NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1178

STATE OF LOUISIANA

VERSUS

CHRIS JOHN RICHARDSON

Judgment rendered February 13, 2012.

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Appealed from the
21st Judicial District Court
in and for the Parish of Livingston, Louisiana
Trial Court No. 23623
Honorable Robert H. Morrison, III, Judge

* * * * * *

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DEFENDANT-APPELLANT
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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Chris John Richardson, was charged by grand jury indictment with aggravated rape, a violation of La. R.S. 14:42. The defendant entered a plea of not guilty. After waiving his right to a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, assigning error in a counseled brief to the trial court's denial of his motion for production of the victim's medical records and assigning error in an amended pro se brief to the sufficiency of the evidence, the waiver of trial by jury, and the violation of his right to a public trial. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On September 15, 2008, Detective Ben Ballard of the Livingston Parish Sheriff's Department received notice of a sexual assault complaint in Maurepas against the defendant and involving M.W., the victim.[1] The victim was eight years old at the time of the report and the defendant was forty-four years old. An interview of the victim by Child Advocacy Services (CAS) was scheduled for the following day. H.W. (the victim's mother) and Misty Richardson (the defendant's wife) were close friends and shared residences almost continuously during most of M.W.'s childhood, and M.W. referred to Misty Richardson as her aunt and the defendant as her uncle. Around June 2006, the group moved from Muskogee, Oklahoma, to Maurepas. During the time period in which the complaint was made, H.W. and Misty Richardson were employed outside of the home while the defendant, the only other adult occupant, was not. They lived in a three-bedroom house, with the defendant and his wife sharing one of the bedrooms, their sons sharing another, and their daughter, H.W., and the victim sharing the third bedroom. During the CAS interview and a subsequent interview at Children's Hospital

[1] In accordance with the law, initials will be used to reference the names of the victim and her family members. See La. R.S. 46:1844(W).

in Baton Rouge, the victim detailed incidents of penile-oral, penile-vaginal, penile-anal, oral-vaginal, digital-vaginal, and object-vaginal contact by the defendant. The victim estimated that the acts began when she was five years old and continued until a date that was near the time of the disclosure.

COUNSELED ASSIGNMENT OF ERROR

In the sole counseled assignment of error, the defendant argues that the trial court erred in allowing him access to only one page of the victim's medical records from Dr. Adrienne Atzemis, formerly of Children's Hospital in New Orleans, Covington, and Baton Rouge. The medical records included a transcript and audio recording of an interview of the victim. The defendant argues that the medical records should have been made available prior to the testimony of Misty Richardson and the victim's mother, who were living at the house when the alleged incidents occurred. The defendant contends that his defense was thwarted in its efforts to establish that the victim was able to give explicit sexual details because she had been exposed to pornography, not because she had been abused. Finally, the defendant concludes that the trial error is significant considering the lack of physical evidence and corroboration of the victim's accusations.

At the hearing on the defendant's motion for additional discovery, including his request for disclosure of the transcript of the interview of the victim by Dr. Atzemis, the trial court ruled that the transcript would be subject to an in camera inspection, and there was no objection. In the midst of questioning the victim during the trial, defense counsel conferred with the defendant and all counsel approached the bench for a conference with the court. The trial court reiterated its decision to perform an in camera inspection and indicated that it did not find any exculpatory information, but would allow the defendant to use page 20 of the transcript of the victim's interview with Dr. Atzemis. In this portion of the interview, the victim made reference to a movie that she saw, specifically stating that the movie included adults kissing and having "humping fun." The defense attorney asked if he could use that page and the trial court stated yes, "but just refer to that one page if you would." After conferring with the defendant,

the defense attorney continued his questioning of the victim. After further questioning of the victim, the defense stipulated to the introduction of page 20 for impeachment purposes.

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the State's case against him in order to prepare his defense. If a defendant is lulled into a misapprehension of the strength of the State's case by the State's failure to fully disclose, such a prejudice may constitute reversible error. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1 Cir. 1986), writ denied, 501 So.2d 228 (La. 1987).

Under the United States Supreme Court decision in **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the State, upon request, must produce evidence that is favorable to the accused where it is material to guilt or punishment. This rule has been expanded to include evidence that impeaches the testimony of a witness, when the reliability or credibility of that witness may be determinative of guilt or innocence. **Giglio v. U.S.**, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Where a specific request is made for such information and the subject matter of such a request is material, or if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the information to the trial judge for an in camera inspection. **State v. Cobb**, 419 So.2d 1237, 1241 (La. 1982).

