chlamydia in October of 2015, the test was negative. The only medical records that indicated the defendant had had a sexually transmitted disease were those from Terrebonne General Medical Center. According to those records, in 2010 the defendant tested positive for chlamydia and was treated for it. The defendant confirmed in his testimony that he had chlamydia in 2010 and had it treated.

When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). The testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). See **State v. Rives,** 407 So.2d 1195, 1197 (La. 1981). The jury's guilty verdict reflected the reasonable conclusion that, based on the testimony of several witnesses, including J.L.'s and the CAC interview, the defendant committed aggravated rape upon J.L. In finding the defendant guilty, the jury clearly

rejected the defendant's theory of innocence. See **Captville**, 448 So.2d at 680.

After a thorough review of the record, we find the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the aggravated rape of J.L. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues that his mandatory life sentence was excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. 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 the 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). Louisiana Code of

Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code of Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. Code Crim. P. art. 894.1, 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. Code Crim. P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial court 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. See **State v. Jones**, 398 So.2d 1049, 1051-52 (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*).

For the defendant's aggravated rape conviction, the trial court imposed the mandatory life sentence. The defendant argues in brief that while the trial court did refer to La. Code Crim. P. art. 894.1, it did not articulate the factors it considered in imposing the sentence. The defendant further contends the trial court abused its discretion in imposing the life sentence, given his young age and "relatively minor criminal record."

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court opined that if a trial judge were to find that the

punishment mandated by La. R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime", he has the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive.

In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676-77, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. While both **Dorthey** and **Johnson** involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in **Dorthey** are not restricted in application to the penalties provided by La. R.S. 15:529.1. See **State v. Fobbs**, 99-1024 (La. 9/24/99), 744 So.2d 1274 (*per curiam*); **State v. Collins**, 2009-1617 (La. App. 1st Cir. 2/12/10), 35 So.3d 1103, 1108, writ denied, 2010-0606 (La. 10/8/10), 46 So.3d 1265.

Despite the defendant's claim that the trial court did not "articulate the factors" it considered when sentencing him, there is no need for the trial court to justify a sentence under La. Code Crim. P. art. 894.1 when it is legally required to impose that sentence. As such, the failure to articulate reasons as set forth in Article 894.1 when imposing a mandatory life sentence is not an error; articulating such reasons or factors would be an exercise in futility since the court has no discretion. **State v. Felder**, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 371, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. See **State v. Ditcharo**, 98-1374 (La. App. 5th Cir. 7/27/99), 739 So.2d 957, writ denied, 99-2551 (La. 2/18/00),

754 So.2d 964; **State v. Jones**, 31-613 (La. App. 2nd Cir. 4/1/99), 733 So.2d 127, 146, writ denied, 99-1185 (La. 10/1/99), 748 So.2d 434; **State v. Williams**, 445 So.2d 1264, 1269 (La. App. 3rd Cir.), writ denied, 449 So.2d 1346 (La. 1984).

Mandatory sentences have been repeatedly upheld as constitutional and consistent with the federal and state constitutional provisions prohibiting cruel, unusual or excessive punishment. See **State v. Jones**, 46,758-59 (La. App. 2nd Cir. 12/14/11), 81 So.3d 236, 249, writ denied, 2012-0147 (La. 5/4/12), 88 So.3d 462. To rebut the presumption that the mandatory minimum sentence is constitutional, 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.

There is nothing particularly unusual about the defendant's circumstances that would justify a downward departure from the mandatory sentence under La. R.S. 14:42. The record before us clearly established an adequate factual basis for the sentence imposed. As a friend of J.L.'s mother, the defendant used this position to exploit J.L.'s trust and rape her. See **State v. Kirsch**, 2002-0993 (La. App. 1st Cir. 12/20/02), 836 So.2d 390, 395-96, writ denied, 2003-0238 (La. 9/5/03), 852 So.2d 1024. The defendant has not proven by clear and convincing evidence that he is exceptional such that a mandatory life sentence would not be meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See **Johnson**, 709 So.2d at 676. Accordingly, no downward departure from the presumptively constitutional mandatory life

sentence is warranted. The sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

This assignment of error is without merit.

SENTENCING ERROR

Whoever commits the crime of aggravated rape (now, first degree rape) shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. La. R.S. 14:42(D)(1). In sentencing the defendant, the trial court failed to provide that the sentence was to be served at hard labor.[3] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, La. Code Crim. P. art. 920(2) authorizes consideration of such an error on appeal. Further, La. Code Crim. P. art. 882(A) authorizes correction by the appellate court.[4] We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this Court should not amend the sentence. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, since a sentence at hard labor was the only sentence that could be imposed, we amend the sentence to provide that it be served at hard labor.

CONVICTION AFFIRMED. SENTENCE AMENDED AND AFFIRMED AS AMENDED.

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[3] The minutes reflect the defendant was sentenced to life imprisonment at hard labor. Generally, where there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[4] An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A).

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 0471

STATE OF LOUISIANA

VERSUS

DOUGLAS MATTHEW FORD

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McCLENDON, J., concurring.

I disagree with the majority that the Louisiana Supreme Court case of **State v. Skinner**, 08-2522 (La. 5/5/09), 10 So.3d 1212, provides a method for remedying the procedural irregularity in this case. **Skinner**, while finding that the issuance of a second subpoena by the State did not cure the State's initial illegality,[1] does not provide guidance for the particular facts before us; that is, whether a search warrant filed after the issuance of a subpoena will cure the initial illegality of obtaining medical records via subpoena. However, finding that nothing in **Skinner** prohibits the State from subsequently filing a search warrant to obtain medical records after initially obtaining those records via subpoena, particularly when those medical records are obtained for trial purposes rather than for criminal investigative purposes, I concur in the result reached by the majority.

[1] In **Skinner**, the State initially obtained a subpoena instead of a search warrant and could not cure its warrantless search and seizure of the records by a second subpoena of those records. **Skinner**, 10 So.3d at 1218.