The test for determining materiality was firmly established in **U.S. v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) and has been applied by the Louisiana Supreme Court. See **State v. Rosiere**, 488 So.2d 965, 970-971 (La. 1986). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383.

First, the defendant did not proffer for appellate review the full interview, nor did he contemporaneously object to the alleged discovery violation. Thus, the defendant failed to properly preserve this issue for appellate review. See La. Code Crim. P. art. 914.1; **State v. Vampran**, 491 So.2d 1356, 1364 (La. App. 1 Cir.), writ denied, 496 So.2d 347 (La. 1986); La. Code Crim. P. art. 841. Further, the defendant has no general constitutional right to unlimited discovery in a criminal case. The defendant used the portion of the evidence to which access was allowed by the trial court, page 20 of the interview of the victim, to impeach the victim and attempt to establish that the victim was exposed to pornography. As noted above, if evidence requested is material or a substantial basis for claiming materiality exists, the prosecutor who receives a specific and relevant request must furnish the information to defense counsel or submit it to the judge for an in camera inspection. **Cobb**, 419 So.2d at 1241. In declaring that a defendant is entitled to a trial court in camera inspection to identify any **Brady** material, the United States Supreme Court reasoned that this procedure adequately ensures that the defendant's right to a fair trial is protected and, simultaneously, protects the sensitive and confidential nature of Child Protection Agency records. **Pennsylvania v. Ritchie**, 480 U.S. 39, 60-61, 107 S.Ct. 989, 1002-1003, 94 L.Ed.2d 40 (1987).

Herein, the defendant was granted an in camera inspection by the trial court. Thus, the prescribed procedures were complied with. The fact that the trial judge, in exercising his reasonable discretion, found no further **Brady** or **Giglio** material in the evidence submitted is not grounds for reversible error. We further note that even if a discovery or **Brady** violation did occur, it would not constitute reversible error without actual prejudice to the defendant's case. See **State v. Francis**, 2000-2800, p. 6 (La. App. 1 Cir. 9/28/01), 809 So.2d 1029, 1033. Moreover, the record does not reflect any manner in which the defendant might have been lulled into a misapprehension of the strength of the State's case. Noting that the defendant has not shown any prejudice on this issue, we find that this assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In pro se assignment of error number one, the defendant argues that the evidence was insufficient to prove the elements of the offense. The defendant notes that there was no physical evidence to show that the victim was raped or even tampered with by the defendant. The defendant also notes that the victim informed Dr. Atzemis that she did not see any blood or notice any bleeding after the defendant allegedly penetrated her. The victim and her mother also informed Dr. Atzemis, as noted by the defendant, that the victim had no history of vaginal or rectal bleeding. The defendant further notes that Dr. Atzemis testified that the physical findings were consistent with a child who never had sexual intercourse. The defendant contends that the victim made inconsistent statements and statements that were influenced by others. The defendant finally contends that H.W.'s testimony that she never discussed the allegations with the victim was not believable.

In reviewing a claim challenging the sufficiency of the evidence, this court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. Code Crim. P. art. 821(B); **State v. Mussall**, 523 So.2d 1305, 1308-1309 (La. 1988). The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony; thus, a reviewing court may impinge on the fact finder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law. **State v. Johnson**, 2003-1228, pp. 4-5 (La. 4/14/04), 870 So.2d 995, 998; **State v. Sylvia**, 2001-1406, pp. 2-3 (La. 4/9/03), 845 So.2d 358, 361. In the absence of internal contradiction or irreconcilable conflict with physical evidence, the testimony of one witness, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Higgins**, 2003-1980, p. 6 (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 **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, in order to convict, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Patorno**, 2001-2585, p. 5 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1 Cir.), writ denied, 514 So.2d 126 (La. 1987).

Louisiana Revised Statute 14:42 provides, 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.

Louisiana Revised Statute 14:41 provides, 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.

Aggravated rape is a general intent crime. **State v. McDaniel**, 515 So.2d 572, 575 (La. App. 1 Cir. 1987), writ denied, 533 So.2d 10 (La. 1988). General criminal intent is present whenever there is specific intent, and also when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2). The trier of fact is to determine the requisite intent in a criminal case. **State v. Crawford**, 619 So.2d 828, 831 (La. App. 1 Cir.), writ denied, 625 So.2d 1032 (La. 1993).

H.W. testified that after her father died in April 2004, she lost her house and began living with Misty Richardson. Based on information she received when the defendant was arrested for a separate complaint involving another victim, starting at 5:00 a.m. on September 15, 2008, Misty Richardson questioned the children in the home, one-by-one, including M.W. Specifically, Misty Richardson informed the victim that the defendant was gone and was never coming back. She then asked the victim if the defendant had ever done anything to make her feel uncomfortable. The victim began crying and asked if she was certain that the defendant would not be coming back before stating that the defendant had touched her between the legs. At that point, Misty Richardson began screaming to awaken the victim's mother and instructed her to immediately take the victim to the Sheriff's Department and she did so. H.W. testified that she was unaware of what happened when Misty Richardson made the complaint with the police. H.W. still, at the time of the trial, had not discussed the details of the allegations with the victim, specifically stating that she could not bear to hear the details. According to Misty Richardson, H.W., and Detective Ballard, no one spoke to M.W. about what she needed to say during the CAS interview that took place the next day.

Christine Roy, a clinical coordinator and forensic interviewer with CAS, conducted the September 16th interview of the victim. During the video and audio recorded interview, the victim drew a picture to describe the defendant's penis. The victim stated that the first inappropriate conduct that she recalled was when the defendant "made me kiss him." She stated that the incidents began in Oklahoma and continued when they moved to Louisiana. When she was five years old, the defendant asked her if she wanted to "try this" and she responded "yes" but did not know what the defendant was referring to. The next day the kissing started. The victim further described the kiss as, "like when you get married." The victim added that he then made her "suck" and "started rubbing mine and his." The victim stated that the defendant would sometimes kiss her lips, cheeks, "tits" or "boobs," and neck. She stated that during the incidents people were home but did not hear anything.

The victim stated that the defendant started with his "stick" and kept telling her to suck hard and white stuff came out. The victim stated that she did not like the defendant. The victim further described the sucking as the defendant making her put her mouth on "it" and "go up and down" and again stated that the defendant would tell her to suck harder. The victim also stated that the defendant made her put her hand on his penis or "dick" and made her lick it and kiss it all over. She stated that once he choked her with it while she was in the bathroom. She specifically stated that the defendant entered the bathroom with his "thing" out and made her suck it. The victim stated that she did not like getting choked with it.

The victim also stated that the defendant would make her say "I want you to F-word me," explaining that the defendant used the actual word although she preferred not to do so. The defendant also told her that he wanted her to be his "b-word." The victim stated that the defendant stuck it in her "front" or "crotch" and "butt part." She stated, the "thing" would "get up" and the defendant would start by rubbing it between her legs and then would put it in her butt and crotch. The defendant told her to put her finger in her crotch to make it stop hurting. At first the victim refused but ultimately complied, adding that the defendant told her to stick her finger in past her first knuckle and she was able to put her finger in her crotch almost up to the top of her finger. The victim stated that she once accidently "pooped" on the defendant's bed when his penis was in her butt and she had to clean it up, and would sometimes have to urinate during the incidents.

The victim indicated that the incidents would usually occur in the boys' bedroom when everyone was asleep. She stated that one summer when the boys were away and she slept in the bunk beds, the defendant positioned her on her belly, pulled her pants down, and put "it" in her butt. The defendant told her to stop crying. The victim also stated that incidents occurred in the shed. The victim stated that she couldn't help crying because it would hurt. The victim stated that once the defendant had her get on her hands and knees and put something that vibrated (a small gray pole with holes) against her crotch, and that once he put his tongue in her crotch and it felt gross.

When asked how often the defendant tried to put his "thing" in her crotch, the victim stated every once in a while, which she clarified as every few weeks or one-to-three times a week. The defendant threatened the victim not to tell anyone. At the trial, Roy noted that the victim in this case was more detailed than most of her other interviewees.

The victim was ten years old and in the fifth grade at the time of the trial. The victim denied being instructed to lie or being coached about what to say regarding the allegations. She further confirmed that her statements during the CAS interview were truthful. The victim also denied ever watching any television show or movie that showed naked people. The victim testified that just before she disclosed the allegations made in this case, her Aunt Misty told her that something bad happened to one of the children who often visited them and that the defendant wasn't ever coming back. The victim further stated that on the same morning, "Misty asked all of us if anything happened. I asked Misty if I can talk with her real quick. She sent them out of the room. I told her 'Yes.' She cried and screamed for my Mom. -- (Crying) Then we called – then we called the police." During cross-examination, the victim responded positively when asked if the defendant put his penis inside her vagina, and after asking for a definition of anus and being told that it was inside her "butt hole," the victim further responded positively to the defendant placing his penis in her anus. The victim confirmed that both types of acts took place many times. The victim confirmed that these acts would cause her pain and make her cry. The victim also confirmed that at times, before penetrating her vagina with his penis, the defendant would tell her to put her fingers inside of her vagina to help ease the pain. The victim stated she would not bleed when the defendant would penetrate her with his penis.

The victim denied seeing a "nasty-fun" or "humping-fun" movie. The defense introduced page 20 of the transcript of the victim's interview with Dr. Atzemis wherein the victim stated that she had seen this type of behavior in movies when grown-ups kissed and had "humping fun." During re-direct examination, the victim stated that she did not remember telling Dr. Atzemis about seeing any such movies.

Defense witness, Melissa Ann Brazille, the defendant's sister, testified that H.W. informed her that she had caught the victim looking at pornographic material on a computer with H.W.'s father. Brazille stated that the conversation took place about one month after the family moved to a house in Maurepas. On cross-examination, Brazille clarified that the victim was sitting next to H.W.'s father while he was looking at pornographic material. Brazille had no indication of how old the victim was during that purported instance. Based on H.W.'s testimony, the victim was four years old when her grandfather died.

Dr. Atzemis, who was accepted as an expert in Pediatric Medicine and Child Abuse Pediatrics, interviewed the victim on October 9, 2008, and was initially a defense witness. Dr. Atzemis confirmed that she did not have any reports of episodes of vaginal or rectal bleeding by the victim. The victim informed Dr. Atzemis that the defendant's conduct began when she was five years old. Dr. Atzemis testified that the "humping fun" by adults that the victim stated to have seen in movies was perceived by the victim as sexual contact, although the true nature of what the victim observed was unknown. Dr. Atzemis fully examined the victim, including the use of a camera with magnification on the light source to photograph her hymen. Dr. Atzemis did not have or use a colposcope instrument, but explained that more recently manufactured digital cameras produce better photo documentation. Dr. Atzemis testified that the physical examination of the victim was normal. However, she further testified that she would not expect to see any injury to the anus or vagina of an eight-year-old child who had been penetrated by a male penis anally and vaginally since the age of five years old. She specified that even if the victim had been examined in proximity with the time of the penetration, "the evidence clearly points that acute findings are still not likely in situations of sexual assault of a pre-pubertal girl." She added that even repeated episodes do not increase the likelihood of having physical findings. At the time of the examination of the victim, she was in the very early stages of pubertal development.

Dr. Atzemis further clarified that she would not expect to have any physical findings of anal penetration at the time, and regarding vaginal penetration, she would

expect findings if the victim was examined close to the time of an occurrence of full penetration (the entire penis inside of a vagina past the hymen), though not if the victim was examined sometime thereafter. However, she stated that the word "penetration" is a broad term, and would not expect any physical findings in the case of penetration of the genitalia even if the victim was examined near the time of the penetration. Dr. Atzemis reiterated that the victim could have been fully penetrated with or without injury. Dr. Atzemis concluded that while the victim's examination results were consistent with no sexual abuse, the results were also consistent with the history of abuse that the victim provided.

On rebuttal, Dr. Atzemis testified that within seventy-two hours is the time frame for trace evidence collection, including swabs of the genitalia or other areas for DNA detection. After seventy-two hours the utility of such testing is very low. With the victim in this case, it was not indicated that any sexual conduct was alleged to have occurred within seventy hours of the referral. Dr. Atzemis indicated that the victim provided a clear and detailed disclosure of sexual assault by the defendant that included penile-oral, penile-vaginal, penile-anal, oral-vaginal, digital-vaginal, and object-vaginal contact. The victim also described ejaculation and exposure to pornography. Dr. Atzemis concluded that the history was consistent with a child who had been abused. The victim's accounts were very detailed and graphic, including her description of ejaculation and how it tasted and things that happened before and after the events. The victim also gave a relevant history of Dysuria, burning when she urinated after an incident. The victim also disclosed pain although she did not disclose bleeding. Dr. Atzemis testified that it was not common for girls to disclose bleeding after such events.

Defense witness Dr. Albert Tydings, of Lakeview Hospital and St. Tammany Parish Hospital (accepted as an expert in Obstetrics and Gynecology in this case), reviewed Dr. Atzemis' report and medical findings on the victim. When asked if he would expect to find any tearing of the hymen or vagina as to a six to eight-year-old pre-pubescent child who was penetrated by an erect penis, Dr. Tydings responded:

> That's a very difficult question to answer. ... It is very possible, according to the literature, to have a 7 or an 8 year old vagina and have a penis in that area without causing pain.
>
> However, if the hymen is penetrated, that causes a lot of discomfort. You usually have some degree [of] bleeding. The patient is in a lot of pain. And many times with colposcopy, you can find scar tissue that more or less designates trauma on the -- in the vagina.
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> But, it doesn't necessarily mean that if the penis comes into contact with the lips, the major lips or the labia minora, you don't necessarily have to have pain, and you do not necessarily have to have any formation of scar tissue from that tearing, bleeding, irritation, redness. It depends on the child. It depends on the erectness of the penis. And number one, it depends on whether the penis is inserted to the hymen and through the hymen.

The defendant did not testify at the trial.

As noted above, La. R.S. 14:41(B) provides that "[e]mission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime." See **State v. Rives**, 407 So.2d 1195, 1197 (La. 1981). Any penetration, however slight, of the aperture of the female genitalia, even its external features, is sufficient sexual penetration. **State v. Ross**, 2003-0564, p. 11 (La. App. 3 Cir. 12/17/03), 861 So.2d 888, 895, writ denied, 2004-0376 (La. 6/25/04), 876 So.2d 829. In this case, Dr. Atzemis and Dr. Tydings testified that it is possible to rape or penetrate a child and cause no injury or leave no physical evidence. It is not necessary that there be physical evidence to prove the defendant committed aggravated rape. 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. 1 Cir. 1987), writ denied, 519 So.2d 113 (La. 1988). An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. 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. Azema**, 633 So.2d 723, 727 (La. App. 1 Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31,

38 (La. App. 1 Cir. 1984). Moreover, where 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. **Richardson**, 459 So.2d at 38.

In this case, the testimonial evidence was sufficient to establish the elements of aggravated rape, including the element of penetration. The victim clearly described incidents consisting of anal, oral, or vaginal sexual intercourse when the victim was well under thirteen years of age. The trial judge clearly rejected the defendant's theory that the young victim was lying and that her claims were due to exposure to pornography. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the trier of fact. **State v. Calloway**, 2007-2306, pp. 1-2 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). When viewed in a light most favorable to the prosecution, the evidence supports the trier of fact's finding that the State sufficiently proved all the elements of aggravated rape in this case beyond a reasonable doubt. Pro se assignment of error number one is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

The defendant contends that his waiver of his right to a trial by jury cannot be held intelligent since he was under the impression the jury-trial waiver would mitigate his sentencing exposure to a maximum of twenty-four years. The defendant argues that under the unique facts of this case, the waiver of trial by jury cannot be held as a knowing and intelligent relinquishment of the right to a trial by jury. The defendant concludes that the conviction should be reversed and a new trial ordered.

A defendant may waive his right to a jury trial and elect to be tried by the judge. La. Code Crim. P. art. 780(A). Generally, the waiver is to be entered at arraignment. A waiver of trial by jury is valid only if the defendant acted voluntarily and knowingly. See **State v. Kahey**, 436 So.2d 475, 486 (La. 1983). A waiver of this right is never presumed. **State v. Brooks**, 2001-1138, p. 5 (La. App. 1 Cir. 3/28/02), 814 So.2d 72,

76, writ denied, 2002-1215 (La. 11/22/02), 829 So.2d 1037. However, no special form is required for a defendant to waive his right to a jury trial. **State v. Coleman**, 2009-1388, p. 4 (La. App. 1 Cir. 2/12/10), 35 So.3d 1096, 1098, writ denied, 2010-0894 (La. 4/29/11), 62 So.3d 103.

The record herein reflects that at an October 18, 2010 pretrial conference, the defense indicated that the defendant wanted to waive a jury trial in this matter and was prepared to discuss the matter with the court. The trial judge noted that he wanted to make sure that everyone was in agreement and understood that everything is "off the table after today." The defense attorney stated that the defendant understood, adding that he explained the plea offer to the defendant extensively, including a no-contest plea to forcible rape with a sentence of twenty-four years at hard labor and that the defendant wished to waive the jury trial and proceed to trial. The defendant confirmed that the defense attorney was correct.

After being informed that the defendant wanted to discuss waiving a jury trial, the trial judge clearly stated that any prior offer would be withdrawn. Further, after being assured that the defendant was well informed, the trial court thoroughly explained the difference between a bench trial and a jury trial in basic terminology. In response, the defendant indicated that he understood the court's explanation. Thereafter, the defendant opted to waive his right to a jury. Upon reviewing the entirety of the jury-trial waiver proceedings in this case, including the colloquy between the trial judge and the defendant, we find that the defendant voluntarily and knowingly waived his right to a jury trial and that the record does not support the defendant's claim that he was led to believe his sentencing exposure would be limited or that he was entering into a plea bargain. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In the final pro se assignment of error, the defendant contends that his right to a public trial was violated. The defendant contends that had the spectators viewed the videotape evidence it would have "stamped upon the court's mind" that evidence insufficient to prove aggravated rape beyond a reasonable doubt had also been observed

by the public. The defendant contends that the defense attorney did not consult with him before waiving his right to a public trial for the showing of the video. The defendant further notes that the trial court did not question him regarding the waiver until after the spectators were removed from the courtroom. The defendant argues that closing the court for the showing of the DVD was highly damaging to the defense in that the balancing of public opinion was short-circuited, leaving the trial judge exclusively with unchecked weighing of his conscience. Finally, in arguing that a new trial should be ordered, the defendant contends that the waiver of his right to a public trial was not knowing and intelligent and cannot be held harmless.

In criminal cases, the accused is granted the right to enjoy a public trial. U.S. Const. amends. VI & XIV; La. Const. art. I, § 16. The right to a public trial is not a "limitless imperative"; the right is subject to the trial judge's power to keep order in the courtroom or to prevent unnecessary pressures or embarrassment to a witness. **U.S. ex rel. Smallwood v. Lavalle**, 377 F. Supp. 1148, 1151 (E.D.N.Y.), cert. denied, 421 U.S. 920, 95 S.Ct. 1586, 43 L.Ed.2d 788 (1975). A trial judge may, in his sound discretion, exclude spectators from the courtroom while the testimony of a witness in a criminal case is being taken, if such a step is reasonably necessary to prevent embarrassment or emotional disturbance of that witness or to enable that witness to testify to facts material to the case. **State v. Poindexter**, 231 La. 630, 635, 92 So.2d 390, 391-392 (1956); **State v. Raymond**, 447 So.2d 51, 53 (La. App. 1 Cir.), writ denied, 449 So.2d 1347 (La. 1984) (wherein the trial court cleared the courtroom of two non-witness, adult children of the defendant's wife, who was to testify about her husband's sexual abuse of children). Additionally, La. R.S. 15:469.1, in pertinent part, provides that "[i]n cases of ... aggravated rape ... in which the victim is a child of fifteen years of age or younger, the court ... may order that the testimony of such victim be heard either in closed session of court or in the judge's chambers...."

In this case, the following colloquy took place before the DVD was played in open court:

BY MR. HARVEY (Defense Attorney):

Your Honor, if we could interpose for one second --

BY THE COURT:
-- All right, stop the tape for a second, please.

BY MR. HARVEY:
Mr. Richardson would like to waive his right to a public trial just for the showing of this DVD-

BY THE COURT:
--All right, ladies, I'm going to have to ask that you step outside for right now. Thank you.

BY MR. HARVEY:
Thank you, Your Honor.

AT THIS TIME, SEVERAL LADIES ARE EXCUSED FROM THE COURTROOM

BY MR. HARVEY:
Is that correct, Mr. Richardson?

BY MR. RICHARDSON:
Yes.

BY THE COURT:
Okay.
Okay, they have left the room. You can resume.

AT THIS TIME, THE DVD IS PLAYED TO THE COURT

Not only did the defendant not object to the closure of the courtroom, the closure was at the defense attorney's request. Thus, this issue is waived on appeal. La. Code Crim. P. art. 841. Moreover, we note that in the present case the victim was between the ages of five and eight years old at the time of the offense, eight years old at the time of the recorded interview, and ten years old at the time of the trial. The recorded interview and subsequent testimony by the victim consisted of a highly sensitive subject matter of undeniable embarrassment to the victim. We find that it was within the trial court's discretion to temporarily exclude spectators from the courtroom to prevent unnecessary pressures or embarrassment to the victim. Based on the foregoing, this assignment has no merit.

CONVICTION AND SENTENCE AFFIRMED.